IN THE HIGH COURT OF AUSTRALIA No M112 of 2019
MELBOURNE OFFICE

Between **GEORGE PELL**

Applicant

And

THE QUEEN

Respondent

APPLICANT'S REPLY

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

1 The respondent does not seek for this Court to reconsider *M v The Queen* (1994) 181 CLR 487, *Palmer v The Queen* (1998) 193 CLR 1, *SKA v The Queen* (2011) 243 CLR 400 or following cases to like effect.

2 It is the respondent's submission {RS [5], [27], [31]} that Weinberg JA (and the applicant) commit a *R v Hillier* (2007) 228 CLR 618 error. But *Hillier* was applying the test from *M* in a circumstantial case where each strand bore the same relationship to a fact in issue and thus had to be evaluated against each other {635 [38], 637 [46], 638 [48]}. Where a complainant's account is the prosecution's case and the relevance of other evidence is whether it casts doubt on the correctness of that account, using a belief in the correctness of the complainant to evaluate the other evidence is impermissibly circular {AS [36], [40]}. Weinberg JA (correctly) applied the relevant authorities {CA [620]-[640] CAB 361-365, [657] 369, [1102]-[1103] 481}. The respondent cites {RS [34] fn 127, [35] fn 130} CA [174] CAB 232 and [351] CAB 298 as confirming that the majority considered the combined effect of the evidence but these paragraphs in fact highlight that consideration of improbability and the accused's and other boy's denials were 'separated' from consideration of opportunity. The respondent adopts {RS [38]-[52]} a piecemeal approach {see AS [44], [48]-[53]}.

3 The respondent seeks to avoid the implications of the majority's compartmentalised approach by arguing {RS [39] fn 152, [51], [27]-[32]} that *Irwin v The Queen* (2018) 262 CLR 626 requires an appellate court to consider only whether intermediate facts were reasonably open to the jury, though in fact the majority themselves accepted and purported to apply the two step approach {CA [25]-[41] CAB 187-192} (see also CA [589]-[663] CAB 353-371 for the history of the *M* test). The Court in *Irwin* {644 [44]-[45]} applied *M* to its critical issue: reasonable

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foreseeability. The Court reasoned {645-646 [49]-[50]} that it was equally open to the jury to have found this element proven or not and, given the jury's advantage, the verdict was not unreasonable. *Irwin* is not authority for an approach to subjective appellate court doubt suggested in the dissents in *M* of Brennan J at 501-2 and McHugh J at 524-5. *SKA* explains {408 [20]} the 'fundamental' error (and see also {409 [22]}. This is the law: *BCM v R* (2013) 88 ALJR 101, 106 [31], *Filippou v R* (2015) 256 CLR 47, 75 [82], *GAX v R* (2017) 91 ALJR 698, 702 [20] and 704 [34]. *Irwin* was not cited in the Court of Appeal, and the only reference to it in the judgments is at CA fn 106 CAB 234 for an unrelated purpose.

4 The respondent {RS [48]} wrongly asserts that the majority assessed but rejected the compounding improbabilities argument {CA [840]-[842] CAB 421-422, [1060]-[1064] 471-472} when they did not assess it {AS [49]}. The respondent's assertion {RS [48]} that the matters said to be 'improbable' {CA [841] CAB 422} were not improbable at all references {RS fn 178} the respondent's claim {RS [45]} that there was some evidence on each matter suggesting it was 'possible'; plainly no answer to the compounding improbabilities argument, and ignoring the distinction between proof beyond reasonable doubt and proof of possibility.[1]

5 The respondent asserts {RS [36]-[37]} that the majority did not reason on the basis of a belief in the complainant because they considered the whole of the evidence and they had reference to two matters providing 'independent support'. The point is that the majority did not independently weigh the combined effect of the evidence. The majority's approach is contrary to *SKA* and *Palmer v The Queen* (1998) 193 CLR 1, 12-15 and 29-30 including the prohibition on circular reasoning. In *Palmer,* there was independent corroboration {CA [1103] CAB 481}. Here: (a) The trial judge (without demur from the prosecution) directed the jury that there was no evidence to support the prosecution case other than that of the complainant {Charge 1587.17-19 CAB 36}; (b) The complainant's description of the 'layout and features' of the wood panelled area was not accurate[2] {cf RS [11](b)(i)}: though he was correct that the wine was located in a

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[1] The respondent relies {RS [13], [43]-[45]} on choir witnesses that they saw the applicant shortly after mass in the choir room at some point while they were in the choir (which was until at least 2000 {CA Annexure A CAB 500}). This evidence does not answer that of Portelli, McGlone and Potter regarding 15th and 22nd December 1996. Nor Finnigan's description of the practice he observed before he left the choir at Christmas 1996 {CA [1090] CAB 478} nor Connor's evidence that the practice was 'invariable' {CA [343] CAB 296} throughout the time Connor was there (which was until November 1997 {CA Annexure A CAB 500}).

