[2008] WASCA 196

JURISDICTION	**:**	SUPREME COURT OF WESTERN AUSTRALIA
TITLE OF COURT	**:**	THE COURT OF APPEAL (WA)
CITATION	**:**	AM -v- THE STATE OF WESTERN AUSTRALIA [2008] WASCA 196
CORAM	**:**	STEYTLER P MILLER JA MURRAY AJA
HEARD	**:**	2 SEPTEMBER 2008
DELIVERED	**:**	26 SEPTEMBER 2008
FILE NO/S	**:**	CACR 42 of 2008
BETWEEN	**:**	AM Appellant AND THE STATE OF WESTERN AUSTRALIA Respondent

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ON APPEAL FROM:

Jurisdiction	**:**	DISTRICT COURT OF WESTERN AUSTRALIA
Coram	**:**	YEATS DCJ
Citation	**:**	THE STATE OF WESTERN AUSTRALIA -v- AM [2008] WADC 20
File No	**:**	IND 1094 of 2006

Catchwords:

Criminal law and procedure - Evidence - Whether alleged statements by accused admissible - Whether alleged statements sufficiently specific as admission against interest - Whether alleged statements of any probative value or weight - Whether sufficient warning within the meaning of ***Longman v The Queen***

Criminal law - Verdict of guilty - Whether verdict reasonably open having regard to the evidence - Whether verdict unreasonable or unable to be supported by the evidence - *Criminal Appeals Act 2004* (WA) s 30(3)(a)

Legislation:

Criminal Appeals Act 2004 (WA), s 30(3)(a), s 119(3), s 120
Evidence Act 1906 (WA), s 36BD

Result:

Appeal allowed
Retrial ordered

Category: B

Representation:

Counsel:

Appellant	:	Mr T F Percy QC & Mr S Nigam
Respondent	:	Ms L Petrusa

Solicitors:

Appellant	:	S C Nigam & Co
Respondent	:	Director of Public Prosecutions (WA)

Case(s) referred to in judgment(s):

Bromley v The Queen (1986) 161 CLR 315
Carr v The Queen (1988) 165 CLR 314
Crampton v The Queen [2000] HCA 60; (2000) 206 CLR 161
Crofts v The Queen [1996] HCA 22; (1996) 186 CLR 427

Dogget v The Queen [2001] HCA 46; (2001) 208 CLR 343
Dyers v The Queen [2002] HCA 45; (2002) 210 CLR 285
FGC v The State of Western Australia [2008] WASCA 47
Fleming v The Queen (1998) 197 CLR 250; [1998] HCA 68
Gassy v The Queen [2008] HCA 18; (2008) 82 ALJR 838
Gaulard v The Queen [2000] WASCA 218
JJB v The Queen (2006) 161 A Crim R 187
Libke v The Queen [2007] HCA 30; (2007) 230 CLR 559
Longman v The Queen (1989) 168 CLR 79
M v The Queen (1994) 181 CLR 487
Martinez v The State of Western Australia [2007] WASCA 143; (2007) 172 A Crim R 389
Michael v Hksar (Unreported, Court of Final Appeal, Hong Kong Special Administrative Region, No 9 of 2004)
R v BWT [2002] NSWCCA 60; (2002) 54 NSWLR 241
R v Doolan [1962] Qd R 449
R v Khalil (1987) 44 SASR 23
Riley v Western Australia (2005) 30 WAR 525; [2005] WASCA 190
Robinson v The Queen [1999] HCA 42; (1999) 197 CLR 162
State of Western Australia v AM [2008] WADC 20
Tullock v The State of Western Australia [2008] WASCA 125
Weiss v The Queen [2005] HCA 81; (2005) 224 CLR 300

1 **STEYTLER P**: I have had the advantage of reading the judgment of Miller JA. I will gratefully adopt his comprehensive statement of the evidence, and of the findings of the trial judge, in this appeal against the appellant's conviction on a charge of sexual penetration, without consent, of a girl aged between 13 and 16 years. I need mention only those facts and findings that are central to my own, similar, conclusions.

Evidence at the trial

2 At the time of the alleged offence, the appellant worked as a bar manager in a restaurant in Kalgoorlie. The restaurant was owned by his brother (SM) and one or both of his parents. The complainant worked there as a waitress for four or five days in about October 2001. She said that she did this by way of unpaid work experience (she was in Year 10 at school and was just short of her 15th birthday). She said that she completed her work experience on a Friday night, being the night upon which the offence occurred. The appellant and his mother (MM) gave evidence to the effect that the complainant was a paid employee who had been dismissed on a Saturday night for being obstructive and lazy.

3 The complainant's evidence was that, after the restaurant had closed on the Friday night, the other staff members left, leaving her and the appellant alone at about 10.40 pm. She telephoned her mother to fetch her. She had a wait of around 15 to 20 minutes. During that time she drank two Southern Comforts and Coke, given to her by the appellant. The appellant asked her to come with him. She did so, following him behind a dividing wall towards the front of the restaurant. There, he had forced sexual intercourse with her lasting 5 to 10 minutes. At the end of it, the appellant took a serviette and cleaned himself and her. The complainant's mother, KP, arrived shortly afterwards. The complainant said nothing to her, because she was too frightened.

4 KP gave evidence. She confirmed that she had picked up her daughter at about 11.00 pm that night. She said that it took her around 10 to 15 minutes to drive to the restaurant from her home.

5 Evidence was also given by TL. He had been a friend of SM and of the appellant and had, at one time, been in partnership with SM in a business in New South Wales. In 2003 he was employed by SM as a manager of SM's rigging business. He was based in Perth. Sometime in 2003 TL was in Kalgoorlie on a social visit. He visited SM's scaffolding yard. SM bought a case of beer 'for the guys to have' in the yard. These were SM's employees and the appellant. TL was asked if he had then had

a conversation with the appellant. He said that he did. He described it in the following terms:

> Basically I walked up to [the appellant] and sort of said, 'What's this I hear about you shagging young waitresses,' or something along those lines, and he replied that, you know, a few beers and away you go sort of thing. Along those lines.
>
> … I sort of asked him what had happened and he sort of said, 'Behind the counter'.
>
> … I basically walked away.

TL said that there was no mention of the name of the waitress or of the date upon which the event occurred. When pressed as to the date of the conversation, the best that he could do was to say that it was probably in April or May 2003.

6 TL subsequently made a complaint to Crime Stoppers. He said that he probably did this in 2005, some two years after the conversation.

7 At the completion of the evidence of TL, counsel for the appellant objected to it. She said that it was highly prejudicial, and so vague as to have no probative value. The trial judge disagreed. She ruled the evidence admissible.

8 In his evidence, the appellant denied that an event of the kind described by the complainant had ever occurred. He said that he had only a vague recollection of the complainant. He was never left alone with a staff member, other than one of his family. When the restaurant was locked, it was necessary to put a metal security grate up over the glass door. Because the locking mechanism was faulty, this needed to be done by two people. Consequently, two family members were always present at closing time to do this. He also said that he and his wife always drove to the restaurant together and went home together. He denied the conversation with TL. He regarded it as a fabrication.

9 In her evidence, MM said that she had asked her daughter-in-law to dismiss the complainant because of her rude and obstructive behaviour. She said that the complainant was never in the restaurant at closing time. She claimed to have been present when the restaurant was locked every night for a period of a year, encompassing the night of the alleged offence. She said that it took two people to fit the 'iron grids to the windows'.

Judgment of the trial judge

10 In her judgment (the trial had been one by judge alone), the trial judge accepted the evidence of TL. She found it to be truthful and reliable [29]. She went on to say [29]:

> I accept that it is limited evidence. He did not name the young waitress. It goes no further than an admission by the accused that he had had sex with a young waitress at the restaurant and that it took place behind the counter. [TL's] evidence is contrary to [MM's] evidence that she was there every night until closing and [the appellant] had no opportunity to be alone with any waitress. [MM] obviously wanted to help her son on his trial but I do not accept her evidence. [TL's] evidence is also contrary to the [appellant's] evidence that he went home every night with his wife.

11 The trial judge also accepted the complainant's evidence as truthful and reliable but said that, before she reached a verdict, there were several matters that she must carefully consider. She addressed the first of these under the heading '***Longman*** warning'. It is necessary to set out the whole of what she said under that heading [34] - [37]:

> It was four years between the alleged offence in 2001 and the date the accused man was charged in 2005. I accept that sort of delay could well prejudice the [appellant] in his defence. Because of the delay the [appellant] cannot rely on any forensic evidence excluding him from involvement in the offence. Generally an accused would not be able to recall the events or call witnesses to assist him in his defence. But in this case the [appellant] has given evidence that he remembers the complainant and remembers the short time she worked at the restaurant and he gave evidence of her leaving after being sacked. The [appellant's] evidence was that he had no control over the waitresses at the restaurant. The waitresses were looked after by his wife and his mother. He said the complainant was hired by his mother against the advice of his wife.
>
> He called his mother to support his evidence and could have called his wife or brother or other family members if their evidence assisted his case. He also accepted that there would be written records of the restaurant regarding payment of staff, but he said he was only an employee of the business. He had never asked his parents to check the complainant's start date and end date in any written record.
>
> [MM] gave evidence that she was one of the owners of the business. She admitted employment records existed but the records were in the hands of liquidators and she had not accessed them.
>
> The [appellant] of course does not have to prove anything and has no obligation to give or adduce any evidence in his defence. But the ***Longman*** warning is meant to alert the tribunal of fact, the jury to the prejudice an accused faces in defending a charge insofar as any prejudice

> arises from such a long four year delay. In the particular circumstances of this case any such prejudice is minimal. Although I must scrutinise the evidence of the complainant with care, it is not a case where there are any real dangers arising from the circumstances of the delay. That is particularly so because I accept [TL's] evidence. The only reasonable inference arising from the question [TL] asked is that he had heard something about the [appellant] 'shagging a young waitress'. There is no evidence of the complainant ever telling anyone of what she alleged happened so the only reasonable inference is that whatever [TL] had heard came indirectly from the accused man himself - joking or bragging or talking about his success with the young waitress. I am satisfied beyond reasonable doubt that the [appellant] well remembered the incident and the complainant. The delay in charging him does not in these circumstances create any real dangers as in a normal ***Longman*** case.

12 After dealing with a number of other issues that had some bearing on her credibility findings, the trial judge said that she had formed an adverse view of the appellant's credibility [50] - [51]. She went on to say that she was satisfied beyond reasonable doubt of the guilt of the appellant [57].

Grounds of appeal

13 There are four grounds of appeal. They are set out in the judgment of Miller JA. The first challenges the admissibility of TL's evidence. The second challenges the weight accorded to that evidence by the trial judge. The third challenges the sufficiency of the ***Longman*** direction (as to which see ***Longman v The Queen*** (1989) 168 CLR 79). The fourth contends that the verdict was not reasonably open and was unsafe and unsatisfactory.

Ground 1 - Admissibility of TL's evidence

14 In my respectful opinion the evidence of TL was rightly found to be admissible. It amounted to evidence of admissions that were adverse to the appellant's case. The evidence, if accepted, established that the appellant had admitted that he had, on one occasion at least, been on his own with a waitress, who was not a family member, at the restaurant. It also established that the waitress had been young, that the appellant had sex with her after a couple of drinks and that the sex had taken place behind a counter (although the complainant described it as having been behind a dividing wall). Although falling well short of a confession that he had committed the offence charged, or any offence, the evidence had sufficient probative value to justify its admission. So long as the evidence was not elevated into a full confession, its reception did not prejudice a

fair trial, more especially in circumstances in which the trial was by a judge alone.

