IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

No. M112 of 2019

BETWEEN:

GEORGE PELL

Applicant

and

THE QUEEN

Respondent

RESPONDENT'S NOTE

Part I: Certification

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

Part II: Submissions

2. Section 44F prohibits a trial judge from directing the jury that if the jury doubts the truthfulness or reliability of a complainant's evidence in relation to a charge, that doubt *must* be taken into account in assessing the truthfulness or reliability of the complainant's evidence generally or in relation to other charges. That is, the provision prohibits a direction that the jury's doubts in relation to one charge are a mandatory consideration in relation to other charges. By reason of s 4A(2) of the *Jury Directions Act 2015* (Vic), an appellate court determining an appeal pursuant to ss 274 and 276(1)(a) of the *Criminal Procedure Act 2009* (Vic) similarly cannot treat doubts about the truthfulness or reliability of the complainant's evidence in relation to one charge as a mandatory consideration in relation to other charges.[1]

3. Section 44F does not, however, prohibit a jury from taking into account their doubts about a complainant's evidence in relation to one charge when assessing other charges. The Note[2] to s 44F states that:

> This section prohibits the trial judge from giving a particular direction to the jury. This does not limit the obligation of the trial judge to refer the jury to the way in which the prosecution and the accused put their cases in relation to the issues in the trial—see section 65.

4. Thus, in a situation where defence at trial argues that the complainant's evidence in relation to one charge gives rise to such doubts about his or her truthfulness or reliability as to have

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[1] This position was accurately set out in Weinberg JA's statement that in view of ss 4A, 44F and 44G, his Honour was "required to avoid treating the improbability of the complainant's account regarding the second incident as meaning that the same doubt that I have regard with that matter *must necessarily* be also applied to his account of the first incident". *Pell v The Queen* [2019] VSCA 186, [1098] **(CAB 480)** (emphasis added).

[2] Which forms part of the Act under s 36(3A) of the *Interpretation of Legislation Act 1984* (Vic).

Filed by: Abbey Hogan
Solicitor for Public Prosecutions
565 Lonsdale Street
Melbourne Vic 3000
DX 210290

Date: 16 March 2020
Telephone: (03) 9603 7666
Direct: (03) 9603 7554
Fax: (03) 9603 7460
Reference: Jennifer Powell / 1602930

a bearing on other charges, the Note indicates that s 44F does not prevent the trial judge from referring to that argument in summing up. That would not be the case if the jury were not permitted to reason in that way. In this vein, the relevant Explanatory Memorandum states in relation to s 44F:[3]

> New section 44F provides that, in a trial in which more than one offence is charged, the trial judge must not give a *Markuleski* direction. …
>
> The prohibition does not extend to counsel. It would be inappropriate to prevent defence counsel from arguing along these lines on behalf of an accused. As the Note provides, if counsel has made a *Markuleski* type argument, the trial judge may refer to that argument when complying with section 65 of the Act (Trial judge's obligations when summing up).

5. The approach in ss 44F and 44G is reflective of the Victorian Court of Appeal's decision in *R v PMT*.[4] In that case, the appellant appealed against his conviction on grounds including that the trial judge erred in not giving a *Markuleski* direction. The Court of Appeal expressed doubts about the desirability of giving a *Markuleski* direction. Buchanan JA stated:[5]

> I think it unlikely that a jury given a separate consideration direction will be entirely uninfluenced by the impressions they derive from the evidence of a witness taken as a whole; I doubt that such a natural tendency needs judicial encouragement in the form of a *Markuleski* direction. Further, I am of the opinion that the proposed direction is likely to promote propensity reasoning and produce confusion rather than assist a jury to properly evaluate the evidence. In my view, in this case it was well within the ability of the jury to assess the evidence of the complainant in the light of their own experience and with the benefit of the addresses of counsel, without the necessity of the warning advocated by counsel for the applicant.

6. As Buchanan JA observed, the mode of reasoning suggested by a *Markuleski* direction is not inherently inconsistent with the separate consideration direction.[6] It is only where the jury is directed that they *must* adopt such reasoning that the issue of inconsistency with the separate consideration direction arises.[7]

7. The text, context and purpose of ss 44F and 44G indicate that those provisions do not prevent a jury from taking into account, where they consider it appropriate to do so, the impressions they have derived from the evidence of the complainant taken as a whole. That being so, the

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[3] Explanatory Memorandum, Jury Directions and Other Acts Amendment Bill 2017 (Vic) 6. Section 44F (together with the other provisions of Pt 4 Div 8 of the *Jury Directions Act 2015* (Vic)) was inserted by s 5 of the *Jury Directions and Other Acts Amendment Act 2017* (Vic).

[4] (2003) 8 VR 50.

[5] (2003) 8 VR 50, 59 [32] (citation omitted). See also at 52 [6] (Charles JA), 59 [34] (Chernov JA). Similar concerns to those stated by Buchanan JA were stated in the Explanatory Memorandum, Jury Directions and Other Acts Amendment Bill 2017 (Vic) 5-6.

[6] See **CAB 63-64** for the direction in this matter.

[7] See the Explanatory Memorandum, Jury Directions and Other Acts Amendment Bill 2017 (Vic) 5-6, which expressed the concern that "[t]he *Markuleski* direction is inconsistent with the direction that the jury must consider each charge separately".

appellate court is similarly not prevented from taking into account, where appropriate, its view of the credibility and reliability of the complainant in relation to one charge when assessing other charges.

Dated: 16 March 2020.

Kerri Judd QC
Director of Public Prosecutions

Mark Gibson QC
Senior Crown Prosecutor

Angela Ellis
Crown Prosecutor

Julia Wang
Office of Public Prosecutions