IN THE HIGH COURT OF AUSTRALIA No M112 of 2019
MELBOURNE OFFICE

Between **GEORGE PELL**

Applicant

And **THE QUEEN**

Respondent

APPLICANT'S SUBMISSIONS

Part I: Certification

1 These submissions are in a form suitable for publication on the internet.

Part II: Issues

2 Can belief in a complainant be used as a basis for eliminating doubt otherwise raised and left by unchallenged exculpatory evidence inconsistent with the offending having occurred where that evidence is not answered by the evidence of the complainant?

3 In a criminal trial, is the evidence of complainants of sexual offending to be assessed according to different standards from that applied to other witnesses?

4 Did the majority err by finding that their belief in the complainant required the applicant to establish that the offending was impossible in order to raise and leave a doubt?

5 Did the majority err in their conclusion that the verdicts were not unreasonable as, in light of findings made by them, there did remain a reasonable doubt as to the existence of any opportunity for the offending to have occurred?

6 Was it open to the jury to find the offending proven beyond reasonable doubt?

Part III: Section 78B of the *Judiciary Act 1903*

7 Consideration has been given to the question whether notice pursuant to sec 78B of the *Judiciary Act 1903* (Cth) should be given with the conclusion that this is not necessary.

Part IV: Citations

8 *Pell v The Queen* [2019] VSCA 186.

Part V: Facts

9 On 11 December 2018, the applicant was found guilty by a jury of one charge of sexual penetration of a child under 16 and four charges of indecent act with a child under 16. This was the second trial of these charges after an earlier jury (who watched the same recording of evidence of the complainant) were unable to agree on a verdict {CA [31] CAB

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189}. The applicant appealed his convictions to the Court of Appeal arguing three grounds – the only ground relevant to this appeal is Ground 1: 'The verdicts are unreasonable and cannot be supported having regard to the evidence because on the whole of the evidence, including unchallenged exculpatory evidence from more than 20 Crown witnesses, it was not open to the jury to be satisfied beyond reasonable doubt on the word of the complainant alone.' The court unanimously granted leave to appeal on Ground 1. The majority (Ferguson CJ and Maxwell P) dismissed the appeal. Weinberg JA dissented.

10 The offending was alleged to have been against choirboys in the St Patrick's Cathedral Choir on two occasions very soon after the conclusion of Sunday Solemn Mass. The prosecution case was that the first occasion (involving the complainant and the other boy[1]) was either 15th or 22nd of December 1996 (the first and only Sunday Solemn Masses said by the applicant in 1996) and the second occasion (involving only the complainant) was 23rd of February 1997 (which was the next, and only, occasion the applicant was present at a Sunday Solemn Mass in the charged period) {CA [404]-[406] CAB 309-310}. The sole issue at trial was whether the prosecution could prove beyond reasonable doubt that the offending occurred. As the trial judge directed the jury, without demur from the prosecution, 'in this case the only evidence to support the prosecution case and proof of the elements of each charge is the evidence of the complainant' {Charge 1587.17-19 CAB 36}. At the time of the complainant's first complaint to police in June 2015, the other boy had died but, before his death, he had denied that he was ever offended against while in the choir {CA [7] CAB 182}.

11 In addition to the complainant and pursuant to its obligation to call all witnesses able to give relevant evidence, the prosecution called over twenty witnesses who had an official role in Sunday Solemn Masses at St Patrick's at the time. The trial judge directed the jury that the complainant's account required seven opportunities to have each occurred for the first occasion of offending and three for the second {Charge 1594.8-1595.25 CAB 43-44}. The witnesses included the applicant's Master of Ceremonies (Portelli), the Sacristan who was in charge of the sacristies (Potter), adult altar servers, adults in charge of the choir and a large number of ex-choirboys. First, prosecution witnesses gave evidence that they recalled the dates in question and placed the applicant on the front steps or in their company such that he had an effective 'alibi' for the alleged offending. Second, prosecution witnesses gave evidence about routines and practices of the Cathedral after Mass (said by some to be 'invariable') which were contrary to there being any realistic opportunity for the offending.

12 At no stage did the prosecution suggest that any of these witnesses were untruthful {CA [251] CAB 265, [937] 445, [952] 448, [988] 456-7, [995] 458-9}. Prior to empanelment

[1] These were the descriptors the Court of Appeal determined would be utilised at the oral hearing of the appeal.

the prosecution identified a need to put that 'these witnesses are incorrect and for [the evidence] not to go to the jury unchallenged.' {Legal Argument (3.8.18) 62.17-22, AFM 5}. The prosecution was granted leave to challenge the correctness of much of this evidence {*DPP v Pell (Evidential Ruling No 3)* [2018] VCC 1231 (**Evidential Ruling No 3**), AFM 7-34}. However, during the evidence, although some leading questions were asked, almost uniformly, the prosecution did not challenge witnesses {CA [154] CAB 226}. Nor, in closing, did the prosecution, for the most part, suggest that this evidence either could or should be rationally set to one side. Instead, the 'central theme' of the prosecutor's address was that the complainant's account 'fitted' with the evidence of the other witnesses {Prosecution Closing 1320.25-1321.16 AFM 61-2}. This was plainly not so.

13 The first incident (charges 1 – 4): The complainant alleged that the applicant committed sexual offences against him and the other boy in the priests' sacristy in 1996 at the Cathedral shortly after finishing saying Sunday Solemn Mass. The prosecution case was that after Mass the choir, bookended by adult altar servers, processed down the Cathedral nave to the West door and then around the outside of the Cathedral towards a small corridor connecting the Cathedral to the Knox Centre where the choir rehearsal room was {CA [363]-[366] CAB 301}.[2] The complainant said that before the procession re-entered the building, he and the other boy, who were in the first third of the procession, without any prior communication, broke away from the procession, unnoticed, and walked back into the Cathedral through the South Transept {Complainant 155.8-156.10 AFM 35-36, 222.14-223.7 AFM 37-38, 259.20-260.17, AFM 39-40}.

14 The prosecution opened that it was anticipated the jury would hear evidence that the procession after Mass was typically highly regimented and that if any choirboy peeled off, that would have been noticed and subject to discipline. The prosecution conceded that such evidence could not easily be reconciled with the complainant's account {CA [391]-[392] CAB 306}. The prosecution had leave to challenge three witnesses on this topic {Evidential Ruling No 3 Annexure A AFM 34} but, when each gave the anticipated evidence that it was not possible for choristers to detach unnoticed by anyone, did not do so {R. Dearing: CA [313]-[317] CAB 287-289, [540]-[545] 344-5, [766] 399-400; D. Dearing: [310]-[312] 284-287, [539] 343-4, [772]-[773] 401-2; Parissi: [579] 351-2, [767] 400}. In closing the prosecution did not refer to Rodney Dearing's evidence and stated (incorrectly) that David Dearing and Parissi described a procession conducive to two boys detaching unnoticed {CA [781] CAB 403, [783] 404}. Numerous other prosecution witnesses gave evidence that they would have noticed boys leaving the procession and they never saw any such thing nor was

[2] See plan of the Cathedral at CA 6 CAB 181. The toilet corridor is directly above the Archbishop's sacristy.

there ever any gossip about such an event {CA [559] CAB 347, [768]-[776] 400-403}.