15 It is convenient to deal with grounds 2 and 3 together.

Grounds 2 and 3 - Weight given to TL's evidence and the *Longman* issue

16 In the case of a trial by a judge alone, it is not particularly helpful merely to recite formulaic directions that might have been given if the trial had been before a jury. Because the trial judge is required to give reasons, what is more important is whether the reasons reflect that the trial judge has properly understood his or her task and has correctly applied those principles which have a bearing on the outcome of the trial.

17 What is required in a case such as the present is that the trier of fact should be reminded, or remind herself or himself (in the case of a trial by judge alone), that a substantial delay in making a complaint will ordinarily have a number of consequences that must be borne in mind. The evidence of the complainant cannot be adequately tested, making it dangerous to convict on that evidence alone, although the trier of fact can convict on that evidence alone if satisfied of its truth and accuracy. Before being so satisfied the evidence must be scrutinised with great care, taking into careful account any circumstances which are peculiar to the case and which have a logical bearing upon the truth and accuracy of the complainant's evidence. The dangers must be seriously considered at every stage of scrutinising the complainant's evidence (see, generally, ***Longman*** (90 - 91); ***Crofts v The Queen*** [1996] HCA 22; (1996) 186 CLR 427, 447 - 448; ***Robinson v The Queen*** [1999] HCA 42; (1999) 197 CLR 162; ***Crampton v The Queen*** [2000] HCA 60; (2000) 206 CLR 161 [44] - [45], [128] - [132], [140] - [143]; ***Dogget v The Queen*** [2001] HCA 46; (2001) 208 CLR 343 [45] - [54], [120] - [141]; ***R v BWT*** [2002] NSWCCA 60; (2002) 54 NSWLR 241 [95], approved by Kirby J in ***Dyers v The Queen*** [2002] HCA 45; (2002) 210 CLR 285 [55]). Even if the complainant's evidence is supported by other corroborative evidence, the trial judge must consider whether, despite this, there remain forensic disadvantages for the accused sufficient to call for the giving of a ***Longman*** direction in a trial by jury (***BWT*** [95]), or to remind oneself of the relevant dangers, in a trial by judge alone.

18 In the present case the trial judge reminded herself of the dangers alluded to in ***Longman***. However, it is necessary to closely examine the way in which that was done. As will be apparent, she accepted that the 'sort of delay' experienced in this case 'could well' prejudice the appellant in his defence. She appreciated that he could not rely on any forensic

evidence that might exclude him from involvement in the offence (although she did not go on to consider what form that evidence might have taken). She also appreciated that, generally, 'an accused' (not this accused) would not be able to recall the events or call witnesses to assist him in his defence. Importantly, she went on to find that, in the particular circumstances of this case, 'any such prejudice is minimal' and there were no 'real dangers' arising from the delay.

19 As will also be apparent, she had four reasons for arriving at these last conclusions. The first was that the appellant remembered the complainant, the short time that she had worked at the restaurant and the circumstances of her departure. The second was that he had called his mother to support his evidence and could have called other family members if their evidence assisted his case. The third was that he may have been able to access employment records that had been kept by the restaurant business if he had tried to do so. The fourth was that the trial judge accepted TL's evidence. She described this as particularly important. That was seemingly because she regarded the only reasonable inference arising from the evidence of TL as being that he had heard something about the appellant's 'shagging a young waitress' as a result of the appellant himself joking or bragging about that event. She said, in that respect, that there was no evidence of the complainant ever telling anyone what she alleged happened. It seems that it was these factors, together, that satisfied the trial judge that the appellant well remembered the incident and the complainant.

20 In my respectful opinion, there are material shortcomings in this analysis. The first is that there was, in fact, real prejudice to the appellant. The delay had caused him to lose the opportunity to advance forensic evidence in his defence. Had a complaint been promptly made, he might, for example, have had the complainant's clothing forensically examined. The absence of any incriminating forensic evidence in that respect, or from an examination of the area in which the offence was said to have taken place, might have been of some assistance to him. Had the complaint been made earlier, the appellant or one of his family may have had some recollection of a specific event that made it less likely, or even impossible, that he had been left alone with the complainant on the night in question. The effect on memory of the delay might have been the explanation for the fact that the appellant had not called other family members as witnesses. Absent the delay, the complainant's mother may have had a more specific recollection of when she was telephoned by the complainant and asked to pick her up, and of how long it took her to arrive at the restaurant (bearing in mind the limited time available for the

complainant to have two alcoholic drinks and then be sexually assaulted for 5 to 10 minutes; and the fact that there was some inconsistency, in that respect, between what had been said by the complainant to the police and what was said in her evidence). The appellant may have been able to give, or lead, evidence of the time at which, and the circumstances in which, he left the restaurant. The complainant's mother might have had some more specific recollection as to why she had been present in the restaurant on the night in question than merely the fact that she was 'always' there. Evidence may have been available whether or not the metal security grate was in position on the following morning (bearing in mind that the complainant's evidence established that it was not up when she left the restaurant). The delay of two years between the time of the making of the alleged admission to TL and the making of complaint might have made it more difficult for the appellant to locate others who may have been present and who still recollected the terms of the conversation.

21 Most importantly, I am unable to accept that the acceptance of TL's evidence overcame the dangers arising from the delay. I have said that, earlier in her reasons, the trial judge accepted that TL's evidence was 'limited'. It went no further than an admission that he had had sex with a young waitress at the restaurant, behind the counter, after a couple of drinks. Acceptance of the fact that the appellant had said those things did not lead to the consequence that he remembered sexually assaulting the complainant. As I have said, the admissions fell well short of a confession that the appellant had committed the offence charged, or any offence. The trial judge's acceptance of that evidence as establishing that the appellant well remembered the incident wrongly elevated its status to that of an admission of sexual conduct with the complainant. Also, the fact that there was no evidence from the complainant that she had told anyone of what she alleged happened did not give rise to the only reasonable inference that whatever TL had heard had come indirectly from the appellant himself. There was also no evidence that he had told anyone of 'success' with a young waitress and, if he had had sex with the complainant, he had every reason not to tell anyone about it.

22 The errors to which I have referred were central to her Honour's conclusion that this was a case in which it was safe for her to convict, essentially on the strength of the complainant evidence. It consequently seems to me that they must result in the appeal being allowed and the conviction being set aside. There is no scope, in circumstances of this kind, for the application of s 30(4) of the *Criminal Appeals Act 2004* (WA).

Ground 4 - Unsafe and unsatisfactory

23 It follows from the conclusion at which I have arrived that the verdict is unsafe. However, because ground 4 bears upon the question whether a re-trial should be ordered, I should say that, having made my own independent assessment of the evidence led at the trial, it seems to me that this is a case in which it would be open to a trier of fact to convict. As I have said, it is open to a trier of fact, properly instructed, to act upon the evidence of a complainant alone, notwithstanding the passage of a lengthy period of time between the offence and the making of complaint. Whether or not there would be a conviction would depend, of course, upon the trier's evaluation of all of the evidence, bearing closely in mind the prejudice that has resulted to the appellant as a consequence of the delay and the limited extent of the admissions that were allegedly made by him to TL.

24 Like Miller JA, and generally for the reasons given by him, I am not persuaded that any or all of the matters raised by the appellant in support of ground 4 would inevitably make it unreasonable or insupportable (s 30(3) of the *Criminal Appeals Act*) or dangerous to convict the appellant: ***M v The Queen*** (1994) 181 CLR 487, 492 - 493.

Conclusion

25 I would allow the appeal, set aside the conviction and order a re-trial.

26 **MILLER JA**: The appellant was charged on indictment with one count of sexual penetration without consent. The indictment read:

> On a date unknown between 1 September 2001 and 31 October 2001 at Kalgoorlie [the appellant] sexually penetrated [the complainant] without her consent, by penetrating her vagina with his penis
>
> And that [the complainant] was over the age of 13 years and under the age of 16 years.

27 The appellant elected trial by judge alone and was tried before Yeats DCJ in the District Court at Perth between 4 and 5 February 2008. On 12 February 2008, he was found guilty of the offence with which he was charged and convicted accordingly. On 15 February 2008, he was sentenced to imprisonment for 3 years 4 months.

Appeal

28 On 26 May 2008, the appellant was given leave to appeal against his conviction on four grounds. Those grounds (without particulars in relation to grounds 1 and 3) are as follows:

> 1. The learned Trial Judge erred in law by admitting into evidence the alleged confession made by the accused to the witness [L].
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> ...
>
> 2. If the evidence of the alleged confession was properly admitted it was not of sufficient weight or probative value to have inclined the learned Trial Judge to the view that it was the critical piece of evidence in the case and the verdict was as a result against the weight of the evidence as to make it unsafe and unsatisfactory.
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> 3. The learned Trial Judge erred in failing to properly direct herself in terms of the warning required in such cases by the judgment of the High Court of Australia in *Longman v The Queen*.
>
> ...
>
> 4. The verdict was not reasonably open having regard to the evidence and was unsafe and unsatisfactory.
>
> PARTICULARS
>
> (1) There was no early complaint.
>
> (2) There was no corroborative evidence of the commission of the offence.
>
> (3) There was no admissible admission on the part of the Accused.
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> (4) The evidence was to the effect that the accused could never have been alone with the Complainant at the time in question.
>
> (5) The timing of the events in question was highly unlikely having regard to the telephone call to the Complainant's mother and the time that the events in question would have taken to complete.

Evidence at trial

29 The evidence for the prosecution primarily consisted of the evidence of the complainant, the complainant's mother (KP), AP and TL. The appellant gave evidence in his defence and called in support MM (his

mother). The essence of the defence was that there had been no incident of sexual penetration as alleged by the complainant and her evidence was a total fabrication.

Evidence of complainant

30 The complainant testified by way of CCTV. She said that she was 21 years of age, having been born in October 1986. She presently lived in Queensland, but in 2001 she lived in Kalgoorlie with her parents. She was then a student in year 10 at the Eastern Goldfields Senior High School.

31 At a time close to her birthday, the complainant obtained work experience at the Casa D'Oro restaurant in Kalgoorlie. She must then have been close to the age of 15 years. The complainant obtained the position because she had been a babysitter for BM, a brother of the appellant.

32 The complainant's evidence was that she first went to the restaurant on a Monday and that she worked there for five nights. She said that she was required to commence work at 5.00 pm and at the close of a night's work she was picked up by her mother, whom she rang between 10 and 20 minutes before her mother would arrive.

33 The complainant gave detailed evidence about the events that occurred on the Friday night, which was her final night of work at the restaurant. She said that the restaurant closed at about 10.00 pm and all staff members, apart from herself and the appellant, left the restaurant. They left through the front door.

34 The complainant said that the appellant offered her a drink of Southern Comfort and Coke. She had this drink at the bar at the front of the restaurant. She then had another. The combined effect of them made her 'a little bit tipsy'.

