

A Significant Possibility that an Innocent Person has been Convicted:

Pell v The Queen (2020) 94 ALJR 394, [2020] HCA 12

By Ann Bonnor

Following a trial by jury, Cardinal Pell was convicted of sexual penetration of a child under 16, and indecent acts with a child under 16. As reported in *Bar News* (Summer) 2019, the majority of the Victorian Court of Appeal dismissed his appeal.

On 7 April 2020, in a unanimous judgment, the High Court granted special leave, quashed Pell's convictions and entered judgments of acquittal in their place. The Court found that there was a significant possibility that an innocent person had been convicted because the evidence did not establish guilt to the requisite standard of proof.

Background

All of the offences were alleged to have been committed in St Patrick's Cathedral, East Melbourne, following celebration of Sunday solemn Mass and within months of Pell becoming Archbishop of Melbourne.

The victims of the alleged offending were two choirboys, 'A' and 'B'. B died some years before trial. Pell's convictions followed a second trial, the first having resulted in a hung jury. A gave evidence in the first trial, and an audiovisual recording of his evidence was admitted in the second trial.

A gave evidence of two incidents: that Pell sexually assaulted him and B in the sacristy after celebration of solemn Mass on a date between 1 July and 31 December 1996 (comprising four offences) and of a further act of indecency on A after another such mass between 1 July 1996 and 28 February 1997.

High Court decision

Unreasonable verdict principles

The Court held that, in determining whether the verdict of the jury is unreasonable in a case such as *Pell*, an appellate court proceeds upon the assumption that the evidence of the complainant was assessed by the jury to be credible and reliable (at [39]). Having accepted this evidence, the appellate court must then examine the record to see whether, by reason of inconsistencies, discrepancies, or other inadequacy, or in light of other evidence, the court is satisfied that the jury,



acting rationally, ought nonetheless to have entertained a reasonable doubt as to proof of guilt (at [39]).

Pell's case

The prosecution case was wholly dependent upon A's evidence. A's credibility ultimately was not questioned. However, evidence from 23 other participants in the masses called into question the likelihood of Pell having had the opportunity to commit the acts alleged (the 'opportunity witnesses').

The Court of Appeal majority subjectively assessed A as being compellingly truthful. The High Court found that this drove their analysis of the consistency and cogency of A's evidence, and the capacity of the opportunity witnesses' evidence to engender a reasonable doubt. The appeal court's reasoning failed to engage with whether, against this body of evidence, it was reasonably possible that A's account was not correct (at [46]).

The Court found that the evidence as a whole was not capable of excluding a reasonable doubt as to Pell's guilt, notwithstanding that the jury found A to be credible and reliable (at [58]). In summary, reasons for this finding included the following.

First, acceptance of A's account required finding that – contrary to a powerful body of evidence of Pell's practice – Pell did not stand on the steps of the Cathedral greeting congregants for 10 minutes or longer after

Sunday solemn Mass (at [57], [103]). This was a critical issue (at [91]).

The Court of Appeal held that the recollections of the opportunity witnesses must have been affected by ritual that developed after the dates of the alleged offences. The High Court found this treatment to be wrong (at [91]).

The master of ceremonies, Portelli, gave unchallenged evidence of actually recalling being beside Pell as he greeted congregants on 15 and 22 December 1996 – the only two occasions on which Pell celebrated Sunday solemn Mass in the Cathedral in 1996 (at [23], [88]). He and other witnesses gave evidence of this practice (at [59]-[75]). Together, this evidence raised lively doubts as to the commission of the offences (at [91]).

Secondly, the Court found that evidence that a defining feature of religious observance was adherence to ritual and compliance with established practice, had particular probative value in this case (at [93]).

Unchallenged evidence was given that Catholic church teaching requires an archbishop to be accompanied while in a church, at least while robed (at [102]). It was Portelli's role to ensure compliance. He gave unchallenged, and corroborated, evidence of accompanying Pell to the sacristy after solemn Mass on 15 and 22 December 1996 (at [61], [77]).

Thirdly, acceptance of A's account required finding that over an interval of some five to six minutes – after A said that he and B had broken away from the procession – no other person entered the priests' sacristy while the assaults took place. Once the procession had ended, a 'hive of activity' would start, with continuous traffic into and out of the sacristy (at [107]-[117]).

Additional inconsistencies included that, on the evidence, it might reasonably be expected that if A and B had left the procession, they would have encountered the (six to 12) altar servers. It was also odd that they did not encounter any concelebrant priests, who would have been expected to go to the sacristy to disrobe after the procession (at [110]).