[2] The complainant described the entire kitchen area as 'unchanged' from 1996 to when he was shown it in 2016 but Potter gave unchallenged evidence it had only been installed in about 2003-2004 {CA [834]-[835] CAB 420}; the complainant said he found and drank red wine when only white wine was used in 1996 {CA [827]-[831] CAB 418-420}; and Potter said he never left the wine out in that area after a Sunday Solemn Mass {CA [826] CAB 417-418}.

particular corner, that was a simple fact that could only be speculated as incapable of recall from a tour; (c) The evidence of two choristers (who joined the choir in 1991 and 1993 {Annexure A CAB 500}) that they had not been in the priests' sacristy before does not prove the complainant did not enter the room on a tour when he started with the choir in 1996 {cf RS [11](iv), [37]} – nor does the fact that the room was off-limits to choristers on a Sunday {cf RS [11](iv)}; (d) The applicant was using the priests' sacristy into 1997 {CA [347]-[348] CAB 297 cf RS [11](a)}: for a very good part of the time that the complainant was in the choir it appears the mass celebrant (whether priest, Dean or Archbishop) openly utilised the priests' sacristy; (e) The complainant was never asked whether he was aware of where the applicant robed in 1996/1997 {see AS [39]}; (f) The evidence of some witnesses that they did not remember the applicant using the priests' sacristy does not equate to positive evidence that he did not openly do so {cf RS [11](a), [37]}. It is also of note that the respondent relies {RS fn 9} on the evidence of Portelli to establish that the applicant was robing in the priests' sacristy on 15th and 22nd December 1996 without confronting the tension between that reliance and the respondent's assertion that Portelli's memory is unreliable when he says he was with the applicant when he robed and disrobed in that room on those dates.

6 In relation to 'alibi', the respondent incorrectly asserts {RS [39]} that the majority found that it was open to the jury to reject the possibility that Portelli, Potter and McGlone gave the applicant an alibi. But the majority only found that it was open to the jury to have 'doubts' or 'reservations' about their reliability {AS [48]}. Like the majority, the respondent's argument {RS [38]-[41]} seems to proceed on the misunderstanding that it is only if the applicant has proved these witnesses correct that their evidence constitutes evidence of alibi and the authorities referred to at AS [35] apply. That is plainly not so. The respondent appears to accept the summary of the evidence at AS [16]-[21] albeit that the respondent seeks to also add the matters at RS [12].[3] This is evidence of alibi. The respondent further attempts {RS [41]} to explain the majority's reversal of onus on this topic by asserting that because the features of the alibi here were not the same as those in *Palmer*, the legal principles set out in that case do not apply. In *Palmer* {17 [37]} the allegations were made to police within six weeks which meant recollections were fresh and documentary support available. Here the applicant faced trial 22 years after the alleged events. The purpose of the significant forensic disadvantage warning was to address, in

the applicant's favour, the fact that the exculpatory evidence was different from what it may have been had the trial occurred around 1996/7 {Charge 1648.12-1654.12 CAB 99-105}. It is contrary to this direction to reason, as the respondent urges, that the alibi was eliminated because, for example, Portelli (whose honesty was never disputed by the prosecution) was less certain when asked general questions or about peripheral matters but nevertheless expressed certainty when asked directly if the applicant was with him on the relevant day. Further, the cogency of the alibi was enhanced by the decision of the prosecution not to challenge its reliability at trial though they had leave to do so {AS [37]}. The respondent's submissions do not engage with these features and their impact {see AS [48] and fn 13}. The alibi was not anywhere near eliminated.

10 **7** The respondent's submissions {RS [53]-[54]} on Father Egan are non-responsive to the applicant's argument {AS [38]} that in considering whether doubt was eliminated, it is relevant to consider unexplained gaps in the investigation. This has particular force in circumstances, as here, where the complainant does not give any evidence about 23 February 1997 {AS 26}: his evidence does not explain how this offending could have occurred on this day without Egan's knowledge. *Mahmood v Western Australia* (2008) 232 CLR 397, 406 [27] confirms that such gaps are relevant {cf RS [54]}. The respondent's claim {RS [53]} that *Whitehorn v The Queen* (1983) 152 CLR 657 is irrelevant because the complainant in the present case was called as a witness misses the point. Similarly, the respondent misunderstands that the applicant's complaint about the other boy is not that his parents were not called {RS [55]} but rather that the
20 prosecution's forensic choice not to seek to call them leaves as an uneliminated possibility that it was a true denial. As the relevance of the denial of offending by the alleged co-victim is to determine if the complainant can be accepted beyond reasonable doubt, it is impermissibly circular to use belief in the complainant to eliminate the doubt otherwise raised by the denial. The respondent's submission {RS [55]} that the applicant 'implicitly accepted' that the agreed formula adequately conveyed the context ignores the limited extent of the evidence: the other boy was asked if he was offended against and he said no.

