

Why the Jury in *Pell v The Queen* Must Have Had a Doubt and the High Court was Right to Quash the Guilty Verdicts

ANDREW HEMMING*

In the aftermath of the High Court's decision in Pell v The Queen to quash the guilty verdicts and enter verdicts of acquittal in their place, there has been considerable public discussion and academic commentary on the respective roles of the jury and appellate courts, with particular focus on the jury as the tribunal of fact. Pell v The Queen was a high-profile case involving sexual assault charges against a Cardinal of the Roman Catholic Church, when just a year earlier the Royal Commission into Institutional Responses to Child Sexual Abuse had published its final report which was dominated by abuses perpetrated in the Roman Catholic Church. This article considers the test for the unreasonableness ground of appeal set out by the High Court in M v The Queen, which is reflected in s 276(1)(a) of the Criminal Procedure Act 2009 (Vic), whether 'upon the whole of the evidence it was open to the jury to be satisfied beyond reasonable doubt that the accused was guilty'; and concludes that the High Court was correct to adopt Weinberg JA's dissenting judgment in the Victorian Court of Appeal which in the author's view was compelling.

I. INTRODUCTION

This article argues that while juries are central to the criminal justice system in Australia, it needs to be more widely recognised that juries can and do make mistakes. Jury verdicts are not sacrosanct or inviolate, which is one of the reasons (other reasons include judicial errors) why guilty verdicts can be appealed and quashed. Appeal grounds vary. The focus of the appeal in *Pell v The Queen* ('*Pell High Court Appeal*')¹ was that the guilty verdicts were unreasonable and could not be supported by the evidence. In order to succeed on this ground, the appellant has to meet a very demanding test, namely, that on the whole of the evidence the jury must have had a doubt against the criminal standard of proof. This article contends that, in the circumstances of the *Pell High Court Appeal*, the above test as set out in s 276(1)(a) of the *Criminal Procedure Act 2009* (Vic) was met.

The case² attracted widespread media and public attention because of the prominence of the defendant, Cardinal Pell, the most senior member of the Roman Catholic Church ever brought to trial for child sexual offences. The trial took place in the aftermath of the Royal Commission into Institutional Responses to Child Sexual Abuse, to which Cardinal Pell had given evidence. Consequently, when Pell's convictions were unanimously quashed by the High Court (whose seven members were only too well aware of the significance of overturning a jury verdict) there was widespread criticism of the decision as undermining both the jury's guilty verdicts in particular and the status of the jury in general. This article respectfully defends the High Court's

* Associate Professor in Law, University of Southern Queensland. The author would like to thank the anonymous referees for their helpful comments which improved the quality of the article.

¹ *Pell v the Queen* [2020] HCA 12 ('*Pell High Court Appeal*').

² See case history: *DPP (Vic) v Pell* [2019] VCC 260, *affd Pell v The Queen* [2019] VSCA 186 ('*Pell Appeal Vic*'), *revd Pell v the Queen* [2020] HCA 12 ('*Pell High Court Appeal*').

decision based on the compelling evidence of the defence witnesses, and contends that the quashing of Pell's convictions remedied a miscarriage of justice.

The *Australian Constitution* is a document that contains few rights, but an exception is s 80 which enshrines the right to trial by jury,³ although the High Court has stated '[o]n its established interpretation, s 80 is a weak conditional guarantee'.⁴ However, the passage of time since 1901 has seen this right qualified such that the original right, which meant the jury had to return a unanimous verdict for the defendant to be found guilty, has been statutorily overruled in seven Australian jurisdictions to allow majority verdicts of either 11-1 or 10-2 depending on the seriousness of the offence and the particular jurisdiction.⁵ Thus, state and territory governments, frustrated by single dissenting jurors leading to hung juries, made policy decisions to dilute the right to trial by jury by statutorily removing the requirement for a unanimous verdict.

In addition, defendants today can elect or request to be tried by judge alone, either on their own election, with the agreement of the prosecution or with the leave of the court, again depending on the jurisdiction.⁶ For example, s 614 and s 615 of the *Criminal Code 1899* (Qld) provide that the prosecutor or the accused person may apply to the court for a no jury order, and inter alia the court 'may refuse to make a no jury order if it considers the trial will involve a factual issue that requires the application of objective community standards'.

A defendant who faced trial in a similar blaze of negative publicity to Cardinal Pell was Dr Patel, who had been employed as a surgeon at the Bundaberg Base Hospital and been dubbed by the media as 'The Butcher of Bundaberg'. Dr Patel faced a second trial for criminal negligence manslaughter in 2012 after the High Court had quashed his convictions and ordered a new trial because evidence 'that was highly prejudicial and now largely irrelevant had been admitted and it was not possible to ameliorate its effects on the jury by directions'.⁷ At the outset of the second trial, the defence applied for a no jury order. However, Douglas J exercised his discretion to refuse the application.

The risk of prejudice that may exist from the publicity is likely to be able to be contained and is offset to a significant extent by the interest in deciding the criminal negligence issue by reference to objective community standards considered by a jury.⁸

³ *Australian Constitution* s 80 'Trial by Jury':

The trial on indictment of any offence against any law of the Commonwealth shall be by jury, and every such trial shall be held in the State where the offence was committed, and if the offence was not committed within any State the trial shall be held at such place or places as the Parliament prescribes.

⁴ *Alqudsi v The Queen* (2016) 258 CLR 203, 216 [25] (French CJ). French CJ expanded on this understanding of s 80, discussing *R v Bernasconi* (1915) 19 CLR 629, 635 (Griffith CJ), 637 (Issacs J): at 216-17 [26].

⁵ See *Jury Act 1977* (NSW) s 55F; *Criminal Code* (NT) s 368; *Jury Act 1995* (Qld) s 59A; *Juries Act 1927* (SA), s 57; *Juries Act 2003* (Tas) s 43; *Juries Act 2000* (Vic) s 46; *Criminal Procedure Act 2004* (WA) s 114.

⁶ *Criminal Procedure Act 1986* (NSW) s 132; *Criminal Code 1899* (Qld) s 615; *Juries Act 1927* (SA) s 7; *Criminal Procedure Act 2004* (WA) s 118; *Supreme Court Act 1933* (ACT) s 68B. To place no jury orders in perspective, in NSW in 2014, judge-only trials accounted for a quarter of all trials: Felicity Gerry, 'Jury is Out: Why Shifting to Judge-alone Trials is a Flawed Approach to Criminal Justice', *The Conversation* (online, 5 May 2020). <<https://theconversation.com/jury-is-out-why-shifting-to-judge-alone-trials-is-a-flawed-approach-to-criminal-justice-137397>>

⁷ *Patel v The Queen* (2012) 247 CLR 531, 535 [6] (French CJ, Hayne, Kiefel and Bell JJ).

⁸ *R v Patel* [2012] QSC 419, [47] (Douglas J).

Arguably, judges take an overly sanguine view of the ability of judicial directions to the jury to contain the risk of prejudice arising from widespread negative publicity concerning the accused. For example, James Wood, QC, Chairman of the NSW Law Reform Commission, has raised concerns that the assumptions underpinning judicial warnings or comments to the jury might be misplaced.