Assuming the jury assessed A's evidence as thoroughly credible and reliable, the issue was whether the compounding improbabilities caused by unchallenged evidence nonetheless required the jury, acting rationally, to have entertained a doubt as to Pell's guilt (at [119]). The Court found that plainly they did. As a consequence, making full allowance for the advantages enjoyed by the jury, there was a significant possibility that an innocent person had been convicted (at [119]).

In relation to the second incident, the capacity of the evidence to support the guilty verdict suffered from the same deficiency (at [120]-[122]).

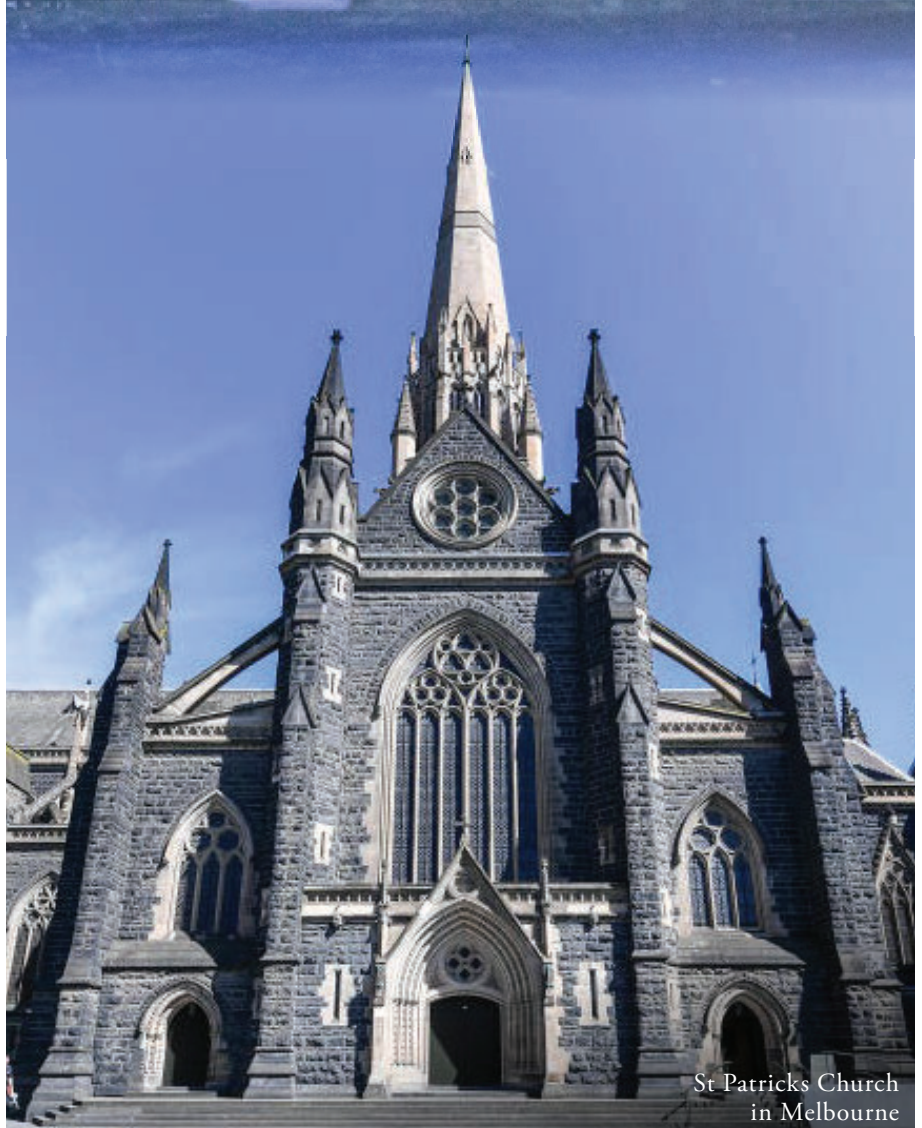
Use of video recordings of evidence in appeals

In conducting its hearing, the Court of Appeal watched video recordings of the trial evidence of four witnesses, including A.

The High Court found that the approach taken by the Court of Appeal should not generally be adopted. There may be cases where there is something particular in a video recording that is apt to affect an appellate court's assessment of the evidence, which can only be discerned visually or by sound, providing a real forensic purpose to the appellate court's examination of the recording (at [36]). However, such cases will be exceptional (at [36]).

The Court emphasised that it is within the province of the jury, as representative of the community, to assess credibility of a witness (at [37]). An appellate court's functions do not involve the substitution of trial by that court for trial by jury; generally, an appeal court should not seek to duplicate this function (at [37]). The jury assesses credibility on the basis that its decisions are unanimous, and after the benefit of sharing their subjective assessments. Judges of appeal do not perform the same function in the same way, or with the same advantages (at [37]). This demarcation has not been superseded by improvements in technology (at [38]).

BN



St Patrick's Church
in Melbourne