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# 'A WITNESS OF TRUTH': THE COURT OF APPEAL'S CARDINAL SIN IN *PELL V THE QUEEN* (2020) 376 ALR 478

*Note: this article addresses themes of child sexual assault which may be disturbing to some readers.*

## I Introduction

Some decisions of the High Court are worthy of comment because they involve a particularly difficult question of law, others because of their public interest. *Pell v The Queen* (2020) 376 ALR 478 ('*Pell*') is unquestionably an example of the latter. Few cases have attracted the public's attention as much as *Pell*. From the initial charge to the hung jury, to the conviction and finally the appeals, the judicial process itself makes for fascinating examination. The process culminated in a unanimous decision of the High Court to acquit Cardinal George Pell, which left some feeling devastated,[1] and others vindicated.[2]

What is apparent from the judgment of the High Court is that this decision was not legally complex. Its place in criminal law textbooks will likely be confined to the confirmation and reapplication of an existing test, rather than the exposition of a new principle. Factually, on the other hand, the decision is complicated. A compelling complainant is contrasted with a body of traditional church practice and procedure which point to the offending being logistically improbable. For the jury, it appears the complainant's evidence was enough. The High Court disagreed. The judgment is as much an analysis of the evidence as it is an emphatic rejection of the majority's decision in the Victorian Court of Appeal. The High Court's rejection of the majority's application of the key test is particularly stinging.

*Pell* highlights a difficult tension in Australian criminal law, between society's right to seek justice for historic sexual abuse offences, and a defendant's right to have their

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1 'George Pell: Church Abuse Victims Shocked as Cardinal Walks Free', *The Guardian* (online, 7 April 2020) <https://www.theguardian.com/australia-news/video/2020/apr/07/george-pell-church-abuse-victims-shocked-as-cardinal-walks-free-video>.

2 Chris Merritt, 'George Pell Verdict: Victoria's Flawed Justice System Must Be Fixed', *The Australian* (online, 8 April 2020) <https://www.theaustralian.com.au/commentary/george-pell-verdict-victorian-justice-system-is-the-biggest-loser-as-convictions-quashed/news-story/a3744bd98fff6d973250dc36a6cbc671>.

guilt proven beyond reasonable doubt. Given sexual abuse often happens in private and within relationships of trust, cases of historic sexual abuse are usually alleged by one witness, who is also the purported victim.[3] If the evidence of one witness, who is also a victim, cannot suffice to establish guilt beyond reasonable doubt, then what is the likelihood of historic sexual abuse claims ever succeeding? Further, when is it the court's place to decide that 12 members of the public *must* have been mistaken?

This case note analyses the *Pell* decision. It assesses the changing role of the High Court in hearing criminal matters and questions the appropriateness of a jury in determining this case. Where a jury has made a determination of guilt, it considers the implications of a court substituting that decision for its own finding of what is rational.[4] This case note discusses whether, moving forward, one 'witness of truth' can ever be held compelling enough to establish guilt beyond reasonable doubt. Finally, it contends that the Court's rejection of the need for an appellate court to view recorded evidence requires further clarity.

## II Background

### A *Facts*

In June 2015, former St Patrick's Cathedral choirboy 'A' made a complaint to Victoria Police that he and another choirboy 'B' had been sexually assaulted by Pell in 1996.[5] A and B were aged 13 years at the time.[6] By the time A had made the complaint, B had 'died in accidental circumstances'.[7]

On 29 June 2017, Pell was charged with five counts of sexual offending.[8] The first offence was alleged to have been committed between 1 July and 31 December 1996 at St Patrick's Cathedral.[9] The case was that A and B had broken away from the procession following Sunday solemn mass and entered the priests' sacristy.[10]

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3 Bianca Klettke and Sophie Simonis, 'Attitudes Regarding the Perceived Culpability of Adolescent and Adult Victims of Sexual Assault' (2011) 26 *Aware* 7, 7; Kara Shead, 'Responding to Historical Child Sexual Abuse: A Prosecution Perspective on Current Challenges and Future Directions' (2014) 26(1) *Current Issues in Criminal Justice* 55, 56.

4 *Pell v The Queen* (2020) 376 ALR 478, 502 [127] (Kiefel CJ, Bell, Gageler, Keane, Nettle, Gordon and Edelman JJ) ('*Pell*').