35 The complainant said that, after she had finished her second drink, the appellant said to her, 'Come with me'. She thought that he was going to show her something to do with the restaurant and she followed him. He took her behind a dividing wall that was towards the front of the restaurant. He placed both hands on her shoulders and pushed her to the ground. She put out her arms behind her to break her fall. He then, with one hand on her shoulder, got down on her. He pushed her down further to the ground so that she was on her back, with her feet on the ground and her knees bent. She said that the appellant then undid his belt buckle,

pulled down her pants and knickers and pulled off one of her shoes. He then leaned over her, put all his body weight on top of her, and penetrated her vagina with his penis. She said that he was 'thrusting back and forth' for 'maybe 5, 10 minutes at the very most' and that she experienced pain during this time. When the incident concluded she said that the appellant got up, grabbed a serviette on the table next to him and cleaned himself. He also cleaned her vagina. He then did up his pants. She pulled up her pants, put her shoe on and walked back to the front door. The complainant said the appellant asked her if she had had her pill for the day, to which she answered that she had not. She said that the appellant added that she had better not tell his wife.

36 The complainant said that her mother then drove up to the door and she walked straight out the front door, into her mother's car. She said nothing to her mother because she was too frightened. She was taken straight home, where she had a shower and went to bed. She said that at home she noticed she was bleeding from the vagina.

37 The complainant said that she did not want the appellant to put his penis into her vagina and that what had occurred was without her consent. She said that she never returned to the restaurant and never saw the appellant again.

38 The complainant was extensively cross-examined. The initial part of the cross-examination related to the circumstances in which she was at the restaurant. Whereas the complainant contended that she was there on work experience, it was put to her by counsel for the appellant that she was, in fact, a paid employee. The complainant denied this. She was never shown any employment records to support the proposition that was being put to her.

39 The complainant was questioned about the nights upon which she worked. It was put to her that, on the first occasion, the Monday was a public holiday. She said that she was unable to say whether it was or it was not. She thought she had been at school that day. It was put to the complainant that the restaurant was not open on the Monday because it was a public holiday, but she said that it was open for her to go in and she did so for the purpose of being trained. She said she actually commenced proper work on the Tuesday evening.

40 The complainant described her work duties. Essentially, they were those of a waitress. She agreed that she had very little contact with the

appellant during the time that she was working at the restaurant. She agreed that the appellant's wife and mother both worked at the restaurant.

41 The complainant said that she began work on the Friday evening at about 5.00 pm. It was not a really busy night. It may have become busy towards the end, but it was slow at the start. There were about four waitresses there. Work concluded at about 10.00 pm.

42 The complainant reiterated in cross-examination that, on the Friday night, all staff left, leaving herself and the appellant the only ones in the restaurant. It was then about 10.40 pm. She remained alone in the restaurant with the appellant until a time which was close to 11.00 pm.

43 Although in a statement made to investigating police on 23 November 2005, the complainant had said that she called her mother at about 9.40 pm on the Friday night, she was adamant in evidence that it was closer to 11.00 pm when she left the restaurant.

44 The complainant said that the appellant closed the windows and the door and he did so by himself. She was asked about big shields that were required for the windows. She agreed that they existed, but she said that she did not assist to put them up. She just assumed that the appellant had put them up, but she was unable to recall.

45 Although it was put to the complainant that she was never alone with the appellant in the restaurant, she stated firmly that she was. She said that she was with him for about 15 to 20 minutes until her mother arrived to collect her. She said that, during that time, she had two Southern Comforts and Coke and she was 'raped' by the appellant. Whilst it was put to her that this was completely untrue and she had made up the whole thing, she denied that this was so.

46 It was put to the complainant that she did not, in fact, finish work on the Friday night, but on the Saturday night, and that she was sacked on the Saturday night by DM (the appellant's wife). The complainant denied that she had been there on the Saturday night and said that she concluded work on the Friday night. She denied that she had been given the sack.

47 It was put to the complainant that she was picked up on her last shift by her boyfriend, JM. She said she was not picked up by him and she did not have a boyfriend at the relevant time. She began seeing JM six months after the incident. She was asked whether she had any intention of making an application for criminal injuries compensation and she said she did not know. She had made no inquiries about the matter.

Evidence of KP

48 The complainant's mother, KP, gave evidence that in 2001, whilst the complainant was a year 10 student, she did a week's work experience at the Casa D'Oro. She knew the restaurant was run by the appellant and two brothers.

49 KP said that she picked up her daughter each night after work. She recalled the Friday night when she picked up the complainant. The complainant was quiet, 'very quiet'. After she had returned home, she went to her room crying hysterically after a disagreement with her sister.

50 In cross-examination, KP was adamant that her daughter was doing work experience and did not have a paid, part-time job. She said that she sometimes picked her daughter up at around 11.00 pm. She lived about 10 or 15 minutes away in terms of driving time. On the Friday night when she collected her, the complainant was 'out the front door'. It was around 11.00 pm.

Evidence of AP

51 AP gave evidence that she was married to the appellant's brother (SM) in September 2001. He was then the co-owner of a restaurant business (the Casa D'Oro) and a scaffolding business.

52 In 2001, AP worked in the Casa D'Oro restaurant. She was co-manager. She was aware that the restaurant took on work experience students, but she was not responsible for hiring anybody.

53 AP appears to have been called primarily for the purpose of giving evidence about a conversation she had with the appellant's brother's secretary in the scaffolding yard of his business in the latter part of 2002. The evidence was ruled inadmissible and it is unnecessary to make further reference to it.

Evidence of TL

54 TL gave evidence that he was a self-employed rigger and crane driver. He knew the appellant through the appellant's brother. He had met him about 20 to 25 years beforehand.

55 TL said that he had worked in partnership with the appellant's brother, SM, in Sydney and in Perth. SM had a company known as Eureka Rigging & Scaffolding of which, in 2001, TL was the Perth manager. This necessitated that he go to Kalgoorlie once a month or

thereabouts and on those occasions he saw the appellant. He was familiar with the Casa D'Oro restaurant and believed that SM owned it in partnership with his parents. He understood the appellant to work there as a manager.

56 TL said that, in around 2003, he was in Kalgoorlie on a social visit. He was at SM's scaffolding yard, where SM had bought a case of beer for the workers to have in the yard. TL had been asked to come to the yard for a beer and he said he would. When he got there, he saw the appellant and a number of SM's employees. He had a conversation with the appellant. The evidence he gave about that conversation was in the following terms:

> Could you tell us about that conversation?---Basically I walked up to [the appellant] and sort of said, 'What's this I hear about you shagging young waitresses,' or something along those lines, and he replied that, you know, a few beers and away you go sort of thing. Along those lines.
>
> Do you remember anything else that was said?---I sort of asked him what happened and he sort of said 'behind the counter'.
>
> And what did you do?---I basically walked away.

57 TL said that there was no mention of the name of 'the young waitress', or the date upon which the incident had occurred. He said that, some time later, he rang Crime Stoppers.

58 The evidence was objected to. The objection was based on the fact that the evidence was too vague, it had no probative value and it was highly prejudicial to the appellant. The trial judge ruled that the evidence was admissible on the following basis:

> I consider that this evidence indicating that he has sex in his restaurant behind the counter with a young waitress or young waitresses, given as it was in 2003 just a year and a half or two years after the evidence of this young woman in this trial does have enough weight that it should come in and be part of the state's case.

59 TL was vigorously cross-examined. It was first put to him that he had fallen out with SM, but he denied this and said that SM had fallen out with his (TL's) wife because she had sided with AP in a 'divorce battle'. He was no longer in contact with SM.

60 TL was taken through the conversation. It was put to him that it never took place at all, but he said that it definitely took place. He was

unable to give a precise recollection of the conversation 'word for word', but said that 'generally it went along those lines that I've described'.

61 He added:

> To the best of your recollection, you say that you said to [AM], 'What's this I hear about you shagging young waitresses'?---Yeah. Something along those lines, yeah.
>
> As in more than on person?---Well, that's not how I meant it. I don't know. He might have been shagging more than one waitress. I'm not sure. I just asked the question.
>
> Okay. I put it to you that that conversation never took place at all?---Well, it definitely took place.

62 TL said that he contacted Crime Stoppers in what was probably 2005.

63 When re-examined, TL said that it took him a long time to make a complaint because he was not initially aware of how old the waitress was, nor was he aware of the fact that it was 'supposedly a rape'.

Evidence of the appellant

64 The appellant gave evidence that he was 42 years of age and a Western Australian police officer by occupation. He had also been a police officer with the Victorian Police between 1988 and 1999. He came to Western Australia to be with his family and to assist in the family business. He arrived in Kalgoorlie in 1999 and took up employment at the Golden Mile Scaffolding & Rigging Service, which was owned by his brother, SM. He said that he was bar manager at Casa D'Oro restaurant and commenced employment there in 2001. The restaurant had opened in March or May 2001. It was owned by his father and his brother, SM. The appellant's wife (DM), his sister-in-law, another sister-in-law, his father and his mother all worked there.

65 The appellant said that he was mainly engaged in bar work at the restaurant, which opened Tuesday to Saturday between 5.00 pm and midnight. It was closed on Sunday and Monday.

66 The appellant said that he vaguely recalled the complainant working at the restaurant. He thought that she had worked there for four or five days from Tuesday until Saturday.

67 The appellant was asked about the procedure relating to the closing of the restaurant each evening. He said that the staff would be told to leave and then a big metal security grate would have to be erected. The locking mechanism on it was a bit 'dicky' and it required two people to put up.

68 The appellant was adamant that the family closed the restaurant and there were always himself and his wife, or himself and his mother or father there at lockup time. He said that his wife and he drove to the restaurant and went home together.

69 The appellant said that he could recall the circumstances in which the complainant ceased 'employment' at the restaurant. He said:

> ---My wife told her to leave.
>
> Do you know why?---Because basically she was lazy and wasn't doing as she was told.
>
> And do you recall at what stage of her shift that took place?---It was on a Saturday. I didn't actually see her leave buy my wife told me later on that she had told her - she'd told [the complainant] to leave.
>
> Was that prior to her shift finishing or after?---Yes, prior.

70 The appellant denied that he had ever been alone with the complainant in the restaurant. He denied that he had given her alcohol. He denied that he had sex with her, or touched her in any inappropriate way. His evidence-in-chief was then about to conclude when the following exchange occurred:

> MYERS, MR: Are you going to ask about that conversation with - are you going to ask about the conversation with Mr - - -
>
> PEPE, MS: Did you at any stage have a conversation with [TL] about this allegation?---No, not at all.

71 The prosecutor then cross-examined the appellant. It was first put to him that he was well experienced in giving evidence in court, and he said he was. He was taken to the circumstances in which the complainant worked at the restaurant and he said that he knew that his mother had employed her. He said she did not receive any training before she started on a Tuesday, arriving at about 5.00 pm. He said that she was paid $10 an hour and that she would have been required to fill in a wages book, indicating start and finish times. She would have been paid cash-in-hand, but he knew nothing about the financial side of the running of the

restaurant. He was cross-examined about what records would have been kept for employees and agreed that it would be necessary in the business to keep records relating to employees. Those records would include a declaration of salary for the purpose of workers' compensation and the withholding of income tax. The appellant said he did not check any records in relation to the complainant's employment, and said that he had never asked his parents for access to any business records.

