SUPREME COURT OF VICTORIA

COURT OF APPEAL

S APCR 2019 0029

GEORGE PELL — Applicant

v

THE QUEEN — Respondent

JUDGES:	FERGUSON CJ, MAXWELL P and WEINBERG JA	
WHERE HELD:	MELBOURNE	
DATE OF HEARING:	5 and 6 June 2019	
DATE OF JUDGMENT:	21 August 2019	
MEDIUM NEUTRAL CITATION:	[2019] VSCA 186	First revision: 22 August 2019 para [386] Second revision: 6 December 2019 para [418]
JUDGMENT APPEALED FROM:	[2019] VCC 260 (Chief Judge Kidd)	

CRIMINAL LAW – Appeal – Conviction – Sexual offences – Sexual penetration of child under 16, indecent act with child under 16 – Whether verdicts unreasonable – Crown case depended on complainant's account – Second alleged victim deceased – Whether complainant credible and reliable – Whether alleged offending improbable – Whether practical impossibility – Opportunity evidence – Whether realistic opportunity for offending to occur – Reasonably open to jury to convict – Appeal dismissed – *M v The Queen* (1994) 181 CLR 487, *Libke v The Queen* (2007) 230 CLR 559 applied – *Criminal Procedure Act 2009* s 276(1)(a).

CRIMINAL LAW – Trial – Evidence – Jury aids – Animation – Moving visual representation – Evidence given by multiple witnesses as to movements of persons – Judge refused defence application to use animation in final address – Whether visual representation fairly reflected effect of evidence – Whether error of law – Power of judge to ensure jury not misled – Leave to appeal refused.

CRIMINAL LAW – Trial – Arraignment – Accused must be arraigned in presence of jury panel – Arraignment viewed by jury panel through video-link – Whether physical presence required – Whether fundamental defect – Whether miscarriage of justice – Leave to appeal refused – *Criminal Procedure Act 2009* ss 210, 217, *Juries Act 2000* pt 6.

WORDS AND PHRASES – 'in the presence of'.

APPEARANCES:	Counsel	Solicitors
For the Applicant	Mr B Walker SC with Ms R Shann	Galbally & O'Bryan
For the Respondent	Mr C B Boyce QC with Mr M J Gibson QC and Ms A Ellis	Mr J Cain, Solicitor for Public Prosecutions

FERGUSON CJ
MAXWELL P

TABLE OF CONTENTS

FERGUSON CJ
MAXWELL P:

Summary

1 Late last year, Cardinal George Pell was convicted of five specific sexual offences alleged to have been committed on two occasions in the mid-1990s, when he was the Catholic Archbishop of Melbourne. (A previous trial on the same charges had ended when the jury were unable to reach a verdict.) Cardinal Pell's position is that he should not have been convicted. That is what we must grapple with in this appeal.

2 Cardinal Pell's conviction and this appeal have attracted widespread attention, both in Australia and beyond. He is a senior figure in the Catholic Church and is internationally well known. As the trial judge commented when sentencing Cardinal Pell, there has been vigorous and sometimes emotional criticism of the Cardinal and he has been publicly vilified in some sections of the community.[1] There has also been strong public support for the Cardinal by others. Indeed, it is fair to say that his case has divided the community.

3 It is important to stress at the outset that Cardinal Pell's conviction only concerns the five offences alleged to have been committed by him. Again, as the trial judge observed, he was 'not to be made a scapegoat for any [perceived] failings … of the Catholic Church' nor for any failure in relation to child sexual abuse by other clergy.[2] His conviction and sentence could not be a vindication of the trauma suffered by other victims of sexual abuse.[3]

4 The offences in respect of which Cardinal Pell was found guilty by a County Court jury were one charge of sexual penetration of a child under 16 and four

---

1 *DPP v Pell* [2019] VCC 260, [5] ('Reasons').

2 Ibid [10].

3 Ibid [11].

charges of indecent act with a child under 16. The trial ran for five weeks. The jury deliberated for several days. Cardinal Pell was sentenced to 6 years' imprisonment, with a non-parole period of 3 years and 8 months.