5 Ibid 479 [2]. Pell is referred to as 'the applicant' in the decision of the High Court.

6 Ibid 481 [15].

7 Ibid 479 [2].

8 'George Pell, Catholic Cardinal, Charged with Historical Sexual Assault Offences', *ABC News* (online, 29 June 2017) <https://www.abc.net.au/news/2017-06-29/cardinal-george-pell-charged-sexual-assault-offences/8547668>.

9 *Pell* (n 4) 479 [1].

10 Ibid 481–2 [15].

Once inside they found a bottle of red altar wine, which they began to drink.[11] Pell allegedly appeared in the doorway 'saying, "[w]hat are you doing here?" or "[y]ou're in trouble"'.[12] He allegedly proceeded to undo his trousers and belt, lower B's head towards his penis and place his hands around B's head (charge one).[13] Then, Pell allegedly turned to A, lowered him to the ground and pushed his penis into A's mouth (charge two).[14] He then allegedly instructed A to take his pants off and began touching A's penis (charge three) while using his other hand to touch his own penis (charge four).[15] After this, A and B left the sacristy and rejoined the choir.[16] A never discussed the incident with anyone, including B.[17] In 2001, in response to a question from his mother, B said that he had never 'been "interfered with or touched up" while in the Cathedral choir'.[18]

The second offence was alleged to have been committed between 1 July 1996 and 28 February 1997,[19] but '[a]t least a month after the first incident'.[20] It was A's evidence that after Sunday solemn mass, as he was processing with the choir along the sacristy corridor, Pell appeared, shoved him against the wall and painfully squeezed his genitals (charge five).[21]

Pell was installed as Archbishop of Melbourne in August 1996.[22] The Cathedral was closed for renovations until the end of November 1996.[23] The only occasions on which Pell celebrated Sunday solemn mass in 1996 were 15 and 22 December.[24] The next occasion was on 23 February 1997.[25] The prosecution's case was 'that the first incident occurred on either 15 or 22 December 1996 and that the second incident occurred on 23 February 1997'.[26]

According to Charles Portelli — Master of Ceremonies at the Cathedral at the time of the alleged offending — at the conclusion of Sunday solemn mass, Pell remained

11 Ibid.
12 Ibid.
13 Ibid 482 [16].
14 Ibid 482 [17].
15 Ibid 482 [18].
16 Ibid 482 [19].
17 Ibid.
18 Ibid 479 [2].
19 Ibid 479 [1].
20 Ibid 482 [20].
21 Ibid.
22 Ibid 482 [22].
23 Ibid.
24 Ibid 483 [23].
25 Ibid.
26 Ibid 483 [25].

on the steps of the Cathedral for at least 10 minutes.[27] This was supported by other witnesses, including sacristan Maxwell Potter and alter server Daniel McGlone. According to Portelli, Pell was always accompanied back to the sacristy, usually by Portelli himself, but on occasion by Potter.[28] Potter confirmed that Pell would never return unaccompanied.[29] According to assistant organist Geoffrey Cox, the sacristy was 'a "hive of activity" after Mass'.[30]

### B *Issue*

The case turned on whether there remained a reasonable doubt as to the occurrence of the offending such that Pell's guilt was not established beyond reasonable doubt.[31]

### C *Lower Courts*

The first trial took place between August and September of 2018.[32] A's examination-in-chief was pre-recorded and played to the jury.[33] A was then cross-examined in front of the jury, which was also recorded.[34] The first trial resulted in a mistrial after the jury was unable to reach a verdict.[35] Pell's second trial began in November 2018. The pre-recorded examination-in-chief and the cross-examination recorded during the first trial were put before the second jury as A's evidence.[36]

On 11 December 2018, Pell was convicted by the second jury of five charges of sexual offending.[37] Chief Judge Kidd of the County Court of Victoria sentenced Pell 'to a total effective sentence of 6 years' imprisonment' with 'a non-parole period of 3 years and 8 months'.[38]

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27 Ibid 491 [61].

28 Ibid 494 [77].

29 Ibid 494 [79].

30 Ibid 495 [86].

31 Ibid 480 [7].

32 Mirko Bagaric, 'George Pell's Successful Appeal Hinged on the Tricky Question of Witnesses', *ABC News* (online, 8 April 2020) <https://www.abc.net.au/news/2020-04-08/george-pell-aquitted-high-court-sexual-abuse/12130064>.

33 *Pell v The Queen* [2019] VSCA 186, [31] (Ferguson CJ and Maxwell P) ('*Pell* (VSCA)').