72 The appellant was cross-examined about his relationship with TL. He said that he had known him since 1985, but that when he joined the police force in 1987, TL stopped having much to do with him. His explanation for TL's evidence was that there had been a falling-out between them. He said:

> So what was the falling out? Do you think because you became a policeman he detested it so much that he was prepared to make up a conversation about you. Is that your evidence?---Most certainly.
>
> You think that that was the level of his enmity, do you?---I most certainly do, your Honour.
>
> Did he ever express this previously to you?---He has spoken previously about his dislike for police.

73 The appellant admitted that he had not told his counsel that TL disliked him so much that he must have made up the conversation about which he gave evidence. He added:

> Did you tell her that he had made it clear to you that he disliked you so much for joining the police force that you thought he just made up a conversation?---No.
>
> Why not?---Because I don't believe that was the only reason why he's made the comments.
>
> All right, what's the other reason?---I believe it was over a dispute between your other - the other witness [AM] where he was helping her with the child custody. The child custody dispute that they were having.
>
> That's got to do with your brother. What has that got to do with you?---Because [AP] made certain allegations in the Family Court in regards to one of the brothers.
>
> What has that got to do with you though?---Because it was alleged that I was one of the brothers that was the - a danger to her children.
>
> A danger to whose children?---[AP's] children.

> All right, but what has that got to do with [TL]?---Because [TL] was supporting [AP] in her family law suit.
>
> So you think that he's prepared to come along here and perjure himself in relation to that conversation just to get back at you, do you?---I think he's prepared to perjure himself, yes.

Evidence of MM

74 MM gave evidence that she was the mother of the appellant. She said that she was at one time involved in the Casa D'Oro restaurant, where she was a co-owner. The appellant worked at the restaurant as bar manager.

75 MM recalled the complainant. She said that she applied for a job and was told that she would be taken on trial. She was adamant that it was paid employment. She was said to have started on a Wednesday because that was pay day. She was trained on the job, and was not ever there for training on a day when the restaurant was closed.

76 MM said that the closing of the restaurant each evening was the responsibility of two family members. When asked to describe the procedure, she said, 'We turn on the alarm, close the door and it took two people to fit the iron grids to the *windows*' (my emphasis).

77 MM said that the complainant started work in a Wednesday and left on either a Friday or Saturday night. She left in the middle of the evening because MM had asked her daughter-in-law to fire her. MM said that she was 'being obstructive and just a nuisance and I was getting complaints from the kitchen ... '.

78 When cross-examined, MM conceded that the business kept records of staff. The business was in liquidation and the liquidators had the records. She said that she had never sought access to those records to give a precise starting and end date for the complainant's employment. She agreed that there would be a record of her being paid if she was paid for her work.

79 MM had 'absolutely no doubt' that the complainant had started work on a Wednesday, because she paid staff on a Wednesday. She agreed that she may have worked only until the Friday. MM said that she was at the restaurant every single night the restaurant was open for a solid year until closing time. She also gave evidence that she saw the complainant picked up outside the restaurant on one of the nights by a young man. That

young man also came into the restaurant to collect her on the night she was sacked.

80 It was suggested to MM that she 'had the wrong girl', but she said that she 'was 100 per cent sure' she did not have the wrong girl.

Trial judge's reasons

81 The trial judge was required to deliver a judgment in which she had to include the principles of law that she had applied and the findings of fact on which she relied: *Criminal Procedure Act 2004* (WA) s 120. The trial judge did this in a set of reasons which occupy some 13 pages.

82 The trial judge first reviewed the evidence of the complainant. She later dealt with what she termed 'credibility issues'. The first of these issues was the question whether the complainant was doing work experience or paid work as a waitress at Casa D'Oro and whether she was 'fired'. As the trial judge observed, although it was put to the complainant in cross-examination that she had been sacked by the appellant's wife on the Saturday night (which she denied), it was never put to her in cross-examination that she was 'lazy or obstructive', or would not do what she was told. The trial judge properly observed that the complainant was never given the opportunity to respond to those allegations.

83 The trial judge was critical of the evidence of the appellant and MM, pointing out that no documents were produced at the trial to prove when the complainant worked at the restaurant, in what capacity she worked there, and whether she was paid for her work.

84 The trial judge concluded that the key issue was whether there was an opportunity for the complainant to be alone with the appellant at closing time on her last night at the restaurant. Her Honour concluded that there was strong and compelling evidence to support the complainant's evidence on this issue. She accepted the evidence of the complainant's mother that she had picked up the complainant every night after she finished work. She accepted the evidence of the complainant and her mother that the complainant did not have a boyfriend at the relevant time, despite MM giving evidence that it was the complainant's boyfriend who had picked her up on the night she was sacked, and said:

> [MM] is mistaken and may be remembering someone other than the complainant who was sacked. I accept Mrs P's evidence that she picked her daughter up from work every night including the Friday night when she finished. [22]

85 The trial judge accepted the evidence of TL about the conversation which he said had occurred with the appellant in the scaffolding yard at Kalgoorlie in 2003. Her Honour pointed out that, in his evidence, the appellant had made no mention of TL's evidence until reminded of it by the prosecutor at the conclusion of his evidence-in-chief. Her Honour was critical of the appellant's evidence and cross-examination about TL detesting police so much that he had made a false report to Crime Stoppers. She pointed out that it was never put to TL in cross-examination that he had 'dobbed the accused in to Crime Stoppers because the accused had joined the WA Police Force'.

86 The trial judge did not accept the evidence of the appellant. She said that it defied common sense that a person who disliked and detested police would, for that reason, make a false report to Crime Stoppers. Her Honour concluded TL to be an impressive and well-spoken witness, with no indication of vindictiveness. She accepted his evidence as truthful and reliable, but said:

> I accept that it is limited evidence. He did not name the young waitress. It goes no further than an admission by the accused that he had had sex with a young waitress at the restaurant and that it took place behind the counter. [29]

87 The trial judge did not accept the evidence of MM that she was at the restaurant every night until closing time and the appellant had no opportunity to be alone with any waitress. She said that MM obviously wanted to help her son on his trial.

88 The trial judge gave specific consideration to TL's two-year delay in reporting the conversation he had with the appellant to Crime Stoppers. Her Honour outlined the reasons given by TL for his delay, noting that what he said was not evidence of the truth of what he learned between the date of the conversation and the date of its report.

89 The trial judge referred to a number of credibility issues raised by the defence which related to the complainant's testimony. These included variation in the complainant's statement to investigating police and in her evidence in relation to the time she ceased work, and the question whether the complainant had attended school during the day on each evening she had worked. The trial judge said that the first was not a substantial matter and, given the delay before she was interviewed by police, it was not surprising that details were not certain. Her Honour said that in relation to the second matter, she had no evidence before her to indicate that the complainant was wrong. She simply did not know what the position was.

90 The trial judge concluded by saying that the complainant gave her evidence in a very direct way. She clearly accepted her credibility, and did so in the following terms:

> Her account of what happened to her was detailed and compelling. There was no sign of any rehearsing or making it up or being evasive or being confused. She answered questions in a manner consistent with a person recalling a very, very unpleasant painful event. I accept the complainant's evidence as truthful and reliable ... [33]

91 The trial judge then proceeded to direct herself in accordance ***Longman v The Queen*** (1989) 168 CLR 79. She described this as a 'Longman warning'. Her Honour was required to do this (*Criminal Procedure Act 2004* s 119(3)).

92 The trial judge accepted that because it was four years between the date of the alleged offence and the date upon which the appellant was charged, that was delay which could well prejudice him in his defence. Because of the delay, the appellant could not rely on any forensic evidence which may have excluded him from involvement in the offence.

93 The trial judge rightly pointed out that generally an accused would not be able to recall the events or call witnesses to assist him in his defence when there had been such a delay. Her Honour observed, however, that, in this case, the appellant gave evidence that he remembered the complainant and remembered the time she worked at the restaurant. He gave evidence of her leaving after being sacked. He called evidence to support his case in this regard. Her Honour also noted that the accused accepted that there would be employment records in existence which could have been accessed.

94 Her Honour then concluded:

> The accused of course does not have to prove anything and has no obligation to give or adduce any evidence in his defence. But the Longman warning is meant to alert the tribunal of fact, the jury to the prejudice an accused faces in defending a charge insofar as any prejudice arises from such a long four year delay. In the particular circumstances of this case any such prejudice is minimal. Although I must scrutinise the evidence of the complainant with care, it is not a case where there are any real dangers arising from the circumstances of the delay. That is particularly so because I accept Mr Lawson's evidence. The only reasonable inference arising from the question Mr Lawson asked is that he had heard something about the accused "shagging a young waitress". There is no evidence of the complainant ever telling anyone of what she alleged happened so the only reasonable inference is that whatever Mr

> Lawson had heard came indirectly from the accused man himself - joking or bragging or talking about his success with the young waitress. I am satisfied beyond reasonable doubt that the accused well remembered the incident and the complainant. [37]

95 The trial judge gave specific attention to the failure of the complainant to make a complaint either to police or anybody else about the alleged sexual assault. Her Honour made reference to the provisions of s 36BD of the *Evidence Act 1906* (WA), noting that delay in making the complaint did not necessarily indicate the complaint to be false, but said:

> It is, however, the case that the failure to make a complaint is something I should have regard to when considering whether I am able to accept the complainant as a truthful and reliable witness. The defence alleges that she did not complain because there was no sexual penetration.
>
> The complainant said she did not tell her mother because she was too frightened to tell her. I have to consider that explanation taking into account that she was a 14-year-old school girl who was having her first work experience in an adult world. She had drunk alcohol when she was well underage. Her mother gave evidence her daughter only ever had had sips of alcohol previously. I also consider that she obtained the work experience through friends, the accused's other brother [B] and his wife [R]. The complainant said [R] was a good friend of hers and [R] is the accused's sister-in-law. In all of these circumstances I do not consider her failure to complain indicates she is not telling the truth about what happened. At her age and her particular circumstances her failure to complain is understandable and I am satisfied it does not indicate the complaint is false. [39] - [40]

96 The trial judge made appropriate reference to the burden of proof and standard of proof. She rightly pointed out that the only issue in the case was whether the incident alleged had occurred and appreciated that it was necessary for the State to satisfy her beyond reasonable doubt that the appellant did actually sexually penetrate the complainant as she alleged. She appreciated that she could not convict if any matters raised by the defence gave rise to a reasonable doubt.

97 Her Honour then reviewed those matters. They were:

(1) *The contention that within 15 - 20 minutes it was unlikely that the complainant could have consumed two drinks and been sexually penetrated for five to 10 minutes before her mother arrived to collect her.*

The trial judge said that on its face this contention seemed to have merit, but, on the other hand, the complainant's evidence was that she was not good at remembering times. Her evidence as to what happened was so compelling that it overcame any concern that the trial judge might otherwise have had about time. It may well have been that KP had arrived a little later, or the penetration was for a shorter time than the complainant now recalled. In any event, her Honour was satisfied beyond reasonable doubt that the incidents occurred between the time the complainant telephoned her mother and the time her mother arrived.

(2) *The suggestion that the appellant's background as a serving police officer and family man with seven children made it highly unlikely that he would commit such an offence in circumstances where he knew the complainant's mother was coming to collect her.*

The trial judge did not consider this submission to sit well with TL's evidence, which she accepted. Her Honour made the point that the offence came to light because the appellant must have been talking about what he had done. He readily admitted sexual activity with a young waitress behind the counter in the restaurant when questioned by TL. She pointed out that the appellant should have known better than to talk about what he had done and said that 'his talking about it has been his downfall' [49].