15 According to the complainant, having re-entered the Cathedral, he and the other boy walked down the sacristy corridor to the priests' sacristy which the complainant claimed was unlocked and empty; they poked around, found some sacramental wine and were swigging it when the applicant entered the room robed and alone {CA [428]-[431] CAB 314-315}. There was evidence that the applicant's practice was to stand on the steps greeting parishioners after Mass for ten to twenty minutes.[3] The prosecution accepted that the applicant had such a practice but argued in closing that it did not start until sometime in 1997 {CA [701] CAB 382}. This theory was not put to any witness and was contrary to unchallenged evidence {CA [279]-[280] CAB 275, [565] fn 146 349, [706] 383, [989] fn 246 457, [1090] 478}.

16 In addition to evidence of practice, Portelli, Potter and McGlone gave evidence they specifically recalled the applicant on the front steps after Mass on one (McGlone) or both (Portelli and Potter) occasions the applicant said Sunday Solemn Mass in 1996 {CA [586] CAB 353}. This was, in effect, evidence of 'alibi' {CA [521] fn 143 CAB 334, [950] 448}. The prosecution had leave to cross-examine each of them on this topic {Evidential Ruling No 3 Annexure A AFM 34, CA [994] CAB 458}. Portelli gave evidence that he specifically recalled being with the applicant on the front steps for more than ten minutes on what were memorable occasions – in part because of the number of people there wanting to greet the new Archbishop {CA [248]-[249] CAB 260-3, [687]-[688] 378-9}. The prosecution did not put to him that he was wrong somehow and that, actually, the applicant was not with Portelli on the steps on at least one of 15th or 22nd December 1996 and, instead, was in the priests' sacristy unaccompanied {CA [691] CAB 379-380}. The prosecution only asked Portelli if he could account for where he and the applicant went after leaving the Cathedral on 15th and 22nd December 1996 (which he could not) {CA [250] CAB 263-264} and whether he recalled if there was an internal or external procession on those days (which he, at least initially, could not) {CA [245] CAB 257}. Neither answer was inconsistent with his evidence that he specifically recalled greeting parishioners with the new Archbishop: that greeting would occur regardless of the processional route {CA [248] CAB 260-1, [877] 431}. The prosecution did ask Portelli if it was possible that on 'an occasion or occasions' the applicant only remained on the front steps for a couple of minutes. Portelli supposed it was possible but did not recall it ever happening {CA [246] CAB 257-8}. The prosecution did not put to Portelli that this occurred in 1996 (as opposed to in one of the many other years in which Portelli acted as Master of Ceremonies to the applicant) and Portelli specifically said it did

[3] The prosecution accepted that if the applicant was on the steps for even ten minutes neither the first nor second incident of offending could have occurred {CA [981] CAB 455}.

not. In closing, the prosecutor submitted that Portelli did not have an actual memory of staying on the front steps on the relevant dates because in examination in chief he did not recall the procession route {Prosecution Closing 1346.19-1348.31 AFM 63-65[4]}. The prosecution did not refer to Portelli's evidence that if there were an occasion when the applicant left the steps quickly, Portelli would have remained with him until after he disrobed {CA [690] CAB 379}: this evidence did not fit the prosecution case on opportunity.

17 McGlone's evidence was that he specifically recalled serving the applicant on the first occasion the applicant said Sunday Solemn Mass as Archbishop, a memorable occasion for McGlone due to a conversation between his mother and the applicant on the front steps after Mass {CA [268]-[272] CAB 271-2, [522-533] 334-342}. The only challenge to this evidence by the prosecution was putting to McGlone that the meeting could have occurred on 22nd December rather than 15th December (McGlone said that was possible though he did not think so) {McGlone 962.22-964.6 AFM 51-3}. In closing, the prosecution accepted that McGlone's evidence 'effectively provided an alibi for [the applicant] for the first Sunday Mass said by [the applicant] in December 1996' {Prosecution Closing 1352.20-26 AFM 66} but argued that the alibi occasion was 'perhaps more likely to be in 1997' {Prosecution closing 1355.2-28 AFM 67}, a theory never put to McGlone and for which there was no evidentiary basis {CA [707] fn 196 CAB 383}. The prosecution also argued that if McGlone was right, then the applicant was only alibied for 15th December 1996 so the first offending was instead 22nd December 1996 {CA [707] 383}; but did not detail how this fitted their argument that in 1996 the applicant did not have a practice of remaining on the front steps as long as McGlone described occurring in 1996 {CA [529]-[533] CAB 341-2, [1085] fn 265 477}.

18 Potter also gave evidence that he recalled the applicant on the front steps for more than ten minutes after the first two Masses which were, he said, significant events {CA [506]-[509], CAB 329-330}. The prosecution merely asked Potter to describe features of the occasions, exposing some confusion in Potter's memory particularly of dates {CA [259] CAB 267, [265]-[266] 270-271}. In argument, the prosecution indicated an intention to go to the jury on the basis that Potter was suggestible and unreliable. It was agreed that because of his confusion, perhaps explicable by his age (84 years), this could be done without specifically putting it to him {CA [992]-[993] CAB 458, [1086] 477}. Actually, the prosecution relied on Potter's evidence in closing in a number of respects and never suggested to the jury that he lacked reliability or was suggestible {CA [267] CAB 271}. The prosecution submitted that

[4] It may be noted that the prosecution theory at 1347.24-1348.3 AFM 64-5 that Mass finished at 12.30pm on the date of the offending requiring the applicant to rush from the steps was not put to any witness and was irreconcilable with the only two dates the offending could have occurred as there were choir rehearsals on both 15th and 22nd December 1996 which were scheduled to occur between 12-12.45pm {CA fn 134 CAB 310}.

Potter's evidence of an adjustment period when the applicant first started saying Mass was a basis for their theory that the practice did not start until sometime in 1997 {CA [532] CAB 342}. But Potter's evidence of the adjustment period was one of the reasons why he recalled the applicant on the front steps in 1996: Potter stayed with the applicant on those days to make sure he knew where to walk {Potter 481.7-14 AFM 43, CA [508] fn 142 CAB 330}. The prosecution never put their theory on what 'adjustment period' meant to Potter and never challenged his evidence that the applicant was on the steps greeting people for more than ten minutes on the first two occasions he said Mass.

19 There was unchallenged evidence that the applicant would never be left alone while robed because: (i) centuries old Church law, always adhered to, dictated that bishops must not be left alone while robed {CA [264] CAB 269-270, [484] 325, [715] 388}; (ii) Portelli's job was to make sure that the applicant was never left alone {CA [286] 277, [711] 384-7}; and (iii) the only reason for the applicant to be in the priests' sacristy after Mass would be to disrobe which was always done with Portelli's assistance {CA [714] CAB 387-8, [483] 325}.

