IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

No. M112 of 2019

BETWEEN:

GEORGE PELL

Applicant

and

THE QUEEN

Respondent

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RESPONDENT'S SUBMISSIONS

Part I: Certification

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

Part II: Issues

2. The issue on appeal, should special leave be granted, is whether the majority of the Court of Appeal erred in their determination of ground 1 of the applicant's appeal by:

   a. requiring the applicant to establish that the offending was impossible in order to raise and leave a doubt; and/or

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   b. making factual findings in light of which there remained a reasonable doubt.[1]

3. These alleged errors were identified by the applicant as his two proposed grounds of appeal.[2]

4. The more general issues stated at paragraphs 2, 3 and 6 of the Applicant's Submissions do not arise.

5. Paragraph 2 as stated is based on the premise that the opportunity evidence in this case in and of itself raises a reasonable doubt. That premise is problematic: it is at odds with High Court authority that an appellate court's task on an unreasonable jury verdict appeal is to look at the evidence as a whole, rather than ask whether individual pieces of evidence consistent with innocence render the jury verdict unreasonable;[3] and it assumes that the jury must have had a reasonable doubt, which is precisely the question the appellate court has to answer.

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6. Paragraph 3 suggests that there is a difference in the way that complainants of sexual offending are assessed. It is unclear how this issue is said to relate to the proposed grounds of appeal or the way in which the majority of the Court of Appeal approached their task.

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[1] See Applicant's Submissions [4]-[5].

[2] Application for Special Leave to Appeal [1]-[2].

[3] *R v Hillier* (2007) 228 CLR 618 (***Hillier***); see below at [27].

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7. Paragraph 6 suggests that the High Court should determine for itself whether it was open to the jury to find the offending proven beyond reasonable doubt.[4] In the absence of identified error in the approach of the majority of the Court of Appeal, this is not the role of the High Court.[5] Further, it is not a task that can be properly undertaken by the High Court when it has not been apprised of the whole of the evidence at trial.[6]

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

8. Notice under s 78B of the *Judiciary Act 1903* (Cth) is not required.

Part IV: Factual Matters in Contention

9. The Crown case is summarised in the Court of Appeal's judgment[7] at [42]-[52].

10 10. There was a significant body of evidence at trial. The applicant refers only to a small portion of that evidence. Consequently, the Chronology and Part V of the Applicant's Submissions provide an incomplete and inaccurate picture of the facts.

11. The applicant glosses over evidence supportive of the account of the complainant (**A**):[8]

    a. A identified the Priests' Sacristy as the location for the first incident. Significantly, the applicant would ordinarily have used the Archbishop's Sacristy to robe and disrobe, but at the end of 1996 the Archbishop's Sacristy was not in use and the applicant was using the Priests' Sacristy before and after Mass.[9] Other witnesses were not aware of or did not recall this fact.[10]

    b. A described entering the Priests' Sacristy just prior to the first incident and finding a 20 wood panelled area containing cupboards and resembling a storage kitchenette. It was in this area that A said he and the other boy (**B**) found wine.[11] Notably:

        i. A's description of the layout and features of this area of the Priests' Sacristy was accurate.[12]

        ii. The area described by A was only visible once well inside the Priests' Sacristy.[13]

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[4] A number of the applicant's arguments appear to address this general issue, rather than whether the majority of the Court of Appeal erred: Applicant's Submissions [33]-[42].
[5] *Liberato v The Queen* (1985) 159 CLR 507, 509 (Mason ACJ, Wilson and Dawson JJ). See also *Hillier* (2007) 228 CLR 618, 640 [54]-[55] (Gummow, Hayne and Crennan JJ).
[6] The Applicant's Book of Further Material contains a very limited selection (107 pages) of materials from the trial. In contrast, the transcript for the trial alone ran to some 1600 pages. Compare *SKA v The Queen* (2011) 243 CLR 400, 409 [25] (French CJ, Gummow and Kiefel JJ) (***SKA***); *BCM v The Queen* (2013) 88 ALJR 101, 106 [32] (the Court).
[7] *Pell v The Queen* [2019] VSCA 186 (***Pell***).
[8] *Pell* [95]-[97] **(CAB 208-209)**.
[9] *Pell* [258] **(CAB 267)**; Portelli T579.22-580.15 **(RFM 493-494)**; McGlone T931.23-26, T932.12-933.2 **(RFM 633, 634-635)**.
[10] Finnigan T421.1-9 **(RFM 340)**; Potter T440.27-441.11 **(RFM 347-348)**; Connor T1019.6-1020.30 **(RFM 710-711)**.
[11] A (Transcript of Ex MFI-G) T156.16-157.2, T172.26-173.15 **(RFM 37-38, 53-54)**.
[12] *Pell* [95] **(CAB 208)**.
[13] See Photobook 1 (Ex B) Photos 9-12, 15 **(RFM 208-212)**; Jury View at St Patrick's Cathedral (Ex X) 17:35-19:50. See also Portelli T568.20-22 **(RFM 482)**; Parissi T716.23-717.5 **(RFM 587-588)**; Mayes T1086.4-19 **(RFM 726)**.

iii. The area described by A was the area where the sacramental wine was stored and prepared for Mass.[14]

iv. A's evidence was that he had never been in the Priests' Sacristy before the first incident.[15] It was off limits to choristers[16] and other choristers stated that they had not been in the sacristies.[17]

12. Paragraphs 11, 16-18 and 20 of the Applicant's Submissions assert that Portelli, Potter and McGlone gave "alibi" evidence. This overstates their evidence, which was as follows:[18]

a. Portelli's direct evidence of the applicant's location after Mass on 15 and 22 December 1996 consisted of Portelli responding affirmatively to a series of leading questions by
10 the applicant's counsel.[19] In contrast, in examination-in-chief, Portelli said:[20]

> GIBSON: Do you recall any specific mass said in the latter part of 1996?—Well there would've been the mass of the vigil of Christ the King, which is the last Saturday of November. There would've been the four Sundays of Advent; *I think* the Archbishop *might have been* present at two of those, and then of course the masses on Christmas Day.
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> ...
>
> And he was present you say, you think for two of [the four Sundays of Advent]?—*I think so*. He would've been in Sydney for the bishop's conference for part of it.
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> What leads you to think that he was present for two of them?—Well the bishop's conference, the Australian bishop's conference used to be held in that part of November,
> 20 so he would've been away for at least one weekend. Which weekend it was I'm not sure.

Portelli was unable to recall whether he and the applicant processed internally or externally before and after Mass on the two occasions in December 1996.[21] He was unable to recall where he went immediately after each Mass and had no independent recall of whether he and the applicant had any events after each Mass.[22]

b. Potter stated that he had an actual recollection of the applicant greeting people after Mass in 1996.[23] However, he was unable to recall which altar servers assisted him on

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[14] Portelli T568.10-570.16 **(RFM 482-484)**; Potter T451.16-455.24 **(RFM 358-362)**.

[15] A T157.15-17 **(RFM 38)**. The walkthrough with A on 29 March 2016 took place after A had described the layout of the Priests' Sacristy in his police statement: Reed T1136.6-21, T1137.8-10 **(RFM 730, 731)**; Discussion T1147.16-29 **(RFM 732)**. There was no evidence that A obtained knowledge of the Priests' Sacristy layout via some other means. The highest the evidence got regarding this notion was puttage by the applicant's counsel to the following effect (A T357.12-16 **(RFM 196)**):

> You were taken, were you not, on a tour of the cathedral when you joined the choir?—I would have, yes.
> And you were shown the sacristies?—I have no recollection of that, no.
> Do you dispute it?—Um, no.

[16] Finnigan T402.12-17 **(RFM 335)**; Parissi T717.9-10 **(RFM 588)**; Mayes T1084.18-20, T1086.7-13 **(RFM 725, 726)**; La Greca T1189.28-1190.21 **(RFM 741-742)**.

[17] Parissi T717.6-8 **(RFM 588)**; La Greca T1190.19-21 **(RFM 742)**. See also Potter T523.6-10 **(RFM 431)**.