34 Ibid.

35 Ibid.

36 Ibid.

37 *DPP v Pell (Sentence)* [2019] VCC 260, [1] (Chief Judge Kidd) ('*Pell (Sentence)*').

38 Ibid [228]–[229].

Pell subsequently appealed to the Court of Appeal, which dismissed the appeal and upheld the conviction, by a 2:1 majority.[39] The majority, consisting of Ferguson CJ and Maxwell P, put themselves 'in the closest possible position to that of the jury',[40] and determined that '[t]aking the evidence as a whole, it was open to the jury to be satisfied of Cardinal Pell's guilt beyond reasonable doubt'.[41] The majority's decision was underpinned by the finding that '[t]hroughout his evidence, A came across as someone who was telling the truth'.[42] Justice of Appeal Weinberg's dissenting judgment was as meticulous as it was long. His Honour ultimately determined that the 'compounding improbabilities',[43] generated by the evidence of the other witnesses, suggested that there was 'a "significant possibility" that the applicant in this case may not have committed these offences'.[44]

### D *Relevant Law*

An appellate court must allow an appeal against conviction if it is satisfied that 'the verdict of the jury is unreasonable or cannot be supported having regard to the evidence'.[45] In *M v The Queen*,[46] it was held that the court is required to ask 'whether it thinks that upon the whole of the evidence it was open to the jury to be satisfied beyond reasonable doubt that the accused was guilty' ('*M* test').[47] The *M* test has been rephrased as 'whether the jury *must*, as distinct from *might*, have entertained a doubt about the appellant's guilt'.[48]

## III Decision

A unanimous High Court granted special leave and allowed the appeal.[49] It was held that, notwithstanding the jury's assessment of A as credible and reliable, the evidence, taken as a whole, did not exclude a reasonable doubt as to Pell's guilt.[50] Critical to the decision was the evidence relating to: (i) Pell's practice of remaining

39 Pell appealed on three grounds. Grounds two and three related to alleged procedural failings at trial and were unanimously dismissed: *Pell* (VSCA) (n 33) [352] (Ferguson CJ and Maxwell P), [1180] (Weinberg JA). Ground one was the 'unreasonableness' ground which became the subject of the appeal to the High Court.

40 Ibid [33] (Ferguson CJ and Maxwell P).

41 Ibid [351].

42 Ibid [91].

43 Ibid [1060] (Weinberg JA).

44 Ibid [1111], quoting *Chamberlain v The Queen [No 2]* (1984) 153 CLR 521, 619 (Deane J) ('*Chamberlain [No 2]*').

45 *Criminal Procedure Act 2009* (Vic) s 276(1)(a).

46 (1994) 181 CLR 487.

47 Ibid 493 (Mason CJ, Deane, Dawson and Toohey JJ).

48 *Libke v The Queen* (2007) 230 CLR 559, 596–7 [113] (Hayne J) (emphasis in original).

49 *Pell* (n 4) 502–3 [129].

50 Ibid 490 [58].

on the Cathedral steps after mass; (ii) the long standing Church practice pursuant to which Pell would always be accompanied in the Cathedral; and (iii) the likelihood of other persons entering the sacristy during the alleged assaults.[51]

As to (i) and (ii), the Court noted that 'Portelli's evidence of having an actual recall of being present beside the applicant on the steps of the Cathedral as the applicant greeted congregants on 15 and 22 December 1996 was unchallenged'.[52] So too was the evidence that Portelli accompanied Pell to the priests' sacristy.[53] While some witnesses provided evidence that Pell was, at times, alone in the sacristy corridor,[54] the Court held that this was 'a slim foundation for finding that the practice of ensuring that the applicant was accompanied while he was in the Cathedral was not adhered to'.[55] It did not, according to the Court, exclude the possibility that Portelli's recall was accurate.[56]

As to (iii), the Court held that if A and B broke away from the procession and entered the sacristy corridor, 'it might reasonably be expected that they would have encountered the altar servers' or 'concelebrant priests in the sacristy corridor or the priests' sacristy'.[57] While there was a period 'of five to six minutes of private prayer time' following Sunday solemn mass, this was separate and 'distinct' from the period during which A and B entered the priests' sacristy.[58]

Regarding the second alleged offence, the Court noted that

> [t]he assumption that a group of choristers, including adults, might have been so preoccupied with making their way to the robing room as to fail to notice the extraordinary sight of the Archbishop of Melbourne dressed 'in his full 15 regalia' advancing through the procession and pinning a 13 year old boy to the wall, is a large one.[59]

Ultimately, the evidence pertaining to the second alleged offence suffered 'from the same deficiency' as the first.[60] Therefore, 'there … [was] a significant possibility that an innocent person has been convicted'.[61] The High Court thus allowed Pell's appeal and ordered that he be acquitted.[62]

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51 Ibid 490 [57].

