IN THE HIGH COURT OF AUSTRALIA No M 112 of 2019
MELBOURNE OFFICE

Between **GEORGE PELL**

Applicant

And

THE QUEEN

Respondent

APPLICATION FOR SPECIAL LEAVE TO APPEAL

The applicant applies for special leave to appeal from part of the judgment by the Supreme Court of Victoria, Court of Appeal, given on 21 August 2019.

PART I:

Proposed grounds of appeal

1 The majority erred by finding that their belief in the complainant required the applicant to establish that the offending was impossible in order to raise and leave a doubt.

2 The majority erred in their conclusion that the verdicts were not unreasonable as, in light of findings made by them, there did remain a reasonable doubt as to the existence of any opportunity for the offending to have occurred.

Proposed orders

3 Appeal allowed.

4 Set aside the order of the Court of Appeal and in lieu thereof allow the appeal on Ground 1 and quash the applicant's convictions and enter verdicts of acquittal in their place.

PART II:

5 Can belief in a complainant be used as a basis for eliminating doubt otherwise raised and left by unchallenged exculpatory evidence inconsistent with the offending having occurred where that evidence is not answered by the evidence of the complainant?

6 In a criminal trial, is the evidence of complainants of sexual offending to be assessed according to different standards from that applied to other witnesses?

Filed on behalf of the Applicant
ADDRESS FOR SERVICE
Galbally & O'Bryan
259 William Street
Melbourne VIC 3000

Date of Filing 17 September 2019
Tel (03) 9200 2533
Fax (03) 9642 1704
Ref Paul Galbally

PART III:

7 On 11 December 2018, Pell was found guilty by a jury of one charge of sexual penetration of a child under 16 and four charges of indecent act with a child under 16. The prosecution case as opened to the jury is summarised at Weinberg JA {Reasons for Judgment 21st August 2019 (**CA**) [360]-[401]}. The complainant's evidence is summarised at Weinberg JA {CA [410]-[454]} and the balance of the evidence at Weinberg JA {CA [456]-[588]}. The arguments at trial and on appeal are summarised at Weinberg JA {CA [664]-[892]}.

8 The applicant appealed his convictions to the Court of Appeal arguing three grounds – the only ground relevant to this application is Ground 1: 'The verdicts are unreasonable and cannot be supported having regard to the evidence because on the whole of the evidence, including unchallenged exculpatory evidence from more than 20 Crown witnesses, it was not open to the jury to be satisfied beyond reasonable doubt on the word of the complainant alone.' The court unanimously granted leave to appeal on Ground 1. The majority dismissed the appeal. Weinberg JA dissented.

9 The test to be applied in determining an unreasonableness ground is authoritatively set out in *M v The Queen* (1994) 181 CLR 487, 493-495 per Mason CJ, Deane, Dawson and Toohey JJ and 508 per Gaudron J. According to *M,* the 'ultimate question' for an appellate court is whether the court thinks that upon the whole of the evidence it was open to the jury to be satisfied of guilt beyond reasonable doubt.[1]

10 The approach to answering the 'ultimate question' requires the appellate court to undertake two steps. First, to make its own independent assessment of the whole of the evidence to determine whether the court itself has a reasonable doubt about the guilt of the accused. This first step was described in *SKA v The Queen* (2011) 243 CLR 400, 408 [20] per French CJ, Gummow and Kiefel JJ as the 'central question'.[2] Second, if the court does have a reasonable doubt, then it is to consider whether the jury had an advantage capable of resolving the doubt experienced by the court. If so, then the appeal fails. In most cases, however, a doubt experienced by the court will be a doubt which a jury should (or must) have also experienced.

---

[1] This 'ultimate question' has also been expressed as being whether the jury 'must' have entertained a doubt: *Libke v The Queen* (2007) 230 CLR 559, 596-7 [113] per Hayne J. The use of the term 'must' in *Libke* does not depart from the test in *M* {CA [613]-[618]}.