[18] See also [38]-[41] below.

[19] The entirety of Portelli's evidence in this respect is set out in *Pell* [248]-[250] **(CAB 260-265)**.

[20] Portelli T581.25-582.9 (emphasis added) **(RFM 495-496)**.

[21] Portelli T581.15-19 (before Mass), T582.20-24 (after Mass) **(RFM 495, 496)**.

[22] Portelli T628.3-17 **(RFM 543)**. See also T614.25-30 **(RFM 529)**.

[23] Potter T481.26-31 **(RFM 388)**.

those occasions[24] and he gave contradictory evidence about whether it was he or Father Portelli that assisted the applicant on those occasions.[25] As the applicant accepts,[26] regard to the entirety of Potter's evidence[27] demonstrates that the sacristan had a confused memory. Indeed, the applicant's counsel stated in closing to the jury that Potter's memory "may not be terrific".[28]

c. McGlone recalled introducing his mother to the applicant on the steps outside the Cathedral after a Sunday Mass in late 1996. He stated that he had a specific recollection of this occasion because it was the first time he had served the applicant in Mass.[29] It became evident, however, that he had served the applicant in an evening vigil Mass on
10 23 November 1996.[30]

13. Paragraphs 11, 15, 19 and 28 of the Applicant's Submissions refer to evidence of practices, "said by some to be 'invariable'",[31] of the applicant remaining on the steps after Mass to greet parishioners and of the applicant always being accompanied while robed. But:

a. Portelli accepted the possibility that the applicant might on occasion have stayed on the Cathedral steps only for a short period of time before returning to the sacristies.[32] He referred, unprompted, to "one or two occasions" where the applicant did not stay at the front door to the Cathedral.[33] On those occasions, the applicant would remain at the end of the procession but would enter the Cathedral at the south transept to return to the sacristies, rather than following the choir through the Knox Centre corridor.[34]

20 b. Two choristers, La Greca and Nathan, recalled the applicant sometimes staying with the procession as it moved around the side of the Cathedral.[35] La Greca recalled a "more dignified procession" on those occasions; the choir would open up to allow the applicant and clergy to enter the Knox Centre first. Another chorister, Parissi, recalled that the applicant "regularly" would enter the Knox Centre before the choir, which would wait for him to walk by before following him in.[36]

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[24] *Pell* [265] **(CAB 270)**; Potter T547.14-548.10 **(RFM 455-456)**.
[25] Compare Potter T483.25-484.2 **(RFM 390-391)** and T521.20-23 **(RFM 429)**.
[26] Applicant's Submissions [18].
[27] See **RFM 344-461**.
[28] *Pell* [267] **(CAB 271)**; Defence Closing T1408.27 **(RFM 797)**.
[29] *Pell* [271] **(CAB 272)**; McGlone T927.22-24, T935.20-23, T947.11-13, T964.22-24, T970.20-23 **(RFM 629, 637, 649, 666, 672)**.
[30] *Pell* [271] **(CAB 272)**; McGlone T1003.2-1004.11 **(RFM 705-706)**.
[31] The term "invariable" was repeatedly used by the applicant's counsel in cross-examination but only one witness, Connor, expressly adopted it: T1043.24-25, T1044.29-30 **(RFM 717, 718)**. He did so only after the applicant's counsel had used the term repeatedly in questions to him: T1038.7-8, T1038.11, T1039.4-5, T1039.25-28, T1040.12-13, T1041.17, T1042.8-10, T1042.18-23 **(RFM 712-716)**.
[32] *Pell* [283] **(CAB 276)**; Portelli T583.27-584.3 **(RFM 497-498)**.
[33] Portelli T624.17-21 **(RFM 539)**.
[34] Portelli T624.17-625.27 **(RFM 539-540)**.
[35] La Greca T1197.25-29, T1203.25-1204.11 **(RFM 749, 755-756)**; Nathan (Transcript of Ex MFI-R) T991.12-18 **(RFM 567)**.
[36] Parissi T712.19-713.15 **(RFM 583-584)**. See also T722.13-T723.10 **(RFM 593-594)**.

c. Portelli accepted there may have been occasions on which he did not accompany the applicant back to the sacristies after Mass, and that, even if he had escorted the applicant back, he might not have gone into the Priests' Sacristy with him.[37]

d. A number of choristers recalled seeing the applicant in the choir room after Mass.[38] Mayes recalled the applicant coming in to the choir room, robed, within the first five minutes of the choir arriving.[39] Thomas, who would disrobe and leave straight away after Mass,[40] saw the applicant in the corridor near the choir room after Mass.[41] The choristers said that the applicant was sometimes unaccompanied on these visits.[42]

e. One chorister said that he had seen the applicant, robed and unaccompanied, in the corridors before Mass on Sundays.[43] Mallinson said that he had seen the applicant accompanied and unaccompanied, robed and unrobed in the sacristy corridor.[44]

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14. Paragraph 14 of the Applicant's Submissions refers to evidence that it would not be possible for two choristers to detach from a procession unnoticed. But:

a. A number of witnesses stated that the procession would become more relaxed, less orderly and "excited", with choirboys mingling and speaking to each other, as the procession passed the first of the gates in its path around the side of the Cathedral.[45] The procession was "a bit rowdy"[46] when it reached the iron gate to the Knox Centre and the formation of the procession broke up.[47] One chorister said that as the procession reached the Knox Centre, "everyone just bolt[ed]", with choirboys running in the rush to disrobe and leave.[48] It was possible for two choirboys to "have slipped through the cracks".[49]

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b. While some witnesses said Finnigan would keep the choristers in procession,[50] Finnigan himself said that as the choir exited the Cathedral he would move up the procession, pass everybody and reach the front, and be the first person in the choir room.[51] When asked if he would have seen two choirboys "nicking off", Finnigan said: "Yep, unless I was distracted, but mostly likely I would have seen it."[52]

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[37] *Pell* [247], [283] **(CAB 258-259, 276)**; Portelli T590.3-15, T591.5-21 **(RFM 504, 505)**.
[38] *Pell* [290], [578] **(CAB 278, 351)**; La Greca T1205.12-20 **(RFM 757)**; Parissi T716.1-6 **(RFM 587)**; Nathan T992.15-28 **(RFM 568)**.
[39] *Pell* [290] **(CAB 278)**; Mayes T1082.2-18, T1087.23-27 **(RFM 723, 727)**.
[40] Thomas (Transcript of Ex MFI-T) T1106.2-8 **(RFM 620)**.
[41] Thomas T1100.4-14 **(RFM 619)**.
[42] Parissi T716.15-17 **(RFM 587)**; Thomas T1100.11-19 **(RFM 619)**.
[43] *Pell* [289] **(CAB 278)**; Bonomy T787.31-788.20 **(RFM 608-609)**.
[44] *Pell* [287]-[288] **(CAB 277-278)**; Mallinson T319.10-17 **(RFM 317)**.
[45] La Greca T1198.25-1199.16 **(RFM 750-751)**; Doyle T819.1-10, T826.14-19, T830.8-21 **(RFM 611, 613, 614)**; Derrij T643.9-645.26 **(RFM 552-554)**; D Dearing T681.1-682.28 **(RFM 561-562)**; Finnigan T402.19-24 **(RFM 335)**; Parissi T713.23-714.9 **(RFM 585)**.
[46] *Pell* [311] **(CAB 285)**; D Dearing T663a.8-23 **(RFM 557)**; Mayes T1074.26-1075.4 **(RFM 720-721)**.
[47] Cox T347.24-29 **(RFM 324)**. See also *Pell* [779]-[783] **(CAB 403-404)**.
[48] Thomas T1098.18-1099.11 **(RFM 617-618)**.
[49] La Greca T1214.15-18 **(RFM 766)**. See also T1215.3-7 **(RFM 767)**.
[50] Cox T361.2-19 **(RFM 326)**; D Dearing T673.15-19 **(RFM 560)**; Parissi T721.7-9 **(RFM 592)**.
[51] *Pell* [302]-[303] **(CAB 282)**; Finnigan T397.2-7, T397.14-26 **(RFM 331)**.
[52] *Pell* [308] **(CAB 284)**; Finnigan T406.7-9 **(RFM 336)**.

