WARNINGS IN SEXUAL OFFENCES CASES RELATING TO DELAY IN COMPLAINT

Question 1 - I have no firm view concerning whether the law relating to warnings required to be given to juries in sexual offence cases relating to delay in complaint is in need of reform. I have not encountered problems of any substance in a criminal trial over which I have presided, nor in the Court of Criminal Appeal.

It is my view that in some cases a speedy complaint can be probative just as a delay in complaint can also be probative. Each case depends on its own circumstances. In some cases a delay will not be of great probative value. However it will be in some cases. Delay in complaint does not mean that the complainant's evidence is unreliable but a failure to make a speedy complaint will, in some cases, suggest that the complaint was not genuine. Need I say it again, each case depends on its own circumstances.

Concerning question 2, I am content that the Evidence Act, s165(5), be repealed. The effect will not be significant.

Concerning question 3, I do not think that the recommended Victorian reform will displace the requirement for a Longman warning in many cases. In most cases of substantial delay in making a complaint, and I am particularly referring to a delay of several years, the forensic disadvantage to the accused is obvious and what it is should be pointed out to the jury. (That however does not mean that the evidence of the complainant is unreliable.) I think juries easily understand. I usually point out to them that if they were charged with having committed an offence last Sunday, or on a particular day last month, and they did not commit it, they would probably be able to remember where they were at the time, what they were doing, who was with them, whether the complainant was around and, if so, what the complainant was doing at the time, but in a case of substantial delay memories of that kind will be lost, and even more so when the allegation is for example, that the offence was committed on an unknown night some time in 1986 or thereabouts. I do not place the complainant's evidence in an unsafe category. I emphasise the understandable problem the accused would have in the circumstances, if he or she is innocent. Whether or not a sexual offence is charged is immaterial.

Concerning question 4(a), I do not support the suggested legislative statement. However, I do not think judges should state it as a presumption in most cases. Juries decide the facts and judges need only point out the forensic disadvantage from which the accused may be suffering, if innocent. Concerning question 4(b), I do not support the proposal. Further, it will create something which your paper purports to seek to avoid, that is difficulty for trial judges and grounds for appeal.

Concerning question 5, for similar reasons I oppose what the paper suggests.

I have no problem with the proposition that juries should not be directed that it is dangerous to convict in cases of long delay in making a complaint. My concern is to ensure that the jury are aware of and take into account the forensic difficulties for an innocent accused after a long time, when they come to consider their verdict.

Concerning a Croft's warning, my view is that if the defence rely on delay in complaining as probative of innocence, the judge should refer to the defence argument when dealing fairly with the defence case, as the judge is required to do, adding of course what is required by the Criminal Code, s371A, to balance the comment. Particularly in cases of sexual offences against children, I am confident that juries fully understand the validity of the s371A direction.

Finally, I make a plea for uniformity between jurisdictions.

Justice Crawford