52 Ibid 495–6 [88].

53 Ibid 498 [102].

54 See, eg, comments regarding the evidence of choirboys Robert Bonomy, David Mayes and Anthony Nathan: ibid 497–8 [95]–[98], 498 [102].

55 Ibid 498 [102].

56 Ibid.

57 Ibid 499–500 [110].

58 Ibid 500 [111].

59 Ibid 502 [124].

60 Ibid 502 [125].

61 Ibid 502 [127].

62 Ibid 502 [129].

The High Court was critical of the approach taken by the majority in the Court of Appeal. The Court held that the majority's approach to the *M* test was driven by their Honours' subjective assessment that A was a compellingly truthful witness.[63] As such, the majority did not properly engage with the body of evidence which suggested that it was reasonably possible that A's account was not correct.[64]

The Court also criticised the majority's suggestion that A's evidence was not uncorroborated. Contrary to the majority, the Court held that A's recollection of the interior layout of the priests' sacristy 'did not afford any independent basis for finding that … he had been sexually assaulted by the applicant'.[65] Further, the Court held that the majority had, despite the requirement in the legislation,[66] failed to take adequately into account the forensic disadvantage experienced by Pell arising from the delay in being confronted by the allegations.[67]

Finally, and perhaps most notably, the High Court criticised the Court of Appeal's decision to watch the recording of A's evidence. The Court held that an appellate court should only view the evidence in exceptional circumstances where 'there is something particular in the video-recording that is apt to affect … [the court's] assessment of the evidence, which can only be discerned visually or by sound'.[68] This is not because historically there were no practical means of an appellate court viewing the evidence. Rather, the Court said, it is because

> [t]he assessment of the weight to be accorded to a witness' evidence by reference to the manner in which it was given by the witness has always been, and remains, the province of the jury … [The] demarcation [between the province of the jury and the province of the appellate court] has not been superseded by the improvements in technology that have made the video-recording of witnesses possible.[69]

## IV Comment

### A *Special Leave and Overturning Jury Verdicts*

Historically, the High Court very rarely granted special leave to appeal against a criminal conviction based purely on a question of fact.[70] In *Liberato v The Queen*, Mason ACJ, Wilson and Dawson JJ held that the High Court 'is not a court of criminal appeal and … it will not grant special leave to appeal in criminal cases … [when]

63 Ibid 488 [46].

64 Ibid 487 [41], 488 [46].

65 Ibid 488–9 [50].

66 *Jury Directions Act 2015* (Vic) ss 4A, 39.

67 *Pell* (n 4) 496 [91].

68 Ibid 485–6 [36].

69 Ibid 486 [38].

70 See, eg, *Warner v The Queen* (1995) 69 ALJR 557 (Brennan, Deane and Dawson JJ).

merely being asked to substitute for the view taken by the Court of Criminal Appeal a different view of the evidence'.[71] While the appeal to the High Court in *Pell* may have been articulated as an appeal based on the misapplication of the *M* test rather than solely a question of fact, there is no doubt Pell was asking the Court to engage primarily in an analysis of the evidence. Regardless, the High Court has undoubtedly become more willing to grant special leave to appeal a criminal conviction.[72]

Justice Michael Kirby, writing extra-curially, suggested that the High Court should make no apology for its increased involvement: 'A final court that was not concerned about criminal law, practice and sentencing would have excised from its work a vital, quite possibly the most vital, part of the law of our community.'[73] The evidence before the High Court in *Pell* was such that it determined there was a reasonable chance that an innocent person had been convicted. Whatever your opinion of the role of an appellate court in overturning the verdict of a jury, assessing whether an innocent person has been convicted must be regarded as within the ambit of the High Court. For this reason, the High Court's decision to grant special leave in this case was the correct one.

