IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

No. M112 of 2019

BETWEEN:

GEORGE PELL

Applicant

and

THE QUEEN

Respondent

RESPONDENT'S FURTHER SUBMISSIONS

Part I: Certification

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

Part II: Issues

2. The issues are set out in paragraph 1 of the Applicant's Further Submissions.

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

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

Part IV: Factual Background

Trial

4. The entire trial in the County Court was recorded.[1]

5. The evidence of the complainant (**A**) was given by way of recorded evidence: A's evidence-in-chief, cross-examination and re-examination had been recorded as it took place in front of the jury at the first trial. During A's cross-examination, a recording of a walkthrough of the Cathedral conducted with A by the police informant on 29 March 2016 was played to A and to the court.[2]

6. The evidence of a number of other witnesses was also given by way of recordings from the first trial.[3] The remainder of the witnesses gave evidence in person.

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[1] *Pell v The Queen* [2019] VSCA 186, fn 35, [415], [1031] (***Pell***) **(CAB 189, 312, 466)**.

[2] A (Transcript of Ex MFI-G) T260.18-265.6 **(RFM 127-132)**. In the present trial, the video of the walkthrough was played in full to the jury and tendered as Exhibit 1; the jury was also provided with a transcript of the walkthrough: T165.6-166.10. Subsequently, during the playing of A's cross-examination, relevant portions of the walkthrough video were again played to the jury: see T171.2ff.

[3] Those witnesses were the former choristers Mueller (Ex MFI-H), Quinn (Ex MFI-J), Nathan (Ex MFI-R), Thomas (Ex MFI-T) and Welch (Ex MFI-V), and the winemaker May (Ex MFI-M).

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7. A recording of the applicant's record of interview conducted on 19 October 2016 was played during the police informant's examination-in-chief.[4]

8. On 14 November 2018, the jury attended a view of St Patrick's Cathedral in the presence of the trial judge and the parties' counsel.[5] The view was filmed by an authorised videographer. A DVD of the recording was tendered as an exhibit in the trial together with an index of locations shown on the view.[6]

Appeal

9. On 9 April 2019, the Judicial Registrar of the Court of Appeal wrote to the parties advising that, subject to any submissions from the parties, the bench intended to:

10 a. view the edited video evidence of A that was shown to the jury;

b. view the evidence of the witnesses Portelli, McGlone and Potter from recordings made of the trial in the County Court; and

c. be taken on a view of the Cathedral.

10. The parties were requested to make any submissions regarding the bench's proposed course of action by 12 April 2019.

11. Both parties filed submissions. The applicant agreed that the bench should have the benefit of a view of St Patrick's.[7] The applicant objected to the bench's proposal to view the video evidence of A, Portelli, McGlone and Potter. The applicant submitted that regard to the transcript was sufficient for the Court's review of the evidence because the applicant's
20 complaint was not that the manner in which A gave his evidence undermined the cogency of A's account, but rather that the content of A's account conflicted with a body of evidence that rendered the offending realistically impossible and/or improbable.[8] The applicant submitted that in the event the bench decided to view the recordings of evidence, then it should also watch the evidence of Connor, Finnigan, Cox, Mallinson, Rodney Dearing, David Dearing, Parissi and Bonomy, as well as the applicant's record of interview.[9] This, the applicant submitted, would "ameliorate (if not eliminate)" the risk of imbalance identified in *SKA v The Queen*.[10]

12. The respondent did not object to the bench being taken on a view of the Cathedral. The respondent supported the bench viewing the evidence of the witnesses proposed in the

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[4] T1101.24-1103.28.
[5] See *Evidence Act 2008* (Vic) s 53.
[6] T214.2-21; Ex X.
[7] Applicant's Submissions in Response to Court's Correspondence of 9 April 2019 [3(b)].
[8] Applicant's Submissions in Response to Court's Correspondence of 9 April 2019 [9].
[9] Applicant's Submissions in Response to Court's Correspondence of 9 April 2019 [13]-[14].
[10] (2011) 243 CLR 400 (***SKA***). See Applicant's Submissions in Response to Court's Correspondence of 9 April 2019 [13].

correspondence from the Court and had no objection to the bench viewing the evidence of the additional witnesses identified in the applicant's submissions.[11]