[2] The plurality in *SKA* referred to the second step in *M* as a 'qualification': 406 [13]. They also held that the first step required the appellate court to make its own findings on critical facts to determine whether there are matters which

Ground 1: The majority erred by finding that their belief in the complainant required the applicant to establish that the offending was impossible in order to raise and leave a doubt.

11 The majority upheld the primary submission of the Crown on appeal that the complainant was 'a very compelling witness. He was clearly not a liar. He was not a fantasist. He was a witness of truth' {CA [90]}.[3] Having so concluded, the majority judgment then turns to each of the matters emphasised by the applicant as, at least in combination, raising and leaving doubt. Contrary to the requirements of the *M* test, the majority examined each piece of evidence in isolation and asked whether it required the jury to have a doubt about the correctness of the
10 believable complainant's allegations {CA [102], [109], [112], [180], [185], [253], [267], [272], [291], [300], [326], [332], [339], [350]}.[4] The majority determined that none did and, therefore, held the verdicts were not unreasonable.

12 This error in approach infected the treatment by the majority of the body of evidence which contradicted the complainant's account as to there being an opportunity for either of the two incidents to have occurred.[5] This evidence fell into two categories: (1) Crown witnesses who gave evidence that they recalled the dates in question and placed the applicant on the front steps or in their company such that he had an 'alibi' for the alleged offending; (2) Crown witnesses who did not recall the dates in question but gave evidence that the routines and practices of the Cathedral after mass (said by some to be 'invariable') were contrary to there being any

---

cause the appellate court to itself experience a doubt: 408-409 [20]-[24].

[3] As Weinberg JA correctly noted, in this case 'there was no supporting evidence of any kind at all' {CA [925]-[926]}. This accords with the trial judge's directions to the jury that 'in this case the only evidence to support the prosecution case and proof of the elements of each charge is the evidence of the complainant' {Charge 1587.17-19}. The majority's conclusion at {CA [90]} appears to have been substantially based on the favourable view the majority took of the manner in which the complainant gave his evidence {CA [73], [87], [90]-[94], [201]-[202], [208]}. Many of the other matters affecting credibility are either viewed by the majority as not detracting from the favourable perception they have of his demeanour or are interpreted through the lens of having concluded he is credible and reliable because of his demeanour: see {CA [71], [73]-[74], [77]-[80], [86] [113], [216], [219]-[220], [225], [234]-[237]}. The majority also relied on two matters as being 'supportive' of the complainant's account: his description of the priests' sacristy and having placed the applicant in that room in late 1996 {CA [95]-[97]}. These were, however, each matters which could have been known by the complainant without the applicant having offended in the manner alleged. On the first matter see Weinberg JA at {CA [908]-[910]}. In regards to the second, it was submitted by the applicant on appeal that the use by the applicant of the priests' sacristy in that period was hardly a secret {Appeal Hearing 5-6th June 2019 143.6-145.29}. These submissions are not referred to in the majority's judgment. Neither do the majority reconcile the supposition that it had been 'exceptional' that the Archbishop's sacristy was not in use at the end of 1996 {CA [96]} with the evidence that the room remained out of use for at least part of 1997 {CA [347]-[348]}. For a very good part of the time that the complainant was in the choir it appears the mass sayer (whether priest, Dean or Archbishop) openly utilised the priests' sacristy.

[4] Though the majority refer in conclusion to having taken 'the evidence as a whole', {CA [351]}, the judgment is otherwise devoid of any mention of the combined effect of the matters raised by the applicant.

[5] As the trial judge directed the jury, the complainant's evidence required seven distinct opportunities to have each occurred for the first occasion of offending to have been possible and three for the second {Charge 1594.21-

opportunity for the offending to have occurred.

14 At no stage did the prosecution suggest that any these witnesses were untruthful {CA [995]}. The prosecution did, however, obtain section 38 of the *Evidence Act 2008* (Vic) to challenge the correctness of much of this evidence {*DPP v Pell (Evidential Ruling No 3)* [2018] VCC 1231 (**Evidential Ruling No 3**) Summary at CA [970]-[997]}. It was telling that, nonetheless, the prosecution did not challenge the witnesses by putting to them that they were wrong – even when they gave evidence they recalled being with the applicant on the dates in question.