20 Portelli also gave evidence that he specifically recalled being with the applicant for the entire time that the applicant was robed on the significant occasions of his first Sunday Solemn Masses as Archbishop {CA [249] CAB 262-3, [710] 384, [716] 388}. The prosecution had leave to challenge Portelli's evidence on this topic {Evidential Ruling No 3 Annexure A AFM 34} but did not do so. Instead, the prosecution only asked Portelli whether there were ever occasions when he did not accompany the applicant after Mass (he said possible but not that he recalled), by questions not directed to 1996 {CA [247] CAB 258-9, [485]-[489] 325-6}. Portelli's evidence that if he ever was not with the applicant, he would ensure someone else such as Potter was, was not challenged. In closing, the prosecution incorrectly argued that Portelli's evidence was only to the effect that he or Potter 'often' would accompany the applicant {Prosecution closing 1372.6-8 AFM 74}. The prosecutor did not refer to Portelli's unchallenged evidence that Portelli was with the applicant up until the applicant disrobed on the relevant dates, but advanced a case that during the first occasion of offending Portelli had gone to the sanctuary to make sure books were in place, despite accepting that this was an activity Portelli said would only ever take him away from the applicant's side for two minutes {Prosecution closing 1373.6-1375.6 AFM 75-7, 1390.14-1391.15 AFM 80-1}. The prosecution did not make any argument to the jury as to how this could fit an opportunity for offending said to have taken 5-6 minutes.

21 In addition, Potter gave evidence that he recalled the applicant being accompanied while robed after Mass on the relevant days {CA [263] CAB 268-9, [516]-[518] 333}. Pursuant to leave, the prosecution put to Potter that he had told the Informant in a

conversation (though not in any formal police statement) that he could not categorically say the applicant was never alone. Potter agreed but explained that Potter did not necessarily see the applicant every time the applicant was in the sacristy if the applicant was being attended to by others. Potter said the applicant never came back to the sacristy alone, in unchallenged evidence {CA [509]-[513] CAB 330-332}. In closing, the prosecution did not put forward a rational basis for disregarding Potter's evidence but rather suggested, incorrectly, that his evidence was to the effect that it was possible that the applicant was left alone in the sacristies on either 15th or 22nd December 1996 shortly after Mass {CA [722]-[723] CAB 389}.

22 The complainant's account of what occurred in the priest's sacristy upon the applicant allegedly entering robed and alone was that the applicant stood in the doorway, told the two boys they were in trouble and pulled apart or moved his robes to the side to reveal his penis {CA [205]-[7] CAB 243, [432]-[440] 315-7, [816]-[7] 412-5, fn 205 416}. The applicant then, the complainant said, indecently assaulted the other boy for a minute or two; orally penetrated the complainant's mouth for a minute or two; then ordered the complainant (who was also robed) to remove his pants and then for a few minutes masturbated himself and the complainant before everyone fixed themselves up and the boys left the room {CA [380]-[2] CAB 304, [441]-[2] 317}. The applicant did not threaten them not to tell. There had been no grooming: the applicant did not personally know either the complainant or the other boy, or their families {CA [756] CAB 397-8}. On the complainant's account, the applicant happened upon them opportunistically and, it follows, did not know whether adults with a duty of care to young choristers were out searching for the missing boys.

23 Portelli and Potter both gave evidence that it was not possible to pull apart the applicant's robes to reveal his penis in the manner described by the complainant because: (i) the robes consisted of layers of material including trousers, an alb (ankle length tunic with no opening down the front) and chasuble (knee length over robe like a poncho) which required the applicant to be assisted in robing and disrobing; and (ii) the alb was tightly tied in place by a cincture (a rope like belt) with the alb's loose material gathered at the back to prevent the applicant tripping when going up stairs. The cincture was also attached to a stole (a piece of material around the neck) and microphone – meaning it could not be moved around the front of the body {Portelli: 592.3-594.2 AFM 45-7, 616.12-618.22 AFM 48-50, CA [824] CAB 417; Potter: CA [514] CAB 332}. It was not in dispute that both Portelli and Potter had familiarity with how the robes were affixed to the applicant. The prosecution had leave to challenge the evidence of each on this topic {Evidential Ruling No 3 Annexure A AFM 34}. They did not do so. In closing, the prosecution submitted that the robes could be 'easily manoeuvred or moved to the side so as to expose a penis' {Prosecution Closing 1383.28-

1384.6 AFM 78-9}.[5] The prosecution did not refer to Portelli's or Potter's unchallenged evidence on this topic nor to the cincture, stole or microphone and how they affected the manoeuvrability of the robes.

24 During the alleged offending, the complainant did not recall the applicant closing the door {CA [78] 203, [743] 395}. The complainant said he and the other boy were sobbing and whimpering and the other boy called out 'can you let us go' in an 'elevated voice', which, according to the complainant, would have been heard in the corridor if the door was not shut {CA [744] 395}. No one entered the room or saw or heard anything. During the offending, according to the complainant, there were no altar servers coming and going in the corridor at the time – he could not say where they were {Complainant 348.9-16, AFM 41}. However, the jury heard from witnesses that there was a 'hive of activity' in and around the priest's sacristy after Sunday Solemn Mass. Connor and McGlone gave evidence that once the external procession reached the glass door in the toilet corridor to re-enter the building, the altar servers at the front of the procession would walk to the left and directly into the priests' sacristy to bow to the cross, the servers from the rear soon joining them {CA [294]-[295] CAB 279-280}. The group, numbering 6-12 men, would thereafter 'invariably' spend the next ten minutes clearing up which required constant activity in the priests' sacristy, which would be empty for no more than half a minute during this time {CA [297-[299] 280-281, [518] 333, [526]-[528] 336-341 [573]-[575] 350-351, [725]-[740] 390-4}. None of this activity would stop if the applicant was in the room – the Archbishop (or any clergy) disrobing was not a private activity {Connor 1050.25-1051.4 AFM 55-6}. The prosecution case was, of course, that the complainant and the other boy detached outside from a procession which was bookended by the altar servers, walked through the South Transept and to the very same room that the altar servers entered at the conclusion of the procession to commence the 'hive of activity'. The prosecution did not seek leave to challenge McGlone and Connor's evidence on this topic. Instead, ignoring this unchallenged evidence, the prosecution argued to the jury that there was no evidence where the altar servers were after they bowed to the cross while they waited for Potter to give them the green light to start clearing up {Prosecution Closing 1368.3-18, AFM 73}. But no witness had given evidence about any such 'green light'. In addition, there was unchallenged evidence that during the hive of activity concelebrant priests disrobed in the priests' sacristy, the Dean of the Cathedral brought the collection into the priests' sacristy to deposit it into the vault and the choir master or deputy would walk along the corridor past the priests' sacristy to the choir room {CA [725]-[740] CAB 390-394}.

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[5] In contrast, Senior Counsel for the prosecution conceded on appeal that the robes would have to be lifted up rather than moved to the side {Appeal Hearing 241.13-244.8 AFM 104-7}.