Perhaps the time is ripe to reconsider whether the assumptions are soundly based for all or some of these warnings or comments and whether, in fact, jurors do lack the fairness, underlying knowledge, experience of life, and common sense which has underpinned their use.⁹

Further empirical support can be found in a study of thirty mock jury deliberations which were performed to explore whether pretrial publicity ('PTP') affected the content of jury deliberations.¹⁰

The pattern of results suggests that PTP has a powerful effect on jury verdicts and that PTP exposure can influence the interpretation and discussion of trial evidence during deliberations. Jurors who were exposed to negative PTP (anti-defendant) were significantly more likely than their non-exposed counterparts to discuss ambiguous trial facts in a manner that supported the prosecution's case, but rarely discussed them in a manner that supported the defence's case. This study also found that PTP exposed jurors were either unwilling or unable to adhere to instructions admonishing them not to discuss PTP and rarely corrected jury members who mentioned PTP.¹¹

In any event, at the time of Pell's trial in 2018 there was no statutory provision for a no jury order in Victoria.¹² Arguably, the Crown would not have proceeded to trial if it was to be heard by a judge sitting alone, as the author contends that it is virtually inconceivable for a judge to have convicted Pell on such a weak case against the standard of beyond reasonable doubt. In support of this contention, the author draws attention to the Policy of the Director of Public Prosecutions for Victoria, and in particular Chapter 1 Prosecutorial Discretion.¹³ The decision to prosecute lists two criteria: 'A prosecution may only proceed if: (1) there is a reasonable prospect of conviction; and (2) a prosecution is in the public interest.'¹⁴ The factors listed under the first criteria include inter alia all the admissible evidence, the reliability and credibility of the evidence, and any possible defence. The argument developed in this article is that any

⁹ James Wood, 'Summing up in Criminal Trials — a New Direction?' NSW Law Reform Commission, (Conference paper, Jury Research, Policy and Practice Conference, 11 December 2007). <https://www.lawreform.justice.nsw.gov.au/Pages/lrc/LRC_jrtw02.aspx>; See also Lily Trimboli, NSW Bureau of Crime Statistics and Research, 'Juror Understanding of Judicial Instructions in Criminal Trials' (September 2008) 119 *Crime and Justice Bulletin* <<https://www.bocsar.nsw.gov.au/Publications/CJB/cjb119.pdf>>.

¹⁰ Christine Ruva and Michelle LeVasseur, 'Behind Closed Doors: The Effect of Pretrial Publicity on Jury Deliberations' (2012) 18(5) *Psychology, Crime and Law* 431, 431-452.

¹¹ *Ibid* 431.

¹² In 2020, Victoria passed legislation allowing judge-only criminal trials as a short-term measure to deal with the absence of court sittings during the COVID-19 lockdown. This legislation was repealed in 2021. However, Victoria has recently passed laws allowing judge-only trials to be reintroduced for one year to help the state cope with a backlog of court cases following the passage of the *Justice Legislation Amendment (Trial by Judge Alone and Other Matters) Act 2022* (Vic). The laws allow for the option of judge-only trials in criminal matters and special hearings for 12 months, including video link hearings, with jury trials to also continue over this time.

¹³ Director of Public Prosecutions Victoria, 'Policy of the Director of Public Prosecutions for Victoria' (24 January 2022) <<https://www.opp.vic.gov.au/getattachment/a26fab55-0c8a-48a9-b4e5-71f3a898e6cb/DPP-Policy.aspx>>.

¹⁴ *Ibid* 3.

objective assessment of the strength of the defence in the *Pell* case based on all the admissible evidence and 23 defence witnesses would lead to the conclusion that there was no reasonable prospect of conviction.

The decision to prosecute in the *Pell* case has parallels with the prosecution of Senior Sergeant Chris Hurley on manslaughter and assault charges. In Hurley's case, the Queensland Director of Public Prosecutions announced no charges would be laid. After media and public pressure, the Queensland Attorney-General appointed Sir Laurence Street to review the decision not to charge Hurley. Street found there was sufficient evidence to prosecute Hurley. Consequently, for the first time since the establishment of the Director of Public Prosecutions, the Attorney-General rather than the Director of Public Prosecutions indicted Hurley. Hurley was found not guilty in 2007.

A more recent case with similar political overtones was the decision of the Director of Public Prosecutions in the Northern Territory in 2019 to charge Constable Zachary Rolfe with murder. Rolfe was found not guilty of all charges. The Northern Territory's anti-corruption commissioner subsequently announced an investigation into the decision to arrest and charge Rolfe, in the wake of ongoing allegations of political interference.

Kerri Judd, QC, the Director of Public Prosecutions for Victoria, could reasonably have anticipated similar media, political and public pressure to prosecute Cardinal Pell, in the public interest, in light of the findings of the Royal Commission into Institutional Responses to Child Sexual Abuse. In the author's view, the unchallenged evidence of the 'opportunity witnesses' in the *Pell* case, as suggested by Weinberg JA in dissent in the Victorian Court of Appeal, would warrant a not guilty verdict at first instance.

As to juror understanding of judicial directions, Virginia Bell, a former Justice of the High Court, writing extrajudicially, has observed in relation to various law reform commission references on the directions given to juries in criminal trials that '[t]here was a concern that the intended audience had become the appellate court and not the jury'.¹⁵ Bell went on to note research from the New South Wales Law Reform Commission¹⁶ which found 'while the empirical evidence suggests that jurors are generally conscientious in their efforts to follow the directions, which they are reported to find helpful, the evidence is less positive about the level of juror comprehension of directions'.¹⁷ Even the New South Wales Law Reform Commission's assessment that jurors found judicial directions 'helpful' is open to challenge given the far reaching reforms contained in the *Jury Directions Act 2015* (Vic), which Bell concluded provided 'a workable template for reform'.¹⁸ The importance of juries understanding the trial judge's directions was stressed by McHugh J: 'Put bluntly, unless we act on the assumption that criminal juries act on the evidence and in accordance with the directions of the trial judge, there is no point in having criminal jury trials.'¹⁹

II. THE CRIMINAL STANDARD OF PROOF

¹⁵ Virginia Bell, 'Jury Directions: The Struggle for Simplicity and Clarity' (Banco Court Lecture, Supreme Court of Queensland, 20 September 2018) 1. <<https://cdn.hcourt.gov.au/assets/publications/speeches/current-justices/bellj/bellj20Sep2017.pdf>>.

¹⁶ New South Wales Law Reform Commission, *Jury Directions* (Report No 136, November 2012) 28 [1.83].

¹⁷ Bell (n 15) 3.

¹⁸ *Ibid* 27.

¹⁹ *Gilbert v The Queen* (2000) 201 CLR 414, 425 [31] (McHugh J).

The author has previously argued that juries in sexual assault cases appear to struggle with the criminal standard of proof of beyond reasonable doubt, based on five cases: *Tyrell v The Queen*,²⁰ *IW v The Queen*,²¹ *JN v The Queen*,²² *Xu v The Queen*,²³ and *Pell v The Queen*,²⁴ where appellate courts have quashed the convictions of the accused.²⁵ Although these five cases are scarcely a significant sample, as far back as the year 2000 Justice Wright marked his retirement from the Tasmanian Supreme Court with critical comments about the jury system.