15 In relation to the first category of unchallenged evidence, senior counsel for the prosecution on appeal agreed that it constituted, effectively, alibi evidence so that any reasonable possibility that it was true and accurate would leave the Crown case 'in some difficulty' {Appeal Hearing 183.5-184.2}. This concession was consistent with accepted authority that when evidence of an alibi is raised, there is no onus on the accused to prove the alibi. Rather, the onus remains on the prosecution to eliminate any reasonable possibility that the alibi is correct: *Killick v The Queen* (1981) 147 CLR 565, 596-70 per Gibbs CJ, Murphy and Aickin JJ, *R v Small* (1994) 33 NSWLR 575, 595-6 per Hunt CJ at CL.

16 Though the majority said at {CA [129]} that there was no onus on the applicant to prove impossibility, that is precisely what their analysis required him to do. The majority explicitly framed the question in terms of whether 'the opportunity evidence fell short of establishing the certainty which the argument of impossibility asserted' {CA [131]}. See also {CA [126]-[130], [134], [143], [151], [166], [168] [170], [284], [291], [309], [314]-[315], [326], [332], [338]-[339], [351]}. In effect, this approach required the applicant to establish actual innocence, as opposed to merely pointing to doubt, in order to counter the favourable impression of the complainant's sincerity adopted by the majority. This was a reversal of the onus and standard of proof.

17 The majority justified this approach on the basis that at trial the applicant had used the terms 'impossible' and 'highly improbable' to refer to the opportunity for offending and had not used the term 'alibi' {[114]-[151]}[6]. By doing so, according to the majority, 'the issue as joined between the parties at trial' was whether the opportunity evidence excluded any possibility of opportunity for the offending conduct to have taken place {CA [134]}. By the majority's

---

1595.25}.

[6] While it was correct that defence had not used the term 'alibi' to the jury or requested an alibi direction, repeatedly defence submitted to the jury that there was no opportunity for the offending in part because the unchallenged evidence put the applicant on the front steps not in the priests' sacristy at the time the offending was said to have taken place. However this evidence was labelled, an effective alibi was raised by the evidence and left to the jury as

unorthodox reasoning, the applicant, at trial, did not 'join issue' with the prosecution on whether they had proved beyond reasonable doubt that the offending occurred. Rather, the trial was one where it was open to the jury to accept the complainant's account beyond reasonable doubt based on the prosecution's submission that he was 'so obviously truthful' and it was then for the defence to undermine his evidence by trying to demonstrate the events were impossible {CA [149]-[150]}. The majority do not explain how this two-step reasoning process found by them to have been 'open to the jury' accorded with the trial judge's directions to the jury not to overvalue demeanour, consider the whole of the evidence before reaching any conclusions, and always bear in mind the accused does not have to prove anything {Charge 1570.20-1572.21}.[7]

10 **18** The correct reasoning process is first to acknowledge that believing a complainant, *ipso facto*, does not equate to the elimination of reasonable doubt otherwise raised. In both oral and written submissions, the applicant drew the appellate court's attention to the distinction drawn in a criminal trial between 'belief' and 'doubt'. In particular, reference was made to *M* at 181 CLR 500 per Mason CJ, Deane, Dawson and Toohey JJ and 510 per Gaudron J, *SKA* at 243 CLR 405-410, [9]-[10], [13], [19], [22]-[24], [30] per French CJ, Gummow and Kiefel JJ; *Palmer v The Queen* (1998) 193 CLR 1, 12 [14], 14-15 [21]-[22] per Brennan CJ, Gaudron and Gummow JJ and 29-30 [73]-[76] per McHugh J. These authorities confirm that finding a complainant is 'compelling' is an inadequate mechanism for eliminating a doubt raised by an otherwise cogent alibi (*SKA* and *Palmer*) or by improbability (*M*). Reasoning which uses a belief in the
20 complainant as the basis for rejecting evidence inconsistent with the complainant's account (where the relevance of that inconsistent evidence is whether it casts doubt on the correctness of the complainant's account) is clearly circular and contrary to the onus and standard of proof in a criminal trial. Though the majority cite these authorities in other contexts, their judgment does not engage with these particular principles at any stage.