However, reviewing determinations of guilt becomes complicated in instances of trial by jury. This is not only because juries do not give reasons for their decisions, but also due to the fact that juries are an important component in the transparency of the courts and in upholding public confidence in the criminal justice system. Justice Brennan in *Chamberlain v The Queen [No 2]* observed that if courts were to overturn jury verdicts whenever they entertained a reasonable doubt, then 'the function of returning the effective verdict would be transferred from the jury to the court — a course which would at once erode public confidence in the administration of criminal justice'.[74] Justice Dawson in *Whitehorn v The Queen* likewise said that the courts must approach the prospect of overturning jury verdicts 'with caution and discrimination'.[75] A significant theme in the *Pell* decision is the apparent willingness of the Court to overturn a unanimous verdict by jury.[76]

It is of note that the *Pell* judgment does not consider in its reasons a need for restraint in the overturning of jury verdicts, nor is there any acknowledgement of potential

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71 *Liberato v The Queen* (1985) 159 CLR 507, 509 (Mason ACJ, Wilson and Dawson JJ).

72 See, eg, Justice Michael Kirby, 'Maximising Special Leave Performance in the High Court of Australia' (2007) 30(3) *University of New South Wales Law Journal* 731, 747. In fact, *Pell* was the third case in six months in which special leave was granted and the accused acquitted. See also *Coughlan v The Queen* (2020) 377 ALR 1; *Fennell v The Queen* (2019) 373 ALR 433.

73 Justice Michael Kirby, 'Why Has the High Court Become More Involved in Criminal Appeals?' (2002) 23(1) *Australian Bar Review* 4, 21.

74 *Chamberlain [No 2]* (n 44) 603 (Brennan J).

75 *Whitehorn v The Queen* (1983) 152 CLR 657, 688 (Dawson J).

76 Gideon Boas, 'The Pell Verdict: What Happens Now?', *La Trobe University* (Blog Post, 9 April 2020) <https://www.latrobe.edu.au/news/articles/2020/opinion/the-pell-verdict-what-happens-now>.

implications for public confidence. In contrast, the Court of Appeal highlighted the importance of the jury as an institution, even acknowledging their combined broader life experience.[77] The jury provides an important check on the judiciary by involving laypeople in justice. A crucial part of the justice system is not only that justice is done, but also that it is *seen* to be done.[78]

Suppose, for example, a victim comes forward alleging sexual abuse, and there are no direct witnesses to the offending other than the victim, as is usually the case. The perpetrator denies the conduct, as is usually the case. There are some minor details imperfectly recalled, as is usually the case. The perpetrator had interactions in public places that make offending seem unlikely, as is usually the case. If this victim is able to convince 12 independent members of the community that they are telling the truth, what grounds does a court have to say that those members must have been mistaken, and that 'acting rationally', would still have had reasonable doubt?

### B *Recorded Evidence on Appeal: To View or Not to View?*

A key feature of the Court's decision was criticism directed at the Court of Appeal's viewing of A's recorded testimony. The Court noted that an 'appeal court should not seek to duplicate the function of the jury in its assessment of the credibility of the witnesses'.[79]

#### 1 *If Not Now, When?*

Restricting the viewing of the recording of evidence because it may influence the appellate court's decision paints a bleak picture of the ability of an appeal court to understand its role in overturning a conviction.

The majority's now incorrect decision in the Court of Appeal was not reached because their Honours viewed the recording; it was reached due to a misapplication of the *M* test. Acting correctly, the majority should have recognised that the jury found A to be credible and reliable, but nonetheless proceeded to assess the evidence as a whole to determine whether a reasonable doubt existed. This function, it is submitted, could have been performed equally as well by viewing the recording or simply reading the transcript. One only needs to read Weinberg JA's dissent to find support for this proposition.[80]

What the restriction aims to combat is 'the highly subjective nature of demeanour-based judgments'.[81] In argument before the Court, counsel for Pell couched the

77 *Pell* (VSCA) (n 33) [103] (Ferguson CJ and Maxwell P).

78 See, eg, Chief Justice JJ Spigelman, 'The Principle of Open Justice: A Comparative Perspective' (2006) 29(2) *University of New South Wales Law Journal* 147, 147.

79 *Pell* (n 4) 486 [37].

80 *Pell* (VSCA) (n 33) [663] (Weinberg JA).

81 *Pell* (n 4) 488 [49].

dangers of viewing the recording in terms of enabling the appellate court to 'see for itself what happened to the blood vessels of the face of a witness when confronted with something'.[82] In *SKA v The Queen*, French CJ, Gummow and Kiefel JJ noted the 'potential for an undue focus upon the complainant as a witness'.[83] A demeanour-based assessment of the credibility of a witness is the function of the jury and such an assessment should not be made by an appellate court.