In particular, His Honour stated that he was fully convinced that juries return what he considered to be wrong verdicts in about twenty five percent of all cases tried. He explained that by ‘wrong verdict’ he meant a verdict that ‘flies in the face of the evidence of palpably honest witnesses or unimpeachable documentary material’. In addition, His Honour suggested that juries make compromises that may result in inconsistent verdicts, in order to bring a trial to a conclusion or for some other inappropriate reason, particularly in cases of serious sexual assault.²⁶

The genesis for the author’s earlier article that juries in sexual assault cases appear to struggle with the criminal standard of proof of beyond reasonable doubt was a publication entitled ‘When Emotions Tip Scales’,²⁷ which posed the question as to why a number of sexual abuse convictions were being overturned on appeal. Solicitors for three of the successful appellants were quoted in this article. John Tyrell’s solicitor, Peter Mihailidis, saw the conviction of his client, a former Christian Brother, in the context of outrage over the revelations of the Royal Commission.²⁸

My view is that, in the current climate, defendants have a strong chance of being convicted in these cases whether they are guilty or not. It takes a brave prosecutor to say, ‘This doesn’t add up’. The prevailing attitude seems to be to prosecute and let the courts sort it out, but many juries are making decisions based on emotion and preconceptions, not evidence or facts.²⁹

Similarly, Carol Younes, the solicitor for ‘IW’, was reported as saying: ‘There is a genuine growing concern that defendants in sexual assault cases do not really enjoy the presumption of innocence.’³⁰ This view was reinforced by Sydney solicitor Ron Malouf, whose 39 year old client, ‘JN’, successfully appealed his conviction for rape of a brother and sister who were once his childhood neighbours.

²⁰ [2019] VSCA 52.

²¹ [2019] NSWCCA 311.

²² [2019] NSWCCA 287.

²³ [2019] NSWCCA 178.

²⁴ *Pell High Court Appeal* (n 1).

²⁵ Andrew Hemming, ‘Do Juries Understand the Criminal Standard of Proof of Beyond Reasonable Doubt?’ (2021) 30(3) *Journal of Judicial Administration* 103, 103-125.

²⁶ Terese Henning, ‘Beyond “Beyond Reasonable Doubt”: Wrong Decisions in Sexual Offences Trials’ (2000-2001) 15 *Australian Journal of Law and Society* 1, 1.

²⁷ Richard Guilliat, ‘When Emotions Tip Scales’ (18 July 2020, *Weekend Australian Magazine*) 12-17. <<https://www.theaustralian.com.au/weekend-australian-magazine/reasonable-doubt-why-sex-abuse-convictions-are-being-overturned/news-story/7a5bd5c868ff829b9b2813ea67bbc70d>>.

²⁸ *Royal Commission into Institutional Responses to Child Sexual Abuse* (Final Report, 15 December 2017).

²⁹ Guilliat (n 27) 14.

³⁰ *Ibid.*

[T]his blanket approach of assuming allegations are true, no matter how flawed or vexatious they may be, is creating a lot of unfairness for the accused. Juries, from my experience, seem to struggle with the fundamental concept of reasonable doubt.³¹

It may be objected that general assertions made by solicitors involved in the above cases as to the erosion of the presumption of innocence carry little weight. However, there is a common thread linking these cases in that the alleged sexual offences took place many years before the respective trial and the defendant faced a significant forensic disadvantage. Two of the cases involved clerical defendants whose cases were dealt with in the aftermath of the Royal Commission, and all the cases were heard while the #MeToo movement was at its zenith.

Ever since the establishment of the English Court of Criminal Appeal in 1907 in the wake of public disquiet over the wrongful convictions of Adolf Beck and George Edalji, it has been recognised that juries are not infallible and that a mechanism of appellate court review was necessary in the interests of justice.³² Indeed, capital punishment was abolished in England in 1965 largely because subsequent events proved that an innocent person had been sent to the gallows. In the shocking case of the execution of Timothy Evans in 1950 for the murder of his daughter, the serial murderer John Christie (who was the chief prosecution witness in Evans's trial) later confessed to the murder. Evans was granted a royal pardon in 1966.

While the jury is the constitutional tribunal for deciding issues of fact,³³ Latham CJ in *Hocking v Bell* acknowledged that a jury verdict should be set aside if it is against the weight of the evidence.

If a verdict is against evidence and the weight of the evidence a new trial may be ordered. If the evidence on one side so greatly preponderates over the evidence on the other side that it can be said that the verdict is such as reasonable jurors, understanding their responsibility, could not reach, a verdict may be set aside and a new trial may be ordered.³⁴

The case of Lindy Chamberlain is perhaps the best-known example of mistaken conviction in Australian criminal history, and it took a judicial inquiry to exonerate her, as the High Court dismissed her appeal 3-2. Justice Murphy, who was one of the dissenting judges, explained the role of appellate courts as a safeguard against conviction of the innocent.

[I]nvariably, juries sometimes make mistakes. History demonstrates that in Australia as elsewhere, despite the protection of the jury system and other safeguards, sometimes the innocent are convicted. Because of such miscarriages courts of criminal appeal have been given power to set aside convictions, not only where the judge wrongly admitted or rejected evidence, or misdirected the jury, but also where although there was evidence which could justify the verdict,

³¹ Ibid 15.

³² See The Hon Justice Peter McClellan, 'A Matter of Fact: The Origins of the Court of Criminal Appeal' (Speech, Centenary of the Court of Criminal Appeal Dinner, 3 December 2012) <<https://www.supremecourt.justice.nsw.gov.au/Documents/Publications/Speeches/Pre-2015%20Speeches/McClellan/mcclellan031212.pdf>>

³³ *Mechanical and General Inventions Co. Ltd. v Austin* (1935) A.C. 346, 373 (Lord Wright).

³⁴ *Hocking v Bell* (1945) 71 CLR 430, 440 (Latham CJ).

the appeal court considered it unsafe. The appellate system thus operates as a further safeguard against mistaken conviction of the innocent.³⁵

However, by the same token, the High Court has consistently acknowledged the unique position juries occupy as representatives of the community in the criminal justice system, and whose verdicts should not be lightly set aside.

A jury is taken to be a kind of microcosm of the community. A ‘verdict of a jury’, particularly in serious criminal cases, is accepted, symbolically, as attracting to decisions concerning the liberty and reputation of accused persons a special authority and legitimacy and hence finality.³⁶

Furthermore, the High Court has stressed that ‘the jury is the body entrusted with the primary responsibility of determining guilt or innocence’.³⁷ More recently, in a case where the High Court restored the jury’s guilty verdict of murder (the Queensland Court of Appeal had substituted a verdict of manslaughter), the High Court observed:

[T]he setting aside of a jury’s verdict on the ground that it is ‘unreasonable’ within the meaning of s 668E(1) of the *Criminal Code* is a serious step, not to be taken without particular regard to the advantage enjoyed by the jury over a court of appeal which has not seen or heard the witnesses called at trial.³⁸

The point being that the High Court, in the *Pell High Court Appeal*, in overturning the jury’s verdict and reversing the decision (majority) of the Victorian Appeal Court, was only too well aware of its previous authority on the strictures applying to such a course of action, and needed no reminding that ‘quashing a jury’s verdict on the basis that it has made a factual error is a significant step for an appellate court to take’.³⁹

III. PELL V THE QUEEN

*Pell v The Queen*⁴⁰ involved a religious figure who was alleged to have committed sexual offences against children many years previously.⁴¹ Such prosecutions for alleged historical sex assault are relatively common. The public policy reasons behind the decision to prosecute are centred on the complainant’s need to feel believed and to heal from the trauma she or he has experienced. The High Court decision reversed the Victorian Court of Appeal’s decision to dismiss an appeal by a 2-1 majority.⁴² The High Court in unanimously (7-0) allowing the appeal, agreed with the analysis of the dissenting judge of the Supreme Court of Victoria Appeal case, Weinberg JA.