19 There are good reasons for allowing belief and doubt to co-exist in a criminal trial. Where, in addition to a complainant, there are witnesses who give exculpatory evidence, the question is not merely whether to 'believe' the complainant or the exculpatory witnesses, or whether the court 'prefers' the complainant's evidence: *Liberato v The Queen* (1985) 159 CLR 507, 515 per Brennan J and 518-520 per Deane J. In addition, where there is no invitation by the

---

matter they were required to consider.

[7] See, in particular, the conflict between the majority at {CA [141]} and the way the issues were framed for the jury {Charge 1594.8-1596A.10, Defence Closing 1419.12-24, 1498.23-1503.2, 1542.20-1543.21, 1549.16-1552.7, Defence Opening 92.9-30, 102.6-103.9}. As these extracts show, defence repeatedly invited the jury to consider impossibility and improbability by reference to the onus and standard of proof.

prosecution to disbelieve the exculpatory witnesses or challenge to their evidence at trial (and any doubts about their reliability have to be filtered through the lens of significant forensic disadvantage), doubt readily coexists with belief.[8]

20 Further, the law recognises the dangers in overvaluing demeanour are such that no jury, nor appellate court, is to make the manner in which a witness gives evidence the only or even the most important factor in its decision as to whether the prosecution has proved guilt beyond reasonable doubt: *Fox v Percy* (2003) 214 CLR 118, 129 [30]-[32] per Gleeson CJ, Gummow and Kirby JJ.[9] Where exculpatory evidence such as alibi is raised, the demeanour of the complainant does not inform the cogency of it. It is contrary to the burden and standard of proof for a jury or appellate court to reason that since they feel persuaded by the complainant, though they cannot say why, the otherwise cogent alibi must be incorrect.

21 Rigid application of the onus and standard of proof in 21st century sexual assault trials in Australia is of particular importance. Over the last two decades in each State and Territory the laws of evidence and procedure have been modified by Australian parliaments with the effect of making it more difficult to test allegations of sexual assault. Those who are accused, including by a complete stranger making decades old allegations, cannot, for example, investigate a complainant's psychological history in the hope of uncovering a reason why a seemingly credible person is accusing them of offending they say they did not commit.[10] In such cases, an accused is heavily reliant on the presumption of innocence and the requirement for juries and appellate courts to apply processes of reasoning which accord with the onus and standard of proof. These reforms highlight the importance of the role of appellate courts in an unreasonableness appeal to ensure full compliance with the *M* test as applied in *SKA* and *Palmer*.

22 Rather than acknowledge the forensic difficulties the applicant faced in theorising about the complainant in this trial, the majority compounded the tension between some of these reforms

---

[8] The trial judge gave a lengthy significant forensic disadvantage warning {Charge 1648.12-1652.8}. The majority refer to it at {CA [163]-[164]}. However, rather than filter their analysis through this lens, the majority found the exculpatory witnesses to have unreliable memories due to the passage of time. In contrast they found that the complainant would certainly recall because of the nature of the offending against him {CA 161]-[162], [216], [219]-[220], [253]-[256]}. This analysis is not only contrary to the significant forensic disadvantage warning, but also takes as its starting point an acceptance that the complainant is a victim of this offending which is the very matter that consideration of the evidence is to determine.

[9] The majority refer to this authority at {CA [57]} but do not explain how it has been applied by them.