c. There would have been many people around the south transept at the time the procession passed it, including people exiting the Cathedral through the south transept and tourists (possibly in the hundreds) milling around.[53]

d. There was evidence of instances where choristers did leave the procession.[54] Witnesses, including Rodney Dearing who did not think two choirboys could leave unnoticed, did not observe or recall these instances.[55]

e. Mallinson said that as the organist, he would not have seen two choirboys re-entering the Cathedral via the south transept.[56]

f. There was no marking of the roll once the choir returned to the choir room.[57] Finnigan said that while he was the "main person" looking after the choristers, it was "not necessarily" the case that he would wait in the choir room for any missing choristers, because he "might not know they were missing".[58] Cox said that it was only "possibly" the case that somebody would notice if a chorister was missing or their robes or music not returned, since at that point it was "[l]ess regimented than other times".[59] There was evidence that the choir room after Mass was chaotic.[60]

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15. Paragraph 23 raises the matter of the applicant's robes. No reference is made to the fact that, as Weinberg JA observed, it was plainly possible for a person wearing the robes and assorted vestments to expose his penis.[61] The robes were an exhibit at the trial[62] and were available to the jury in the jury room during their deliberation.[63]

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16. Paragraph 24 misstates A's evidence. A was not sure whether the door had been open or closed; he did not think the door was wide open at the time.[64] A agreed that when B said "Can you let us go?" it was in an elevated voice, but he did *not* say this would have been heard in the corridor if the door was not shut. While A agreed, as a general proposition, that an elevated voice could be heard through a door that is not shut, he said whether it was the case depended on how loud or soft the voice was.[65]

17. Paragraph 24 also refers to the "hive of activity" which, according to the applicant, was occurring while the first incident took place. This is a mischaracterisation of the evidence, as discussed in more detail in Part V below.[66] For present purposes, it suffices to note that

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[53] *Pell* fn 120 **(CAB 287)**; Finnigan T399.25-400.10 **(RFM 332-333)**; Portelli T575.25-577.5 **(RFM 489-491)**; D Dearing T661.7-22 **(RFM 556)**.
[54] Nathan T985.20-987.11, T1002.3-1003.18 **(RFM 564-566, 569-570)**; La Greca T1215.3-7 **(RFM 767)**.
[55] R Dearing T752.4-18 **(RFM 607)**; Mallinson T290.12-14 **(RFM 288)**; La Greca T1213.26-28 **(RFM 765)**.
[56] *Pell* [319]-[321] **(CAB 290)**; Mallinson T288.10-21, T288.27-289.24 **(RFM 286-287)**.
[57] *Pell* [304] **(CAB 282)**; Finnigan T408.23-29 **(RFM 337)**; La Greca T1203.17-19 **(RFM 755)**.
[58] Finnigan T408.3-15 **(RFM 337)**.
[59] Cox T367.29-368.1 **(RFM 327-328)**.
[60] *Pell* [291] **(CAB 325)**; McGlone T956.27-957.5 **(RFM 658-659)**.
[61] *Pell* [820] **(CAB 416)**.
[62] Ex 2 and 6. See also T192.8, T620.15-16 **(RFM 226, 535)**.
[63] *Pell* [145] **(CAB 223)**. The Court of Appeal also had the opportunity to handle the robes.
[64] *Pell* [78] **(CAB 203)**; A T346.24-347.3 **(RFM 187-188)**.
[65] A T347.30-349.17 **(RFM 188-190)**.
[66] See [56]-[63] below.

the applicant's suggestion that there could have been up to 12 altar servers[67] is not grounded in the evidence. Potter said there were usually 8 altar servers at Sunday Mass;[68] McGlone and Connor recalled an average of 6 to 8 altar servers.[69]

18. Paragraph 25 refers to A and B having to "negotiate their way through two locked doors without alerting choir officials to their absence". The applicant implies that A should have had a specific memory or explanation of how he and B made their way through these doors. But other choristers recalled no impediment to going through one or both of these doors when they were late to rehearsal.[70] Further, there was evidence that:

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   a. The glass door was sometimes unlocked when the procession reached it,[71] and was sometimes kept open by way of a doorstopper.[72]

   b. The fire door was sometimes kept open by way of a doorstopper or a mat.[73]

   c. The choir would use the toilets outside the glass door,[74] meaning that a chorister who needed to use the toilet after Mass would need to go out the fire door and the glass door. One chorister said that he would chock open the door when he needed to go to the toilet.[75]

   d. After Mass, there would be choristers disrobing in the corridor area just outside the choir room,[76] close to the fire door.

19. Paragraph 27 states that Portelli "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".[77] This is a misstatement of Portelli's evidence, which made no reference to an "unusual occasion". Again, Portelli's "recollection" consisted of a series of affirmative answers to leading questions in cross-examination.[78] He later said:[79]

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> RICHTER: Do you recall in February - he didn't say solemn mass again until March?—Yes. If you can take that.

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[67] A figure that appears to have been taken from *Pell* fn 198 **(CAB 390)**.
[68] Potter T438.22-23 **(RFM 345)**.
[69] McGlone T923.11-13 **(RFM 625)**; Connor T1011.3-4 **(RFM 708)**. McGlone said that the main concern was to fill the four primary positions of thurifer, crucifer and two acolytes; "[a]nything beyond that was a plus": McGlone T924.3-10 **(RFM 626)**.
[70] Doyle T814.24-31, T821.25-26 **(RFM 610, 612)**; La Greca T1185.7-1186.14, T1221.19-21 **(RFM 737-738, 773)**.
[71] McGlone T939.17-20, T980.18-22 **(RFM 641, 682)**.
[72] La Greca T1184.15-24, T1220.3-11; **(RFM 736, 772)**; Thomas T1093.5-10, T1100.20-24 **(RFM 615, 619)**.
[73] Cox T347.10-17 **(RFM 324)**; Finnigan T392.5-11 **(RFM 329)**; Thomas T1093.17-19, T1100.20-24 **(RFM 615, 619)**.
[74] Mallinson T241.7-11, T321.2-13 **(RFM 239, 319)**; D Dearing T667.26-668.3 **(RFM 558-559)**; Parissi T706.17-20 **(RFM 577)**; Thomas T1096.10-18 **(RFM 616)**.
[75] Thomas T1100.25-30 **(RFM 619)**.
[76] Mayes T1082.26-1083.8, T1092.18-27, T1094.4-15 **(RFM 723-724, 728, 729)**.
[77] See also *Pell* [861], [875] **(CAB 427, 430)**, where, the respondent submits, Weinberg JA also misstated Portelli's evidence on this point.
[78] Portelli T611.16-21, T612.2-8 **(RFM 526, 527)**.
[79] Portelli T612.18-26 (emphasis added) **(RFM 527)**.

HIS HONOUR: So, do you agree, is that your memory or you?—Yes, I do recall that he did preside once, *but I mean it was – there were so many different events but that's what would have happened.* The protocol is if - - -

RICHTER: You're not certain about that date, all right.