The applicant had been convicted of one charge of sexual penetration of a child under 16 years and four charges of committing an act of indecency with or in the presence of a child under the age of 16 years.

³⁵ *Chamberlain v The Queen (No 2)* (1984) 153 CLR 521, 569 (Murphy J).

³⁶ *MFA v The Queen* (2002) 213 CLR 606, 621 [48] (Gleeson CJ, Hayne and Callinan JJ).

³⁷ *SKA v The Queen* (2011) 243 CLR 400, 405 [13] (French CJ, Gummow and Kiefel JJ).

³⁸ *The Queen v Baden-Clay* (2016) 258 CLR 308, 329 [65] (French CJ, Kiefel, Bell, Keane and Gordon JJ).

³⁹ Greg Byrne, ‘The High Court in *Pell v The Queen*: An “unreasonable” review of the jury’s decision’ (2020) 45(4) *Alternative Law Journal* 284, 284.

⁴⁰ *Pell High Court Appeal* (n 1).

⁴¹ The time period was 22 years.

⁴² *Pell Appeal Vic* (n 2). Ferguson CJ and Maxwell P constituted the majority, with Weinberg JA in dissent.

All the offences were alleged to have been committed in St Patrick's Cathedral, East Melbourne following the celebration of Sunday solemn Mass and within months of the applicant's installation as Archbishop of Melbourne. The victims of the alleged offending were two Cathedral choirboys, 'A' and 'B'.⁴³

The Crown case depended on the truth and reliability of A's evidence, as B had died before A made his complaint in 2015. Significantly, in 2001, in response to a question from his mother, B had said he had not been 'interfered with or touched up' while in the Cathedral choir.⁴⁴

The High Court in the *Pell High Court Appeal* set out the appropriate process⁴⁵ to be followed by an appellate court when the appeal ground is that the jury's verdict is unreasonable.

The function of the court of criminal appeal in determining a ground that contends that the verdict of the jury is unreasonable or cannot be supported having regard to the evidence [*Criminal Procedure Act 2009* (Vic), s 276(1)(a)], in a case such as the present, proceeds upon the assumption that the evidence of the complainant was assessed by the jury to be credible and reliable. The court examines the record to see whether, notwithstanding that assessment — either by reason of inconsistencies, discrepancies, or other inadequacy; or in light of other evidence — the court is satisfied that the jury, acting rationally, ought nonetheless to have entertained a reasonable doubt as to proof of guilt.⁴⁶

The above passage takes a common-sense approach to the task of assessing whether the jury's verdict is unreasonable. Clearly, the jury must have found the complainant credible and reliable in order to convict Cardinal Pell, as the complainant provided the only evidence that the alleged offences had occurred.⁴⁷

Essentially, the split in the Victorian Court of Appeal centred on the weight to be given to A's evidence in light of the evidence of the 'opportunity witnesses'.⁴⁸ The High Court summed up the differences between the majority and the minority views as follows:

The members of the Court of Appeal viewed the recording of A's evidence, and that of a number of other prosecution witnesses. The majority, Ferguson CJ and Maxwell P, assessed A as a compellingly credible witness. There was evidence, adduced in the prosecution case from witnesses described as 'the opportunity

⁴³ *Pell High Court Appeal* (n 1) [1] (Kiefel CJ, Bell, Gageler, Keane, Nettle, Gordon and Edelman JJ).

⁴⁴ *Pell High Court Appeal* (n 1) [2] (Kiefel CJ, Bell, Gageler, Keane, Nettle, Gordon and Edelman JJ).

⁴⁵ Section 276(1)(a) of the *Criminal Procedure Act 2009* (Vic) reflects the test set out by the High Court in *M v The Queen* (1994) 181 CLR 487, 493 (Mason CJ, Deane, Dawson and Toohey JJ):

[T]he 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. (citations omitted)

⁴⁶ *Pell High Court Appeal* (n 1) [39] Kiefel CJ, Bell, Gageler, Keane, Nettle, Gordon and Edelman JJ).

⁴⁷ In *Pell High Court Appeal* (n 1), the High Court was critical of the majority in the Victorian Court of Appeal who suggested A's evidence was corroborated by his knowledge of the interior layout of the priests' sacristy where the alleged offences were said to have occurred, discounting the possibility this knowledge may have come from a tour of the Cathedral when A joined the choir. 'Satisfaction that A had been inside the priests' sacristy did not afford any independent basis for finding that, on such an occasion, he had been sexually assaulted by the applicant': at [50] (Kiefel CJ, Bell, Gageler, Keane, Nettle, Gordon and Edelman JJ).

⁴⁸ The term 'opportunity witnesses' refers to witnesses in the Cathedral at the time of the alleged offending, whose unchallenged evidence greatly restricted the span of time in which the alleged offending could possibly have occurred.

witnesses', with respect to the applicant's and others' movements following the conclusion of Sunday solemn Mass, which was inconsistent with acceptance of A's account. Their Honours concluded that no witness could say with certainty that the routines and practices described by the opportunity witnesses were never departed from [*Pell v The Queen* [2019] VSCA 186 at [166]]. Their Honours reviewed a number of 'solid obstacles' to conviction and in each case concluded that the jury had not been compelled to entertain a doubt as to the applicant's guilt.

Weinberg JA, in dissent, considered that, in light of the unchallenged evidence of the opportunity witnesses, 'the odds against [A's] account of how the abuse had occurred, would have to be substantial' [*Pell v The Queen* [2019] VSCA 186 at [1064]]. His Honour concluded that the jury, acting reasonably on the whole of the evidence, ought to have had a reasonable doubt as to the applicant's guilt.⁴⁹

Two points should be made in relation to the above passage. First, the majority concluded that while the jury *might* have had a doubt, the evidence was insufficient to establish the jury *must* have had a doubt, whereas Weinberg JA concluded the opposite because the odds against A's account were so substantial. Secondly, the majority approached their task by focusing on the possibility A's account was true ('no witness could say with certainty'), as compared with Weinberg JA's more balanced approach ('the unchallenged evidence of the opportunity witnesses').

In this regard, the High Court observed '[t]he division in the Court of Appeal in the assessment of A's credibility may be thought to underscore the highly subjective nature of demeanour-based judgments'.⁵⁰ The reason why the High Court in *Pell v The Queen* stressed the dangers of relying on demeanour⁵¹ was because the Victorian Court of Appeal had watched video-recordings of A's evidence and the evidence of other witnesses, in an attempt to place the court in the position of the jury. The High Court admonished the Victorian Court of Appeal for adopting this practice because there is a demarcation between the province of the jury and the province of the appellate court, stating 'generally speaking, the appeal court should not seek to duplicate the function of the jury in its assessment of the credibility of the witnesses where that assessment is dependent upon the evaluation of the witnesses in the witness-box'.⁵²

In this context, McClellan cites various sources for the proposition that demeanour is a poor indicator as to whether or not a witness is lying.⁵³ For example, Ekman came to the conclusion

⁴⁹ *Pell High Court Appeal* (n 1) [5]-[6] (Kiefel CJ, Bell, Gageler, Keane, Nettle, Gordon and Edelman JJ).

⁵⁰ *Pell High Court Appeal* (n 1) [49] (Kiefel CJ, Bell, Gageler, Keane, Nettle, Gordon and Edelman JJ), citing *Fox v Percy* (2003) 214 CLR 118, 129 [31] (Gleeson CJ, Gummow and Kirby JJ).