25 After the alleged offending, the complainant said he and the other boy walked back the way they came through the South Transept and around the outside of the building to the glass door in the toilet corridor {CA [49] CAB 194}. This was an entirely indirect route and left them to, somehow, negotiate their way through two locked doors without alerting choir officials to their absence {CA [804] CAB 408}. The complainant was unable to explain how this occurred {CA [814] CAB 411}. The complainant said that upon entering the choir room, he and the other boy re-joined only some of the choir who were getting changed and finishing up for the day {CA [446] CAB 318}. The boys then left the Cathedral precinct {CA [49] CAB 194} and were picked up 10-15 minutes later than a normal Sunday {CA [228] CAB 251}. The complainant was unable in cross-examination to reconcile his account with the special rehearsals which it was not disputed occurred after Mass on 15th and 22nd December 1996 (scheduled between 12-12.45pm) and involved the entire choir {Appeal Hearing 238.2-22 AFM 103, CA [221]-[225] CAB 249-50, fn 134 310, [791]-[797] 405-7}.

26 **The second incident (charge 5):** The complainant alleged a second assault in the 1996 choral year 'over a month' after the first, again immediately after a Sunday Solemn Mass said by the applicant who was wearing 'full robes' {CA [211]-[214] CAB 244-7, [330]-[331] 292-3, [416]-[418] 312, [448] 318, [454] 319, [667]-[669] 371-2}. In accordance with the complainant's allegation, it was put to the applicant in the record of interview that this incident occurred in 1996 {Reed 1283.2-7 AFM 57}, however, after the committal, the prosecution extended the dates for the second incident to include the first months of 1997 and, at the trial, their case was that it had occurred on the 23rd of February 1997 when the applicant presided in choir dress over a Mass said by Father Brendan Egan {CA [186] CAB 235, [329] 292, [474] 323, [569]-[571] 350, [679]-[681] 376-377}. This occasion was only selected because records obtained by the prosecution in early September 2018 showed it was the first time the applicant was present at the Cathedral for a Sunday Solemn Mass after 22nd December 1996 {Appeal Hearing 224.9-225.22 AFM 101-2, CA [404]-[406] CAB 309-310, [870]-[874] 429-430, [1016]-[1029] 463-465}.

27 This assault allegedly occurred as the choir was processing from the Cathedral body back to the choir room internally, via the sacristy corridor {CA [50] CAB 194}. The complainant claimed he was walking in the middle of the 50 person choir in the area between the entry to the priests' sacristy and the Archbishop's sacristy when the applicant appeared and pushed him into the wall, grabbing and squeezing his testicles hard in a clear and violent action in front of others {CA [333]-[336] CAB 293-295, [451]-[452] 319, [853]-[856] 424-426}. No witness gave evidence of ever seeing such a thing occur. Portelli, who gave evidence that he recalled the unusual occasion when the applicant presided over Father Egan's

Mass and was with the applicant after that Mass, said he did not ever see the applicant do such a thing {CA [337] CAB 295, [711] 384, [861] 427, [875] 430}. The prosecution did not seek leave to challenge this evidence and did not refer to it in closing.

28 Connor gave unchallenged evidence that the applicant would have been with Father Egan after the Mass if the applicant presided – making Egan an eyewitness to the applicant's movements in the same way that Portelli was {CA [345] 297, [869] 429}. Sergeant Reed stated that he had never spoken to Egan though Reed agreed it would have been reasonable to want to know from Egan whether he went back with the applicant to disrobe together on 23rd February 1997. He did not have an answer for why that enquiry was never undertaken {CA [867]-[868] CAB 428-429}. The prosecution in closing, did not mention Egan. There was also unchallenged evidence that on 23rd of February 1997 the 'invariable' practice of the applicant greeting parishioners on the front steps after Mass was followed {CA [342]-[343] CAB 296, [876]-[879] 430-431}. The prosecution did not refer to this evidence in closing. Rather, the prosecution asserted that the applicant was in the midst of the choir procession because he was rushing to disrobe in the Archbishop's sacristy to get to a 3pm Mass in Maidstone {CA [349] CAB 297-298}. This was contrary to the unchallenged evidence of Portelli that the Archbishop's sacristy was still not in use in February 1997 {CA [347] CAB 297, [880] 432} and Maidstone was only 30 minutes away {CA [350] CAB 298, [881] 432} and did not require any rushing from a Mass which finished around midday.

29 In addition, the jury were provided with the applicant's record of interview in which he emphatically denied the allegations and told the police that 'the most rudimentary interview of staff and choir boys at the Cathedral would confirm that the allegations are fundamentally improbable and most certainly false' {CA [181]-[184] CAB 234-235}.

30 The prosecution closing was that the complainant's account could and should be accepted beyond reasonable doubt {CA [925]-[926] CAB 441-2}. The prosecution argued that 'a good starting point' was what overall impression the jury were left with by the complainant's evidence and invited the jury to view some specific occasions when the complainant closed his eyes while giving evidence as 'cues' for determining his honesty and reliability as a witness {Prosecution Closing 1318.20-1320.24, AFM 59-61}. The prosecution argued because the complainant's account was 'powerful and persuasive' and the account 'in fact fits and is not at odds' with the rest of the witnesses, the prosecution had discharged its burden of proving the allegations beyond reasonable doubt {Prosecution Closing 1320.25-1321.18, AFM 61-2}. The prosecution also emphasised two matters they said provided 'support' for the complainant's account: him having accurately described some features of the inside of the priests' sacristy {Prosecution Closing 1363.11-1365.9 AFM 70-2} and having

placed the applicant in that room at a time when the Archbishop's sacristy was closed {Prosecution closing 1356.29-1357.25 AFM 68-9}.

31 In closing, the defence argued that the complainant's account was by no means as compelling as the prosecution submitted: his account repeatedly shifted when he was challenged about the implausibility or impossibility of his allegations {CA [416]-[455] CAB 312-320}. The defence emphasised the burden and standard of proof and argued that, in any event, the whole of the evidence led at trial meant that a reasonable doubt arose regardless of the complainant's demeanour – in large part because the opportunities for offending were either improbable, not realistically possible or indeed impossible (particularly when compounded) {Defence Closing 1419.12-24 AFM 85, 1498.23-1503.2 AFM 86-91, 1542.20-1543.21 AFM 92-3, 1549.16-1552.7 AFM 94-7}. Defence referenced the complainant's concession that he may have been in the priests' sacristy on a tour as an explanation for his familiarity with its general layout {CA [836] CAB 420-1}.

32 No challenge was made on appeal to the trial judge's directions. These included: repeated directions about the burden and standard of proof including that evaluation of the opportunity witnesses must be undertaken through this lens {Charge 1571.19-1572.21 CAB 16-17, 1591.16-1597.10 CAB 40-6}; a direction that the jury must take care not to make the manner in which any witness gave their evidence the sole or even main factor in their decision {Charge 1570.14-1571.5 CAB 15-16}; and a detailed significant forensic disadvantage warning {Charge 1648.12-1654.12 CAB 99-105}.

Part VI: Argument

33 No matter how favourable a view was taken of the complainant, it was not open to the jury, acting rationally, to conclude that the prosecution had eliminated all reasonable doubt. At the conclusion of the case, a remarkable evidentiary picture was left. A large number of undisputedly honest witnesses whose evidence was not challenged by the party who had the burden of proving the case beyond reasonable doubt – even where those witnesses gave effective alibi evidence. A reported denial by the alleged co-victim that any such offending ever occurred. A highly improbable allegation made decades after the event which contained features inconsistent even with the prosecution's case. An incomplete investigation by the prosecution of the recollections of eyewitnesses. No rational explanation for the whole of the evidence provided by the prosecution in closing. Strong judicial directions about the impact of delay and danger of overvaluing demeanour.