It is unclear what would amount to 'something particular in the video-recording' which, in the opinion of the Court in *Pell*, would warrant its viewing.[84] In *CSR Ltd v Della Maddalena*, Callinan and Heydon JJ viewed a recording because it 'loomed so large' in the judgment of the lower court.[85] But this cannot be the test; if it was, there would be a strong argument for the High Court to have viewed the recording in this instance. Greater clarity is needed to guide appellate courts as to the need to watch a recording of evidence. What are the characteristics in the evidence of a witness that necessitate audio or visual representation, but are not encapsulated in the jury's function as the assessor of demeanour?

### 2 *'Acting Rationally'*

In overturning the jury's verdict, is the Court not, in effect, substituting the jury's role in the decision-making for its own? The Court decided that the 12 independent members of the community, who each came to their own finding of guilt beyond reasonable doubt, could not have done so had they been 'acting rationally'.[86] Arriving at this finding without considering all the material which was before the jury to inform their decision-making is problematic.

In some respects, it appears unusual to declare that the assessment of the demeanour of witnesses is purely within the province of the jury, but that the subsequent decision made by the jury having regard to this assessment is not. This was especially so in *Pell*, given that the prosecution's argument rested almost entirely on the testimony of A. Having viewed the testimony, the majority in the Court of Appeal determined that 'A came across as someone who was telling the truth'.[87] This suggests that the assessment of A's demeanour was an important factor in the majority's determination of the weight to be given to A's evidence.

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82 Transcript of Proceedings, *Pell v The Queen* [2020] HCATrans 26, 566–7 (BW Walker QC).

83 *SKA v The Queen* (2011) 243 CLR 400, 410 [29].

84 See above n 68 and accompanying text.

85 *CSR Ltd v Della Maddalena* (2006) 224 ALR 1, 47 [192] (Callinan and Heydon JJ).

86 *Pell* (n 4) 486 [39].

87 *Pell* (VSCA) (n 33) [91] (Ferguson CJ and Maxwell P).

### C *Can One 'Witness of Truth' Ever Be Sufficient?*

Counsel for the prosecution in the Court of Appeal described A as 'a very compelling witness. He was clearly not a liar… [or] a fantasist. He was a witness of truth'.[88] The jury, it seems, was in agreement, as was the majority of the Court of Appeal. It is no insignificant feat to persuade 12 jurors as to the guilt of the accused beyond reasonable doubt, let alone to do so with only the testimony of one uncorroborated witness, more than 20 years after the alleged offending. One question which arises from the decision of the High Court is whether, moving forward, one sole 'witness of truth' will ever be held to be credible enough to establish guilt beyond reasonable doubt on appeal of a jury verdict.

The criminal justice system serves to determine the guilt and punishment of those proven to have breached the legal standards of behaviour. The consequences of such a finding are significant, including monetary fines, terms of imprisonment, social ostracisation, employment ramifications, and more. It is of the utmost importance that guilt is determined beyond reasonable doubt, because to level such consequences on an innocent person is state-sanctioned injustice. In the famous words of Sir William Blackstone, '[i]t is better that ten guilty persons escape than that one innocent suffer'.[89] A key protection against wrongful conviction is the mechanism of appealing to a higher court.

Sexual offending almost always has a degree of improbability, because it is abhorrent. Instinctively, we do not want to believe people in their right mind would ever behave so despicably, especially a person at the pinnacle of a church. Though the High Court acknowledged there is no legal requirement for evidence to be corroborated for a jury to find guilt beyond reasonable doubt,[90] in effect, it seems there may be such a requirement in practice.

The lack of corroboration of A's testimony was considered to contribute to the improbability of the offending having occurred.[91] In some respects, this reasoning appears to align with the historical common law rule that the testimony of the victim of an alleged sexual assault was to be regarded as unreliable.[92] Judges were required to warn juries of this fact and of the dangers of convicting someone based on uncorroborated evidence.[93] Legislation in all Australian jurisdictions has since abolished

88 Ibid [90].

89 See, eg, William Blackstone, *Commentaries on the Laws of England*, ed Wilfrid R Prest et al (Oxford University Press, 2016) bk 4, 231.

90 *Pell* (n 4) 489 [53].

91 Ibid 478–9 [50].

92 *Kelleher v The Queen* (1974) 131 CLR 534, 541 (Barwick CJ), 559–60 (Mason J).