(3) *Evidence of the appellant and his mother (a) that family members worked at the restaurant and paid staff were allowed to finish when business slowed during the evening; (b) that family members stayed to close up and the accused would never have been there alone with a staff member.*

The trial judge pointed out the difference in testimony between the appellant who said that it was the door that required a security grate to be fitted and MM who said that it was windows that required heavy grates to be fitted. Her Honour accepted the complainant's evidence that she had walked straight out of the door on the night of the alleged assault and said that this would indicate that the door was still open when she left [53].

The trial judge further concluded that the evidence of TL made it clear that the appellant must have been alone with a young waitress at the restaurant. She said that it was unclear how the appellant had managed that, but she was satisfied beyond reasonable doubt that he did [56].

98 The trial judge was critical of the credibility of the appellant. She described him as a police officer experienced in giving evidence in court, but noted that during cross-examination, he adopted a particular posture of looking directly at her and avoiding eye-contact with the prosecutor. She said that this had the effect of his evidence 'appearing unnatural and contrived' [50]. She did not consider that his evidence had the ring of truth, and pointed out that he took the opportunity to give disparaging evidence about the complainant's work as a waitress. She found it odd that the appellant could remember such details about the complainant's work when she was a casual waitress who had worked only such a short time at the restaurant four years beforehand if, in fact, he had nothing to do with her as he asserted.

99 The trial judge accepted the complainant's evidence as compelling and highly persuasive. She considered that the evidence of TL supported the prosecution case. She was satisfied beyond reasonable doubt of the appellant's guilt.

Grounds of appeal

Ground 1

100 This ground contends that the trial judge erred in law by admitting into evidence the alleged confession made by the appellant to TL.

101 A number of particulars are given. They are:

PARTICULARS

(1) The alleged conversation between the accused and Lawson was insufficiently specific to the event in question to constitute an admissible admission against interest.

(2) The alleged confession:-

(a) Was non specific as to the time of the event in question.

(b) Did not specifically refer to and was not reasonably referable to the complainant.

(c) Differed in a material particular to the Prosecution case as to the location of the event in question.

(d) Was made some two years after the events in question.

(e) Referred to multiple girls rather than the Complainant.

(f) Was uncorroborated.

(3) The evidence should have been excluded.

102 The essential contention of the appellant is that the conversation about which TL gave evidence was insufficiently specific to the offence alleged in the indictment to constitute an admissible admission against interest. It is said that its probative value was extremely low and its prejudicial value high.

103 The particulars annexed to the ground contend why the alleged confession was unsatisfactory. The first is that it was non-specific. That is, there was nothing in the alleged confession to link it to the charged contained within the indictment. This is followed up in the second particular, where it is contended that the alleged confession did not specifically refer to and was not reasonably referable to the complainant. It is said that because there were a number of waitresses employed at the restaurant at the relevant time, the alleged confession was not referable in any way to the complainant.

104 I cannot agree with these contentions. Whilst TL asked the question, 'What's this I hear about you shagging *young waitresses*?' (my emphasis) and was therefore referring to waitresses in the plural, the fact was that the complainant was a young waitress working at the Casa D'Oro. Whether or not the appellant had been 'shagging' more than one young waitress was not to the point. The complainant was one of those waitresses. This immediately brought her within the class of persons to whom reference was being made. Further, TL said in cross-examination that he 'meant it' as a reference to one person.

105 The answer allegedly given by the appellant, 'You know a few beers and away you go' raised the question of consumption of alcohol. In the present case, the complainant was a young waitress who said she was offered two drinks at the close of work and before the incident allegedly occurred. They were not 'beers', but they were alcoholic drinks. This further narrowed the alleged confession made by the appellant.

106 TL said that he then asked the appellant what had happened and the appellant was reported to have said that it had occurred 'behind the counter'. In the present case, the complainant alleged that the incident occurred behind a dividing wall within the restaurant. A dividing wall and a counter are two separate things, but they are barriers. It was behind a barrier that the complainant said the sexual assault had occurred. That barrier was within the restaurant where she was working.

107 When seen in totality, the answers which TL said the appellant gave sufficiently identified (1) sexual intercourse on the appellant's part with at least one young waitress, (2) sexual intercourse after consumption of alcohol, and (3) sexual intercourse behind a counter.

108 In the complainant's case, the prosecution was alleging sexual intercourse with (1) a young waitress, (2) after consumption of alcohol, and (3) behind a dividing wall. Seen in this way, there was sufficient probative value in the answers given by the appellant to constitute a confession relevant to the case.

109 It was for the trial judge to determine whether the confessional evidence had sufficient probative value to justify its admission. Of course, it was prejudicial. Once the appellant had admitted sexual intercourse with a young waitress at the restaurant and behind a counter, it was to his prejudice. However, all confessional evidence is prejudicial in that sense. The question really was whether the prejudicial effect of the evidence so outweighed the probative value of the evidence as to justify its rejection.

110 I am of the opinion that the evidence was sufficiently probative to justify its admission, and that probative value outweighed any prejudicial effect. Contrary to the appellant's contentions, the evidence was not equivocal. It actually implicated the appellant in sexual relations with at least one young waitress at the restaurant, behind a counter in circumstances where alcohol was consumed. There was nothing equivocal about that.

111 An equivocal or ambiguous admission may, of course, he held by a trial judge to be inadmissible. Thus, in ***R v Khalil*** (1987) 44 SASR 23 at 37, O'Loughlin J said:

> There is no doubt that where a confession is equivocal, the court may quash a conviction founded solely thereon: S L Phipson, *The Law of Evidence* (13th ed, 1982), p 449; ***R v Barker*** (1915) 11 Cr App R 191; ***R v Smith*** (1979) 5 Crim LJ 161. [25]

It is to be observed that, in this case, the conviction was founded solely upon the equivocal confession.

112 In ***R v Doolan*** [1962] Qd R 449, it was held that whilst even if strictly admissible, an equivocal admission would be dangerous to accept in evidence. The admission in question was truly equivocal as Townley J (at 455) makes clear:

> [T] made a written statement which might be said to implicate the appellant. A copy of it was handed to the latter who appeared to read it and then said: 'I thought that bastard had more bloody sense than to give you fellows a statement. He has dubbed us all in.' This comment was, to say the least, equivocal and, in my opinion, could not be taken as an unequivocal admission of the truth of the contents of the statement.

113 The appellant relies in written submissions upon a judgment of Sir Anthony Mason in ***Michael v Hksar*** (Unreported, Court of Final Appeal, Hong Kong Special Administrative Region, No 9 of 2004), where his Honour said at [53] that where an admission is equivocal so that its prejudicial effect is out of proportion to its probative value or weight, it will be excluded on the ground that its reception will prejudice a fair trial.

114 There is nothing novel in this proposition. In the case in question, the confession was considered admissible. It was in the nature of a priest's apology for sexual abuse of an altar boy. There was an admission which was in general terms, without identifying any one or more of the offences with which the appellant was charged. The admission on its own would not have constituted evidence that an offence was committed on any of the four occasions alleged, but the complainant's testimony provided that evidence. The importance of the admission was that, although non-specific as to the occasions alleged, it supported the complainant's testimony that he had been sexually abused by the appellant: [63].

115 The same principles are applicable to the present case. In fact, there was nothing equivocal about the appellant's confession in the sense that he admitted to sexual relations with young waitresses after drinking and behind a counter in a restaurant. These admissions undoubtedly supported the testimony of the complainant that she was a young waitress who had been sexually penetrated without consent after drinking with the appellant and behind what she described as a dividing wall within the restaurant. As I have already pointed out, the distinction between a counter and a dividing wall is minimal in the circumstances of the case.

116 In my opinion, the evidence of TL was clearly admissible. It was evidence of admissions of the appellant relevant to the circumstances of the case. I therefore consider that ground 1 fails.

Ground 2

117 This ground is related to the first ground. It contends that if the evidence of the alleged confession was properly admitted, it was of insufficient weight or probative value to have led to the trial judge to the

view that it was a critical piece of evidence in the case. This, in turn, goes to the fourth ground, namely, that the verdict was against the weight of the evidence so as to make it unsafe and unsatisfactory.

118 The question of the weight to be attributed to the confessional evidence was a matter for the trial judge. She gave full consideration to the circumstances in which the appellant's statements were made. She found TL to be an impressive and well-spoken witness [29], and, in her opinion, there was no sign of any vindictiveness or righteousness which would lead her to refuse to accept his evidence. She appreciated that the evidence was limited in that it did not name the young waitress and went no further than an admission by the appellant that he had had sex with a young waitress at the restaurant and behind the counter [29]. Her Honour noted that it was two years before TL reported the matter to Crime Stoppers, but a credible explanation was given by him as to why that was so. Further, the trial judge found it difficult to understand the contention of the appellant that TL made a false report to Crime Stoppers because he disliked and detested police [28].

119 In the end, the trial judge considered the evidence of TL to be very important [56]. She concluded that the evidence of TL meant that the appellant, on his own admission, must have been alone with a young waitress, which was exactly what the complainant was contending.

120 In my opinion, there was weight to be attributed to the evidence of TL. It did put the appellant in a position where he had admitted to having sexual relations with at least one young waitress after drinking and at the restaurant behind a barrier. Necessarily, he must have been alone with the waitress for that to have occurred. There could not reasonably have been others present in the restaurant. All of this was confirmatory of what the complainant said had happened to her. The evidence therefore had weight and was properly considered by the trial judge in that respect. I would dismiss ground 2.

Ground 3

121 This ground contends that the trial judge erred in failing to properly direct herself in terms of the warning required by ***Longman***. The particulars to the ground are in the following terms:

> (1) The case involved an uncorroborated case of sexual assault which occurred some years before any complaint being made.

> (2) In the circumstances it was incumbent on the learned Trial Judge to approach the case on the basis that it would be dangerous to convict the Accused.
>
> (3) The learned Trial Judge's finding that the prejudice to the Accused would be minimal was wrong in all the circumstances of the case.
>
> (4) The learned Trial Judge's findings in respect of the satisfactory nature of the Complainant's evidence was [*sic* were] insufficient to absolve her from approaching the case on the basis that it was dangerous to convict the Accused.

122 I have already referred to the trial judge's conclusion that although generally a delay of four years would be of significant prejudice to an accused person, in the present case the appellant did not suffer the prejudice of being unable to recall the events or call witnesses to assist him in his defence. Her Honour's conclusion was that the appellant had a clear recollection of the complainant's employment at the restaurant and the circumstances in which she left that employment. He called his mother to support his testimony in that respect.

123 The trial judge did observe that the appellant would suffer the prejudice of not being able to rely upon any forensic evidence which may have excluded him from involvement in the offence.

124 The trial judge did scrutinise the evidence of the complainant with care [37]. She concluded, however, that there were no real dangers which arose from the circumstances of the delay. This was particularly so because of the acceptance of TL's evidence.

The 'Longman warning'

125 The 'Longman warning' stems from the decision of the High Court in ***Longman***, where Brennan, Dawson and Toohey JJ said:

> 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. 91

126 A 'Longman warning' is particularly applicable to a sexual assault case. Wheeler JA, in ***FGC v The State of Western Australia*** [2008] WASCA 47 at [1] - [2], pointed out that in sexual assault cases, a special rule applies. A warning is required of the danger of acting on the uncorroborated testimony of the alleged victim in cases of rape and other sexual offences.