13. Ultimately, in addition to reading transcript from the trial, all members of the bench viewed the video recordings of the evidence given by A, Portelli, Potter, McGlone, Connor, Finnigan, Cox, Mallinson, Rodney Dearing, David Dearing, Parissi and Bonomy[12] and the applicant's record of interview.[13] The bench also attended a view of the Cathedral in the presence of both parties' lawyers.[14] The judgment of the majority of the Court of Appeal also indicates that their Honours watched the video of the 29 March 2016 walkthrough.[15]

Part V: Submissions

10 ***General principles***

14. An intermediate appellate court's task in applying the test in *M* is not to substitute trial by an appeal court for trial by jury.[16] At the same time, the intermediate appellate court must undertake an "independent assessment"[17] of the "whole of the evidence"[18] in order to answer the question of whether it was open to the jury to be satisfied beyond reasonable doubt that the accused was guilty.

15. These aspects of the intermediate appellate court's role must be balanced in order to answer the question of whether the court can and should go beyond the written record of the trial. On the one hand, the "whole of the evidence" before the jury, taken at its broadest, is not confined to the written record: the jury will have seen witnesses give evidence, either in
20 person or in recorded form; and in some cases, the jury will have considered evidence not readily reducible to writing, such as their observations from a view. On the other hand, the fact that the intermediate appellate court is not to substitute trial by appeal court for trial by jury tells against a requirement that the court replicate the jury's experience of the evidence.

16. It is for the latter reason that the *M* test does not as a general rule require an intermediate appellate court to undertake a review of evidence not contained in the written record of the trial. Thus, in *SKA*, French CJ, Gummow and Kiefel JJ said:[19]

> The account given and the language used by witnesses, which are available by way of transcript, are usually sufficient for a review of evidence. It is to be expected that if there is something which may affect a court's view of the evidence, which can only be discerned
30 visually or by sound, it can and will be identified. Absent this purpose it is not possible to

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[11] Respondent's Submissions in Response to Email from Judicial Registrar on 9 April 2019 [1].
[12] *Pell* [32]-[33], [1044]-[1046] **(CAB 189-190, 468-469)**.
[13] *Pell* [185], [1091] **(CAB 235, 478)**.
[14] *Pell* [33] **(CAB 189)**; Transcript of Court of Appeal hearing T1.32-2.6.
[15] *Pell* fn 62 **(CAB 202)**.
[16] *M v The Queen* (1994) 181 CLR 487, 494 (Mason CJ, Deane, Dawson and Toohey JJ) (***M***); *R v Baden-Clay* (2016) 258 CLR 308, 330 [66] (the Court) (***Baden-Clay***).
[17] *M* (1994) 181 CLR 487, 492 (Mason CJ, Deane, Dawson and Toohey JJ).
[18] *M* (1994) 181 CLR 487, 493 (Mason CJ, Deane, Dawson and Toohey JJ).
[19] (2011) 243 CLR 400, 411 [31].

conclude that a court is obliged to go further and view a recording of evidence. There must be something in the circumstances of the case which necessitates such an approach.

Since the applicant in *SKA* had not identified any circumstance which would have necessitated the viewing of the complainant's recorded evidence, the applicant's complaint that the Court of Criminal Appeal erred by not viewing the recording failed.[20]

17. At the same time, *SKA* did not purport to prohibit an intermediate appellate court from having regard to evidence considered by the jury that is outside of the written record. The Court in *SKA* was dealing with an argument that the Court of Criminal Appeal had erred by not viewing the complainant's video recorded evidence. The Court's statements were therefore directed to whether an intermediate appellate court is obliged to view recordings of evidence, as opposed to whether it is permitted to do so. Further, the joint judgment referred[21] with apparent approval to the observations made in *R v El Moustafa*[22] that whether a video recording of evidence should be viewed must depend upon the particular circumstances of the case.

18. In the respondent's submission, it would not be desirable to stipulate for every case a single answer to the question of whether an intermediate appellate court should have regard to evidence considered by the jury that extends beyond the written record of the trial. Much will depend upon the circumstances of the case, including the nature of the evidence considered at trial and the specific arguments put on appeal. It is not difficult to envisage situations where it may be challenging for an intermediate appellate court to properly fulfil its function without recourse to recorded or other non-written evidence: for example, where there is a dispute about what was said by a witness or about the manner in which it was said, or where it may be difficult to understand the written transcripts of evidence without regard to the recorded (or other) evidence.