93 Australian Law Reform Commission, *Family Violence: A National Legal Response* (Report No 114, October 2010) vol 2, 1311 [28.12].

this rule.[94] These reforms, in theory, increase the probability of conviction for sexual offences. It could be argued, however, that the High Court's reasoning in *Pell* suggested that the jury must have had a doubt as to Pell's guilt because the evidence was uncorroborated. If so, this raises issues of inconsistency with the statutory abolition of corroboration warnings.

Further, it was raised by Weinberg JA in the Court of Appeal that the sheer 'brazenness' made the offending so unlikely.[95] Is sexual offending not always brazen? How many improbabilities must accumulate before guilt beyond reasonable doubt cannot be established? Granted, in *Pell* there were many: Pell must have broken his ordinary course of conduct and not stood on the steps of the Cathedral for 10 minutes; he must not have been accompanied back to undress; the boys must not have been seen; and, no one could have walked in on the offending. But none of these improbabilities were impossible. It seems the fact that they were unlikely made establishing guilt beyond reasonable doubt unachievable. This case seems to convey that the testimony of only one witness is not capable of defeating numerous improbabilities.

### D *Implications for Whether to Allow and Choose Trials by Judge Alone*

*Pell* has undoubtedly reignited the debate surrounding the role of the jury. How can a carefully chosen and appropriately directed jury deliberate on a verdict for five days only for the High Court to negative that verdict clinically and unanimously? This is especially so when, in the same judgment, the Court stressed the 'advantages that the jury brings to the discharge of its function'.[96] Conversely, it is hard to suggest that there should be *no* function for appellate courts to overturn jury findings or that a test, such as the *M* test, is the wrong mechanism to discharge that function. This necessarily brings the appropriateness of a jury determining this trial into question.

Trial by jury has always been a significant pillar of the justice system in determining guilt. Section 80 of the *Constitution* provides that '[t]he trial on indictment of any offence against any law of the Commonwealth shall be by jury'.[97] In an impassioned statement, Deane J in *Kingswell v The Queen* described this section as 'not the mere expression of some casual preference for one form of criminal trial. It reflected a deep-seated conviction of free men and women about the way in which justice should be administered in criminal cases'.[98] By involving the laypeople in the determination of guilt, juries reinforce public confidence in the courts and the broader criminal

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94 See, eg, *Evidence Act 1995* (Cth) s 164; *Evidence Act 2011* (ACT) s 164; *Evidence Act 1995* (NSW) s 164; *Evidence Act 1929* (SA) s 34L(5); *Evidence Act 2001* (Tas) s 164; *Evidence Act 2008* (Vic) s 164; *Evidence Act 1906* (WA) s 50; *Criminal Code Act 1899* (Qld) s 632; *Criminal Code Act 1924* (Tas) s 136.

95 *Pell* (VSCA) (n 33) [1095] (Weinberg JA). See also at [641]–[642], citing *Fitzgerald v The Queen* (2014) 311 ALR 158 (Hayne, Crennan, Kiefel, Bell and Gageler JJ).

96 *Pell* (n 4) 486 [37].

97 *Constitution* s 80.

98 *Kingswell v The Queen* (1985) 159 CLR 264, 298 (Deane J).

justice system. Despite this, had Pell been charged in nearly any other jurisdiction in Australia, he would have been able to apply for a trial by judge alone.[99]

That is, of course, not to say the result would have been any different. In 1993 in New South Wales, 62.4% of trials by judge alone resulted in acquittal compared with 52.3% of jury trials. By 2014, acquittal rates were 33.3% for judge alone and 35.2% for jury trials.[100] Furthermore, a majority in the Court of Appeal determined that the conclusion reached by the jury was 'open' to them.[101]

Pell is, however, a very well-known figure and these allegations attracted the attention of society like few other cases. In sentencing Pell, Chief Judge Kidd noted that he was

> to be punished only for the particular wrongdoing you have been convicted of on this Indictment, of sexually abusing two boys in the 1990's, and only of that wrongdoing
>
> …
>
> As I directed the jury who convicted you in this trial, you are not to be made a scapegoat for any failings or perceived failings of the Catholic Church … You have not been charged with or convicted of any such conduct or failings.[102]

Despite this direction from the trial judge, it is easy to understand the scepticism associated with a trial by jury in this case. This is particularly so when the highest court in the country ultimately finds that the conclusion the jury reached was incorrect. In 1986, the New South Wales Law Reform Commission reported that 'it may be that publicity which is adverse to the accused person is so prolonged and widespread that it is clearly impossible to eliminate its impact upon potential jurors'.[103] While there may not have been significant publicity regarding personal claims against Pell, the failings of the Catholic Church with respect to sexual abuse allegations have been well documented,[104] and it is easy to see why some may speculate as to the ability of a jury to assess the evidence in this case appropriately.