Part V: Statement of Argument

Relevant legal principles

20. It is fundamental to our system of criminal justice that the jury is the constitutional tribunal for deciding issues of fact.[80] The role of the jury as representative of the community in a jury trial is of abiding importance;[81] the jury is "a kind of microcosm of the community".[82] The verdict of the jury has unique legitimacy, and "the determination of guilt by jury protects the courts from controversy and secures community support for, and trust in, the administration of criminal justice."[83]

21. The jury also has epistemic advantages as the primary fact-finder. It has a "composite and broad experience of life"[84] and a worldly wisdom that cannot be assumed to be shared by appellate judges.[85] It is best placed to decide matters of credibility and reliability.[86] The jury has the benefit of being able to deliberate as a group in private throughout the trial.[87] And its decisions are subject to the discipline generated by the requirement of unanimity or a very high majority.[88]

22. In light of the above considerations, the setting aside of a jury's verdict is a serious step, not to be taken without particular regard to the advantage enjoyed by the jury over a court of appeal.[89] The boundaries of reasonableness within which the jury's function is to be performed should not be narrowed in a hard and fast way.[90]

23. The question for the court on an unreasonable jury verdict appeal is that posed by the joint judgment in *M v The Queen*: "whether the court 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".[91] The applicant accepts that another way of expressing this test is to say that the jury must have entertained a doubt.[92]

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[80] *R v Baden-Clay* (2016) 258 CLR 308, 329 [65] (the Court) (***Baden-Clay***).
[81] *Baden-Clay* (2016) 258 CLR 308, 329 [65] (the Court).
[82] *MFA v The Queen* (2002) 213 CLR 606, 621 [48] (McHugh, Gummow and Kirby JJ).
[83] *Alqudsi v The Queen* (2016) 258 CLR 203, 251 [117] (Kiefel, Bell and Keane JJ).
[84] *M v The Queen* (1994) 181 CLR 487, 507 (Brennan J) (***M***).
[85] *Jones v The Queen* (1997) 191 CLR 439, 441-2 (Brennan J).
[86] *Chidiac v The Queen* (1991) 171 CLR 432, 443-4 (Mason CJ). See also *R v Bauer* (2018) 92 ALJR 846, 865 [69] (the Court).
[87] *Pell* [37], [103], [1050] **(CAB 191, 211, 469-470)**; *Hawi v The Queen* [2014] NSWCCA 83, [480] (McCallum J).
[88] *Pell* [37] **(CAB 191)**; *AK v Western Australia* (2008) 232 CLR 438, 477-8 [103] (Heydon J).
[89] *Baden-Clay* (2016) 258 CLR 308, 329 [65] (the Court).
[90] *Baden-Clay* (2016) 258 CLR 308, 329 [65] (the Court).
[91] (1994) 181 CLR 487, 494-5 (Mason CJ, Deane, Dawson and Toohey JJ).
[92] Applicant's Submissions fn 8; *Libke v The Queen* (2007) 230 CLR 559, 596-7 [113] (Hayne J). See also *Pell* [21]-[22], [614]-[618] **(CAB 185-186, 359-360)**.

24. The applicant submits at paragraph 43 of his submissions that *M* "requires" the appellate court to undertake a two-step process. While *M* discusses the relationship between an appellate court's doubt and that of the jury, that discussion ends with the statement that "the ultimate question *must always be*" the question set out above.[93] It is this ultimate question which ensures that the court is not substituting trial by a court of appeal for trial by jury.[94] The observations made in *M* about an appellate court's doubt do not supplant the ultimate question stated in *M*. Thus, the appellate court's independent assessment of the whole of the evidence is ultimately performed for the purpose, not (as asserted by the applicant) of determining whether the court itself has a reasonable doubt, but of deciding whether it was open to the jury to find the accused guilty.[95]

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25. In *M*, the joint judgment said that there were two considerations that the appellate court "must not disregard or discount" in assessing whether a jury verdict is unsafe or unsatisfactory: first, that the jury is the body entrusted with the primary responsibility of determining guilt or innocence; and second, that the jury has had the benefit of having seen and heard the witnesses.[96] Applying the two-step process outlined by the applicant without regard to the ultimate question in *M* risks obscuring the first of those considerations.

26. Further, if an appellate court applying the two-step process states that it experiences a reasonable doubt but goes on to uphold the jury verdict at the second stage, a question mark may be cast over the jury's verdict. Undermining a conviction is a serious consideration[97] and one which, in the respondent's submission, militates against any notion that the two-step process replaces the ultimate question posed in *M*.

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27. The *M* test asks whether it was open to the jury to reach the verdict that it did. As was stated in *Libke v The Queen*, "[i]t is not sufficient to show that there was material which might have been taken by the jury to be sufficient to preclude satisfaction of guilt to the requisite standard."[98] And as was stated in *R v Hillier*, the fact that there is evidence consistent with an accused's innocence is not dispositive, because the question for the Court of Appeal is "whether, on the *whole* of the evidence, it was open to the jury to be persuaded beyond reasonable doubt that [the accused] was guilty".[99] It is therefore wrong for an appellate court to treat facts which in isolation are consistent with innocence as requiring the conclusion that it was not open to the jury to be satisfied of guilt beyond reasonable doubt.[100] Further, the fact that the appellate court considers there to be multiple views of the evidence open to the

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[93] *M* (1994) 181 CLR 487, 494-5 (Mason CJ, Deane, Dawson and Toohey JJ) (emphasis added). Reaffirmed in *Baden-Clay* (2016) 258 CLR 308, 330 [66] (the Court).
[94] *M* (1994) 181 CLR 487, 494 (Mason CJ, Deane, Dawson and Toohey JJ).
[95] *SKA* (2011) 243 CLR 400, 409 [22] (French CJ, Gummow and Kiefel JJ): "On appeal, the task of the Court of Criminal Appeal was to make an independent assessment of the whole of the evidence, *to determine whether the verdicts of guilty could be supported*" (emphasis added). See also *Chamberlain v The Queen [No 2]* (1984) 153 CLR 521, 534 (Gibbs CJ and Mason J).
[96] *M* (1994) 181 CLR 487, 493 (Mason CJ, Deane, Dawson and Toohey JJ). These considerations were described as the "starting point" in *SKA* (2011) 243 CLR 400, 405 [13] (French CJ, Gummow and Kiefel JJ).
[97] *Momcilovic v The Queen* (2011) 245 CLR 1, 229 [605] (Crennan and Kiefel JJ).
[98] (2007) 230 CLR 559, 597 [113] (Hayne J, Gleeson CJ and Heydon J agreeing).
[99] (2007) 228 CLR 618, 639 [49] (Gummow, Hayne and Crennan JJ) (emphasis in original).
[100] *Hillier* (2007) 228 CLR 618, 639 [51]-[52] (Gummow, Hayne and Crennan JJ).

jury, including a view consistent with innocence, does not necessarily mean that the jury verdict was unreasonable;[101] the assessment of the evidence is a matter for the jury.[102]

28. It is in the context of the above principles that Weinberg JA's analysis, upon which the applicant relies,[103] must be considered. His Honour applied the two-step process outlined by the applicant.[104] His Honour first considered all of the evidence and came to the view that he had a doubt as to the applicant's guilt. In reaching this conclusion, his Honour expressed views including that:

    a. A's evidence was "entirely unsupported";[105]

    b. if A's evidence stood alone, his Honour would "not [himself] be prepared to say, … that [A] was such a compelling, credible, and reliable witness that [his Honour] would necessarily accept [A's] account beyond reasonable doubt";[106]

    c. "Portelli was a credible and reliable witness" and "[h]is evidence alone may well have been sufficient to create a reasonable doubt as to the applicant's guilt";[107]

    d. Potter was "a witness whose evidence could generally be accepted as reliable when it came to matters of liturgical practice, and his own decades-long role as Sacristan";[108]

    e. McGlone's evidence about his meeting with his mother and the applicant was credible and had "a very strong 'ring of truth' about it";[109]

    f. Finnigan's evidence "was particularly significant";[110] and

    g. the applicant's denials in his record of interview were "made in a forceful and persuasive manner".[111]

Thus, in his Honour's view, the defence had made good the proposition that there was a "substantial body of evidence that … left open at least the 'reasonable possibility' that A's allegations fell short of the standard of proof required for conviction".[112]

29. Having reached this view on the "first limb" of the applicant's two-step process, his Honour considered the "second limb". His Honour noted that in respect of A's evidence, the Court of Appeal had seen exactly what the jury saw.[113] His Honour had also viewed recordings of the evidence given by a number of other witnesses.[114] While the jury had the advantage of being present in the courtroom for the whole of the trial, and the benefit of each other's views, his Honour ultimately considered "the advantage that the jury had in seeing and