[10] Section 32C of the *Evidence (Miscellaneous Provisions) Act 1958* (Vic) limits access to and use of any confidential communications with a medical practitioner or counsellor unless, *inter alia,* the applicant can establish (without having seen the material or having been permitted to ask any questions about it) that it has substantial probative value and the public interest in preserving confidentiality is substantially outweighed by the public interest in admitting it.

and the onus of proof. This can be particularly observed in the majority's discussion at {CA [65]-[71]} of the absence of any proved motive for the complainant to lie. In this section of their judgment, they 'test' the defence 'hypotheses' of fabrication and fantasy. They argue that, although the applicant was not obliged to suggest a motive, the failure to do so meant the complainant's apparent credibility was not damaged on this account {CA [71]}.[11]

23 According to the majority, where a complainant is 'apparently credible', it is 'usual' or 'common' for a motive to lie to be alleged {CA [65]-[66]}. The majority support this statement by reference to case examples in which the complainant and accused were known to each other. The majority do not refer to the fact that, here, the applicant did not know the complainant or anything about him. Nor to the fact that the applicant was not permitted to ask questions about or subpoena the complainant's psychological history {see, though, Weinberg JA at CA [1057] and FN 258}. Nor that the applicant could not tell the jury that the complainant had had psychological treatment and the applicant had been denied the ability to obtain the records of it.[12]

24 The majority's circular reasoning can also be observed in the way they resolve suggested weaknesses in the complainant's evidence through the lens of having accepted he is a rational person when nothing about his history including his psychological make up, other than what he himself disclosed as part of his account of the offending, was before the jury {CA [112]-[113]}. Further tension between the majority's reasoning and the onus and standard of proof arises in their conclusion that doubt was not raised and left by the failure of the prosecution to investigate the recollections of Father Egan who, on the evidence, was with the applicant on the date the prosecution eventually nominated for the second episode of offending {CA [186]-[195], [868]}.[13]

Application of correct judicial method by the majority would have produced verdicts of acquittal

25 The majority's erroneous judicial method prevented them from recognising that, even on their own incomplete analysis of the evidence, doubt was raised and left. Most significantly, the majority did not conclude that the alibi witnesses were dishonest. Instead, the majority found that the jury were entitled to have 'reservations' about the reliability of Portelli's unchallenged alibi evidence {CA [253]} and were 'well justified in having doubts' about the reliability of Potter's

---

[11] Neither the prosecution at trial nor on appeal suggested at trial or on appeal that this was a relevant matter for the jury or appellate court to consider. It was not raised during the appeal hearing to canvass submissions about whether it was an appropriate mode of reasoning in this case or at all.

[12] Section 32D(5) of the *Evidence (Miscellaneous Provisions) Act 1958* (Vic). There was only a limited amount the defence could say {Defence Opening 91.23-92.30, Legal Discussion 95.12-96.4, 98.14-99.26, Defence Closing 1542.20-1543.21, 1549.16-21}.

[13] The fixing of the second episode as occurring on the 23rd of February 1996 was a late reconstruction by the

evidence {CA [267]}. In other words, absent the impermissible reasoning that the alibi is eliminated simply because it is inconsistent with the complainant's account, the majority found only that these witnesses might be wrong which, by its corollary, meant they might be right. On the majority's own analysis, the alibi was not eliminated. [14]

26 It was also not in dispute that if any number of the practices and routines of the Cathedral were followed there would be no opportunity for the offending {CA[166], [388]-401]}. The majority did not conclude that so many departures from practice would not have been, at least, highly unlikely. Indeed, the majority did not engage with the argument about compounding improbabilities at all {cf Weinberg JA at CA [1060]-[1064]}. The unchallenged opportunity evidence, as explained by the majority, did not exclude the reasonable possibility that the routines and practices were, in fact, not departed from in one or more of the required ways on the relevant dates. This is so particularly in light of the significant forensic disadvantage warning.

27 Further, the majority accepted there was some evidence supporting the applicant's contentions of impossibility on virtually every matter raised {CA [172]}. This was unchallenged evidence from honest witnesses. The comparison between the evidence relied on by the applicant and that by the prosecution had to be weighed and evaluated in accordance with *SKA* at 243 CLR 409 [22]-[24] per French CJ, Gummow and Kiefel JJ and considered according to the onus and standard of proof as per *Liberato* at 159 CLR 515 per Brennan J and 518-520 per Deane J.[15] Similarly, the majority provide no plausible theory as to why the practices were not adhered to on the relevant dates and, in some key instances, make findings of fact contrary to theories the prosecution advanced at trial as explanations for departures from practice.[16]

---

prosecution which was contrary to the complainant's own account {CA [866]-[882], [1016]-[1029]}.