⁵¹ For a fuller discussion of demeanour in the context of the *Pell* case, see Fiona Hum and Andrew Hemming, 'The Inconsistencies, Improbabilities and Impossibilities in the case of Cardinal George Pell: A Reply to Memory Science' (forthcoming). This article is a rejoinder to an article published in the *Criminal Law Journal* in 2020 by psychological researchers Goodman-Delahunty, Martschuk, and Nolan. In particular, the authors evaluate the arguments by the researchers that the High Court decision in *Pell v The Queen* was based upon a misunderstanding of an application of memory science involving routine practices versus singular impactful events. The authors criticise the narrow focus on memory science rather than other relevant issues associated with the mind such as confabulation and demeanour.

⁵² *Pell High Court Appeal* (n 1) [37] (Kiefel CJ, Bell, Gageler, Keane, Nettle, Gordon and Edelman JJ).

⁵³ The Hon Justice Peter McClellan, 'Who is Telling the Truth? Psychology, Common Sense and the Law' (2006) 80 *Australian Law Journal* 655, 657-658.

that ‘most liars can fool most people most of the time’.⁵⁴ Similarly, Ellard has argued that demeanour will only reveal incompetent liars.⁵⁵

With respect, it also suggests that the majority fell into error by preferring the evidence of the complainant, which goes to the standard of proof of beyond reasonable doubt is not met by the jury making a choice between the veracity of the complainant and the accused. On the clear conflict between the evidence of the complainant and the evidence of Pell, the trial judge, Chief Judge Kidd, directed the jury in the following terms:

It is not sufficient for you to merely find the prosecution case preferable to the defence case. So even if you do not think the accused is telling the truth but are unsure where the truth lies, you must find the accused not guilty. Even if you are convinced his statements in the recorded interview [with Victorian detectives in the Vatican] are not true ... you simply put it to one side and ask yourself if the prosecution has proven the accused’s guilt beyond reasonable doubt.⁵⁶

Whether or not the jury understood and applied this fair but nuanced direction will never be known. What can be said is that the majority in the Victorian Court of Appeal appear not to have put the credibility of the complainant to one side, and instead asked themselves whether the Crown had proved Pell’s guilt beyond reasonable doubt.

The trial judge was satisfied that the accused has experienced a significant forensic disadvantage due to the prolonged delay in the complainant coming forward,⁵⁷ and informed the jury of the nature of the disadvantage experienced by the accused and the need to take the disadvantage into account when considering the evidence.⁵⁸

Because of the delay ... Cardinal Pell lost the opportunity to make inquiries at or close to the time of the alleged incidents ... Most of the church and cathedral witnesses could only give evidence on practice or protocol or routine rather than what they recalled on specific dates. If this trial was being held proximate to 1996 or 1997, then one might expect more witnesses to give specific recollection of the dates in question.⁵⁹

However, such a direction on forensic disadvantage is somewhat undermined by s 39(3)(b) of the *Jury Directions Act 2015* (Vic), which prevents the trial judge from saying or suggesting that it would be dangerous or unsafe to convict the accused or that the victim’s evidence (here A’s uncorroborated evidence) should be scrutinised with great care.

More broadly, the weight of authority in Australia supports the proposition that a judge who entertains strong doubts as to the strength of the Crown’s case is neither permitted to advise

⁵⁴ Paul Ekman, *Telling Lies: Clues to Deceit in the Marketplace, Politics and Marriage* (Norton, rev ed, 2009) 162.

⁵⁵ John Ellard, ‘A Note on Lying and its Detection’ (1996) 2(4) *The Judicial Review* 303, 307.

⁵⁶ Melissa Davey, *The Case of George Pell: Reckoning with Child Sexual Abuse by Clergy* (Scribe, 2020) 191.

⁵⁷ Section 39(2) *Jury Directions Act 2015* (Vic).

⁵⁸ Section 39(3)(a) *Jury Directions Act 2015* (Vic).

⁵⁹ Davey (n 56) 192.

the jury to return a verdict of not guilty,⁶⁰ nor direct them to do so unless the evidence taken at its highest could not sustain a guilty verdict beyond reasonable doubt.⁶¹

This was the second trial of the charges against Cardinal Pell (the jury at the first trial having been unable to agree on its verdicts), which was presided over by Chief Judge Kidd of the County Court of Victoria. Arguably, given the strength of Weinberg JA's dissent, which was endorsed 7-0 in the High Court, Chief Judge Kidd should have directed the second jury to return a verdict of not guilty because the evidence taken at its highest could not sustain a guilty verdict beyond reasonable doubt as a result of the compounding improbability of events having occurred as A described them in light of the unchallenged evidence given by church witnesses. The standard of criminal proof is well beyond 'probable', yet objectively A's evidence was improbable, not even passing a *prima facie* case for prosecution.

This argument follows from the High Court's demolition of the analysis undertaken by the majority in the Court of Appeal.

Their Honours reasoned, with respect to largely unchallenged evidence that was inconsistent with those allegations [made by A] (the 'solid obstacles' to conviction), that notwithstanding each obstacle it remained *possible* that A's account was correct. The analysis failed to engage with whether, against this body of evidence, it was reasonably possible that A's account was not correct, such that there was a reasonable doubt as to the applicant's guilt.⁶²

The High Court then proceeded to examine the 'solid obstacles' to conviction.

The applicant adopted Weinberg JA's analysis of his submission below with respect to the 'compounding improbabilities' [*Pell v The Queen* [2019] VSCA 186 at [840]-[843], [1060]-[1064]]. His Honour distilled the applicant's case to ten claimed compounding improbabilities [*Pell v The Queen* [2019] VSCA 186 at [841]].

In this Court, the respondent correctly noted that a number of the claimed improbabilities raise the same point. It remains that acceptance of A's account of the first incident requires finding that: (i) contrary to the applicant's practice, he did not stand on the steps of the Cathedral greeting congregants for ten minutes or longer; (ii) contrary to long-standing church practice, the applicant returned unaccompanied to the priests' sacristy in his ceremonial vestments; (iii) from the time A and B re-entered the Cathedral, to the conclusion of the

⁶⁰ *Director of Public Prosecutions Reference No 1 of 2017* [2019] HCA 9. The High Court overruled *The Queen v Prasad* (1979) 23 SASR 161, 163 (King CJ) which was authority for the judge being able to direct a jury in a criminal trial that it is open at any time after the close of the prosecution case to acquit the accused if the jury consider the evidence is insufficient to support a conviction. The High Court unanimously held that:

'[T]he exercise of the discretion to give a *Prasad* direction based upon the trial judge's estimate of the cogency of the evidence to support conviction is inconsistent with the division of functions between judge and jury and, when given over objection, with the essential features of an adversarial trial': at [56].

⁶¹ *Doney v The Queen* (1990) 171 CLR 207, 214-5 (Deane, Dawson, Toohey, Gaudron and McHugh JJ). For a fuller discussion on this point, see Andrew Hemming, 'When Should a Judge Stop a Trial?' (2013) 15 *University of Notre Dame Australia Law Review* 56, 56-82.

⁶² *Pell High Court Appeal* (n 1) [46] (Kiefel CJ, Bell, Gageler, Keane, Nettle, Gordon and Edelman JJ) (emphasis in original).

assaults, an interval of some five to six minutes, no other person entered the priests' sacristy; and (iv) no persons observed, and took action to stop, two robed choristers leaving the procession and going back into the Cathedral.