8 **Proposed Ground 2:** The respondent seeks {RS [56]-[63]} to deflect this ground by arguing for a factual conclusion that is inconsistent with some essential elements of the majority's reasoning. The majority found: (a) Potter began clearing after the 'private time' for
30 prayer gap of 5-6 minutes (and the gap started around the same time as the commencement of the

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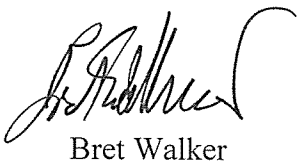
[3] The respondent oddly submits {RS [38]} that the applicant has not provided the High Court with the whole of the

post-mass external procession) {CA [293] CAB 279}; (b) McGlone and Connor's evidence allowed for the possibility that the priests' sacristy was unlocked and empty *before* the servers entered it at the conclusion of the procession {CA [293]-[296] CAB 279-280}; (c) After the servers bowed to the cross they commenced clearing up and the room was not thereafter unlocked and unattended (it was a 'hive of activity') {CA [294]-[295] CAB 279-280, [297] 280-281} (this accorded with the unchallenged evidence of Connor {1039.9-1040.25 RFM 713-4} and McGlone {981.17-982.28 RFM 683-4}); (d) That, taking this evidence as a whole, it was open to the jury to find the offending occurred in the private time described by Potter *before* the hive of activity described by the servers {CA [300] CAB 281}. It is correct {RS [56]} that the prosecution argued to the jury that the offending occurred *after* the servers returned from procession. However, the majority clearly, and for good reason, rejected that theory. This theory required the prosecution to place the servers in a location other than in and out of the priests' sacristy for a period of at least 5-6 minutes, before the commencement of the hive of activity. The prosecution originally closed that after bowing to the cross the servers went to the worker sacristy to wait for 5-6 minutes before clearing up {RFM 786-792}. But after defence drew attention to the fact that it had not been put to either McGlone or Connor and was directly contrary to each of their evidence {Prosecution closing 1366, AFM Annexed to Reply 1}, the submission was withdrawn and the prosecution conceded that 'there's no evidence of where [the altar servers] were' save for the complainant says they were not in the priests' sacristy while the offending was taking place {Prosecution closing 1368, AFM Annexed to Reply 2}.[4] Thus the first two sentences of RS [56] and fn 210 wrongly make a submission to this Court that the majority upheld an argument that was, in fact, withdrawn at trial as unsupportable.

20 February 2020



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evidence {see also RS [7] fn 6} though it was lodged with the Registry in the company of the respondent's solicitor.

[4] As the complainant's account did not explain where the servers were, 'belief' in the complainant was incapable of eliminating the doubt otherwise raised and left by McGlone and Connor's evidence of their movements after mass.

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10 **APPLICANT'S REDACTED FURTHER MATERIALS ANNEXED TO REPLY**

MS SHANN: Your Honour.

HIS HONOUR: Ms Shann?

MS SHANN: Can we just raise one issue in particular which is really with the hope that our learned friend might take the opportunity to either tell us where we've got this wrong or fix it up with the jury. The submission was put that the altar servers would go into the priests' sacristy to bow to the crucifix, and then go and wait in the workers' sacristy for the interval of decorum to pass. That is not a concept which we can find anywhere in the evidence, nor was it put to McGlone who said, "We bow to the cross and then start going back and forth between the priests' sacristy and sanctuary", that's at 981 to 982, or Mr Connor who says, "We bow to the cross and then start clearing in and out of the priests' sacristy for the next ten minutes", 1039 to 1040.

HIS HONOUR: All right. Mr Gibson, you've heard that. I won't ask him to respond now, but it's a matter for him. Okay. 2.15.

LUNCHEON ADJOURNMENT

(At 2.17 pm the jury entered the court.)

HIS HONOUR: Welcome back, members of the jury. Mr Gibson

MR GIBSON: Mr Foreman and members of the jury, before lunch I had spoken about there being this period of time after the altar servers had bowed to the crucifix in the priests' sacristy and before Mr Potter had started ferrying items from the sanctuary to the priests' sacristy. I think I might have said that the altar server were in their workers' sacristy during this five to six minute time period. There is, of course, no evidence of that, and there's no evidence of where they were. There is evidence of where they weren't from [redacted], and that is that they weren't in the priests' sacristy, so I was inviting you to conclude that it was during this period waiting for the green light from Mr Potter that, wherever the altar servers were, it was not in the priests' sacristy. I just wanted to make that clear.

Now, might I say something about the wine, which is where I got to at lunch time. It was put to Mr [redacted] that at the committal he described the colour of the wine bottle as like an off-coloured sort of greeny amber. You know in the account that he gave in his evidence he said it was a dark bottle that Mr Richter took him to some of the things he'd said at the committal, and he'd described it as an off-coloured sort of greeny amber. He also said at the committal that it was a murky bottle, and he said the wine was some kind of sweet red wine.

At the trial he said that, "The bottle we looked at and drank out of was red wine", and Mr Potter, you'll recall, said they used white wine when Dean William