[101] *Irwin v The Queen* (2018) 262 CLR 626, 645 [49] (the Court) (***Irwin***).
[102] *Irwin* (2018) 262 CLR 626, 646 [50], 647 [52] (the Court).
[103] Applicant's Submissions [54].
[104] *Pell* [663], [1034] **(CAB 370-371, 466)**.
[105] *Pell* [412] **(CAB 311)**; contra *Pell* [95]-[97] **(CAB 208-209)** and above at [11].
[106] *Pell* [929] **(CAB 443)**.
[107] *Pell* [1087] **(CAB 478)**.
[108] *Pell* [1088] **(CAB 478)**.
[109] *Pell* [1089] **(CAB 478)**.
[110] *Pell* [1090] **(CAB 478)**.
[111] *Pell* [1091] **(CAB 478)**.
[112] *Pell* [1105] (citations omitted) **(CAB 482)**.
[113] *Pell* [1036] **(CAB 467)**.
[114] *Pell* [1045] **(CAB 469)**.

hearing the evidence given in this trial to have been somewhat less than would ordinarily be the case."[115]

30. In applying the "first limb", Weinberg JA focused on his Honour's own assessment of the credibility and reliability of A and the various witnesses. The respondent submits that his Honour did not consider whether the jury could reasonably have formed a different conclusion on those matters that would have left it open for the jury to be persuaded beyond reasonable doubt of the applicant's guilt. His Honour's analysis at the "second limb", which focused on a comparison between what was before the jury and what was before the Court of Appeal, did not address this gap. As a result, his Honour's approach, the respondent respectfully submits, did not sufficiently acknowledge the jury's role as the primary tribunal of fact, as required by the ultimate question in *M*.

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31. His Honour's comments that certain pieces of evidence could, on their own, create a reasonable doubt[116] is also in tension with the requirement in *M* (which was highlighted in *Hillier*) that whether a jury's verdict is open must be assessed on the whole of the evidence; individual pieces of evidence consistent with innocence are not dispositive. In a similar vein, the applicant's submissions suggest, contrary to *M*, that some of the opportunity evidence in this case "raised a doubt" which A's evidence could not "eliminate".[117]

32. As Weinberg JA stated, the prosecution at trial had to eliminate any reasonable possibility that there was no opportunity for the offending to occur. On appeal, however, the question for the appellate court was whether it was open to the jury to be satisfied that the prosecution had discharged this burden. This is a different question to whether, in the appellate court's own view, the prosecution had discharged this burden. Failure to draw this distinction ignores considerations regarding the role and advantages of the jury that *M* states cannot be disregarded or discounted.

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Majority did not require applicant to establish that offending was impossible

The majority's general approach

33. The majority of the Court of Appeal began their reasons by correctly identifying the question they had to answer: whether, on the whole of the evidence, it was open to the jury to be satisfied beyond reasonable doubt that the applicant was guilty.[118] The majority noted the applicant's submission that the two-step process should be applied.[119] As required by *M*, the majority took heed of the role of and advantages enjoyed by the jury.[120]

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34. In Part I of their reasons, the majority outlined their approach. The "critical issue" of whether A's account could be accepted beyond reasonable doubt[121] had to be considered in the context of the numerous issues raised on the evidence, including whether A's account was

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115 *Pell* [1048]-[1050] **(CAB 469-470)**.
116 *Pell* [960], [1087] **(CAB 450, 478)**.
117 Applicant's Submissions [36].
118 *Pell* [12] **(CAB 183)**.
119 *Pell* [25] **(CAB 187)**.
120 *Pell* [27]-[41] **(CAB 187-192)**.
121 *Pell* [53] **(CAB 195)**.

false;[122] the alleged improbability of the offending due to its brazen nature;[123] whether the offending was impossible;[124] whether there was no reasonable opportunity for the offending;[125] and the impact of B's denial, the applicant's denials and the fact that Father Egan was not called.[126] Having regard to all of these matters and the whole of the evidence, the majority was not persuaded that the jury must have had a reasonable doubt about the applicant's guilt.[127] In addition, the majority formed the view on the whole of the evidence that they themselves did not experience a doubt about the applicant's guilt.[128]

35. In Part II of their reasons, the majority explored in detail the evidence relating to the issues of falsity, impossibility and opportunity identified in Part I. For each of these issues, the majority undertook their own independent analysis of the evidence and considered what view the jury could reasonably have formed about the credibility and reliability of the witnesses and the import of their evidence.[129] Taking the evidence, and what the jury could reasonably have made of the evidence, as a whole, the majority rejected the conclusion that the jury must have had a doubt about whether there was a realistic opportunity for the offending to occur, or a doubt that the particular sexual offending occurred.[130]

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"Belief" in the complainant

36. The applicant suggests that the majority proceeded on the basis of "believing" A — that this was "the end" of the majority's enquiry.[131] The majority did not reason on the basis of "belief" in A. Rather, they "reviewed the whole of the evidence"[132] and made an "assessment of [A's] credibility and reliability"[133] in the context of:

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a. the evidence A gave in the trial;

b. consistencies between A's account and other evidence;[134]

c. inconsistencies between A's account and other evidence;[135]

d. an assertion by defence that A consciously altered his evidence when challenged;[136]

e. the defence contention that A's story was inherently improbable;[137]

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[122] *Pell* [65]-[97] **(CAB 199-209)**.
[123] *Pell* [98]-[113] **(CAB 209-214)**.
[124] *Pell* [114]-[151] **(CAB 214-225)**.
[125] *Pell* [152]-[173] **(CAB 225-232)**.
[126] *Pell* [175]-[195] **(CAB 232-238)**.
[127] *Pell* [174] **(CAB 174)**.
[128] *Pell* [39] **(CAB 191)**.
[129] See, eg, *Pell* [253]-[256], [267], [271]-[272], [276], [283]-[284] **(CAB 265-266, 271, 272, 274, 279)**.
[130] *Pell* [351] **(CAB 298)**.
[131] Applicant's Submissions [55]. The prosecutor did not invite the jury to reason on the basis of belief. The trial judge gave clear directions to the jury on the onus and standard of proof: T1587.9-1588-9, T1592.4-1593.26, T1596.18-31 **(CAB 36-37, 41-42, 45)**. The applicant's counsel took no objection to the prosecutor's closing or the trial judge's directions on this issue. No challenge was made to the trial judge's charge on appeal: *Pell* [17] **(CAB 184)**.
[132] *Pell* [14] **(CAB 183)**.
[133] *Pell* [53]-[195] **(CAB 195-238)**.
[134] *Pell* [59] **(CAB 197)**.
[135] *Pell* [60] **(CAB 198)**.
[136] *Pell* [60]-[61], [73]-[76], [210]-[231] **(CAB 198, 201-203, 244-253)**.
[137] *Pell* [60], [62], [98]-[103] **(CAB 198, 209-211)**.

f. the defence contention that it was factually impossible for the offending to have occurred as alleged;[138]

g. A's failure to complain and A's explanation of why he did not complain, which the majority concluded seemed entirely plausible and compelling;[139]

h. B's denial;[140] and

i. the applicant's denials.[141]

37. By focusing on "belief", the applicant incorrectly suggests that the only basis on which the majority evaluated A's evidence was by reference to demeanour.[142] The applicant disregards an important aspect of the majority's assessment of A's credibility and reliability: that undisputed facts regarding the applicant's use of the Priests' Sacristy and the layout of the Priests' Sacristy provided independent support for A's account.[143] The applicant instead focuses on criticising the prosecution for not asking other choristers about whether they had been shown the Priests' Sacristy on a tour and whether they knew that the Archbishop's Sacristy was not being used for robing in late 1996. The applicant ignores evidence given by choristers that they had never been inside the Priests' Sacristy[144] and that the sacristies were a "mystery" to them.[145] The applicant also ignores the fact that senior participants in Mass, including the sacristan Potter, the altar server Connor and the choir marshal Finnigan did not recall that the applicant was using the Priests' Sacristy to robe.[146]