[14] There was plainly no rational basis to conclude that Portelli was wrong. His evidence of having a specific recollection was unchallenged despite the prosecutor having section 38 of the *Evidence Act 2008* leave to do so {Evidential Ruling No 3 [57], [61] and Topic 2 of Annexure A}. The significant forensic disadvantage warning had direct application. His evidence was supported by numerous other credible, unchallenged witnesses. See Weinberg JA {CA [458]-[491], [521], [538], [544], [548], [572], [586]-[587], [691], [710], [1076]-[1084], [1087]-[1090]}. It should be noted that the majority's reliance on an out of court experiment they conducted with the robes as a basis for doubting Portelli's reliability was unfair to the applicant (and Portelli) {CA [146], [256]}. Portelli's evidence on the robes was not challenged at trial though the prosecutor had leave to do so {Evidential Ruling No 3 [64]-[65], [68], [70], [72] and Topic 3 of Annexure A}. The parties on appeal were agreed that the robes could not be moved to one side {Appeal Hearing 242.21-244.8}. Strikingly, Weinberg JA, who also examined the robes, found that the alb 'most certainly cannot be parted, pulled or pushed to one side' {CA [824]}. The majority did not afford the applicant the opportunity to make submissions on the problematic experiment by reconvening court.

[15] See for example, the majority failure to assess the weight and significance of the evidence on the key issue of whether the applicant was alone while robed after mass {CA [285]-[291]}. The majority do not identify anything in the evidence highlighted by the prosecution that enabled the prosecution to exclude the reasonable possibility that the centuries old practice was followed on each of the three dates in question. See Weinberg JA {CA [708]-[724]}.

[16] First, for example, the prosecution case at trial was that the applicant's practice of greeting on the front steps did not commence until 1997 {CA [701]-[707]} but the majority accepted there was unchallenged evidence of that being his practice in 1996 {CA [272], [279]-[282]}. Second, the prosecution case at trial was that Portelli was attending to

28 The majority found the applicant's denials in the record of interview to be emphatic {181]-[185]}. These denials are supported by both the evidence of 'alibi' and practice. The majority further accept that the denial attributed to the other boy was a 'significant matter' which 'weighed against' the prosecution's case {[179]-[180]}. The majority reason that the jury were able to assess the possibility that it was a false denial, despite the anti-speculation direction and absence of any evidence about the other boy, including the context of the denial or the other boy's demeanour when giving the denial (which may have been compelling in its manner). The majority's reasoning leaves open as an unexcluded possibility that it was a truthful denial. To regard it as capable of being dispelled by the jury is to countenance illegitimate speculation. Doubt is raised and left by this alone.[17]

29 The majority also found the defence improbability arguments were 'powerful' and it was highly improbable that the applicant would have acted in the way alleged {CA [98]}. The majority highlighted a number of cases where brazen or improbable offending has been found proven {CA [99]-[101]}. They note that these cases show that high risk does not, 'in and of itself', oblige a reasonable doubt {CA [102]}. But each of these examples was dealing with multiple complainants where tendency and/or coincidence reasoning was available to counter the unlikeliness of the circumstances of the alleged offending.[18] The majority do not explain how these case examples assist in the present case where there were no other complainants providing allegations to counter the improbability of the offending as alleged. Thus improbability was a matter properly contributing to whether doubt was raised and left.