34 The prosecution in this case, having identified before the trial a need to challenge witnesses on a number of topics in order to discharge its burden of proof, made a deliberate forensic choice not to do so. The prosecution understandably may have considered that

challenging witnesses would have only further firmed those witnesses' exculpatory evidence, that any additional investigations would not have assisted the prosecution case, and that there were, in fact, no rational arguments available that explained how the whole of the evidence was consistent with proof of guilt beyond reasonable doubt. Having made that choice, however, the prosecution was faced with difficulty on an unreasonableness appeal in arguing that the jury could have rationally rejected all of the matters which combined to raise doubt.

35 The ramifications of the prosecution's passive approach at trial can be particularly observed regarding the evidence which placed the applicant on the front steps or with others at the time of the alleged offending. As was conceded by senior counsel for the prosecution on appeal, evidence such as this was, effectively, alibi evidence so that any reasonable possibility that it was true and accurate would leave the Crown case 'in some difficulty' {Appeal Hearing 183.5-184.2 AFM 99-100}. This concession was consistent with accepted authority that when evidence of an alibi is raised, there is no onus on the accused to prove the alibi. Rather, the onus remains on the prosecution to eliminate any reasonable possibility that the alibi is correct: *Killick v The Queen* (1981) 147 CLR 565, 569-70 per Gibbs CJ, Murphy and Aickin JJ, *R v Small* (1994) 33 NSWLR 575, 595-6 per Hunt CJ at CL.

36 Critically, a finding that a complainant is 'compelling' is an inadequate mechanism for eliminating a doubt raised by otherwise cogent alibi: *SKA v The Queen* (2011) 243 CLR 400, 405-410, [9]-[10], [13], [19], [22]-[24], [30] per French CJ, Gummow and Kiefel JJ; *Palmer v The Queen* (1998) 193 CLR 1, 12 [14], 14-15 [21]-[22] per Brennan CJ, Gaudron and Gummow JJ and 29-30 [73]-[76] per McHugh J. This occurs as a natural corollary of the burden and standard of proof. Reasoning which uses a belief in the complainant as the basis for rejecting evidence inconsistent with the complainant's account (where the relevance of that inconsistent evidence is whether it casts doubt on the correctness of the complainant's account) is clearly circular and contrary to the onus and standard of proof in a criminal trial: *Palmer* per McHugh J 29-30 [74]-[75]. Where exculpatory evidence such as alibi is raised, the demeanour of the complainant does not inform the cogency of it. It is contrary to the burden and standard of proof for a jury to reason that since they feel persuaded by the complainant, though they cannot say why, the unchallenged alibi must be incorrect.

37 Eliminating an alibi must require confrontation of its correctness. That is particularly so where, as here, the honesty of the witnesses was never in dispute and any doubts about their reliability had to be filtered through the lens of significant forensic disadvantage. The requirement that the prosecution prove the guilt of any accused beyond reasonable doubt is the defining characteristic of the accusatorial system of criminal justice, so fundamental that 'no attempt to whittle it down can be entertained': *Woolmington v DPP* [1935] AC 462, 481-2

per Viscount Sankey LC, *Lee v The Queen* (2014) 253 CLR 455, 466-7 [32] per French CJ, Crennan, Kiefel, Bell and Keane JJ. It does not permit a prosecutor to rely on the evidence of a 'compelling' complainant and take a passive approach to other evidence in the trial. This moves towards an attempt at trial by accusation alone. In *SKA* at 243 CLR 405 [9] per French CJ, Gummow and Kiefel JJ, the Crown's lack of challenge to the alibi evidence considered there was explicitly noted by the plurality.[6]

38 The prosecution failure at trial to actively pursue the elimination of doubt can also be observed in their decision not to investigate the recollections of Father Egan. The prosecution is obliged to place before the jury all relevant evidence – particularly from eye witnesses. That obligation does not arise only if the defence requests that they do so. The absence of Egan leaves as an unexcluded possibility that he provides a complete alibi for the applicant for 23rd of February 1997. The failure of the prosecution to call a key witness is a matter relevant to consideration of an unreasonableness ground: *Whitehorn v The Queen* (1983) 152 CLR 657, 685, 690-1 per Dawson J (Gibbs CJ and Brennan J agreed at 660), *RPS v The Queen* (2000) 199 CLR 620, 633 [29] per Gaudron ACJ, Gummow, Kirby and Hayne JJ. The burden and standard of proof also required the prosecution to address the doubt raised by the reported denial of the other boy by eliminating (by evidence, not speculation) any reasonable chance that it was true. It was never for the applicant to prove the denial was true. Yet the prosecution made a forensic decision not to seek to call evidence about the context of the denial including the manner in which it was given.[7]

39 Similarly, the prosecution's emphasis in closing (and on appeal) on the two matters said to 'support' the complainant's account arose in the context of the prosecution adopting an entirely passive approach to these issues during the trial. The prosecution did not ask any choir witnesses (including those in charge) if they were shown the inside of the priests' sacristy during a tour (and, if so, whether they could recall its general layout). Nor did the prosecution ask any choristers (including the complainant) whether it was apparent to them by dint of their regular movement through the sacristy corridors that in late 1996 and into 1997 that the Archbishop's sacristy was not being utilised for the Archbishop's robing. Had the prosecution asked witnesses questions about these matters, their arguments may have been advanced or may have been exposed as entirely unsustainable. Despite having the burden of proof, the prosecution made a forensic decision not to seek to establish which one it was.

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[6] See also *Palmer* at 193 CLR 15 [22] where reference was made to the prosecution having tested the alibi. Here, the prosecution on appeal did not take issue with the applicant's argument that the fact that the exculpatory evidence was not challenged at trial was relevant to the appellate court's weighing of that evidence to determine if it was open to the jury to be satisfied of guilt beyond reasonable doubt {CA [996]-[7], CAB 459}.

[7] In an accusatorial system it is entirely irrelevant that defence did not ask the prosecution to speak to Father Egan and preferred the other boy's parents were not called.

40 The prosecution determined not to pursue witnesses or issues in circumstances where, on any view, the allegations made by the complainant were highly improbable. It is of note that the distinction in the accusatorial system between 'belief' and 'elimination of doubt' has been specifically applied in the context of a compelling complainant whose account was held unable to eliminate doubt otherwise raised and left by the inherent improbability of the offending as described: *M v The Queen* (1994) 181 CLR 487, 500 per Mason CJ, Deane, Dawson and Toohey JJ (see also 510 per Gaudron J).

41 The jury was directed (as are all juries in Victoria) that whether or not they believe any witness is a matter for them {Charge 1569.14-22 CAB 14}. However, 'belief' and 'doubt' can coexist in a criminal trial as the question is not merely whether to 'believe' the complainant or 'believe' the exculpatory witnesses, or whether the jury 'prefers' the complainant's evidence: *Liberato v The Queen* (1985) 159 CLR 507, 515 per Brennan J and 518-20 per Deane J, *De Silva v The Queen* [2019] HCA 48, [5]-[13] per Kiefel CJ, Bell, Gageler and Gordon JJ. A prosecutor must do more than invite a jury to believe. The law recognises the dangers in overvaluing demeanour are such that no jury is to make the manner in which a witness gives evidence the only or even the most important factor in its decision as to whether the prosecution has proved guilt beyond reasonable doubt: *Fox v Percy* (2003) 214 CLR 118, 129 [30]-[32] per Gleeson CJ, Gummow and Kirby JJ, *Fennell v The Queen* [2019] HCA 37, [81] per Kiefel CJ, Keane, Nettle, Gordon and Edelman JJ.