"Alibi" evidence

38. Much of the applicant's argument relies upon the claim that there was "cogent alibi" evidence.[147] The applicant makes this assertion without regard to the evidence set out above,[148] and without providing the High Court with the whole of Portelli, Potter and McGlone's evidence.[149]

39. The majority undertook a thorough review of Portelli and Potter's "alibi" evidence.[150] The majority identified a number of concerning aspects of their evidence: the contrast between their affirmative answers in cross-examination and their uncertain answers in examination-

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[138] *Pell* [63], [232]ff **(CAB 198-199, 253ff)**.
[139] *Pell* [81]-[87] **(CAB 204-206)**.
[140] *Pell* [179] **(CAB 233-234)**.
[141] *Pell* [185] **(CAB 235)**.
[142] Applicant's Submissions [36], [41].
[143] *Pell* [95]-[97] **(CAB 208-209)**; see above at [11].
[144] Parissi T717.6-8 **(RFM 588)**; La Greca T1190.19-21 **(RFM 742)**.
[145] Mayes T1086.7-19 **(RFM 726)**.
[146] Finnigan T421.1-9 **(RFM 340)**; Potter T440.27-441.11 **(RFM 347-348)**; Connor T1019.6-1020.30 **(RFM 710-711)**.
[147] Applicant's Submissions [35]-[37], [48]. Contrary to the applicant's submission at [35], senior counsel for the prosecution did not concede that the evidence was alibi evidence: see the full discussion at Court of Appeal T183.5-T186.29 **(RFM 803-806)**.
[148] See above at [12].
[149] The Applicant's Book of Further Materials reproduces 1 page from Potter's evidence, 6 pages from Portelli's evidence, and 3 pages from McGlone's evidence. The entirety of these witnesses' evidence is set out at **RFM 344-461** (Potter), **469-551** (Portelli), **621-707** (McGlone).
[150] *Pell* [244]-[267] **(CAB 256-271)**.

in-chief and re-examination; Potter's confusion about various undisputed facts relating to Mass; and the acknowledgement by the applicant's counsel that Potter was susceptible to being led and did not have a terrific memory. It is unsurprising that the majority concluded that it was open to the jury to have reservations about the reliability of Portelli's and Potter's evidence and thus reject the possibility that their evidence gave the applicant an alibi.[151] In doing so, the majority correctly[152] recognised that their task as the appellate court was to consider, on the basis of the evidence, what view of Portelli and Potter's evidence was reasonably open to the jury.[153]

40. The majority also independently reviewed McGlone's evidence.[154] As the majority observed, testing of McGlone's evidence demonstrated uncertainty regarding the date of the incident recalled by McGlone, and taken at its highest, McGlone's evidence merely ruled out the possibility that the first incident occurred on one of two dates.

41. Portelli, Potter and McGlone's evidence did not rise to the level of alibi evidence, actual or effective. *Palmer v The Queen*[155] does not assist the applicant; the alibi evidence relied upon in that case — sworn affidavits of service attesting to the appellant's location at precise times on the alleged date of the offending — is in stark contrast to the evidence here.[156]

Evidence of practices

42. The applicant argues it was not open to the jury to exclude the reasonable possibility that certain practices were followed so as to render the offending impossible.[157] Those practices were: (i) that the applicant would stand on the steps greeting parishioners after Mass for more than 10 minutes;[158] and (ii) that the applicant would be accompanied while robed.[159]

43. As the majority stated,[160] Portelli, Connor and Finnigan spoke of the applicant having a practice of standing on the steps after Mass for an extended period of time. But Portelli accepted that the applicant might on occasion have stayed on the steps for only a short period of time and referred to one or two occasions when this occurred.[161] And, significantly, a number of witnesses gave evidence of seeing the applicant at locations other than the steps shortly after Mass.[162] One witness said this occurred "regularly".[163] Such evidence provided

[151] The jury were evidently alert to the significance of Portelli's evidence; they requested a copy of the video recording of Portelli's evidence: T1670.10-16 **(RFM 798)**.
[152] Cf Applicant's Submissions [48], which relies upon an argument that is contrary to *Irwin* (2018) 262 CLR 626.
[153] Contra Weinberg JA's approach at *Pell* [1087]-[1088] **(CAB 478)**; see above at [30].
[154] *Pell* [268]-[272] **(CAB 271-272)**.
[155] (1998) 193 CLR 1.
[156] In *SKA* (2011) 243 CLR 400, also cited by the applicant, the High Court did not reach a conclusion on whether the jury verdicts were unreasonable; the matter was remitted to the Court of Criminal Appeal for rehearing.
[157] Applicant's Submissions [49]-[50].
[158] See *Pell* [239] **(CAB 255)**.
[159] See *Pell* [285] **(CAB 277)**.
[160] *Pell* [246], [279]-[280] **(CAB 257, 275)**.
[161] *Pell* [246] **(CAB 258)**; see above at [13(a)].
[162] *Pell* [290], [578] **(CAB 278, 351)**; see above at [13(b)], [13(d)].
[163] See above at [13(b)].

a sound foundation for the conclusion that any practice of standing on the steps not only *could*, but *was* departed from.

44. Similarly, while Portelli spoke of always accompanying the applicant while the applicant was robed, he allowed for the possibility that on occasions he did not accompany the applicant to the sacristies to disrobe.[164] Again, witnesses gave evidence of seeing the applicant robed and alone.[165]

45. The task of the jury as the constitutional tribunal of fact was to assess the evidence of the practices identified by the applicant in the context of all of the evidence in the case, including A's account of the offending. As the majority recognised,[166] the state of the evidence on opportunity was such that there was always a well-founded and proper basis for rejecting evidence that conflicted with there being a realistic opportunity for the offending to have occurred. Not only did witnesses accept that it was possible the applicant did not always stay on the steps after Mass, there was in fact evidence supporting that proposition. Not only did Portelli accept that it was possible that on occasions he did not accompany the applicant, there was in fact evidence of the applicant being unaccompanied while robed. Not only did witnesses allow the possibility of two choirboys leaving the procession unnoticed, there was in fact evidence that choirboys had left the procession unobserved by others.[167]

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Impossibility arguments

46. The applicant criticises the majority for analysing whether the opportunity evidence rendered the offending impossible. The applicant alleges that by doing so the majority reversed the onus of proof.[168] This misconstrues the majority's reasons. As the majority stated, a central part of the defence case at trial was that A's account was impossible.[169] That being so, the prosecution at trial had to defeat that argument of impossibility.[170] On appeal, the Court of Appeal *had* to independently review the evidence relating to the impossibility contentions and assess whether it was open to the jury to conclude that the prosecution had discharged its burden of rebutting the defence argument of impossibility. This was especially so because the applicant continued to press the impossibility arguments on appeal.[171]

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47. As Part I of the majority's reasons make clear, whether the prosecution had successfully rebutted the impossibility contentions was only one aspect of the majority's analysis of the evidence in the case.[172] The majority understood that this issue was part of the Crown's broader task of proving beyond reasonable doubt that there was a realistic opportunity for the offending to have occurred and that the offending did occur.[173]

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[164] *Pell* [247], [283] **(CAB 258-259, 276)**; Portelli T590.3-15, T591.5-21 **(RFM 504, 505)**.
[165] *Pell* [287]-[290] **(CAB 277-278)**; see above at [13(d)], [13(e)].
[166] *Pell* [170]-[173] **(CAB 231-232)**.
[167] See above at [14(d)].
[168] Applicant's Submissions [45].
[169] *Pell* [114]-[127] **(CAB 214-218)**.
[170] *Pell* [128], [151] **(CAB 219, 225)**.
[171] *Pell* [135]-[137] **(CAB 220-221)**.
[172] See also above at [34], [36].
[173] *Pell* [128]-[129] **(CAB 219)**.