19. Thus, while the starting point is that the written record is usually sufficient for a review of the evidence,[23] the respondent submits that an intermediate appellate court has a discretion as to whether to consider recorded or other non-written evidence that was before the jury. This is consistent with the current practice of intermediate appellate courts.[24]

20. Matters relevant to the exercise of the court's discretion include:

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[20] (2011) 243 CLR 400, 412 [35] (French CJ, Gummow and Kiefel JJ), 433 [116] (Crennan J).
[21] (2011) 243 CLR 400, 412 [34] (French CJ, Gummow and Kiefel JJ).
[22] [2010] VSCA 40, [45] (Redlich and Harper JJA and Habersberger AJA).
[23] *SKA* (2011) 243 CLR 400, 411 [31] (French CJ, Gummow and Kiefel JJ).
[24] In Victoria, see, for example: *Pate (a pseudonym) v The Queen* [2019] VSCA 170, [77] (recording not viewed); *Smith v The Queen* [2018] VSCA 258, [62] (recording not viewed); *Deacon (a pseudonym) v The Queen* [2018] VSCA 257, [144] (recording not viewed); *Badem (a pseudonym) v The Queen* [2016] VSCA 200, [63] (recording viewed); *R v El Moustafa* [2010] VSCA 40, [44]-[46] (recording viewed). In New South Wales, see, for example: *JPM v The Queen* [2019] NSWCCA 301, [55], [64], [240] (recording viewed); *AZ v The Queen* [2018] NSWCCA 294, [42]-[54], [142] (recording viewed); *Ambury v The Queen* [2018] NSWCCA 275, [75] (recording not viewed); *CLC v The Queen* [2015] NSWCCA 248, [75]-[78], [94]-[95], [101] (recording viewed by some members of the bench but not others); *Elmowy v The Queen* [2015] NSWCCA 85, [35], [58] (recording not viewed); *Panchal v The Queen* [2014] NSWCCA 275, [53]-[55] (recording not viewed); *Soames v The Queen* [2012] NSWCCA 188, [1], [90] (recording not viewed).

a. the centrality of the evidence to the case as run at trial and the arguments on appeal;

b. any arguments made by the parties as to why the evidence should or should not be viewed;

c. the nature of the evidence — whether the substance of it is captured in the written record, or whether it is not readily reducible to written form; and

d. whether viewing the evidence would lead to an undue focus upon certain witnesses or aspects of the case, thus creating the risk of imbalance identified in *SKA*.[25]

21. The applicant appears to suggest that *SKA* imposes a requirement upon the intermediate appellate court to identify a forensic purpose for viewing recorded or other non-written evidence.[26] The respondent does not agree that *SKA* stands for that proposition. The Court of Criminal Appeal in *SKA* did not view the recording in question so no issue arose as to whether it should have identified a purpose for doing so. Rather, *SKA* makes clear that a *party* that does not identify a forensic purpose for viewing a recording cannot then allege that the intermediate appellate court erred by not having regard to the recording.

22. While it may generally be desirable for an intermediate appellate court to provide reasons for why it has decided to view recorded or non-written evidence, the respondent does not agree with the applicant's submission that an absence of or deficiency in such reasons necessarily vitiates a decision to view the evidence.[27] As set out in more detail below,[28] the respondent submits that in this case there was no error in the Court of Appeal's decision to view the evidence that it did.

23. A court's decision to view recorded or other non-written evidence does not diminish the force of the first consideration identified in *M* as relevant to the application of the test — namely, that the jury is the body entrusted with the primary responsibility of determining guilt or innocence.[29]

24. A court's decision to view recorded or other non-written evidence may reduce, but cannot eliminate, the force of the second consideration identified in *M* — namely, the jury's benefit in seeing and hearing the evidence.[30] It is not common for an intermediate appellate court to watch the recordings of the evidence of any more than a handful of witnesses. In contrast, a jury undertakes its task in the particular atmosphere of the trial which may not be reproducible upon appeal.[31] As recently observed in *AZ v The Queen*:[32]

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[25] (2011) 243 CLR 400, 410 [28]-[29] (French CJ, Gummow and Kiefel JJ).
[26] Applicant's Further Submissions [5]-[6].
[27] See *Housing Commission of New South Wales v Tatmar Pastoral Co Pty Ltd* [1983] 3 NSWLR 378, 386 (Mahoney JA); *Public Service Board of New South Wales v Osmond* (1983) 159 CLR 656, 666-667 (Gibbs CJ).
[28] See below at [28]-[34].
[29] *M* (1994) 181 CLR 487, 493 (Mason CJ, Deane, Dawson and Toohey JJ).
[30] *M* (1994) 181 CLR 487, 493 (Mason CJ, Deane, Dawson and Toohey JJ).
[31] *Whitehorn v The Queen* (1983) 152 CLR 657, 687 (Dawson J, Gibbs CJ and Brennan J agreeing); *Jones v The Queen* (1997) 191 CLR 439, 442 (Brennan J). See also *Pell* [35]-[36], [1048]-[1049] **(CAB 190-191, 469)**.
[32] [2018] NSWCCA 294, [148]-[149] (Walton and Wilson JJ).