42 In these circumstances, 'belief' in the complainant was not available as a rational basis upon which the jury could set aside the combined effect of the whole of the evidence. Any conflation of the concepts of 'belief' and 'elimination of doubt' is an attempt to fundamentally depart from the defining safeguards of the accusatorial system of criminal justice. These safeguards protect people from the risk of being wrongfully convicted of crimes they did not commit.

43 The test to be applied in determining an unreasonableness ground pursuant to s 276(1)(a) of the *Criminal Procedure Act 2009* is authoritatively set out in *M v The Queen* (1994) 181 CLR 487, 493-495 per Mason CJ, Deane, Dawson and Toohey JJ and 508 per Gaudron J. According to *M,* the 'ultimate question' for an appellate court is whether the court thinks that upon the whole of the evidence it was open to the jury to be satisfied of guilt beyond reasonable doubt.[8] The approach to answering the 'ultimate question' requires the appellate court to undertake two steps. First, to make its own independent assessment of the whole of the evidence to determine whether the court itself has a reasonable doubt about the

[8] This 'ultimate question' has also been expressed as being whether the jury 'must' have entertained a doubt: *Libke v The Queen* (2007) 230 CLR 559, 596-7 [113] per Hayne J. The use of the term 'must' in *Libke* does not depart from the test in *M* {CA [613]-[618] CAB 359-60}.

guilt of the accused. This first step was described in *SKA* at 243 CLR 408 [20] per French CJ, Gummow and Kiefel JJ as the 'central question'. Second, if the court does have a reasonable doubt, then it is to consider whether the jury had an advantage capable of resolving the doubt experienced by the court. If so, then the appeal fails.[9] In most cases, however, a doubt experienced by the court will be a doubt which a jury should (or must) have also experienced.

44 The appellate majority in this case upheld the primary submission of the prosecution on appeal that the complainant was 'a very compelling witness. He was clearly not a liar. He was not a fantasist. He was a witness of truth' {CA [90] CAB 207}. Having so concluded, the majority judgment then turns to each of the matters emphasised by the applicant as, at least in combination, raising and leaving doubt. Contrary to the requirements of the *M* test, the majority examined each piece of evidence in isolation and asked whether it required the jury to have a doubt about the correctness of the believable complainant's allegations {CA [102] CAB 211, [109] 213, [112] 213-4, [180] 234, [185] 235, [253] 265, [267] 271, [272] 272, [291] 278, [300] 281, [326] 291, [332] 293, [339] 295, [350] 298}.[10] The majority determined that none did and, therefore, held the verdicts were not unreasonable.

45 This error in approach infected the treatment by the majority of the unchallenged body of evidence contradicting the complainant's account on opportunity. Though the majority said at {CA [129] CAB 219} that there was no onus on the applicant to prove impossibility, that is precisely what their analysis required him to do. The majority explicitly framed the question in terms of whether 'the opportunity evidence fell short of establishing the certainty which the argument of impossibility asserted' {CA [131] CAB 219}. See also {CA [126]-[130] CAB 218-9, [134] 220, [143] 223, [151] 225, [166] 230, [168] 230, [170] 231, [284] 276-7, [291] 278, [309] 284, [314]-[315] 287-8, [326] 291, [332] 293, [338]-[339] 295, [351] 298}. In effect, this approach required the applicant to establish actual innocence, as opposed to merely pointing to doubt, in order to counter the favourable impression of the complainant's sincerity adopted by the majority. This was a reversal of the onus and standard of proof.

46 The majority justified this approach on the basis that at trial the applicant had used the terms 'impossible' and 'highly improbable' to refer to the opportunity for offending and had not used the term 'alibi' {CA [114]-[151] CAB 214-25}[11]. By doing so, according to the

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[9] The plurality in *SKA* referred to the second step in *M* as a 'qualification': 406 [13]. They also held that the first step required the appellate court to make its own findings on critical facts to determine whether there are matters which cause the appellate court to itself experience a doubt: 408-409 [20]-[24].

[10] Though the majority refer in conclusion to having taken 'the evidence as a whole', {CA [351] CAB 298}, the judgment is otherwise devoid of any mention of the combined effect of the matters raised by the applicant.

[11] While defence had not used the term 'alibi' to the jury or requested an alibi direction, repeatedly defence submitted that there was no opportunity in part because the unchallenged evidence put the applicant on the front steps not in the priests' sacristy at the time it was said to have taken place. However this evidence was labelled, an effective alibi was raised by the evidence and left to the jury as a matter they were required to consider.

majority, 'the issue as joined between the parties at trial' was whether the opportunity evidence excluded any possibility of opportunity for the offending conduct to have taken place {CA [134] CAB 220}. By the majority's unorthodox reasoning, the applicant, at trial, did not 'join issue' with the prosecution on whether they had proved beyond reasonable doubt that the offending occurred. Rather, the trial was one where it was open to the jury to accept the complainant's account beyond reasonable doubt based on the prosecution's submission that he was 'so obviously truthful' and it was then for the defence to undermine his evidence by trying to demonstrate the events were impossible {CA [149]-[150] CAB 224-5}. The majority do not explain how this two-step reasoning process found by them to have been 'open to the jury' accorded with the trial judge's directions not to overvalue demeanour, consider the whole of the evidence before reaching any conclusions, and always bear in mind the accused does not have to prove anything {Charge 1570.20-1572.21 CAB 15-17}.[12]

47 In both oral and written submissions, the applicant highlighted the distinction drawn in a criminal trial between 'belief' and 'elimination of doubt' in *M*, *SKA* and *Palmer*. Though the majority cite these authorities in other contexts, their judgment does not engage with these particular principles at any stage. There is no explicit acknowledgment that 'belief' in a 'compelling' complainant does not, *ipso facto*, equate to the elimination of reasonable doubt otherwise raised.

48 The majority's erroneous judicial method prevented them from recognising that, even on their own incomplete analysis of the evidence, doubt was raised and left. Most significantly, the majority did not conclude that the alibi witnesses were dishonest. Instead, the majority found that the jury were entitled to have 'reservations' about the reliability of Portelli's unchallenged alibi evidence {CA [253] CAB 265} and were 'well justified in having doubts' about the reliability of Potter's evidence {CA [267] CAB 271}. In other words, absent the impermissible reasoning that the alibi is eliminated simply because it is inconsistent with the complainant's account, the majority found only that these witnesses might be wrong which, by its corollary, meant they might be right. On the majority's own analysis, the alibi was not eliminated. [13]

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[12] See, in particular, the conflict between the majority at CA [141] CAB 222 and the way the issues were framed for the jury by the trial judge and defence {see paragraphs [31]-[32] of these submissions}. The jury were repeatedly told to consider impossibility and improbability by reference to the onus and standard of proof.