30 In addition, the majority made findings relating to the complainant himself which are ordinarily viewed as matters tending against proof beyond reasonable doubt. These include that: the complainant was uncertain about many matters {CA [77]}; he had a hazy recollection of the

---

books on the sanctuary for a few minutes while the offending in the priests' sacristy took place {Prosecution Closing 1374.20-1375.6, 1390.4-1391.15}. As Weinberg JA notes, this would not have taken Portelli away from the applicant for enough time for the offending to have occurred {CA [1071]}. The majority do not engage with this difficulty {CA [283]}. Third, the prosecution case at trial was that the applicant was in the midst of the procession during the second incident of offending because he was rushing to disrobe in the Archbishop's sacristy to attend a mass at Maidstone {Prosecution Closing 1396.20-25, 1399.2-7, 1393.31-1394.5}. The majority accept there was no evidentiary basis for these theories but provide no alternate explanation for why the applicant would be in that place at that time {CA [347]-[350]}.

[17] To this must be added that the jury were directed to have regard to the significant disadvantage the applicant faced in not having the other boy available to give evidence of his denial {Charge 1651.21-31}. It is of note that the majority's suggestion at {CA [178]} that the denial was given no particular prominence in the defence closing is wrong. In fact, the defence referred to it as one of three 'principal matters' for the jury to bear in mind as they listened to the addresses {Defence closing 1403.24-27, 1411.5-17}.

[18] For example, the plurality in *Hughes v The Queen* 263 CLR 338, 361-2 [57]-[60] emphasised that courting a substantial risk of discovery by other adults is unusual and, had there been no cross-admissibility in that case, the evidence of each complainant might have seemed 'inherently unlikely'.

surrounding circumstances of his allegations {CA [216], [219]-[220]}; he had 'buried the memories' {CA [86]}; he made mistakes about when the offending occurred {CA [234]-[237]}; he was unable to reconcile his account with at least some undisputed facts {CA [225]}; his account contained a number of implausible features {CA [78]-[80]}; and his account contained changes {CA [73]-[74]}. While the existence of these features is unlikely, in isolation, to warrant appellate court intervention on an unreasonableness ground, they are properly to be considered in combination with all the other matters indicating unexcluded doubt.[19]

31 The correct judicial method is observed in the dissent of Weinberg JA. His Honour articulated the requirement for the prosecution to eliminate any reasonable possibility that there was no opportunity for the offending {CA [457], [491], [510], [520], FN143, [532], [684]-[686], FN 191-2, [586], [733], [948]-[953], [955]-[956], [987], [1105] FN 268, [1087]}. This extends to circumstantial evidence of practice {CA [587], [944], [947], [960]-[969]}. He referred to the requirement for strict observation of the test in *M* {CA [662]-[663]}, to the profound impact of forensic disadvantage to the applicant in this case {CA [1001], [1007]-[1008], [1010]} and the central, and powerful, argument of the applicant regarding the compounding effect of each matter relied on as giving rise to doubt {CA [833], [840]-[843], [889], [1058], [1063]-[1065]}.

32 Justice Weinberg analysed in detail the cases relied on by the applicant regarding the proper approach to exculpatory evidence, where a complainant is seen as compelling {CA [620]-[640]. [657], [1102]-[1103]}. He emphasised that the question is not simply whether the complainant is to be believed in preference to a witness who gives exculpatory evidence [CA {969}]; that an inability to find the complainant to be a liar is not determinate of whether proof beyond reasonable doubt has been established {CA [1056]-[1057], FN 258}; and that the law recognises the risks in placing too much weight on demeanour {CA [917]}. Justice Weinberg's summary at {CA [1100]} should be accepted as correct.

33 Belief in the complainant is the beginning of the enquiry, not the end. Belief is a prerequisite to conviction but belief does not preclude the existence of doubt raised and left by other cogent evidence. To find otherwise would fundamentally alter the burden and standard of proof in a criminal trial and increase the likelihood of miscarriages of justice. Had the majority properly appreciated the distinction between belief in a complainant and proof beyond reasonable doubt in light of all the evidence, their conclusion on Ground 1 must have been different.

---

[19] Particularly where, as here, there was a significant forensic disadvantage warning and an honest but erroneous memory warning {Charge 1648.12-1654.12}.

Ground 2: The majority erred in their conclusion that the verdicts were not unreasonable as, in light of findings made by them, there did remain a reasonable doubt as to the existence of any opportunity for the offending to have occurred.