> the trial environment is informed by every aspect of the trial: the opening proceedings and what the jury is told by the trial judge then and during the trial about its task; the observations of the interchange between counsel and witness; the observations of witnesses and the demeanour of each, and the differing observations that may be made at different stages of the evidence of the same witness; and the presence before the jury of the accused person, and the opportunity the jury has to observe him or her when particular evidence is given, and throughout the trial. All of those aspects of a jury trial have a bearing on the verdicts ultimately returned by the tribunal of fact.
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> The environment of the trial provides the context to the jury's observations of evidence, and decisions made by jurors as to what evidence should be accepted and what rejected; and to their receptiveness or otherwise to arguments placed before them. The jury's advantage in being present at the whole of the trial is of considerable importance in determining a ground of appeal that contends that the verdict or verdicts returned by a jury were unreasonable and not supported by evidence.

25. Further, as the respondent has previously submitted,[33] the jury's advantage includes the worldly experience it brings to its task, its ability to deliberate as a group throughout the trial, and the discipline generated by the requirement of unanimity or very high majority. As the majority in the Court of Appeal observed, "no advance in technology can ever replicate the unique features of jury deliberation and decision-making".[34]

Non-written evidence and the "two-step process"

26. The respondent's submissions have been made on the basis that the *M* test is encapsulated by the question: "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".[35] As previously submitted,[36] the respondent does not agree that *M* "requires" the two-step process set out by the applicant[37] or that the two-step process is "orthodox".[38]

27. If, however, the High Court were to accept the applicant's submission that the two-step process must be applied, it is the respondent's submission that this may impact the answer to whether an intermediate appellate court should have regard to non-written evidence that was considered by the jury. Under the two-step process, the first and central question for an intermediate appellate court is whether the court itself has a reasonable doubt as to guilt. In order to properly answer that question, one would expect the court should have regard to *all* of the evidence from the trial available to it, both written and non-written — for a verdict is informed by every aspect of the trial, not simply what can be reduced to transcript.[39]

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[33] Respondent's Submissions [21].
[34] *Pell* [39] **(CAB 191-192)**.
[35] See Respondent's Submissions [20]-[27].
[36] Respondent's Submissions [24]-[26].
[37] Applicant's Submissions [43].
[38] Applicant's Further Submissions [7]. There is no reference to any two-step process in the High Court's recent judgments in *R v Baden-Clay* (2016) 258 CLR 308, *GAX v The Queen* (2017) 91 ALJR 698, *Irwin v The Queen* (2018) 262 CLR 626 and *Fennell v The Queen* (2019) 93 ALJR 1219.
[39] See above at [15], [24].

The burden thus imposed upon an intermediate appellate court may necessitate a departure from that position. But as a matter of principle, the two-step process suggests that intermediate appellate courts would be expected to have regard to recorded and other non-written evidence more frequently than is contemplated by *SKA*.[40]

Application of principles in the present case

No error in viewing evidence

28. In the present case, the Court of Appeal exercised its discretion to undertake a view of the Cathedral; (in the majority's case) to view a recording of the 29 March 2016 walkthrough of the Cathedral; and to view the recorded evidence of certain witnesses. In the respondent's submission, it was appropriate for the Court to do so.

29. The Court's view of the Cathedral was supported by both parties and was conducted in the presence of the parties' lawyers. Many of the witnesses in the trial referred to various locations within and just outside the Cathedral in their evidence. The Court's attendance of the view assisted it in understanding the evidence of those witnesses.

30. The majority's view of the walkthrough video was understandable given the detailed questioning about the video during A's cross-examination.[41] While a transcript of the walkthrough video was prepared, that transcript does not capture what was seen in the walkthrough video. The majority's view of the walkthrough video assisted it in understanding A's cross-examination.