[13] The appeal arguments regarding Portelli are summarised at CA [251]-[252] CAB 265, [1069]-[1084] 473-7. There was plainly no rational basis to conclude that Portelli's unchallenged evidence of having a specific recollection was wrong. The significant forensic disadvantage warning had direct application. His evidence was supported by numerous other truthful, unchallenged witnesses {CA [521] CAB 334, [538] 343, [544] 344-5, [548] fn 145 345-6, [572] 350, [586]-[7] 353, [1090] 478}. The majority appear to themselves have accepted the steps greeting was in place in December 1996 {CA [271]-[2] CAB 272}). The prosecution relied on the accuracy of Portelli's memory as to where the applicant robed on 15th and 22nd December 1996 {CA [43] CAB 193}. Portelli had initially been uncertain about whether the Archbishop's sacristy was closed at the relevant time {CA

49 It was also not in dispute that if any number of the practices of the Cathedral were followed there would be no opportunity for the offending {CA [166] CAB 230, [388]-[401] 306-8}. The majority did not conclude that so many departures from practice would not have been, at least, highly unlikely. Indeed, the majority did not engage with the argument about compounding improbabilities at all.[14] The unchallenged opportunity evidence, as explained by the majority, did not exclude the reasonable possibility that the routines and practices were, in fact, not departed from in one or more of the required ways on the relevant dates. This is so particularly in light of the significant forensic disadvantage warning.[15]

50 Further, the majority accepted there was some evidence supporting the applicant's
10 contentions of impossibility on virtually every matter raised {CA [172] CAB 231}. This was unchallenged evidence from honest witnesses. The comparison between the evidence relied on by the applicant and that by the prosecution had to be weighed and evaluated in accordance with *SKA* at 243 CLR 409 [22]-[24] per French CJ, Gummow and Kiefel JJ and considered according to the onus and standard of proof as per *Liberato* at 159 CLR 515 per Brennan J and 518-520 per Deane J.[16] Similarly, the majority provided no plausible theory as to why the practices were not adhered to on the relevant dates and, in some key instances,

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[244] CAB 256}. This was not suggested by the prosecution to indicate an unreliable specific memory of those occasions as it related to the topic they considered advanced their case. The majority's decision at CA [146] CAB 224, [256] 266 to use their findings from an out of court experiment they conducted with the robes as a basis for questioning Portelli's evidence as a whole is unsustainable in circumstances where: (i) Portelli's credibility was never in issue and it is unexplained by the majority how his description of the manoeuvrability of the robes once he had tied them onto the applicant could be wrong (the evidence being that he robed the applicant 140-150 times {CA [255] CAB 266}); (ii) Portelli's evidence on this matter (which included a demonstration) was not challenged at trial; (iii) the complainant agreed when shown the robes that they could not be pushed aside {CA [438]-[440] CAB 316-7}; (iv) the prosecution agreed on the appeal that the robes could not be moved to one side {Appeal Hearing 241.13-244.8 AFM 104-7}; and (v) Weinberg JA, who also examined the robes, found that the alb 'most certainly cannot be parted, pulled or pushed to one side' {CA [824] CAB 417}.

[14] The majority's reference at CA [170] CAB 231 to the applicant's 'catalogue of impossibilities' only considered that as, on their view of the evidence, each deviation from practice was possible, the argument of the applicant regarding the combined effect of the evidence was defeated. Rather than grapple with the compounding effect of the evidence, the majority's treatment of the opportunity evidence as of significance only if by it the applicant could prove the offending impossible demonstrates illegitimate reasoning of a fundamental kind (cf Weinberg JA at CA [1060]-[1064] CAB 471-2). Tellingly, the prosecution on appeal failed to address the applicant's submission on compounding improbabilities either in writing or orally {CA [843] CAB 423}.

[15] It is of note that though the majority refer to the significant forensic disadvantage warning at CA [163]-[164] CAB 229, their reasoning process appears contrary to it. For example, the majority found the exculpatory witnesses to have unreliable memories due to the passage of time. This was the basis upon which their evidence could be viewed as something other than 'cogent'. In contrast, they found that the complainant would certainly recall because of the nature of the offending against him {CA [161]-[162] CAB 228-9, [216] 248, [219]-[220] 249, [253]-[256] 265-6}. In addition to paying little regard to the directives in the significant disadvantage warning, this analysis takes as its starting point an acceptance that the complainant is a victim of this offending which is the very matter that consideration of the evidence is to determine.

[16] For example, the majority failed to assess the weight and significance of the evidence on the issue of whether the applicant was robed and alone {CA [285]-[291] CAB 277-8}, instead summarising it without identifying anything in the evidence highlighted by the prosecution that enabled the prosecution to exclude the reasonable possibility that the centuries old practice was in fact followed on the dates in question.

made findings of fact contrary to theories the prosecution advanced at trial as explanations for departures from practice.[17]

51 The majority considered the applicant's denials in the record of interview to be emphatic {CA [181]-[185] CAB 234-5}. These denials were supported by both the evidence of 'alibi' and practice. In addition, the majority accepted that the denial attributed to the other boy was a 'significant matter' which 'weighed against' the prosecution's case {CA [179]-[180] CAB 233-4}. The majority reasoned that the jury were able to assess the 'possibility' that it was a false denial. Such reasoning leaves open as an unexcluded possibility that it was a truthful denial.[18]

10 **52** The majority also found the defence improbability arguments were 'powerful' and it was highly improbable that the applicant would have acted in the way alleged {CA [98] CAB 209}. The majority highlighted a number of cases where brazen or improbable offending has been found proven {CA [99]-[101] CAB 209-211}. They noted that these cases show that high risk does not, 'in and of itself', oblige a reasonable doubt {CA [102] CAB 211}. But each of these examples was dealing with multiple complainants where tendency and/or coincidence reasoning was available to counter the unlikeliness of the circumstances of the alleged offending.[19] The majority do not explain how these case examples assist in the present case where there were no other complainants providing allegations to counter the improbability of the offending as alleged. Thus improbability was a matter properly
20 contributing to whether doubt was raised and left.

53 In addition, the majority made findings relating to the complainant himself which are ordinarily viewed as matters tending against proof beyond reasonable doubt. These include that the complainant: was uncertain about many matters {CA [77] CAB 203}; had a hazy recollection of the surrounding circumstances of his allegations {CA [216] CAB 248, [219]-[220] 249}; had 'buried the memories' {CA [86] CAB 205-6}; made mistakes about when the offending occurred {CA [234]-[237] CAB 254-5}; and was unable to reconcile his account

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[17] First, for example, contrary to the prosecution case at trial that the applicant's practice of greeting on the front steps did not commence until 1997, the majority accepted there was unchallenged evidence of that being his practice in 1996 {CA [272] CAB 272, [279]-[281] 275-6}. Second, the majority do not engage at all with the difficulty in the prosecution theory that Portelli was away from the applicant for two minutes attending to books on the sanctuary while offending of 5-6 minutes duration took place (compare {CA [283] CAB 276 with [1071] 474. Third, the majority accept there was no evidentiary basis for the prosecution theories as to why the applicant was in the midst of the procession during the second incident but provide no alternate explanation for why the applicant would be in that place at that time {CA [347]-[350] CAB 297-8}.