127 Even apart from sexual assault cases, a warning is necessary to avoid a perceptible risk of miscarriage of justice which arises from the circumstances of the case (see ***Bromley v The Queen*** (1986) 161 CLR 315 per Gibbs CJ at 319; ***Carr v The Queen*** (1988) 165 CLR 314 per Brennan J at 330). In any case in which the circumstances of the case are such as to suggest that the evidence of a complainant may be unreliable and the jury may not appreciate the risk of acting on that evidence without special scrutiny being given to it, a warning is thus required (see ***FGC*** per Wheeler JA at [3] - [4] and per Buss JA at [120] - [121] for a full exposition of the relevant principles).

128 No particular wording is required for such a warning. In particular, it is not necessary to warn a jury that it would be 'dangerous' to accept the evidence of the complainant without careful scrutiny of it: ***Gaulard v The Queen*** [2000] WASCA 218 [14] (Miller J).

The Longman warning given in this case

129 To properly analyse the trial judge's Longman warning, it is necessary to repeat some of what I have already said.

130 In giving herself a Longman warning, the trial judge began by saying:

> It was four years between the alleged offence in 2001 and the date the accused man was charged in 2005. I accept that sort of delay could well prejudice the accused in his defence. Because of the delay the accused cannot rely on any forensic evidence excluding him from involvement in the offence. [34]

131 The trial judge then acknowledged that generally an accused person would not be able to recall the events or call witnesses to assist him in his defence when there had been a long delay between the date of the alleged offence and the date upon which he was charged. Her Honour thought, however, that in the present case the position was different. The appellant had given evidence that he remembered the complainant and remembered the short time she worked at the restaurant. He gave evidence of her

leaving after being sacked. He called his mother in support of his evidence.

132 I should interpolate that the trial judge said that the appellant 'could have called his wife or brother or other family members if their evidence assisted his case'. This observation, although not the subject of any ground of appeal, was erroneous. The appellant was not under any obligation to call any witnesses. Indeed, he was not under any obligation to give evidence at all.

133 The trial judge did separately accept that the appellant did not have to prove anything and had no obligation to give or adduce evidence in his defence, but this seems to be inconsistent with the passage to which I have referred.

134 The trial judge continued:

> [T]the Longman warning is meant to alert the tribunal of fact, the jury to the prejudice an accused faces in defending a charge insofar as any prejudice arises from such a long four year delay. In the particular circumstances of this case any such prejudice is minimal. Although I must scrutinise the evidence of the complainant with care, it is not a case where there are any real dangers arising from the circumstances of the delay. That is particularly so because I accept [TL's] evidence. [37]

135 Her Honour then analysed the evidence of TL, concluding that the only reasonable inference to be drawn from the question TL had asked was that he had heard something about the appellant 'shagging a young waitress'. She said there was no evidence of the complainant ever telling anybody of what she alleged happened, and thus the only reasonable inference was that, whatever TL had heard, it came indirectly from the accused man himself.

136 There is no ground of appeal in relation to this conclusion, but it was clearly erroneous. The complainant may have told a person, or a number of persons, what had happened. It was not the only reasonable inference to be drawn that the appellant was responsible for telling people what TL had heard.

137 The trial judge concluded with the following statement:

> I am satisfied beyond reasonable doubt that the accused well remembered the incident and the complainant. The delay in charging him does not in these circumstances create any real dangers as in a normal Longman case. [37]

138 This conclusion is at odds with the trial judge's earlier conclusion at [29] that she accepted that the evidence of TL was 'limited evidence'. I have already quoted this passage in which the trial judge concludes that because the appellant did not name the young waitress, the admission went no further than an admission by the appellant than he had had sex with a young waitress at the restaurant and that it took place behind the counter.

139 In my opinion, there was no warrant for the trial judge concluding that she was satisfied beyond reasonable doubt that 'the accused well remembered the incident and the complainant'. She had already found that the evidence of TL was limited and, indeed, it was. It could not, on any view, have satisfied her beyond reasonable doubt that, by reason of what the appellant said to TL, he was confessing to the sexual offence which was alleged against him.

Adequacy of the Longman warning

140 There are difficulties with the Longman warning which the trial judge administered to herself. The first of the difficulties is that the warning was too restricted. The trial judge spoke of the four-year delay being a delay which 'could well prejudice the accused in his defence', pointing out that he could not rely on any forensic evidence which excluded him from involvement in the offence. However, the matter went a good deal further than that. In ***JJB v The Queen*** (2006) 161 A Crim R 187, Kirby J (with whom Spigelman CJ and Howie J agreed) said:

> His Honour did not say, in terms, that delay created difficulties for the appellant in testing the Crown case, including the complainant's evidence. That was an important shortcoming. Every formulation of the *Longman* direction suggests it is a requirement. The loss of surrounding detail with the lapse of time inevitably makes it more difficult to cross-examine the complainant and meet the Crown case (***R v WRC*** (2002) 130 A Crim R 89 at [141] - [143], per Kirby J). Counsel for the appellant suggested that this was a fundamental error, giving rise to the possibility of a miscarriage of justice, such that leave should be given. ... First, the disadvantages occasioned to the appellant were actual not simply theoretical.
>
> ...
>
> The failure to state that delay had disadvantaged the accused in respect of his ability to test the evidence was an error. (95) - (97)

141 Kirby J's conclusion is important:

> Here, most aspects of the *Longman* warning had been covered. Taking the summing up as a whole, the jury had been told of the difficulties which delay had occasioned to the appellant in meeting the Crown case. They had been warned and, indeed, repeatedly warned in strong terms that it was dangerous to convict on the evidence of the complainant alone. They had been enjoined to scrutinise her evidence with great care, bearing in mind the warning, and directing their attention not only to her truthfulness, but to the accuracy of her testimony. What was missing was a direction that delay had made it difficult to test the complainant's evidence and that such delay had caused actual prejudice, rather than possible prejudice.

142 In the present case, it can also be said that most aspects of the Longman warning were covered by the trial judge. Her Honour did appreciate that she had to scrutinise the evidence of the complainant with care (although she should technically have said 'great care'). She also made reference to the fact that the appellant would be prejudiced because he could not rely on any forensic evidence to exclude him from involvement in the offence. However, the trial judge did not direct herself that the four-year delay had caused 'actual prejudice rather than possible prejudice' (***JJB*** per Kirby J at [98]). Her Honour appears to have been only concerned about *possible prejudice* not *actual prejudice*.

143 There was a good deal of actual prejudice which the appellant had suffered. It included inability to have (1) forensic examination of the clothing of the complainant, (2) forensic examination of the scene where the offence was alleged to have occurred, (3) examination of the rubbish at the restaurant to see whether there were tissues stained with semen, (4) the evidence of patrons at the restaurant who may have been in a position to contribute to the question of the time at which the complainant left the restaurant and/or the time at which the restaurant closed, (5) the evidence of witnesses who were responsible for the actual closure of the restaurant on the night in question, the time at which that was done, and the number of people who were there.

144 Further, had the appellant been charged in close proximity to the time of the alleged offence, memories would, no doubt, have been much better than they were some four years on.

145 The trial judge did not advert to these issues, but, rather, took the view that because the appellant had given evidence that he remembered the complainant and remembered the short time she worked at the restaurant, he was not, in fact, prejudiced. She concluded that, in the particular circumstances of the case, any prejudice to him was 'minimal'.

146 In my opinion, this was an error and in accordance with the observations of Kirby J in ***JJB***, what was missing from the Longman direction was a direction that delay had, in fact, made it difficult to test the complainant's evidence. In other words, the delay had caused actual prejudice, rather than possible prejudice.

147 There is a second problem with the Longman direction. The logic employed by the trial judge for concluding that any prejudice to the appellant was minimal was twofold. In the first instance, she took account of the fact that he could remember the complainant and remember her working at the restaurant. She also took account of the fact that the appellant was able to call his mother to give evidence about that issue. In the second place, the trial judge was fortified by the evidence of TL. She said that it was not a case where there were any real dangers arising from the circumstances of the delay, particularly because of TL's evidence. She elevated the evidence of TL to a conclusion that she was satisfied from it beyond reasonable doubt that the appellant well remembered 'the incident' and the complainant. In other words, she elevated the evidence of TL to that of a confession on the part of the appellant.

148 Had there, in fact, been a confession on the part of the appellant, there would indeed have been no actual prejudice occasioned by the delay in the charging of the appellant. But there was no confession on his part.

149 In the circumstances, I am of the opinion that the trial judge (a) gave herself an inadequate Longman warning, and (b) mistakenly thought that the evidence of TL (contrary to her earlier conclusion) constituted a confession on the appellant's part such that any prejudice to the appellant occasioned by the delay in being charged was 'minimal'.

Applicability of the proviso

150 Under s 30(4) of the *Criminal Appeals Act 2004*, even if a ground of appeal might be decided in favour of the offender, the Court of Appeal may dismiss the appeal if it considers that no substantial miscarriage of justice has occurred.

151 However, I consider the trial judge's failure to properly direct herself in accordance with ***Longman*** to have been an error which constituted a serious breach of the presuppositions of the trial process. As such, I consider it denied the application of the proviso: ***Weiss v The Queen*** [2005] HCA 81; (2005) 224 CLR 300 [45]. In the circumstances of the case, it is impossible to assess the impact of the irregularity which occurred on the fairness of the trial: ***Libke v The Queen*** [2007] HCA 30;

(2007) 230 CLR 559 [46] (Kirby and Callinan JJ) (in dissent in the case, but not on the principles to be applied).

152 The result is that ground 3 of the grounds of appeal is made out.

Ground 4

153 This ground contends that the verdict of guilty was not reasonably open to the trial judge. It is a ground which seeks to apply s 30(3) of the *Criminal Appeals Act 2004* which provides that the Court of Appeal must allow an appeal if, in its opinion, the verdict of guilty on which the conviction is based should be set aside because, having regard to the evidence, it is unreasonable or cannot be supported.

154 The test to be applied is that set out in ***M v The Queen*** (1994) 181 CLR 487 by Mason CJ, Deane, Dawson and Toohey JJ at 492 - 493:

> The question is one of fact which the court must decide by making its own independent assessment of the evidence [***Morris v The Queen*** (1987) 163 CLR 454] and determining whether, notwithstanding that there is evidence upon which a jury might convict, 'none the less it would be dangerous in all the circumstances to allow the verdict of guilty to stand' [***Hayes v The Queen*** (1973) 47 ALJR 603 at 604]. But a verdict may be unsafe or unsatisfactory for reasons which lie outside the formula requiring that it not be 'unreasonable' or incapable of being 'supported having regard to the evidence'. A verdict which is unsafe or unsatisfactory for any other reason must also constitute a miscarriage of justice requiring the verdict to be set aside.
>
> …
>
> Where, notwithstanding that as a matter of law there is evidence to sustain a verdict, a court of criminal appeal is asked to conclude that the verdict is unsafe or unsatisfactory, the question which the court must ask itself is whether it thinks that upon the whole of the evidence it was open to the jury to be satisfied beyond reasonable doubt that the accused was guilty [***Whitehorn v The Queen*** (1983) 152 CLR 657 at 686; ***Chamberlain v The Queen [No 2]*** (1984) 153 CLR 521 at 532; ***Knight v The Queen*** (1992) 175 CLR 495 at 504 - 505, 511]. But in answering that question the court must not disregard or discount either the consideration that the jury is the body entrusted with the primary responsibility of determining guilt or innocence, or the consideration that the jury has had the benefit of having seen and heard the witnesses. On the contrary, the court must pay full regard to those considerations [***Chamberlain v The Queen*** (*supra*) at 621].