It suffices to refer to the evidence concerning (i), (ii) and (iii) to demonstrate that, notwithstanding that the jury found A to be a credible and reliable witness, the evidence as a whole was not capable of excluding a reasonable doubt as to the applicant's guilt.⁶³

For present purposes, it is illuminating (and in the author's view decisive) to expand on the High Court's summary of Weinberg JA's analysis by extracting the key passages from his Honour's dissenting judgment, starting with the compounding improbabilities of the complainant's version of events.

Mr Richter [Pell's barrister at trial] submitted that each of a large number of independently improbable, if not 'impossible', things would have had to have occurred within a very short timeframe (perhaps 10 minutes or so), if the complainant's account were true.

The matters relied upon by Mr Richter in support of that 'compounding improbabilities' submission were:

- the applicant does not remain on the front steps.
- he is alone when he enters the priest's sacristy.
- Portelli does not enter to help the applicant disrobe, or to disrobe himself.
- Potter is not there to assist in the disrobing.
- Potter is not moving between the sanctuary and the Priests' Sacristy.
- the altar servers are not moving between the sanctuary and the Priests' Sacristy.
- there are no concelebrant priests in the Priests' Sacristy, or for some reason, they do not disrobe.
- 40 people, some of whom are adults, do not notice the complainant and the other boy break away from the procession.
- the complainant and the other boy enter the choir room, having gone through two locked doors, without anyone having noticed; and
- the complainant and the other boy enter a choir rehearsal which they were required to attend, after being missing for more than 10 minutes, without anyone having noticed.

By 'compounding improbabilities', Mr Richter was plainly inviting the jury to approach the matter using a form of probabilistic analysis (without using that expression), demonstrating that the complainant's account could not possibly satisfy the requirement of proof beyond reasonable doubt.⁶⁴

Weinberg JA returned to this submission later in his judgment.

⁶³ *Pell High Court Appeal* (n 1) [56]-[58] (Kiefel CJ, Bell, Gageler, Keane, Nettle, Gordon and Edelman JJ).

⁶⁴ *Pell Appeal Vic* (n 2) [840] – [842] (Weinberg JA).

In order for the complainant's account to be capable of being accepted, a number of the 'things' set out by Mr Richter at [840] - [842] of my reasons, had to have taken place within the space of just a few minutes. In that event, the odds against the complainant's account of how the abuse had occurred, would have to be substantial. The chances of 'all the planets aligning', in that way, would, at the very least, be doubtful. This form of 'probabilistic analysis, if properly applied, suggests strongly to me that the jury, acting reasonably, on the whole of the evidence in this case, ought to have had a reasonable doubt as to the applicant's guilt.⁶⁵

In his dissenting judgment, Weinberg JA used the following heading: 'Only a "madman" would attempt to sexually abuse two young boys in the Priests' Sacristy immediately after Sunday solemn Mass', which Weinberg JA considered reflected Mr Richter's closing submission 'in precisely these somewhat florid terms'.⁶⁶ This submission has considerable weight as (i) the complainant had not suggested the door to the Priests' Sacristy was closed and anyone could have walked in; (ii) there were dozens of people congregating around the area of the Priests' Sacristy shortly after the conclusion of Sunday solemn Mass; (iii) there was no ambiguity whatever about the nature of the acts alleged which could not be explained away; (iv) there was nothing to have prevented either of the boys from leaving the room while the other was being attacked; and (v) if one of the two boys subsequently made a complaint, the other could corroborate it.⁶⁷

On the issue of risk, the *Pell High Court Appeal* can be distinguished from *Hughes v The Queen*⁶⁸ where in a 4-3 decision the majority in the High Court held that '[w]hen considered together, all the tendency evidence provided strong support to show the appellant's tendency to engage opportunistically in sexual activity with underage girls despite a high risk of detection'.⁶⁹ In *Hughes*, the defence had argued that the evidence of the various complainants was fantasy as it involved the appellant courting a substantial risk of discovery by friends, family members, workmates or even casual passers-by. In the *Pell High Court Appeal*, there was a single complainant, and the risk of discovery to a newly installed Archbishop in full regalia opportunistically, without any grooming, raping two choirboys during a period of some five to six minutes, when the sacristy door could open at any time to reveal priests returning to disrobe, would rate a reading of 10 on a Richter scale of risk.⁷⁰

Essentially, the High Court adopted the applicant's submission, which was based on Weinberg JA's dissent in the Victorian Court of Appeal, that the majority had reversed the standard and burden of proof 'by asking whether there existed the reasonable possibility that A's account was correct, rather than whether the prosecution had negatived the reasonable possibility that it was not'.⁷¹

⁶⁵ Ibid [1064] (citations omitted).

⁶⁶ Ibid [752].

⁶⁷ Ibid [752] - [757].

⁶⁸ [2017] HCA 20.

⁶⁹ *Hughes v The Queen* [2017] HCA 20, [62] (Kiefel CJ, Bell, Keane and Edelman JJ).

⁷⁰ Readers will perhaps forgive the double entendre. The Richter scale is a quantitative measure of an earthquake's magnitude and Robert Richter QC was Pell's barrister at trial. On appeal, Pell was represented by Bret Walker SC.

⁷¹ *Pell High Court Appeal* [54] (Kiefel CJ, Bell, Gageler, Keane, Nettle, Gordon and Edelman JJ).

The sheer improbability⁷² that a newly installed Archbishop in full regalia, who was normally accompanied by another Church official (the High Court observed that Portelli's evidence on this point was unchallenged⁷³), would choose such a tiny window of time to sexually abuse two choirboys after Mass in a Cathedral on a Sunday morning with numerous other church officials and members of the congregation in attendance, sits uncomfortably with and is in stark contrast to the meaning of 'proof beyond reasonable doubt'. The High Court was unanimous in finding the *M* test, namely, the jury 'must have had a doubt'⁷⁴ (as opposed to 'might') about the applicant's guilt had been satisfied: 'Making full allowance for the advantages enjoyed by the jury, there is a significant possibility in relation to charges one to four that an innocent person has been convicted.'⁷⁵

IV. WHY DID THE JURY FIND PELL GUILTY?

*It is no insignificant feat to persuade 12 jurors as to the guilt of the accused beyond reasonable doubt, let alone to do so with only the testimony of one uncorroborated witness, more than 20 years after the alleged offending.*⁷⁶

Any conjecture as to why the jury found Pell guilty is pure speculation, although the jury must have found the complainant to be credible and reliable, as jurors are not required to give reasons, and indeed in Australia jurors are prevented from disclosing information about jury deliberations both during and after the trial.⁷⁷ This has not deterred Pell's barrister (after the trial) and various commentators from offering their opinions.

Robert Richter QC was interviewed by Melissa Davey in February 2020 and gave as his view that the reason Pell was convicted was because of 'three years of Royal Commission shit'.⁷⁸ Davey went on to expand on Richter's view of the guilty verdict, which amounted to prejudice based on negative prior publicity.

Pell's appearance before the royal commission had damaged his reputation and influenced people's perceptions of him, Richter said ... the media coverage of Pell's evidence, in which he 'came across as wooden and doctrinaire', had turned the public against him, Richter said. 'There was three years of press that painted him as a monster.'⁷⁹

A similar view has been taken by Keith Windschuttle, editor of *Quadrant* magazine.

