PELL v THE QUEEN (M112/2019)

Court appealed from:	Court of Appeal, Supreme Court Victoria [2019] VSCA 186
Date of judgment:	21 August 2019
Date application referred to Full Court:	13 November 2019

The applicant was convicted, after a trial by jury in the County Court of Victoria, of one charge of sexual penetration of a child under 16 and four charges of indecent act with a child under 16, alleged to have been committed on two occasions in the mid-1990s, when he was the Catholic Archbishop of Melbourne. The first occasion was alleged to have taken place in the Priests' Sacristy at St Patrick's Cathedral and involved two choirboys in the Cathedral choir ("A" and "B"). The second occasion involved A alone. The prosecution case rested on the evidence given by A. By the time A first made a complaint to police, in June 2015, B had died from accidental causes. Evidence was also called from a number of witnesses who held official positions at the Cathedral, or were members of the choir, during the relevant period. Their evidence as to processes and practices at the Cathedral at the relevant time went to the issue of whether there was 'a realistic opportunity' for the offending to have taken place (the opportunity witnesses).

The prosecution case was that A was a witness of truth, on the basis of whose evidence the jury could be satisfied beyond reasonable doubt that the events he described had occurred. The defence case was that A's account was a fabrication or a fantasy and that, in any event, the evidence of the opportunity witnesses, taken as a whole, combined to render A's account either literally impossible, or so unlikely as to be of no realistic possibility.

On appeal to the Court of Appeal (Ferguson CJ and Maxwell P, Weinberg JA dissenting) the applicant's principal ground of appeal was that the guilty verdicts were unreasonable and could not be supported having regard to the evidence. The Court noted that the approach which an appellate court must take when addressing the unreasonableness ground was defined by this Court in *M v The Queen* (1994) 181 CLR 487: that is, the appeal court must ask itself whether it thinks that upon the whole of the evidence it was open to the jury to be satisfied beyond reasonable doubt that the accused was guilty. In most cases a doubt experienced by an appellate court will be a doubt which a jury ought also to have experienced. It is only where a jury's advantage in seeing and hearing the evidence is capable of resolving a doubt experienced by a court of criminal appeal that the court may conclude that no miscarriage of justice occurred.

The majority of the Court noted that the critical issue in the trial was whether A's evidence was credible and reliable. The defence contended that there were inconsistencies in his evidence; that he consciously altered his evidence when challenged, thus demonstrating his untruthfulness; and that his story was inherently improbable. The majority, however, accepted the Crown's submissions that A was a very compelling witness; he was clearly not a liar or a fantasist; and that he was a witness of truth. They considered that the credibility of his account was considerably enhanced by the accuracy of his description of the Priests' Sacristy.

The majority found it was reasonably open to the jury to reject the improbability arguments. They were not persuaded that there was anything about A's account of the incidents which was so inherently improbable as to require the jury to entertain a doubt. Having read all of the opportunity evidence and watched some of it, they were not persuaded that the evidence of any individual witness, or the evidence taken as a whole, established impossibility in the sense contended for by the defence. What emerged was not a 'catalogue of impossibilities', as the applicant contended, but a catalogue of uncertainties and possibilities. So far from the evidence of individual witnesses supporting each other to establish impossibility, their Honours considered that evidence of the successive witnesses served only to confirm that what A claimed had occurred was not impossible.

The majority concluded that, having reviewed all of the material placed before them and having reviewed the evidence for themselves, they were not persuaded that the jury must have had a reasonable doubt about the applicant's guilt. Taking the evidence as a whole, it was open to the jury to be satisfied of the applicant's guilt beyond reasonable doubt.

Weinberg JA (dissenting) had a genuine doubt as to the applicant's guilt. He found there was a significant body of cogent evidence casting serious doubt upon A's account, both as to credibility and reliability. In order for A's account to be capable of being accepted, a number of the 'things' had to have taken place within the space of just a few minutes. In that event, the odds against A's account of how the abuse had occurred, would have to be substantial. The chances of 'all the planets aligning', in that way, would, at the very least, be doubtful. This suggested strongly that the jury, acting reasonably, on the whole of the evidence, ought to have had a reasonable doubt as to the applicant's guilt. Turning to the second limb of the *M* test, his Honour concluded that the various advantages that the jury had did not allay his doubt.

The proposed grounds of appeal are:

- 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.
- 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.