34 It was common ground at trial that the complainant's account required the applicant and the two boys to be alone in the priests' sacristy for 5-6 minutes. The majority accepted that shortly after the conclusion of mass each Sunday, there was a 'hive of activity' in and around the priests' sacristy which would have prevented offending occurring in that room {CA [293]}. The majority found that it was 'open to the jury' to find that the 5-6 minutes of offending occurred during 5-6 minutes of 'private prayer time' before the hive of activity commenced {CA [300]}. 'Private prayer time' commenced, according to the majority, when the procession arrived at the main door of the Cathedral to start the external procession around the side of the building.[20] However, the complainant's account (and the Crown case) was that both he and the other boy were in that external procession. They travelled around at least part of the outside of the building, entered the South Transept, walked to the priests' sacristy, found and then drank some altar wine – all before the applicant was said to have entered the room and the 5-6 minutes of offending started to run {CA [43]-[44], [371]-[377], [422]-[431]}.[21] The majority concluded that if any of the evidence showed impossibility, in one respect or another, then the jury must have had a doubt {CA [130], [151]}.[22] The facts as found by them were that the only time when the room was empty for 5-6 minutes was a time when the complainant and the other boy, on the Crown case, were not in the room.[23] Thus, according to this aspect of the majority's own approach, the verdicts were unreasonable.

---

[20] In fact Potter's evidence was that the waiting for the private prayer time commenced from the end of mass which meant the start of the procession up the nave {Potter 473.17-27}. He also gave unchallenged evidence that the priests' sacristy was locked during this time {Potter 476.9-18}.

[21] The complainant drew the external route the procession walked around the outside of the Cathedral on a diagram at committal {3rd document of Exhibit A, Tab 3). The jury walked this route as part of the view and it took many minutes. This walk was recorded and tendered as Exhibit X. The appellate judges walked the same route in advance of the appeal hearing.

[22] Of course, to show impossibility of offending does far more than raise and leave a reasonable doubt. The correct approach involves recognising that an unexcluded real chance that the offending was impossible would raise and leave a reasonable doubt.

[23] As Weinberg JA correctly noted, the 'hive of activity' evidence was squarely at odds with the account of the complainant {CA [965], FN 125}. This was a matter emphasised by the applicant on the appeal both in writing {Schedule of Evidence 11-12} and in the oral hearing {Appeal Hearing 134.16-139.17}.

PART IV:

Not applicable.

PART V: Authorities

- *Liberato v The Queen* (1985) 159 CLR 507, 515, 518-520.
- *M v The Queen* (1994) 181 CLR 487, 493-5, 508.
- *Palmer v The Queen* (1998) 193 CLR 1, 12, 14-15, 29-30.
- *SKA v The Queen* (2011) 243 CLR 400, 405-410.

PART VI: Legislation

Criminal Procedure Act 2009 (Vic)

276 - Determination of appeal

(1) On an appeal under s 274, the Court of Appeal must allow the appeal against conviction if the appellant satisfies the court that –

(a) The verdict of the jury is unreasonable or cannot be supported having regard to the evidence…

17th September 2019

Counsel for the applicant
Bret Walker
T (02) 8257 2527
F (02) 9221 7974
E maggie.dalton@stjames.net.au

Counsel for the applicant
Ruth Shann
(03) 9225 6043
ruth.shann@vicbar.com.au

TO: The Office of Public Prosecutions
C/- Jennifer Powell
565 Lonsdale Street Melbourne VIC 3000
Tel: (03) 9603 7554 Email: jennifer.powell@opp.vic.gov.au

TAKE NOTICE: Before taking any step in the proceedings you must, within **14 DAYS** after service of this application, enter an appearance in the office of the Registry in which the application is filed, and serve a copy on the applicant.

Solicitors for the applicant
Galbally & O'Bryan
259 William Street
Melbourne VIC 3000

Paul Galbally and Kartya Gracer
Tel: (03) 9642 1704
Email: pgalbally@galballyobryan.com.au