See also ***Weiss***; ***Libke***; ***Gassy v The Queen*** [2008] HCA 18; (2008) 82 ALJR 838; ***Martinez v The State of Western Australia*** [2007] WASCA 143; (2007) 172 A Crim R 389 at [6].

155 The contentions of the appellant are that there were a number of factors present in this case which cast doubt on the veracity of the complainant and the likelihood of the offence having occurred.

156 The contention is that there was no early complaint. It is said that because the complainant lived at home with her parents, it was not unreasonable to expect such a complaint. Further, she was collected from the restaurant on the night in question by her mother within minutes of the offence allegedly having occurred in circumstances where a complaint might reasonably have been expected.

157 The trial judge made specific reference to the failure of the complainant to make complaint and I have already referred to that passage. Full consideration was given to the circumstances in which the complainant was placed.

158 The appellant relies on ***Crofts v The Queen*** [1996] HCA 22; (1996) 186 CLR 427, a case which has given rise to what is often termed a 'Crofts direction'. In ***Tullock v The State of Western Australia*** [2008] WASCA 125, I made detailed reference to this issue and to the circumstances in which a Crofts warning may be required. I said:

> ... each case must be looked at on its own facts. Only where the particular facts of the case and the justice of the circumstances require it will the trial judge be required to make critical comment about a complainant's failure to make complaint. Even then, the purpose of s 36BD of the *Evidence Act* must not be undermined by suggesting that complainants in sexual assault cases are unreliable, or delay in making a complaint is invariably a sign that the complainant's evidence is false. [17]

159 In the present case, it must be borne in mind that the complainant was not a person who made a complaint years after the event and in circumstances where she deferred making that complaint for no fathomable reason. To the contrary, she only made complaint after TL had reported the conversation with the appellant to Crime Stoppers.

160 It is clear from the evidence that the complainant was approached by investigating police after the complaint was made to Crime Stoppers. It was only then that the complainant came forward with an account of what had occurred. It seems to me that this is a far different case from one in

which a complainant prevaricates and is unable to bring herself to make a complaint for several years.

161 The second contention that the verdict was unsupported by the evidence is because there was no medical or forensic evidence to corroborate the commission of the offence. Reference is made to the fact that the complainant said she bled after the incident, but she sought no medical attention.

162 The trial judge recognised the fact that the appellant was deprived of the ability to test any forensic evidence which may have been available. To this extent, he was certainly prejudiced and the Longman warning was appropriate in those circumstances. However, the evidence establishes that the complainant determined that, after the incident, she would say nothing and report the matter to nobody. This was her position until TL reported to Crime Stoppers the conversation he had had with the appellant. In those circumstances, it is not surprising that there was no medical or forensic evidence. Nor is it surprising that the complainant had not sought any medical attention. She had been through an event which she kept to herself and presumably would not have made complaint about had it not been for TL's report to Crime Stoppers. The absence of medical consultation on her part does not seem to me to be a factor fatal to the appellant's conviction.

163 The appellant's third contention is that there was no admissible admission on his part which unequivocally referred to the occurrence of the event and no record of interview. It is said that it was significant that he testified in his own defence and denied the offence absolutely.

164 I am unable to accept these contentions. I have already indicated that I consider the appellant to have made an admission against interest which was sufficiently probative to be admissible against him. In fact, it was telling evidence that supported the complainant's testimony. It was he who had admitted 'shagging young waitresses' in the conversation with TL and it was this that led to the complaint to Crime Stoppers.

165 The fact that the appellant testified in his own defence and denied that he had committed the offence does not, in my opinion, mean that the conviction was unsupported by the evidence. The trial judge specifically rejected the evidence of the appellant.

166 The appellant's fourth contention is that the trial judge failed to resolve an inconsistency in the evidence in relation to the circumstances in which the restaurant was closed at the end of trading each night.

However, I have already pointed out that the appellant said that it required two people to close a security grate at the door, whereas his mother said that it required two people to close security windows. It was this inconsistency which the trial judge was unable to resolve, and an inconsistency it was.

167 The trial judge considered that the appellant was not to be believed when he contended that he could not have been alone with the complainant at the restaurant. Her Honour concluded that the complainant's testimony in this respect was to be believed.

168 The complainant said that she left the restaurant through an open door and was picked up by her mother immediately outside. Her mother gave evidence that she saw her daughter outside the door.

169 The evidence of the complainant and the appellant was in conflict over the issue whether they could have been alone together at the restaurant, but the trial judge accepted the evidence of the complainant. The complainant's evidence was open to be accepted in this respect.

170 The appellant's fifth contention is that the trial judge articulated no affirmative reason for rejecting the evidence of the appellant's mother to the effect that the appellant and the complainant could not have been together alone at the restaurant. However, I have already pointed out that there was an inconsistency between the evidence of the appellant on the one hand, and his mother on the other about the circumstances in which the restaurant was closed; specifically, whether it was a security gate put over door that required two people, or whether it was iron grids over windows that required two people.

171 The evidence of the appellant's mother had shortcomings. It suffered from the fact that MM contended that the complainant had worked only Wednesday to Saturday, had not been trained at all, and had been sacked in the middle of an evening because it had become necessary to fire her because she was being obstructive and a nuisance. This evidence did not accord with the testimony of the complainant's mother that she called and collected her daughter at approximately 11.00 pm on the Friday night.

172 Further, and as the trial judge observed, counsel for the appellant had never put to the complainant that she was obstructive, a nuisance and the recipient of complaints from the kitchen about her attitude.

173 MM's evidence that she was at the restaurant every single night of its opening until closing time for a whole year was also hard to accept.

Further, she said that a young man had picked up the complainant on one of the nights when she was working at the restaurant and a young man had collected her on the night when she was sacked. Both the complainant and her mother gave evidence that it was the mother who collected the complainant on the Friday night when she ceased work, and, in any event, she did not have a relationship with a young man until some six months after this incident. In these circumstances, it is wrong to contend that the evidence of MM had such significance that the verdict was contrary to the evidence.

174 The appellant's sixth contention is that the verdict is unsupported by the evidence because of the complainant's failure to initiate a complaint, but I have already dealt with this issue.

175 The appellant's seventh contention is that the verdict is unsupported by the evidence because the complainant varied her evidence in relation to the time at which she ceased work, conceding that she told police that she had terminated her employment at about 9.40 pm on the night in question, whereas in evidence she said it was around 11.00 pm. I have already dealt with this aspect. Given the circumstances of the case, and the fact that the statement made by the complainant to police was made years after the event, there does not seem to me to be any significance in the fact that she said in the statement that it was 9.40 pm, but in her evidence she said it was 11.00 pm. She explained in her evidence why it was that she had put 9.40 pm in her statement to the police, saying that she thought, when she made the statement, that was the correct time. She said that she could not remember what time it was at the time she made the statement, but 9.40 pm was what she thought it was. In cross-examination, she was given the opportunity to address the issue and she said that it was late, 'It was more close to 11', when she left. That is the evidence she gave, and, in my view, it was acceptable.

176 The appellant's eighth contention is that there were important issues which needed to be resolved about the circumstances of the complainant's employment: whether she was a waitress or on work experience and whether she had attended school on the Monday prior to the offence which was a public holiday. These, in my opinion, were minor matters. The complainant was adamant that she had been on work experience. So was her mother. The complainant thought she had attended school on the Monday, but she conceded she may have been wrong about that. They were not matters which were such as to render the conviction contrary to the evidence.

177 The appellant's ninth contention is that the events of the night in question (drinking at the bar and then intercourse behind the dividing wall) appear highly unlikely in the time frame suggested by the complainant. I have already referred to how the trial judge dealt with this issue. In my view, it would be wrong to think that the complainant's evidence about time was so specific that there could be no variation in times. Whether it was 10, 15 or 20 minutes during which the two drinks were consumed and then sexual intercourse occurred is an issue which cannot be clearly resolved. The complainant's testimony was that it was 'sometimes 10, maybe 15 even 20 minutes sometimes' between the time it took to telephone her mother and the time her mother arrived.

178 The complainant said that she had two drinks of Southern Comfort and Coke and, after she had finished, the appellant said, 'Come with me' and took her to a position behind a dividing wall, where he pushed her to the ground and had sexual intercourse with her without her consent. She said that it took maybe five, or 10 minutes at the very most, for the sexual penetration to occur.

179 In my opinion, time estimates in circumstances such as this cannot be looked at with precision. Given the period of time that had elapsed between the date of the incident and the trial of the appellant (which by then was around seven years), it is obvious that the times could not be set precisely. There is nothing, in my view, which suggests that, by reason of this fact, the verdict was unsupported by the evidence.

180 The appellant's tenth contention is that the finding of the trial judge that the complainant's evidence was detailed and compelling sits uncomfortably with her finding that it lacked detail, but was excusable because of the time lapse since the incident.

181 What the trial judge was saying was that, given the delay between the event and the complainant's interview with police, it was not surprising that the complainant had changed her evidence in relation to the time at which she left the restaurant on the night of the alleged sexual assault. That was not relevant to the trial judge's conclusion that the *complainant's account of what happened to her* (my emphasis) was detailed and compelling. The trial judge said that there was no sign of rehearsing or making up that evidence and there was no sign of her being evasive or confused.

182 The appellant's eleventh contention is that because the trial judge concluded that 'the appellant would have found it almost impossible to be

alone with the complainant' this 'sits uncomfortably with her finding [that] the charge [was] proved to the required standard'.

183 What the trial judge found [56] was that the appellant *contended* that he could not have been alone with the complainant and suggested that another family member must have been present.

184 When considering this issue, the evidence of TL was important. His evidence, once accepted, established that the appellant must have been alone with a young waitress.

185 The final contention of the appellant is that the trial judge erred in finding that the appellant's experience in giving evidence as a police officer was a relevant factor in reaching a view adverse to his credibility.

186 As I have indicated, the trial judge noted that the appellant was a police officer with 13 years' experience in giving evidence in court. The trial judge noted his demeanour and considered that the effect of his evidence was 'unnatural and contrived'. This was a matter particularly relevant to the trial judge's own assessment. As was pointed out in ***M*** at 493, consideration must be given to the fact that the trial judge was the person who had the benefit of seeing and hearing the witnesses. Full regard must be paid to that consideration. In this instance, it must be appreciated that the trial judge who saw the appellant give evidence was distinctly unimpressed by his demeanour. That did not affect the obligation of the prosecution to prove his guilt beyond reasonable doubt, but it did mean that, in all the circumstances of the case, the trial judge was justified in rejecting the appellant's evidence.