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99 See, eg, *Supreme Court Act 1933* (ACT) s 68B; *Criminal Procedure Act 1986* (NSW) s 132; *Criminal Code 1889 Act* (Qld) s 720; *Juries Act 1927* (SA) s 7(1); *Criminal Procedure Act 2004* (WA) s 118.

100 Peter Krisenthal, 'Judge Alone Trials: Practical Considerations' (Report, September 2015) app B <https://criminalcpd.net.au/wp-content/uploads/2016/09/Judge_alone_trials_in_NSW_peter_krisenthal.pdf>.

101 *Pell* (VSCA) (n 33) [300] (Ferguson CJ and Maxwell P).

102 *Pell (Sentence)* (n 37) [8]–[10].

103 New South Wales Law Reform Commission, *Criminal Procedure: The Jury in a Criminal Trial* (Report No 48, 1986) 81 [7.3].

104 See, eg, *Royal Commission into Institutional Responses to Child Sexual Abuse* (Final Report, 15 December 2017) vol 16, bk 2.

Perhaps cases of such notoriety are always going to generate criticism irrespective of the trier of the fact. However, had trial by judge alone been permitted in Victoria, at the very least the option would have been considered. If a global pandemic can force Victoria to permit trials by judge alone temporarily,[105] the decision in *Pell* should encourage the government to keep them.

## V Conclusion

Perhaps the best description of *Pell* comes from the complainant himself:

> There are a lot of checks and balances in the criminal justice system and the appeal process is one of them. I respect that.
>
> It is difficult in child sexual abuse matters to satisfy a criminal court that the offending occurred beyond the shadow of a doubt.[106]

*Pell* demonstrates that the High Court is willing to overturn a verdict of a jury where the Court believes the standard of proof, beyond reasonable doubt, is not satisfied. The Court in *Pell* determined that it was inappropriate for the Court of Appeal to view A's testimony in assessing whether guilt beyond reasonable doubt had been established. The Court explained that it is the jury's role to make demeanour-based assessments. However, there is a compelling argument that, for a court to overturn a jury verdict, it should review all the material which formed the basis of the jury's decision. If a judgment on demeanour is relevant to deciding guilt, why should the court not itself review the evidence upon which demeanour was assessed when determining whether the jury was 'acting rationally'?

If *Pell* had been heard in nearly any other jurisdiction of Australia, the defence would have been entitled to opt for trial by judge alone. The concern around juries being susceptible to public opinion and the media is a valid one, particularly in cases involving public figures. However, empanelling a jury involves placing in those individuals the authority to make a determination of guilt on the facts. For a court to discard their opinion, without being privy to their reasons, is of concern to public confidence. The decision in *Pell* once again brings into issue the appropriateness of an appellate court overturning a jury's verdict, especially in circumstances where the complainant's testimony was uncorroborated. Juries are a vital part of the justice system, and decisions such as this inevitably undermine their credibility.

*Pell* exposes a tension in criminal law between the right of society to have guilty persons convicted for historical sexual abuse, and the standard of proof being beyond reasonable doubt. The decision in *Pell* suggests that, in cases of alleged historical

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105 See *COVID-19 Omnibus (Emergency Measures) Act 2020* (Vic) s 420D.

106 'Witness J, Former Choirboy Who Accused George Pell, Says Case "Does Not Define Me"', *ABC News* (online, 8 April 2020) <https://www.abc.net.au/news/2020-04-08/george-pell-accuser-witness-j-reacts-to-high-court-judgment/12130684#>.

sexual abuse where there is a degree of improbability and only one witness to the alleged offending, the prosecution's case will be at risk of failing to meet the requisite standard of proof. This is, however, simply the nature of historic sexual abuse. That being said, the right of the defendant to have their guilt proven beyond reasonable doubt is a cornerstone of the criminal justice system not to be undermined. Ultimately, these remain intractably hard cases, but the High Court's approach in dispensing what it perceived to be justice in *Pell*'s case carries the risk of making that same goal harder to achieve in others.