"Compounding" improbabilities

48. The applicant criticises the majority for not accepting his "compounding improbabilities" argument.[174] However, the notion of "compounding" relied upon by the applicant was flawed. As Weinberg JA stated,[175] the applicant's argument was an attempt to apply the product rule of probability theory. That rule is only valid where one has mutually independent events. The various "improbabilities" relied upon by the applicant,[176] however, were evidently not all independent in this way. The notion of compounding improbabilities may be an attractive rhetorical device but, in this case, it was unhelpful and inaccurate.[177] This is particularly so when a careful examination of all of the evidence discloses that the 10 "improbabilities" relied upon by the applicant were not, in fact, improbable.[178]

49. The applicant also complains that the majority "examined each piece of evidence in isolation".[179] This relies on a selective reading of the majority's reasons. It is true that the majority considered each issue raised by the evidence in detail and expressed a conclusion on what view the jury could have reached on that issue. That is not indicative of error. Rather, it is indicative of the majority being cognisant of the need to undertake an independent assessment of the evidence[180] in the framework of the ultimate question in *M*. The majority recognised that all of the various issues raised by the evidence went to the central question: whether it was open to the jury to accept A's account beyond reasonable doubt.[181] It was convenient[182] to address the issues separately, but the majority's conclusion on the ultimate 20 question posed in *M* was expressly based on the effect of the whole of the evidence.[183]

Matters which the majority appropriately took into account

50. The applicant raises the matters of the applicant's emphatic denials,[184] B's denial,[185] and the improbability of the applicant acting in the way alleged by A.[186] The majority acknowledged that each of these matters had to be considered in the jury's deliberations, but said that none of the matters was decisive; it was for the jury to weigh the matters in the context of all the evidence at trial and the jury's own human experience.[187]

51. The applicant appears to agree with the majority's approach of treating the applicant's emphatic denials as relevant but not dispositive. To the extent that the applicant suggests

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[174] Applicant's Submissions [49]; see also Applicant's Submissions [54].
[175] *Pell* [1063] **(CAB 472)**.
[176] See *Pell* [841] **(CAB 422)**.
[177] Where events are not mutually independent, a more complex conditional probability analysis applies, and it is an error to rely on intuitive "compounding". See also *Pell* fn 262 **(CAB 472)**.
[178] See above at [45].
[179] Applicant's Submissions [44].
[180] *SKA v The Queen* (2011) 243 CLR 400, 406 [14] (French CJ, Gummow and Kiefel JJ).
[181] *Pell* [53] **(CAB 195)**, [64] **(CAB 199)**.
[182] *Pell* [64] **(CAB 199)**.
[183] *Pell* [12], [14], [106], [143], [157]-[158], [170]-[174], [351] **(CAB 183, 212, 223, 227-228, 231-232, 298)**.
[184] Applicant's Submissions [51].
[185] Applicant's Submissions [51].
[186] Applicant's Submissions [52].
[187] *Pell* [98]-[103], [180], [185] **(CAB 209-211, 233, 235)**.

that the brazenness of the offending alone could render the verdicts unreasonable,[188] it is at odds with the applicant's position in the Court of Appeal[189] and at odds with recent judicial statements.[190] The applicant attempts to find error in the majority's statement that "[t]he jury were well able to assess the possibility that [B's denial] was a false denial",[191] but that argument ignores the context of the majority's statement[192] and is similar to the argument rejected in *Irwin v The Queen*.[193] As the majority noted, defence rightly conceded at trial that the prosecutor should be able to advance possible explanations for B's denial.[194]

52. The applicant also points to findings made by the majority regarding A's account as "matters tending against proof beyond reasonable doubt".[195] But as the majority carefully explained,[196] it was open to the jury to regard these aspects of A's account as "unremarkable" and "understandable and consistent with human experience".[197]

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The calling of witnesses

53. The applicant submits that the absence of Father Egan from the trial resulted in an unreasonable jury verdict because there was "an unexcluded possibility that he provides a complete alibi for the applicant for 23rd of February 1997".[198] This assertion is based on Connor's evidence that Father Egan "would have" been in procession with the applicant after Mass.[199] Connor stated, however, that independent of his diary he had no specific recollection of occasions of Sunday Mass[200] and that he did not have a specific memory of whether Father Egan was in fact in procession with the applicant on 23 February 1997.[201] The applicant's description of Father Egan as a "key witness"[202] is incorrect.[203] The applicant's reliance upon *Whitehorn v The Queen* (where the prosecution did not call the complainant)[204] is misplaced when A gave evidence and was cross-examined at length.

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54. The notion that Father Egan could have provided the applicant with a "complete alibi" suggests that an inference should be drawn from Father Egan's absence from the trial. Such

[188] Applicant's Submissions [40], [52].
[189] Court of Appeal T147.2-148.24 **(RFM 801-802)**.
[190] See, eg, *Hughes v The Queen* (2017) 263 CLR 338, 401 [169] (Nettle J); *Badem (a pseudonym) v The Queen* [2016] VSCA 200, [62] (Warren CJ, Weinberg and Priest JJA).
[191] *Pell* [179] **(CAB 234)**.
[192] An earlier sentence in the same paragraph refers to the jury having to decide whether they were satisfied that A's account could be accepted beyond reasonable doubt: *Pell* [179] **(CAB 234)**.
[193] (2018) 262 CLR 626.
[194] *Pell* [176]-[179] **(CAB 232-234)**. See also Pre-Trial Discussion (12.10.2018) T8.27-11.7, (18.10.18) T1.22-7.21 **(RFM 7-17)**; Discussion T1305.10-28 **(RFM 784)**; Prosecution Closing T1382.4-15 **(RFM 796)**.
[195] Applicant's Submissions [53].
[196] *Pell* [210]-[231] **(CAB 244-253)**.
[197] See also *Jury Directions Act 2015* (Vic) s 54D(2)(c).
[198] Applicant's Submissions [38].
[199] Applicant's Submissions [28].
[200] Connor T1015.3-5 **(RFM 709)**.
[201] *Pell* [345] **(CAB 297)**; Connor T1041.31-1042.7 **(RFM 715-716)**.
[202] Applicant's Submissions [38].
[203] The applicant made no request for the prosecution to call Father Egan and did not seek a direction from the trial judge about the fact that Father Egan was not called. The trial judge did not refer to Father Egan in his Honour's charge, and no challenge was made to the trial judge's charge on appeal: *Pell* [17], [187]-[189] **(CAB 184, 236)**.
[204] (1983) 152 CLR 657.

a course is contrary to this Court's decision in *Mahmood v Western Australia*,[205] and, as stated by the majority in the Court of Appeal,[206] runs counter to the anti-speculation direction.[207]

55. The applicant also complains that B's parents were not called, while acknowledging that the applicant preferred this course at trial.[208] The submission that the applicant's preference at trial is "entirely irrelevant" is contrary to what was said by Deane J in *Whitehorn*.[209] It was implicitly accepted by the applicant at trial that the agreed formula as to what B said adequately conveyed the context of the denial.