[18] To this must be added that the jury were directed to have regard to the significant disadvantage the applicant faced in not having the other boy available to give evidence of his denial {Charge 1651.21-31 CAB 102}. It is of note that the majority's suggestion at CA [178] CAB 233 that the denial was given no particular prominence in the defence closing is wrong. In fact, the defence referred to it as one of three 'principal matters' for the jury to bear in mind as they listened to the addresses {Defence closing 1403.24-27 AFM 83, 1411.5-17 AFM 84}.

[19] For example, the plurality in *Hughes v The Queen* (2017) 263 CLR 338, 361-2 [57]-[60] per Kiefel CJ, Bell, Keane and Edelman JJ emphasised that courting a substantial risk of discovery is unusual and, had there been no cross-admissibility in that case, the evidence of each complainant might have seemed 'inherently unlikely'.

with at least some undisputed facts {CA [225] CAB 250}. In addition, his account contained a number of implausible features {CA [78]-[80] CAB 203-4}; and changes {CA [73]-[74] CAB 201-2}. While the existence of these features may not, in isolation, warrant appellate court intervention on an unreasonableness ground, they are properly to be considered in combination with all the other matters indicating unexcluded doubt.

54 The correct judicial method is observed in the dissent of Weinberg JA. His Honour articulated the requirement for the prosecution to eliminate any reasonable possibility that there was no opportunity for the offending {CA [457] CAB 320, [491] 326, [510] 331, [520] 333, fn 143 334, [532] 342, [586] 353, [684]-[686] 378, fn 191-2 378, [733] 392, [948]-[953] 447-8, [955]-[956] 449, [987] 456, [1087] 478, [1105] 482}. This extends to circumstantial evidence of practice {CA [587] CAB 353, [944] 446, [947] 447, [960]-[969] 450-2}. He referred to the requirement for strict observation of the test in *M* {CA [662]-[663] CAB 370-1}, the profound impact of forensic disadvantage in this case {CA [1001] CAB 460, [1007]-[1008] 461, [1010] 461-2} and the central, and powerful, argument of the applicant regarding the compounding effect of each matter relied on as giving rise to doubt {CA [833] CAB 420, [840]-[843] 421-3, [889] 433, [1058] 471, [1063]-[1065] 472-3}. Justice Weinberg analysed in detail the cases relied on by the applicant regarding the proper approach to exculpatory evidence, where a complainant is seen as compelling {CA [620]-[640] CAB 361-5, [657] 369, [1102]-[1103] 481}. He emphasised that: the question is not simply whether the complainant is to be believed in preference to a witness who gives exculpatory evidence {CA [969] CAB 452}; an inability to find a complainant to be a liar does not determine whether proof beyond reasonable doubt has been established {CA [1056]-[1057] CAB 471}; and the law recognises the risks in placing too much weight on demeanour {CA [917] CAB 439}. His Honour's summary at CA [1100] CAB 480 should be accepted as correct.

55 At trial, believing the complainant did not conclude the jury's task. Similarly, the majority's belief in the complainant was the beginning, not the end, of the appellate enquiry.

The majority erred as, in light of findings made by them, there did remain a reasonable doubt as to the existence of any opportunity for the offending to have occurred.

56 The majority (correctly) accepted that the evidence of the altar servers was that at the conclusion of the external procession (which included the choir), they entered the priests' sacristy and then commenced their duties of clearing up which continually involved people going in and out of the priests' sacristy (thus making it a 'hive of activity') {CA [294]-[295] CAB 279-80, [297] 280-1}. The applicant argued that the hive of activity prevented an opportunity for the required 5-6 minutes of offending to have occurred. In rejecting this

argument, the majority found that it was 'open to the jury' to find that the 5-6 minutes of offending occurred before the hive of activity commenced, during the 5-6 minutes of 'private prayer time' that Potter described occurring after the procession reached the west door {CA [300] CAB 281, [293] 279}. This finding did, indeed, avoid a clash between the offending and the hive of activity evidence. However, it was inconsistent with the complainant's account of having travelled in the same external procession as the altar servers. When the jury walked the route of the complainant after Mass it took almost four and a half minutes {DVD Exhibit X}: several minutes of 'travel time' was required for the complainant and the other boy between the conclusion of Mass and the commencement of the offending (not to mention the time for 'poking around' in the room and swigging wine before the applicant entered). The majority concluded that if any of the evidence showed impossibility, in one respect or another, then the jury must have had a doubt {CA [130] CAB 219, [151] 225}.[20] The facts as found by them were that the only time when the room was empty for 5-6 minutes was a time when the complainant and the other boy, on the Crown case, were not in the room.[21] Thus, according to this aspect of the majority's own approach, the verdicts were unreasonable.

Part VII: Orders sought

57 Appeal allowed. Set aside the order of the Court of Appeal and in lieu thereof allow the appeal on Ground 1 and quash the applicant's convictions and enter verdicts of acquittal in their place.

Part VIII: Time estimate

58 The applicant seeks no more than four hours for the presentation of oral argument.

3rd January 2020

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[20] Of course, to show impossibility of offending does far more than raise and leave a reasonable doubt. The correct approach involves recognising that an unexcluded real chance that the offending was impossible would raise and leave a reasonable doubt.

[21] As Weinberg JA correctly noted, the 'hive of activity' evidence was squarely at odds with the account of the complainant {CA [965] CAB 451, fn 125 303}.

Annexure (Legislative Provisions)

***Criminal Procedure Act 2009* (Vic)**

276 Determination of appeal against conviction

(1) On an appeal under section 274, the Court of Appeal must allow the appeal against conviction if the appellant satisfies the court that—

(a) the verdict of the jury is unreasonable or cannot be supported having regard to the evidence…

***Evidence Act 2008* (Vic)**

38 Unfavourable witnesses

(1) A party who called a witness may, with the leave of the court, question the witness, as though the party were cross-examining the witness, about—

(a) evidence given by the witness that is unfavourable to the party; or

(b) a matter of which the witness may reasonably be supposed to have knowledge and about which it appears to the court the witness is not, in examination in chief, making a genuine attempt to give evidence; or

(c) whether the witness has, at any time, made a prior inconsistent statement.

(2) Questioning a witness under this section is taken to be cross-examination for the purposes of this Act (other than section 39).

(3) The party questioning the witness under this section may, with the leave of the court, question the witness about matters relevant only to the witness's credibility.

(4) Questioning under this section is to take place before the other parties cross-examine the witness, unless the court otherwise directs.

(5) If the court so directs, the order in which the parties question the witness is to be as the court directs.

(6) Without limiting the matters that the court may take into account in determining whether to give leave or a direction under this section, it is to take into account—

(a) whether the party gave notice at the earliest opportunity of the party's intention to seek leave; and

(b) the matters on which, and the extent to which, the witness has been, or is likely to be, questioned by another party.

(7) A party is subject to the same liability to be cross-examined under this section as any other witness if—

(a) a proceeding is being conducted in the name of the party by or on behalf of an insurer or other person; and

(b) the party is a witness in the proceeding.