Delay in prosecution and significant forensic disadvantage

Commentary

The requirement to warn the jury about the disadvantage to the defendant arising from delay in complaint has been significantly altered by s 132BA *Evidence Act* 1977. In *Longman v The Queen* (1989) 168 CLR 79 the High Court held that the jury should have been directed that the long delay in complaint had impaired the defendant's ability to test the case against him.

The *Criminal Code (Child Sexual Offences Reform) and Other Legislation Amendment Act* 2020 amended the *Evidence Act* 1977 by inserting s 132BA. The provision commenced on the day after assent (s 2(1)). The date of assent was 14 September 2020. The provision applies only if the trial starts on or after 15 September 2020: s 154(1) *Evidence Act* 1977.

The main aspects of s 132BA are:

(a) The provision applies to criminal proceedings where there is a jury: s 132BA(1). The requirements are also applicable in a trial by judge alone: s 615B *Criminal Code*.

(b) On the judge's own initiative, or on the application of a party, the judge **may give** the jury a direction if satisfied that the defendant has suffered a **significant forensic disadvantage** because of the effects of delay: s 132BA(2).

(c) A significant forensic disadvantage is not established by the **mere fact of delay** in prosecuting the offence: s 132BA(3).

(d) In giving the direction, the judge **must** inform the jury of:

- the nature of the disadvantage: s 132BA(4)(a)(i); and
- the need to take the disadvantage into account when considering the evidence: s 132BA(4)(a)(ii).

(e) However, the judge **must not** warn or in any way suggest to the jury that:

- it would be dangerous or unsafe to convict: s 132BA(4)(b)(i); or

- the complainant's evidence should be scrutinised with great care: s 132BA(4)(b)(ii).

(f) The judge **need not** give the direction if there are good reasons for not doing so: s 132BA(5).

(g) The judge **must not**, other than under s 132BA, give the jury a direction about the disadvantages of delay: s 132BA(6).

(h) Delay includes delay in reporting the offence: s 132BA(7).

The provision is very similar to s 165B *Evidence Act* (NSW). In that provision the factors that may be regarded as establishing a **significant forensic disadvantage** are specified as including that potential witnesses have died or are not able to be located, and that potential evidence has been lost or is unavailable: s 165B(7).

In *TO v R* (2017) 265 A Crim R 214; [2017] NSWCCA 12 the New South Wales Court of Criminal Appeal (Price J, with whom Button and Fagan JJ agreed) summarised the effect of s 165B at [167]. See also *Cabot (a pseudonym) v R (No 2)* [2020] NSWCCA 354. Price J said:

> "The following is a summary of the effect of s 165B:
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> - (1) The duty on the judge to give a direction in accordance with subsection (2) arises only on application by a party and what is said to be the particular significant forensic disadvantage must form part of the application: *Groundstroem v R* [2013] NSWCCA 237 (*"Groundstroem"*) at [56].
> - (2) Subsection (5) prohibits the judge from directing the jury 'about any forensic disadvantage the defendant may have suffered because of delay' otherwise than in accordance with the section: *Jarrett v R* (2014) 86 NSWLR 623 at [53] ("*Jarrett*").
> - (3) There is a duty to inform the jury of the nature of the disadvantage and the need to take that disadvantage into account when considering the evidence, only when the judge is satisfied that the defendant has 'suffered a significant forensic disadvantage because of the consequences of delay': *Jarrett* at [53].
> - (4) Subsection (3) provides a rider to the obligation to inform where the judge is satisfied there are 'good reasons' for not taking that step: *Jarrett* at [53].

- (5) Subsection (4) prohibits the judge from suggesting that it would be dangerous or unsafe to convict the defendant 'solely because of' the delay or the disadvantage. Otherwise, no particular form of words need be used: *Jarrett* at [53].
- (6) Whether there has been a significant forensic disadvantage depends on the nature of the complaint and the extent of the delay in the circumstances of the case. The extent of delay is not the test. It is the consequence of delay which is decisive: *Groundstroem* at [61]. The proper focus of s 165B is on the disadvantage to the accused: *Jarrett* at [60].
- (7) The concept of delay is relative and judgmental. Although various factors may contribute to a delay, where a significant element is misconduct on the part of the accused, any resultant forensic disadvantage may not be characterised as a consequence of delay or, in the alternative, may provide a good reason for a judge not to give a direction, pursuant to the exception in s 165B(3): *Jarrett* at [61]-[62].
- (8) If the accused is put on notice of the complaint, any failure to make inquiry thereafter will not normally constitute a consequence of the delay, but a consequence of the accused's own inaction: *Jarrett* at [63]."

By s 632(3) *Criminal Code*, a judge may make a comment on the evidence that is appropriate in the interests of justice, "but the judge **must not** warn or suggest in any way to the jury that the law regards any class of persons as unreliable witnesses".