Majority did not make factual findings which left a reasonable doubt

10 56. The Crown contended that the first incident occurred after the altar servers from the procession had entered the Priests' Sacristy and bowed to the crucifix, but before the post-Mass "hive of activity" began.[210] The majority of the Court of Appeal, having reviewed the evidence, held that it was open to the jury to find that the offending took place in the period posited by the Crown.[211] The applicant asserts that this timeline was not possible.[212] The applicant's submission of impossibility is based on the premise that 5-6 minutes of private prayer time began, like clockwork, as soon as the procession reached the main door. The majority made no such factual finding. Nor is such a premise borne out by the evidence given at trial.[213]

57. The evidence painted the following picture. At the conclusion of Mass, a recessional hymn
20 would have been played on the organ and sung by the choir. During the hymn,[214] a procession down the nave would have occurred. The procession would have been led by certain altar servers — the crucifer (cross bearer), thurifer (censer bearer) and acolytes.[215] The choir would have been behind those altar servers in pairs,[216] followed by the remaining altar servers and clergy.[217]

58. The procession would have exited the Cathedral at the main entrance. At around this time, the recessional hymn would have concluded and the organist would have begun playing a postlude.[218] The procession would have gone down the steps outside the main entrance,

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[205] (2008) 232 CLR 397, 406 [27] (Gleeson CJ, Gummow, Kirby and Kiefel JJ).
[206] *Pell* [191] **(CAB 237)**.
[207] See *Dyers v The Queen* (2002) 210 CLR 285, 293-4 [13]-[14] (Gaudron and Hayne JJ).
[208] Applicant's Submissions fn 7.
[209] (1983) 152 CLR 657, 665: "The fact that criminal proceedings in this country are adversary in character means that what is required by the standards of fairness and detachment which should be observed by the Crown in the calling of witnesses may be modified by the informed consent of the accused."
[210] Prosecution Closing T1343.6-1344.24, T1356.18-1360.16 **(RFM 786-787, 788-792)**.
[211] *Pell* [293]-[300] **(CAB 281)**.
[212] Applicant's Submissions [56].
[213] Unsurprisingly, none of the witnesses was able to be precise about the timeline of activities after Mass. See in this regard *Pell* [1123] **(CAB 485)**.
[214] La Greca T1192.16-24, T1194.31-1195.8 **(RFM 744, 746-747)**; R Dearing T743.22-24 **(RFM 605)**.
[215] McGlone T930.25-931.7 **(RFM 632-633)**; Cox T345.1-7 **(RFM 322)**. See also Potter T514.16-515.2 **(RFM 422-423)**.
[216] McGlone T931.7-8 **(RFM 633)**; Cox T345.1-7 **(RFM 322)**; R Dearing T745.14-18 **(RFM 606)**.
[217] Cox T345.7-8 **(RFM 322)**; Portelli T582.27-583.3 **(RFM 496-497)**.
[218] Mallinson T275.10-22 **(RFM 273)**; Cox T345.11-15 **(RFM 322)**.

turned left, proceeded past a metal gate and the south transept, and arrived at the iron gate through which it would enter the Knox Centre.[219] A's evidence was that he and B broke away from the procession at around this time and re-entered the Cathedral via the south transept.[220] The organist was possibly still playing the postlude at this point.[221]

59. Meanwhile, the procession would have gained entry to the Knox Centre. The altar servers in the procession would have made their way to the Priests' Sacristy. The door to the Priests' Sacristy would already have been unlocked by Potter.[222] The altar servers would have entered the Priests' Sacristy and bowed to the crucifix, marking the end of the formal part of the Mass.[223] The altar servers would have then left the Sacristy — either for the workers' room, where they disrobed, or for the sanctuary to assist Potter.[224] The Priests' Sacristy would be unlocked and open.[225]

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60. The Crown's case was that A and B then entered the Priests' Sacristy. They were shortly[226] followed by the applicant. The offending occurred for 5-6 minutes.[227] It was only after A and B left the Priests' Sacristy after the first incident that Potter and/or altar servers first returned to the Priests' Sacristy with items from the sanctuary.

61. Potter gave evidence that after Mass, parishioners would approach the sanctuary area of the Cathedral to pray.[228] Potter and the altar servers would not "move in" and commence clearing items from the sanctuary and returning them to the sacristies until after a suitable interval of decorum to allow parishioners private prayer time.[229] Potter estimated that this interval was 5-6 minutes. Precisely when this interval would end would, of course, depend on the circumstances including how many people were in the Cathedral.[230]

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62. There was evidence that when the altar servers left the Priests' Sacristy after bowing to the crucifix, the Cathedral would have still been quite busy. The Sunday Mass was the most popular mass of the week, with hundreds of people in attendance.[231] On the occasion of Sunday Mass recalled by McGlone, he entered the Priests' Sacristy after processing externally, bowed to the crucifix, and returned to the body of the Cathedral to find his mother two thirds of the way down the nave, the Cathedral about a third full, and parishioners

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[219] Cox T346.13-26 **(RFM 323)**; Finnigan T396.22-397.1 **(RFM 330-331)**.
[220] A T155.12-156.10, T222.18-223.3 **(RFM 36-37, 95-96)**.
[221] Mallinson T288.22-26 **(RFM 286)**. Mallinson expressly said this was possible having regard to the specific postlude pieces being played at the Masses on 15 and 22 December 1996: T294.24-295.10 **(RFM 292-293)**. This is consistent with Cox's evidence that he could be at an organ "for ten minutes or more" after the conclusion of Mass: T345.15-23 **(RFM 322)**.
[222] *Pell* [293]-[296] **(CAB 279-280)**.
[223] *Pell* [294]-[295] **(CAB 279-280)**.
[224] Potter T496.8-25, T518.5-7 **(RFM 404, 426)**.
[225] *Pell* [296] **(CAB 280)**.
[226] *Pell* [43]-[44] **(CAB 192-193)**. The boys had barely opened the wine and taken a couple of swigs.
[227] *Pell* [44]-[48] **(CAB 193-194)**. Charge 1 took place for barely a minute or two, charge 2 would not have been any more than two minutes and the two instances which comprised charges 3 and 4 took a minute or two.
[228] Potter T473.17-27 **(RFM 380)**.
[229] Potter T473.17-474.22 **(RFM 380-381)**; Mallinson T268.26-269.17, T270.12-26 **(RFM 266-267, 268)**; McGlone T945.15-17, T989.20-25 **(RFM 647, 691)**.
[230] Mallinson T269.14-17 **(RFM 267)**.
[231] Mallinson T274.12-16 **(RFM 272)**; Finnigan T425.12-13 **(RFM 342)**.

praying.[232] Cox said that there would still be parishioners in the Cathedral when he finished playing the organ, some ten minutes or so after the conclusion of Mass.[233] Finnigan gave evidence of seeing the "hive of activity" a considerable time after the conclusion of Mass. Finnigan said that after disrobing after Mass, he would observe "people everywhere" in the sacristy corridor for some "ten, 15 minutes or so": concelebrating priests would be disrobing and altar servers would be bringing things into the sacristies.[234] As the choir marshal, Finnigan would have disrobed and entered the sacristy corridor area after he had overseen the choirboys hanging up their robes and leaving.[235] Finnigan's observations of the "hive of activity" would therefore have been made some time after the choir first arrived at the choir room.[236] The evidence of McGlone, Cox and Finnigan points against the "hive of activity" having commenced immediately after the altar servers bowed to the crucifix and left the Priests' Sacristy.

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63. As Weinberg JA stated[237] in relation to ground 2 in the Court of Appeal, "[t]he jury could hardly have failed to understand the significance of [the] evidence" regarding the "hive of activity" after Mass. It was the jury's task to assess that evidence to determine whether it allowed a reasonable opportunity for the offending to have occurred. There was no error in the majority's finding that the jury's conclusion on that issue was open to it.

Part VI: Time Estimate

64. It is estimated that the respondent's oral argument will require 4 hours to present.

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Dated: 31 January 2020.

Kerri Judd QC
Director of Public Prosecutions

Mark Gibson QC
Senior Crown Prosecutor

Angela Ellis
Crown Prosecutor

Julia Wang
Office of Public Prosecutions

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232 McGlone T943.7-945.19 **(RFM 645-647)**.
233 Cox T350.6-16 **(RFM 325)**.
234 *Pell* [298], [567] **(CAB 281, 349)**; Finnigan T422.1-22 **(RFM 341)**.
235 Finnigan T428.8-17 **(RFM 343)**; see T401.11-30 **(RFM 334)** as to what would occur before the choirboys left.
236 For example, Mayes said that there would still be people in the choir room after 15 minutes, "but almost everybody except for the senior members have left by then": T1081.13-28 **(RFM 722)**.
237 *Pell* [1130] **(CAB 487)**.

IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

No. M112 of 2019

BETWEEN:

GEORGE PELL

Applicant

and

THE QUEEN

Respondent

RESPONDENT'S ANNEXURE

1. *Jury Directions Act 2015* (Vic) s 54D, Authorised Version No. 011