

Between

GEORGE PELLED IN COURT



Applicant

And

THE QUEEN

Respondent

APPLICANT'S OUTLINE OF ORAL ARGUMENT

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

Compounding improbabilities

1 Even if the prosecution proved that each of the required opportunities for each incident was possible, the odds against all of these events occurring were substantial: Charge 1594.8-1595.25 CAB 43-44, CA [840]-[841] CAB 421-422, AS [49] fn 14, CA [1061]-[1064] CAB 472, Rep [4].

The prosecution's lack of challenge

2 There was no reasonable basis for the jury to consider any Cathedral witness was lying: AS [12], Evidential Ruling No 3 [116] AFM 29, CA [154] CAB 226, [251] CAB 265, [952] CAB 448.

3 The prosecution identified a need to challenge the correctness of many Cathedral witnesses, obtained leave to do so, but then, on the critical issues, did not: AS [12], [34] (see, for example, Portelli 625.28-626.2 RFM 540-1, 628.1-629.22 RFM 543-4, McGlone 962.12-964.9 RFM 664-666), *R v Baden-Clay* (2016) 258 CLR 308, 324 [48].

Unchallenged evidence inconsistent with offending – incident 1

4 The greeting on the front steps:

(a) practice: AS [15], Charge 1575.18-27 CAB 24, CA [272] CAB 272, [279]-[281] CAB 275-6, [565] CAB 349, [706] CAB 383, [989] CAB 457, [1090] CAB 478, Rep fn 1, AS [50].

(b) Portelli, McGlone, Potter: AS [16]-[18], [35]-[37], [48], CA [251]-[256] CAB 265-6, [267] CAB 271, [271]-[272] CAB 272, [508] CAB 330, [532] CAB 342, [937] CAB 445, [997] CAB 459, [1010] CAB 461-2, [1065] CAB 473, Rep [6].

5 Accompanied while robed:

(a) practice: AS [19], fn 16, CA [283]-[291] CAB 276-8, [724] fn 197 CAB 389, [940]-[965] CAB 445-451, [1071] CAB 474, Rep [4] fn 1.

(b) Portelli and Potter: AS [20]-[21], [35]-[37], [48], fn 13.

6 The 'hive of activity': AS [24].

The prosecution at trial:

(a) Wrongly assimilated Potter's 5-6 minutes of 'private prayer time' with the undisputedly required 5-6 minutes for offending: Prosecution Closing 1384.28-1385.5 (Parties' Further Materials (PFM) 32 fn 126), Potter 473.17-27 RFM 380, 474.8 RFM 381, 476.9-477.7 RFM 383-4, 522.18-22 RFM 430, cf Prosecution Closing 1358.15-1359.19 RFM 790-1.

(b) Presented a theory on the servers to the jury which had to be withdrawn as lacking an evidentiary foundation: Rep [8], Connor 1039.9-1040.25 RFM 713-4, McGlone 981.17-982.28 RFM 683-4, 986.16-28 RFM 688, 990.10-20 RFM 692.

10 *The majority:*

(c) Concluded that it was open to the jury to find the offending occurred during Potter's private prayer time but this was contrary to the evidence that the complainant and other boy were travelling in an external procession at this time: AS [56], CA [300] CAB 281, [293] CAB 279, fn 125 CAB 303, [964]-[965] CAB 451.

The respondent in this Court:

(d) Asserts the majority accepted the prosecution argument at trial that included the theory later withdrawn: RS [56] fn 210.

(e) Continues to maintain that the 5-6 minutes of offending occurred during Potter's 5-6 minutes of private prayer time: RS [61].

20 (f) Relies {RS [59] fn 224} on a theory of the movements of the servers: (i) contrary to the servers' own (ignored) evidence: Connor 1039.9-1040.25 RFM 713-4, McGlone 981.17-982.28 RFM 683-4; (ii) not put to the servers at trial; (iii) not argued in closing by the prosecution at trial: Prosecution Closing 1368.3-18 AFM Annexed to Reply 2; (iv) not submitted by the respondent to the appellate court: Respondent's Written Case [23](d) PFM 85-6, [44]-[45] PFM 94-5, Respondent's Schedule of Evidence Table D PFM 112-114 (cf Respondent's Summary of References Table D); (v) that even on Potter's evidence does not place the servers who return in procession away from the priests' sacristy at the required time for the required period: Potter 496.8-13 RFM 404, 518.4-519.22 RFM 426-7.

30 (g) Incorrectly asserts that the evidence of McGlone, Cox and Finnigan (not relied on by the prosecution at trial for this point) suggests a gap at the required time of the required duration: RS [62], McGlone 931.29-31 RFM 633, 943.9-13 RFM 645, 945.26-30 RFM 647, 944.10-14 RFM 646, Cox 350.6-30 RFM 325, CA [299] CAB 281, Finnigan 422.1-22 RFM 341, CA [298] CAB 281.

7 The robes: AS [22]-[23], fn 13, CA [146] CAB 224, [256] CAB 266, [824] CAB 417, RS [15].

8 The choir rehearsals: AS [25], CA [49] CAB 194, Appeal Hearing 238.2-22 AFM 103, CA [225]-[227] CAB 250-251, fn 134 CAB 310, [1023] CAB 464.

Unchallenged evidence inconsistent with offending – incident 2

9 23rd February 1997: AS [26], CA [233]-[238] CAB 254-5, [328]-[332] CAB 292-3, [1016]-[1029] CAB 463-4 (see also, contrary to the direction against guessing, CA [220] CAB 249, [1100]-[1101] CAB 480-1).

10 The greeting on the front steps: AS [28], CA [341]-[346] CAB 296-7, [876]-[879] CAB 430-1.

11 Unseen by others present: AS [27], CA [112]-[113] CAB 213-4, [338]-[339] CAB 295, [1095]-[1096] CAB 479.

12 Father Egan: AS [28], [38], CA [186]-[195] CAB 235-238, [865]-[868] CAB 428-9, [1007] CAB 461, Rep [7].

Judicial method


13 The majority reversed the onus by attributing to defence a requirement to demonstrate that the offending was impossible in order to establish the jury verdicts were unreasonable: AS [45]-[46], CA [126]-[131] CAB 218-9, [134] CAB 220, [140]-[143] CAB 222-3, [149]-[151] CAB 224-5 (and see, for example, [315] CAB 288, [326] CAB 291), [940]-[965] CAB 445-451, Charge 1570.20-1572.21 CAB 15-17, Defence Closing AFM 90-1, 94-5.

20 14 The majority failed to weigh the combined effect of the evidence both on opportunity and other matters that (particularly in combination) resulted in doubt no reasonable jury could set aside: AS [44] fn 10, [48]-[53] fn 14, CA [166]-[174] CAB 230-2, (see, for example, [180] CAB 234, [283]-[284] CAB 276, [291] CAB 278, [309] CAB 284, [350] CAB 298), [1058]-[1065] CAB 471-3, Rep [2]-[4] fn 1

15 The respondent seeks to support the majority's approach by asserting an appellate method contrary to *M* at 493-5: RS [32], CA [662]-[663] CAB 370.

16 The majority failed to advance any reasoning as to why *SKA*, *Palmer*, and *Liberato* did not inform the proper approach AS [36], [41], [47], CA [620]-[640] CAB 361-5, [657] CAB 369, [966]-[969] CAB 451-2, [1056]-[1057] CAB 471, [1102]-[1104] CAB 481-2, Rep [5]-[6].

30 11th March 2020


Bret Walker



Ruth Shann