A Majority of the Victorian Court of Appeal Uphold Cardinal Pell's Conviction for Child Sexual Assault Offences

Emma Sullivan reports on *Pell v The Queen* [2019] VSCA 186[1]

On 21 August 2019, the Victorian Court of Appeal dismissed Cardinal George Pell's appeal against conviction for the commission of sexual offences by majority (2 to 1).

The appeal followed Cardinal Pell's conviction on 11 December 2018 in the Victorian County Court after a five week trial before a jury of one charge of sexual penetration of a child under 16 and four charges of indecent act with a child under 16.

Cardinal Pell was sentenced to six years imprisonment (with a non-parole period of three years and eight months).

Grounds of appeal

Cardinal Pell sought leave to appeal from his conviction, relying on three proposed grounds of appeal (with the application for leave and the appeal itself being heard together). The first and primary ground was that the guilty verdicts were unreasonable and could not be supported having regard to the whole of the evidence (including evidence that was said to be unchallenged and exculpatory).

The second ground of appeal related to the trial judge's refusal to permit defence counsel to show the jury a 19 minute animation (showing a blue-print of the Cathedral complex with various coloured dots and lines depicting persons or groups) during his closing address to the jury.

The third ground of appeal asserted a fundamental irregularity in the trial process by not arraigning the accused in the presence of the jury as required under the *Criminal Procedure Act 2009* (arraignment being the process where the charge is read to the accused person named on the indictment and they are asked whether they plead guilty or not guilty). The issue arising was whether this had occurred 'in the presence of' the jury panel, who were in a different room watching via video link at the time of Cardinal Pell's arraignment.

Determination of appeal

Relevant context

The offences were alleged to have been committed by Cardinal Pell against two 13 year old choirboys in the St Patrick's Cathedral choir on two occasions while the Cardinal was Archbishop of Melbourne in 1996–1997. The first occasion was alleged to have involved both boys (A and B) in the Priests' Sacristy of the Church; the second involved only A and was alleged to have occurred in a busy corridor within the Church. By the time A made a report to police in 2015, B had died from accidental causes.

The prosecution case rested primarily on evidence given by A. In addition, numerous witnesses involved with Sunday Mass at the Cathedral gave evidence as to processes and practices ('the opportunity witnesses' whose evidence concerned whether there was a realistic opportunity for the offending to have occurred). Cardinal Pell's voluntary interview with police – in which he denied the allegations – was shown to the jury. The defence called no evidence at the trial.

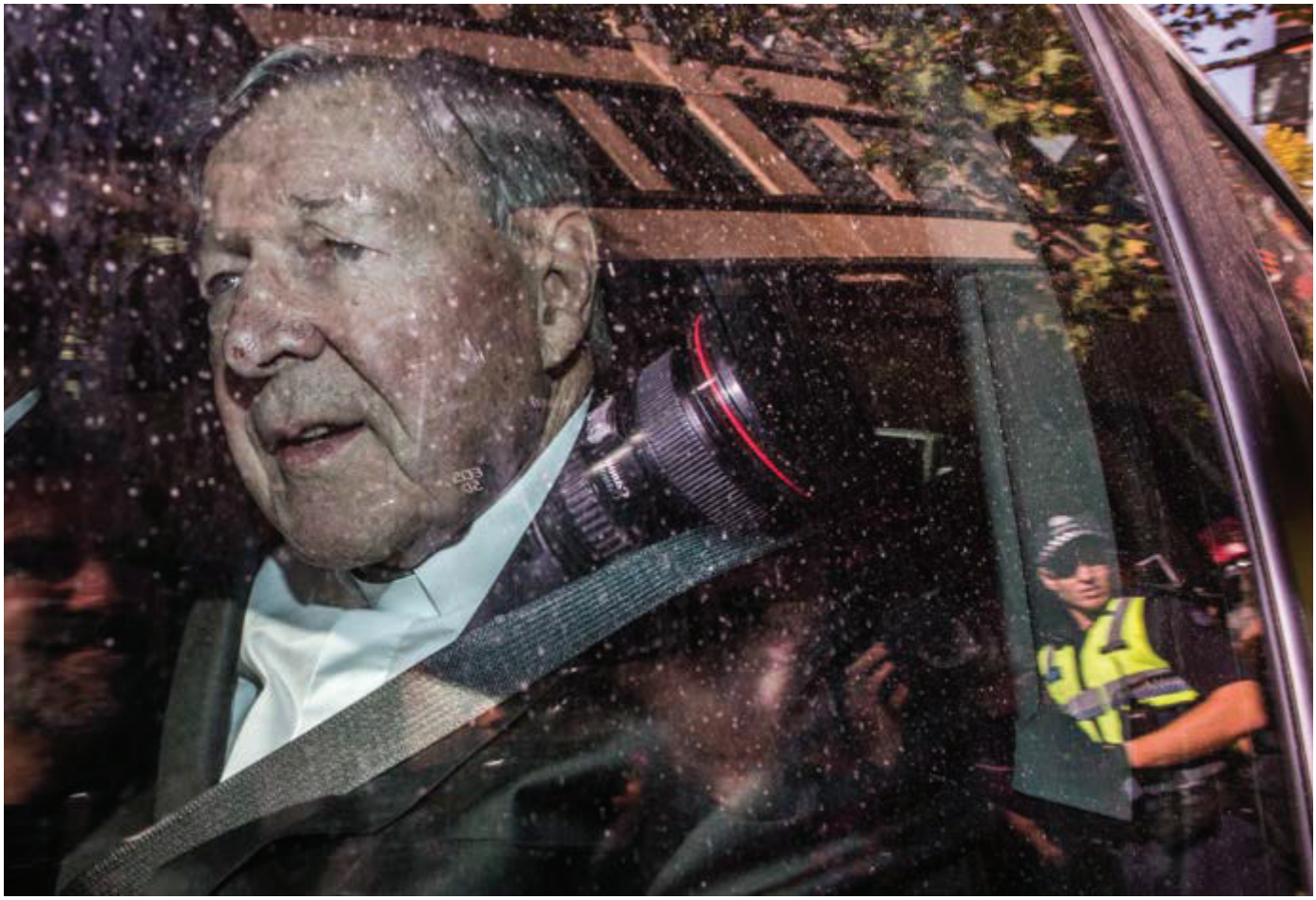
The central prosecution submission was that A was a witness of truth. For Cardinal Pell, it was submitted that the jury must have had a doubt about A's account, said to be a fabrication or fantasy; the evidence of the opportunity witnesses was said to render A's account impossible, and to constitute a 'catalogue of at least 13 solid obstacles in the path of a conviction': *Pell v The Queen* [2019] VSCA 186, at [157].[2]