31. The Court's decision to seek to view the recorded evidence of A, Portelli, Potter and McGlone reflected the nature of the arguments on appeal. The applicant primarily relied upon the evidence of Portelli, Potter and McGlone in asserting that the offending was "impossible".[42] The respondent argued in response that the jury was entitled to question the reliability of those witnesses' evidence.[43] In those circumstances, and given the centrality of the evidence of Portelli, Potter and McGlone to the applicant's case, it was within the Court's discretion to consider that it would be aided in its task by viewing the recordings of those witnesses' evidence. Further, the applicant's case on appeal included an attack on A's credibility: it was asserted that A repeatedly changed his account in critical ways and that he either was "uncertain and unreliable about critical particulars of his own narrative" or "demonstrated a tendency to deliberately alter crucial elements of his story on numerous occasions when confronted by solid obstacles".[44] In light of that argument and the centrality of A's evidence to the prosecution case, it was also within the Court's discretion to decide that it would be assisted by viewing the recording of A's evidence.

32. The Court of Appeal gave the parties an opportunity to provide submissions on whether it should view the evidence of A, Portelli, Potter and McGlone. The Court ultimately adopted

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[40] See above at [16].
[41] See A (Transcript of Ex MFI-G) T260.18-265.6 **(RFM 127-132)**.
[42] Applicant's Written Case in the Court of Appeal [20]-[21].
[43] Respondent's Revised Written Case in the Court of Appeal [38]-[41].
[44] Applicant's Written Case in the Court of Appeal [26].

a course suggested by the applicant, which was agreed to by the respondent: it watched the evidence of a number of additional witnesses identified by the applicant so as to address any concerns of the kind raised in *SKA* about an imbalance in the evidence. The parties were made aware of the Court's course[45] and had the opportunity at the hearing to make submissions on matters arising from the recordings.

33. Each judgment identified the non-written evidence viewed by the respective judges. The majority observed that it had viewed A's evidence because of its "centrality", and that it had viewed the evidence of a number of opportunity witnesses to avoid the risk of imbalance identified in *SKA*.[46] Weinberg JA stated that the process of watching the recorded evidence of the various witnesses had "proved to be of considerable value".[47]

34. Having regard to the above circumstances, the Court of Appeal's approach to the viewing of recorded and non-written evidence was well open to it.

Impact of viewing of evidence

35. As the majority of the Court of Appeal correctly recognised,[48] the decision by the bench to view the recorded evidence of various witnesses did not detract from the consideration that the jury was the primary tribunal of fact. And while the availability of recorded evidence narrowed the gap between the position of the jury and the appellate court,[49] it remained the case that the jury retained an advantage over the appellate court[50] for the reasons identified above.[51] The majority's judgment appropriately reflected these considerations.[52]

36. Ultimately, the majority's viewing of non-written evidence did not affect its application of the *M* test in any manner relevant to the issues in this application for special leave. As required by *M*, the majority assessed A's reliability and credibility in the context of the whole of the evidence in the case.[53] A's demeanour was one aspect of the majority's assessment but the applicant overstates[54] the role it played in the majority's analysis. The majority's discussion of A's demeanour occurred in its assessment of the applicant's argument that A's account was a deliberate falsity or a fantasy.[55] In reaching its conclusion that the jury were entitled to reject that contention,[56] the majority took into account not only A's demeanour but also the substance of what A said.[57] Further, the majority expressly recognised that A's account could not be considered in isolation but had to be critically evaluated in light of the

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[45] Transcript of Court of Appeal hearing T1.32-2.6.
[46] *Pell* [32] **(CAB 189)**.
[47] *Pell* [1045] **(CAB 468-469)**.
[48] *Pell* [40] **(CAB 192)**.
[49] *Pell* [30] **(CAB 188)**.
[50] *Pell* [35]-[39] **(CAB 190-192)**.
[51] See above at [24]-[25].
[52] See Respondent's Submissions [28]-[35].
[53] Respondent's Submissions [36]-[37].
[54] Applicant's Further Submissions [14].
[55] *Pell* [65]-[97], [197]-[231] **(CAB 199-209, 239-253)**.
[56] *Pell* [90] **(CAB 207)**.
[57] *Pell* [77]-[80], [86]-[87], [91]-[97], [203]-[207], [209], [216], [219]-[231] **(CAB 203-209, 242-244, 249-253)**.

opportunity evidence.[58] The applicant has not identified any error in the majority's judicial method.

Dated: 26 February 2020.

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[58] *Pell* [93] **(CAB 208)**.