⁷² It is acknowledged that sexual predators sometimes offend in the most unlikely contexts with a high risk of detection, as in *Hughes v The Queen* [2017] HCA 20. However, there is no suggestion that Pell's personality included paraphilia (a condition characterised by abnormal sexual desires, typically involving extreme or dangerous activities) or narcissism, two comorbidities of sexual predators prepared to risk detection. Neither is it credible that Pell would have believed he was beyond suspicion or detection in the circumstances of the case, where defence witnesses testified Pell was always accompanied when in robes and the sacristy door was open at a busy time immediately after the Mass in the Cathedral. The risk was further magnified by virtue of the lack of grooming. In addition, there were two boys allegedly assaulted who would have been able to reinforce each other's testimony.

⁷³ *Pell High Court Appeal* [102] (Kiefel CJ, Bell, Gageler, Keane, Nettle, Gordon and Edelman JJ).

⁷⁴ *Ibid* [119] (emphasis added).

⁷⁵ *Ibid* [119].

⁷⁶ Samuel Beer and Charlotte Butchart, "A Witness of Truth": The Court of Appeal's Cardinal Sin in *Pell v The Queen* (2020) 41(2) *Adelaide Law Review* 683, 693.

⁷⁷ See, for example, s 68B *Jury Act 1977* (NSW); s 70 *Jury Act 1995* (Qld); s 78 *Juries Act 2000* (Vic).

⁷⁸ Davey (n 56) 314.

⁷⁹ *Ibid*.

The decision in the George Pell case suggests that Australian juries are no longer what they once were. In this case, finding the defendant guilty of sexually assaulting two 13-year-old choirboys in Melbourne's St Patrick's Cathedral did not involve balancing competing scales of evidence and argument and delivering a finding beyond a reasonable doubt. Enough of this case has already been publicly discussed - the location, timing and intricacies of the incident concerned, the alibis given by those accompanying the archbishop at the time, the denial by one of the two boys in the case that he was ever sexually abused, and the complete absence of any corroboration of the alleged victim's claims - to demonstrate that the Pell jury could not have come to its decision on the basis of reason and evidence alone. Other influences must have made an impact on the jury.⁸⁰

Windshuttle identified these 'other influences' as the Royal Commission into Institutional Responses to Child Sexual Abuse and the #MeToo movement.⁸¹

The implication of Windshuttle's observation above that 'Australian juries are no longer what they once were' is that juries have become less discerning, less objective, and more easily influenced by extraneous factors over the years. The difficulty faced by any study of the quality of jury decisions in Australia is that jury secrecy prevents an accurate assessment of whether juries are getting it 'right'. Australian jurors are forbidden from discussing their deliberations with anyone, including why they came to a decision. Consequently, Windshuttle's suggestion that 'other influences' were at work in Pell's guilty verdict is unknowable, although maintaining juror impartiality has become more difficult in the age of the internet and social media.

There is some support for juries being subject to biases when it comes to deciding on a trial.⁸² In a recent article,⁸³ Curley, Monroe, and Dror examined three main sources of bias: 1) pre-trial bias; 2) cognitive bias; and 3) bias from external legal actors (expert witnesses). The review concluded that bias is a multifaceted phenomenon introduced from many different elements, and that several sources of bias may interact with one another during a jury trial to cause the effects of bias to snowball.

One problem with jury selection can be confidently identified, namely, the pre-emptive challenge, which allows either the prosecution or defence counsel to veto a potential juror from being empanelled without having to give any reason or justification. The pre-emptive challenge undermines the notion that the jury is a randomly selected representative cross-section of the community. The potential for jury bias is obvious.

Be that as it may, the author offers an alternative viewpoint and one that Robert Richter QC doubts. Davey asked Richter if he thought the outcome might have been different if Pell had taken the stand. Richter replied that the collective view of the defence team and Pell himself

⁸⁰ Keith Windschuttle, 'George Pell and the Jury' (online, 12 March 2019) 63(4) *Quadrant* 4 <<https://quadrant.org.au/opinion/qed/2019/03/george-pell-and-the-jury/>>.

⁸¹ Ibid.

⁸² Lee John Curley, Itel Dror and James Munro, 'Juries are Subject to all Kinds of Biases when it comes to Deciding on a Trial' *The Conversation* (online, 28 February 2022). <<https://theconversation.com/juries-are-subject-to-all-kinds-of-biases-when-it-comes-to-deciding-on-a-trial-176721>>.

⁸³ Lee J Curley, James Monroe and Itiel E Dror, 'Cognitive and Human Factors in Legal Layperson Decision Making: Sources of Bias in Juror Decision Making' (online, 17 February 2022) *Medicine, Science, and the Law* <<https://doi.org/10.1177%2F00258024221080655>>.

was there was no point in calling Pell to give evidence because the jury had already seen Pell's interview with Victorian detectives in the Vatican, and all Pell could say if called was he didn't do it.⁸⁴

The most important decision a defence lawyer has to make at trial is whether or not to call the defendant to give evidence. Whilst defence lawyers act according to instructions and it is ultimately a matter for the accused to choose whether or not he or she takes the stand, the decision is heavily influenced by the advice of the accused's defence counsel. Juries expect defendants to take the stand and loudly proclaim their innocence. There may be good reasons for not putting the defendant through the rigours of cross-examination if the view is that the defendant will not perform well on the witness stand and strengthen the prosecution case if the jury does not believe the defendant is telling the truth. However, such reasons did not apply in this case as Pell is an articulate, educated man well capable of giving his version of events and backed by a strong defence from the 'opportunity witnesses'.

For example, Pell would have been able to demonstrate in court that the complainant's claim his liturgical vestments could be easily parted to engage in the alleged offending was incorrect. Frank Brennan, a Jesuit priest, explained the restrictions in movement when someone is wearing an alb worn under a chasuble and secured by a cincture.

Witnesses familiar with liturgical vestments had been called who gave compelling evidence that it was impossible to produce an erect penis through a seamless alb. An alb is a long robe, worn under a heavier chasuble. It is secured and set in place by a cincture which is like a tightly drawn belt. An alb cannot be unbuttoned or unzipped, the only openings being small slits on the side to allow access to trouser pockets underneath. The complainant's initial claim to police was that Pell had parted his vestments, but an alb cannot be parted; it is like a seamless dress. Later the complainant said that Pell moved the vestments to the side. An alb secured with a cincture cannot be moved to the side.⁸⁵

While the jury were able to examine Pell's liturgical vestments for themselves as the alb, chasuble and cincture were all tendered,⁸⁶ Charles Portelli, the Master of Ceremonies, and Max Potter, the sacristan, had both given evidence that the alb could not be moved to the side in the way the complainant had suggested and nor could it be parted.⁸⁷ The prosecution accepted this was the case, but argued the alb could be lifted up allowing the penis to be exposed.⁸⁸ However, as Weinberg JA pointed out 'the problem with the complainant's account was not so much with the physical impossibility of exposing the penis, but with doing so in anything remotely like the manner that the complainant himself, at various times, and in various ways, described'.⁸⁹

Arguably, under cross-examination, Pell could have reinforced the evidence of Portelli and Potter by giving clear, confident denials of the complainant's version of events, and highlighted the stark difference between parting his vestments, as alleged by the complainant, compared with lifting up the alb, which as mentioned above, is a long robe. This in court demonstration

⁸⁴ Davey (n 56) 316.

⁸⁵ Frank Brennan, 'Truth and Justice after the Pell Verdict' (online, 26 February 2019) 29(4) *Eureka Street* <<https://www.eurekastreet.com.au/article/truth-and-justice-after-the-pell-verdict#>>.