Ground 1 (unreasonable verdict)

The majority (Chief Justice Ferguson and Justice Maxwell, President of the Court of Appeal), found that on the whole of the evidence, it was open to the jury to be satisfied beyond reasonable doubt that Cardinal Pell was guilty of the offences. Their Honours relevantly held that:

- the inquiry into a ground of unreasonableness is a 'purely factual one': the appeal Court reviews the evidence presented to the jury and asks whether on that material, it was open to the jury to convict the accused (at [13]);
- the approach an appellate Court must take when addressing the unreasonableness ground was authoritatively stated in *M v The Queen* (1994) 181 CLR 487, where their Honours (Mason CJ, Deane, Dawson and Toohey JJ) said that the appeal Court must ask itself: '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' (at [19]).

The majority stated that they had approached their task by trying to put themselves in the closest possible position to that of the jury, having read the transcript, watched some of the oral evidence and attended a view of the Cathedral: at [33]. Their Honours also tried on the Archbishop robes (as the jury had done); they considered it was well open to the jury to reject the contention of physical impossibility of manoeuvring the robes: at [144] – [146].



There was nothing about the complainant's evidence or the opportunity evidence which meant that the jury 'must have had a doubt': their Honours accepted A to be a compelling witness, whose account had the ring of truth.

In a lengthy dissenting judgment, Weinberg JA held that it was not open to the jury to be satisfied beyond reasonable doubt of Cardinal Pell's guilt. In particular, his Honour found A's account of the second incident (said to have occurred in a corridor in plain view) to be implausible (at [1054]); he considered A to have embellished certain matters (at [928]) and found there was a cogent body of evidence casting doubt on A's account, both as to credibility and reliability (at [1058] – [1059]).

Ground 2

In refusing leave on this ground, the Court of Appeal agreed with the trial judge's ruling refusing to permit the animation to be shown to the jury during defence counsel's final address. It was considered to bear little resemblance to the actual evidence and was described as 'tendentious in the extreme', with the potential to mislead or confuse the jury (at [16], [1128]-[1130]).

Ground 3

The Court of Appeal determined that the word 'presence' in the context of the legislation included presence by video link and did not require physical presence (at [16], [1136] ff).

Special leave application

On 13 November 2019, Justices Gordon and Edelman referred Pell's application for special leave to appeal to the Full Court of the High Court for argument as on appeal: *Pell v The Queen* [2019] HCATrans 217 (13 November 2019). BN

ENDNOTES

1 The judgment of the Victorian Court of Appeal extends to 325 pages – necessarily, this short form summary can provide a high level overview only.

2 *Pell v The Queen* [2019] VSCA 186, supra, at [157].