

Delay in Prosecution

Longman v The Queen (1989) 168 CLR 79
s165B Evidence Act (NSW) 1995

In many criminal matters there is a delay in making a complaint. This can cause significant forensic disadvantage to the Accused. Every defence lawyer needs to understand this concept and the law relating to it in order to represent their clients effectively. This paper aims to assist legal practitioners in NSW.

The Longman Direction

The need to direct the jury on the forensic disadvantage occasioned to the accused as a result of delay in complaint emanated from the High Court decisions in Longman¹ and Crampton.² The direction has now been codified in s165B Evidence Act.

s165B Evidence Act

Section 165B only applies in jury trials. In summary, it provides:

1. The judge may only give a direction about delay under this section,³
2. The Accused person must apply for a direction,⁴
3. Delay by itself does not create significant forensic disadvantage,⁵
4. The direction must explain how the delay has disadvantaged the Accused,⁶
5. It is the consequence of delay which is decisive.⁷

Submissions

The application would go something like this:

I apply for a Longman / s165B direction and submit that the delay in making the complaint has impaired the ability of the Accused to mount his defence. By reason of the delay, he has lost the chance to test the prosecution evidence and to bring forward evidence in his own case to establish a reasonable doubt. The delay means that evidence relied upon by the Crown cannot be as fully tested as it otherwise might have been.

¹ Longman v The Queen (1989) 168 CLR 79

² Crampton v The Queen (2000) 206 CLR 161 at [45]

³ Jarrett v R (2014) 86 NSWLR 623

⁴ Groundstroem v R [2013] NSWCCA 237 at [56]

⁵ Jarrett v R (2014) 86 NSWLR 623 at [53]

⁶ Jarrett v R (2014) 86 NSWLR 623 at [53]

⁷ Groundstroem v R [2013] NSWCCA 237 at [61]

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. It would have enabled his evidence to be checked in relation to those details against independent sources so as to verify it, or to disprove it. The complainant's inability to recall precise details of the circumstances surrounding the incident makes it difficult for the accused to throw doubt on his evidence by pointing to circumstances which may contradict him.

Had the accused learned of the allegations at a much earlier time he may have been able to recall relevant details which could have been used in cross-examination of the complainant.

Another aspect of the accused's disadvantage is that, but for the delay, he may have been able to find witnesses or items of evidence that might have either contradicted the complainant or supported the Defence case, or both. He may have been able to recall with some precision what he was doing and where he was at particular times on particular dates and to have been able to bring forward evidence to support this.

I submit that taken together, this amounts to significant forensic disadvantage as provided in Longman / s165B Evidence Act and the direction should be given.

I'm available everyday if you have any interesting issues.

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