⁸⁶ *Pell Appeal Vic* (n 2) [825] (Weinberg JA).

⁸⁷ *Ibid* [819].

⁸⁸ *Ibid* [825].

⁸⁹ *Ibid* [824].

may well have destroyed the Crown's argument that such a difference did not matter given the passage of time,⁹⁰ as opposed to seeing Pell sitting impassively in the dock in clerical dress and not hearing from him at all, other than the recorded Vatican interview with Victorian detectives.

V. CONCLUSION

There are two words that leap off the pages of the High Court's judgment in *Pell v The Queen*⁹¹: 'unchallenged' and 'possible'. There are 14 references to the unchallenged evidence of the 'opportunity witnesses', and 21 references to the word 'possible' in the context of the 'opportunity witnesses' accepting under cross-examination that a particular event might just have occurred although they strongly doubted this possibility. An example of the former is that 'Portelli's evidence was unchallenged'.⁹² A good example of the latter can be found in the following exchange between the prosecutor and Portelli, bearing in mind it was essential to the Crown case that Pell did not spend any more than two minutes meeting and greeting members of the congregation on the Cathedral steps after Sunday Mass when he normally spent 10 to 15 minutes doing so.

Portelli explained ... [t]he 'meet and greet' could vary from 'as little as ten minutes, say up to 15 or nearly 20. It would depend on what else we had to do that afternoon'. Portelli disputed that, even on occasions when there was an engagement in the afternoon, the length of the 'meet and greet' might be shorter, saying 'it wouldn't be much shorter. It wouldn't make sense to stop for any less time than at least - at least six or seven minutes.' He was asked:

'Q. Sure, but was there an occasion or were there occasions, as best you can recall, where the Archbishop might depart from that practice and speak for a short period of time before returning to the sacristy?

A. He may have done so on occasion, yes.

Q. When I say short period of time, I'm speaking of just a couple of minutes?

A. Yes, I suppose that's possible but I don't really recall it, but it's possible.'⁹³

A similar exchange occurred between the prosecutor and Potter, again on the vital point of whether Pell had ever spent just a few minutes on the Cathedral steps after Sunday Mass.

The prosecutor pressed Potter as to whether it was possible that the applicant had remained on the front steps speaking with congregants 'for a very short period of time', to which Potter responded, 'not the first time when he was the Archbishop, it took him a while to adjust, and [he] stayed in there welcoming people for a couple of months in the cathedral'. Potter agreed that it was possible that on occasions the applicant greeted congregants for a period of ten or 15 minutes rather than the 20 to 30 minutes that he had initially stated. He could not recall the applicant spending 'just a short time' in this activity unless the weather was inclement. ...⁹⁴

Thus, it can be seen that both Portelli and Potter had no recollection of Pell ever having spent just two minutes on a 'meet and greet', but admitted it was just possible. However, while the two-minute scenario might just survive scrutiny as a possibility, there was far more powerful

⁹⁰ Ibid [825].

⁹¹ *Pell High Court Appeal* (n 1).

⁹² *Pell High Court Appeal* (n 1) [91] (Kiefel CJ, Bell, Gageler, Keane, Nettle, Gordon and Edelman JJ).

⁹³ Ibid [60].

⁹⁴ Ibid [64].

evidence pointing to another major obstacle to the Crown's case, namely, that Archbishop Pell in liturgical vestments was unaccompanied when he entered the Priests' Sacristy. The evidence of both Portelli and Potter was that this, consistent with unchallenged church protocol, never happened.

Apart from these two instances, Portelli had no recall of any occasion when he did not accompany the applicant [Pell] to the sacristy to disrobe.⁹⁵

Potter disputed that on any occasion the applicant [Pell] had returned to the sacristy unaccompanied; '[i]f Father Portelli wasn't there, he would let me know. I would go down and greet the Archbishop to bring him back in'.⁹⁶

Potter confirmed that the applicant would never return to the sacristy unaccompanied.⁹⁷

The High Court was singularly unimpressed by the majority's (in the Victorian Court of Appeal) treatment of the evidence of Portelli and Potter, reinforced by their discounting of the forensic disadvantage experienced by Pell.

Their Honours were required to take into account the forensic disadvantage experienced by the applicant arising from the delay of some 20 years in being confronted by these allegations [*Jury Directions Act 2015* (Vic), s 39(3)(a)]. Their Honours, however, reasoned to satisfaction of the applicant's guilt by discounting a body of evidence that raised lively doubts as to the commission of the offences because they considered the likelihood that the memories of honest witnesses might have been affected by delay.⁹⁸

In the author's view, the High Court's decision to quash Pell's convictions was the only available outcome consistent with justice. The High Court's judgment evinces frustration with the majority in the Victorian Court of Appeal⁹⁹ for not properly applying the test in *M v The Queen*,¹⁰⁰ which is reflected in s 276(1)(a) of the *Criminal Procedure Act 2009* (Vic), whether 'upon the whole of the evidence it was open to the jury to be satisfied beyond reasonable doubt that the accused was guilty'.

As this article has sought to demonstrate, the Crown case against Pell was built on the uncorroborated evidence of complainant A, which in turn was predicated on an aggregated series of possibilities amounting to links in a chain. In order to convict, the jury would have had to be satisfied that each link in the chain was proven beyond reasonable doubt, such that

⁹⁵ Ibid [78]. These two instances were in June 1997 when Portelli was overseas, and in October 2000 when Portelli underwent surgery. As the alleged events were purported to have occurred on either 15 or 22 December 1996, these two instances were completely irrelevant.

⁹⁶ Ibid [64].

⁹⁷ Ibid [79].

⁹⁸ Ibid [91].

⁹⁹ Mr GJC Silbert QC has written an article critical of the performance of the Victorian Court of Appeal under its President, the Hon Chris Maxwell: Gavin Silbert QC, 'The First 24 Years of the Victorian Court of Appeal in Crime' (2020) 94 ALJ 455. The thrust of the article is that under the first President, the Hon John Winneke, between 1995 and 2005 the Victorian Court of Appeal was only reversed twice by the High Court, whereas under the Hon Chris Maxwell between 2006 and 2019 the Victorian Court of Appeal was reversed 16 times by the High Court.

¹⁰⁰ (1994) 181 CLR 487, 493 (Mason CJ, Deane, Dawson and Toohey JJ).

(i) Pell only stood on the Cathedral steps for two minutes; (ii) Pell was unaccompanied on returning to the Priests' Sacristy; and (iii) no-one entered the Priests' Sacristy for five to six minutes immediately after the conclusion of Sunday Mass.

When applying the test in *M v The Queen*,¹⁰¹ the High Court had to take into account (i) the 'compounding improbabilities' set out by Pell's defence counsel; (ii) the unchallenged evidence given by the 'opportunity witnesses'; and (iii) the forensic disadvantage experienced by Pell after 22 years. In light of the countervailing evidence measured against the criminal standard of proof of beyond reasonable doubt, it was predictable that the High Court unanimously (7-0) allowed the appeal. Perhaps the final word should be left with Weinberg JA when assessing complainant A's account: 'The chances of "all the planets aligning", in that way, would, at the very least, be doubtful.'¹⁰²

¹⁰¹ (1994) 181 CLR 487, 493 (Mason CJ, Deane, Dawson and Toohey JJ).

¹⁰² *Pell Appeal Vic* (n 2) [1064] (Weinberg JA).