Also, section 4A(4) *Criminal Law (Sexual Offences) Act* 1978 provides:

> "(4) If a defendant is tried by a jury, the judge must not warn or suggest in any way to the jury that the law regards the complainant's evidence to be more reliable or less reliable only because of the length of time before the complainant made a preliminary or other complaint."

A trial judge may make a comment in response to a suggestion by defence counsel that it would be inherently improbable that the complainant would have behaved as they did if they had been sexually abused.

In *R v Cotic* [2003] QCA 435, the Court of Appeal did not disapprove of a comment by a trial judge along the following lines – although the trial judge in that case told the jury that they could ignore it:

> "There are no rules about how people who engage in the sexual abuse of children behave and no rules about how their victims behave. It is dangerous to make assumptions, or apply pre-conceived notions, about how abused children should behave, either generally, or in this particular case."

In *R v MCJ* [2017] QCA 11 the Court of Appeal considered a ground of appeal that the summing up was inadequate because of a failure to specifically refer to the complainant's failure to complain about particular details of the allegations. Henry J (with whom McMurdo P and Gotterson JA agreed) said:

> "[52] The framing of these circumstances as being so significant as to warrant curial warning implicitly relies upon the long outdated reasoning that suspicion attends the failure of a child victim of sexual abuse to complain, and complain in complete detail, when any early opportunity to do so arises.
>
> [53] Reasoning of this kind is now well recognised as being without proper foundation and failing to allow for the reality that the making of a complaint of sexual assault for any complainant, let alone a child, is a harrowing experience. Indeed the inappropriateness of giving judicial imprimatur to such reasoning was made plain by the legislature in 2003 by the insertion of s 4A in the *Criminal Law (Sexual Offences) Act* 1978…"

In *R v Hansen* [2012] QCA 156 Holmes JA (as her Honour then was), with whom Gotterson and Philippides JJA agreed, explained at [29]-[30] that a warning to the jury based on the fact that the complainant was a child of the tender years "would run foul of s 632(3) of the *Criminal Code*."

In *R v BDJ* [2022] QCA 108, the Court of Appeal (Fraser and Mullins JJA and Ryan J) explained that s 132BA ensures that the objective of a direction to the jury about the disadvantage caused by delay is achieved without the use of extreme language that may overcompensate an accused for any significant forensic disadvantage (at [30]). The impugned direction was to the effect that the jury must take into account the lack of opportunity to *prove or disprove* the allegation. The court considered that the word "test" would have been much better (at [55]). The sample direction has

been amended to remove the words “so as to verify it, or to disprove it” and insert the words “so as to test it”.

Sample direction

> **This is a direction I must give you relating to the issue of the delay in complaint being made by the complainant.**
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> **It is most important that you appreciate fully the effects of delay on the ability of the defendant to defend himself/herself by testing the prosecution evidence or bringing forward evidence in his/her own case [**or any other effect**].**
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> **In this regard, I refer to the following specific difficulties encountered by the defendant in testing the evidence of the prosecution [**or in adducing evidence in his/her own case**]. These difficulties include [**set out the specific difficulties such as the capacity of the complainant to accurately recall events that occurred [ ] years ago and the possibility of distortion in recollection**].**
>
> **These difficulties put the defendant at a significant disadvantage in responding to the prosecution case, either in testing the prosecution evidence, or in bringing forward evidence himself/herself, or both [**or any other disadvantage**]**.
>
> **The delay means that evidence relied upon by the Crown cannot be as fully tested as it otherwise might have been.**
>
> **Had the allegations been brought to light and the prosecution commenced much sooner, it would be expected that the complainant’s memory for details would have been clearer. This may have enabled his/her evidence to be checked in relation to those details against independent sources so as to test it. The complainant’s inability to recall precise details of the circumstances surrounding the incidents makes it difficult for the defendant to throw doubt on his/her evidence by pointing to circumstances which may contradict him/her. Had the defendant learned of the allegations at a much earlier time he/she may have been able to recall relevant details which could have been used by his/her counsel in cross-examination of the complainant.**

Another aspect of the defendant's disadvantage is that had he/she learned of the allegations at a much earlier time he/she may have been able to find witnesses or items of evidence that might have either contradicted the complainant or supported his/her case, or both. He/she may have been able to recall with some precision what he/she was doing and where he/she was at particular times on particular dates and to have been able to bring forward evidence to support him/her.

You should also take into account that because of the delay, the defendant has lost the opportunity to bring forward evidence from sources including: [set out specific evidence that has been lost or is no longer available**].**

I direct you that in considering the evidence in this case, you need to take into account the disadvantage the defendant is at, which means that [e.g. the complainant's evidence has not been tested to the extent that it otherwise could have been nor has the defendant been able to bring forward evidence to challenge it**]**.