Conclusion on ground 4

187 It seems to me that there was ample evidence to support the verdict of guilty. Once the evidence of the complainant was accepted as credible and persuasive and the evidence of the appellant was rejected, it was necessary only for the trial judge to carefully scrutinise the evidence of the complainant before acting upon it. In this respect, she was entitled to consider the evidence of TL about the appellant's admissions and the evidence of the complainant's mother in relation to the time, the night and the circumstances in which the complainant was collected from the restaurant.

188 The complainant contended that she had been sexually penetrated without consent by the appellant at a restaurant where she was working and where she was alone with the appellant at the end of the night. She

had made no complaint about the matter until such time as TL made a report to Crime Stoppers after a conversation with the appellant. The admissions made by the appellant were supportive of the testimony of the complainant. They tended to confirm the incident about which she complained. There was confirmation in what the appellant said about three key factors: sexual relations with at least one young waitress; sexual relations after drinking alcohol; and sexual relations behind a 'barrier' in the restaurant at which the appellant was working. This, in my opinion, combined with the persuasive evidence of the complainant herself was sufficient to bring about the verdict of guilty. It could not be said that it was unreasonable, incapable of being supported having regard to the evidence, or in any way unsafe or unsatisfactory. I would therefore dismiss the fourth ground of appeal.

Conclusion

189 I would dismiss the appeal on grounds 1, 2 and 4, but allow the appeal on ground 3. I would quash the conviction of the appellant and direct that he be retried.

190 **MURRAY AJA**: In this matter I have had the considerable advantage of reading in draft the reasons published by Steytler P and Miller JA. I agree with their Honours that the appeal should be allowed and that a new trial in the District Court should be ordered.

191 I agree, generally for the reasons given by their Honours, to which I have nothing to add, that ground 1, concerning the admissibility of the appellant's out-of-court statements to the witness TL, cannot succeed. But it is important to note that, although what was said by the appellant constituted an admissible declaration against interest, having a not insubstantial probative value in relation to factual issues which arose in the trial, it was by no means a confession that the appellant sexually penetrated the 14-year-old complainant in the restaurant on a night in about early October 2001, during a period of rather less than a week in which she worked at the restaurant as a waitress. Much less was it a confession that sexual penetration, always denied by the appellant, occurred without the complainant's consent.

192 There was a contest of credibility between the appellant and TL. The trial judge accepted the evidence of TL that the conversation of which he spoke occurred some time in 2003. She did not accept the contrary evidence given by the appellant. Unsurprisingly, her Honour did not

accept that TL was motivated by the considerations suggested by the appellant, to make a false report against him to Crime Stoppers in 2005.

193 But her Honour accepted that the evidence of TL was 'limited evidence': ***State of Western Australia v AM*** [2008] WADC 20 [29]. With respect, her Honour's observation is right. The material parts of TL's evidence have been set out by Steytler P and Miller JA. TL referred to the conversation he had with the appellant in the most general terms:

> What's this I hear about you shagging young waitresses? Or something along those lines (ts 104).

194 There was no reference in the conversation to when the 'shagging', which I take to refer to penile-vaginal penetration, occurred. There was no reference to the age of the waitresses. There was no reference to how many were being referred to, if more then one, and there was certainly no reference to such activity being other than consensual. It seems to have been assumed by both parties to the conversation that the question referred to activities in the restaurant, 'behind the counter' (ts 104). There was a reference to the consumption of alcohol, 'a few beers', by the appellant and/or the one or more young waitresses involved, and presumably one might infer that the sexual activity was private. TL gave no evidence, of course, about who was his informant.

195 The importance of the evidence was that it contradicted the appellant's denial, supported to some extent by the evidence of his mother, that any such activity, consensual or otherwise, involving the appellant and the complainant, or any other young waitress, in the restaurant, with or without consent, ever occurred. But its probative value was certainly limited in that way.

196 As to ground 4, I respectfully agree with Steytler P and Miller JA that, for the reasons their Honours give, the proposition that the verdict and decision of the trial judge was unreasonable or cannot be supported, having regard to the evidence, is not made good.

197 I agree with Steytler P that grounds 2 and 3 can be considered together. Ground 2 has merit, in my view, but, as will appear, the merit of the ground lies in what I consider is a flaw in the reasoning process adopted by the trial judge in relation to ground 3, which complains of her Honour's consideration of the warning or instruction to be given to the tribunal of fact discussed by the High Court in ***Longman v The Queen*** (1989) 168 CLR 79.

198 The process of trial by judge alone is dealt with in Div 7 of Pt 4 of the *Criminal Procedure Act 2004* (WA). Section 119 provides that when that process of trial is employed, the same principles of law and procedure as are required in the case of a trial before a jury are to apply. By s 119(3):

> If any written or other law -
>
> (a) requires information or a warning or instruction to be given to the jury in certain circumstances; or
>
> (b) prohibits a warning from being given to a jury in certain circumstances,
>
> the judge in a trial by a judge alone must take the requirement or prohibition into account if those circumstances arise in the course of the trial.

The requirement is not that the trial judge should solemnly give himself or herself the warning or instruction which would be required to be given to the jury, but the judge is to take that requirement into account.

199 A judgment is to be given. Section 120(2) requires the judgment of the judge to, 'include the principles of law that he or she has applied, and the findings of fact on which he or she has relied'.

200 Such a judgment will reveal whether the principles have been properly understood and will expose the reasoning process behind the findings of fact made: ***Fleming v The Queen*** (1998) 197 CLR 250; [1998] HCA 68, a case where, in a trial by judge alone, the judge had failed to refer to the principle expressed by a ***Longman***-type warning, and ***Riley v Western Australia*** (2005) 30 WAR 525; [2005] WASCA 190.

201 In this case, the judgment of the trial judge adequately exposed her reasoning process in support of her findings of fact, but in doing so, in my view, her Honour revealed that she had fallen into error in the way in which she took into account the principle derived from ***Longman*** and the considerable number of later cases where the warning referred to in that case has been discussed.

202 It is sufficient for my purposes that the nature of the principle giving rise to the need for the warning discussed in ***Longman*** appears clearly from the judgments in that case. It is that where, for any reason, the reliability of a witness, upon the acceptance of whose evidence the prosecution case solely or substantially relies, comes into question, having regard to the issues raised in the case, then, before relying on that

evidence to find facts which may establish guilt beyond reasonable doubt, the judge or jury must scrutinise the evidence with great care, paying particular attention to the challenges made to it and the matters relevant to its evaluation.

203 If, having done that, the court is satisfied of its truth and accuracy, then of course the evidence may be relied upon to establish the facts necessary to lead to the conclusion that guilt has been proved beyond reasonable doubt: ***Longman*** per Brennan, Dawson and Toohey JJ at 91, Deane J at 102, and McHugh J at 107. At that page, after discussing earlier cases concerned with what might be described as a full corroboration warning, McHugh J said:

> If, however, the evidence discloses any circumstance which suggests that the evidence of the complainant may be unreliable, the trial judge has a duty to make the jury aware of the dangers concerning that person's evidence. As in any case where the prosecution depends solely upon the evidence of one witness, the trial judge is entitled to point out that the evidence of the complainant requires careful scrutiny before acting upon it. But cases will frequently arise where the circumstances will require a stronger warning. The terms of that warning will depend upon the particular circumstances of the case.

204 In this case, as I have mentioned, the conflict was stark. The case against the appellant rested entirely upon the evidence of the complainant. I agree with Steytler P and Miller JA that the lapse of time between the alleged commission of the offence and the appellant being charged and the trial, meant that there was an incapacity for either side to gather evidence which might enable the credibility of the complainant to be thoroughly examined in the context of a body of evidence concerned with the events of the night in question. There was real forensic disadvantage for both sides attendant upon the case generally.

205 The trial judge commenced her judgment with a review of the evidence. Having done so, at [33] her Honour spoke approvingly of the complainant as a witness. She said:

> The complainant gave her evidence in a very direct way. Her account of what happened to her was detailed and compelling. There was no sign of any rehearsing or making it up or being evasive or being confused. She answered questions in a manner consistent with a person recalling a very, very unpleasant painful event. I accept the complainant's evidence as truthful and reliable but before I reach a verdict there are several matters I must carefully consider.

206 Her Honour then referred to matters under the heading 'Longman warning'. In other words, it seems to me that her Honour reversed the appropriate order of consideration of the issues. Before considering the extent to which she needed to carefully scrutinise the evidence of the complainant, having regard to the various challenges made to its reliability, her Honour had already expressed the view that she accepted the complainant's evidence as being truthful and reliable. In my view, her Honour was in error in that regard.

207 However, when considering what I might describe as Longman issues, and in finding that the case did not give rise to real dangers, arising from the delay, in accepting the evidence of the complainant, her Honour said, at [37]:

> Although I must scrutinise the evidence of the complainant with care, it is not a case where there are any real dangers arising from the circumstances of the delay. That is particularly so because I accept [TL's] evidence. The only reasonable inference arising from the question [TL] asked is that he had heard something about the accused 'shagging a young waitress'. There is no evidence of the complainant ever telling anyone of what she alleged happened so the only reasonable inference is that whatever [TL] had heard came indirectly from the accused man himself - joking or bragging or talking about his success with the young waitress. I am satisfied beyond reasonable doubt that the accused well remembered the incident and the complainant. The delay in charging him does not in these circumstances create any real dangers as in a normal Longman case.

208 Her Honour seems to have found that what Lawson had heard originated from the appellant, 'joking or bragging or talking about his success with the young waitress'. Her Honour's reference to one young waitress seems to me to imply that she had concluded that the appellant had been bragging about his conquest of the complainant. If that is a correct reading of her Honour's judgment, there was nothing to support such a conclusion. In truth, the evidence of TL was not capable of having any substantial impact upon the careful scrutiny of the reliability of the complainant's evidence required before her Honour was justified in accepting the complainant as a truthful and reliable witness.

209 Her Honour returned to this theme at [49]:

> I accept [TL's] evidence. This offence came to light because the accused must have been talking about what he had done. And he readily admitted sexual activity with a young waitress behind the counter in the restaurant when [TL] questioned him. I consider [TL's] evidence very powerfully persuasive. It may well be that Police officers should know better. The

> accused should have known better than to talk about what he had done. His talking about it has been his downfall.

Indeed, shortly after that statement, her Honour concluded her judgment by referring to the importance of the evidence of TL when considering the fundamental issue of whether the appellant could have committed the offence.

210 The evidence of TL was certainly important in the case. If accepted, as it was, the appellant had made statements contradicting his evidence and that of his mother that he had no opportunity to commit the offence. But that evidence, relevant only in that way and having no probative value to support the complainant's evidence that the appellant did commit the offence in the circumstances she alleged, was not material to the process of carefully scrutinising the complainant's evidence, having regard to the matters of forensic disadvantage which the case raised, before the complainant was accepted as a truthful witness.

211 Rather, what the trial judge did in this case, it seems to me, was that, having already accepted the complainant as a truthful witness, her Honour did not adequately and appropriately evaluate the reliability of her evidence, having regard to the obvious elements of forensic disadvantage which the case threw up.

212 That error having been made, there has been a substantial miscarriage of justice because the appellant has been deprived of a trial in which the complainant's evidence, upon which the case against him so substantially depended, was appropriately and thoroughly tested for its reliability before it was accepted as evidence of truth: ***Fleming*** at 265 [39].

213 For those reasons, I concur in the view that it would be appropriate in this case to allow the appeal, quash the conviction and order a retrial.