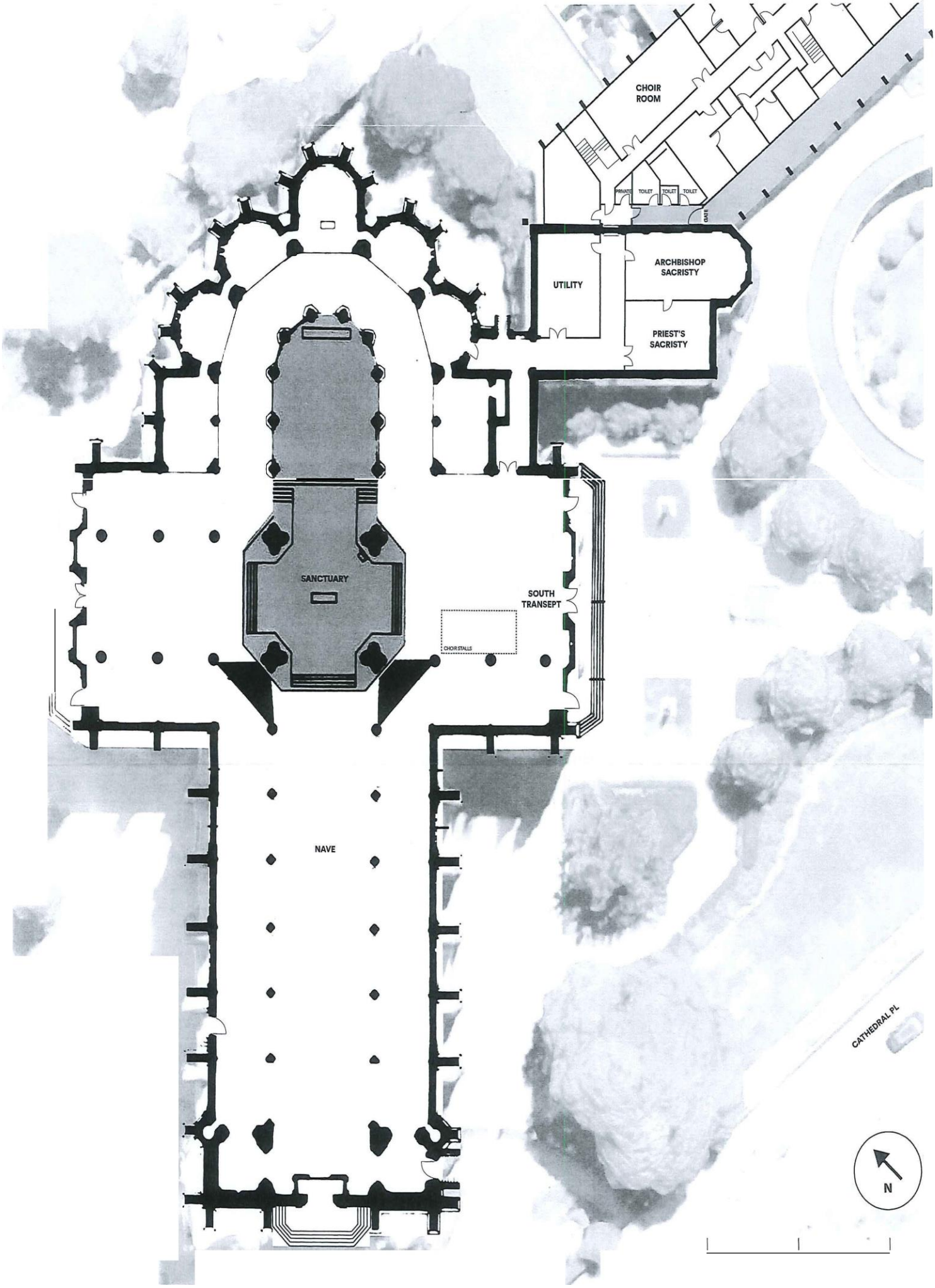
5 Cardinal Pell now seeks leave to appeal against conviction. There are three proposed grounds, the principal of which is that the guilty verdicts are 'unreasonable and cannot be supported having regard to the evidence'[4] ('the unreasonableness ground'). The other grounds concern aspects of the conduct of the trial.

6 At the time of the alleged offending, Cardinal Pell was the Catholic Archbishop of Melbourne. The offences were alleged to have been committed on two occasions, in 1996–1997, against choirboys in the St Patrick's Cathedral choir. The first occasion was said to have involved two boys, to whom we will refer as 'A' and 'B' respectively.[5] The second occasion involved A alone. The first incident was alleged to have taken place in the Priests' Sacristy at St Patrick's. The second incident was alleged to have taken place in the corridor outside the Archbishop's and Priests' Sacristies at the Cathedral. On the next page is a plan of the Cathedral.

---

4 *Criminal Procedure Act 2009* s 276(1)(a).

5 To ensure that there is no possibility of identification of the complainant and the other boy, this judgment has been anonymised by the adoption of pseudonyms.


CHOIR ROOM
PRIVATE
TOILET
TOILET
TOILET
GATE
UTILITY
ARCHBISHOP SACRISTY
PRIEST'S SACRISTY
SANCTUARY
SOUTH TRANSEPT
CHOIR STALLS
NAVE
CATHEDRAL PL
N

7 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. In 2001, when asked by his mother whether he had ever been 'interfered with or touched up' while in the Cathedral choir, B said that he had not.

8 As will appear, the prosecution also called evidence from a number of witnesses who held official positions at the Cathedral, or were members of the choir, during the relevant period. As the judge told the jury in his summing-up, 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. (Like the trial judge, we will refer to this evidence as the 'opportunity evidence'.)

9 Included among these witnesses were:

- Charles Portelli — the Master of Ceremonies to Cardinal Pell;
- Daniel McGlone — altar server;
- Jeffrey Connor — altar server;
- Maxwell Potter — the sacristan;
- Peter Finnigan — the choir marshal;
- John Mallinson — organist and choirmaster; and
- Geoffrey Cox — assistant organist and choirmaster.[6]

10 The defence called no evidence at the trial. Earlier, Cardinal Pell had participated voluntarily in a record of interview with police. The jury were shown a recording of that interview, in which Cardinal Pell strongly denied the allegations.

11 The prosecution case was that A was a witness of truth, on the basis of whose

[6] A list of all the witnesses referred to in these reasons is attached.

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 it's of no realistic possibility'.

12 Where the unreasonableness ground — often referred to as the 'unsafe and unsatisfactory' ground[7] — is raised, the task for the appeal court is to decide whether, on the whole of the evidence, it was open to the jury to be satisfied beyond reasonable doubt that the accused was guilty. In answering that question, the High Court has said, the appeal court

> must not disregard or discount either the consideration that the jury is the body entrusted with the primary responsibility of determining guilt or innocence, or the consideration that the jury has had the benefit of having seen and heard the witnesses.[8]

13 It should be emphasised that the inquiry which this ground requires is a purely factual one. Unlike the position where a ground of appeal contends that the trial judge has erred in law — for example, by admitting certain evidence or in giving (or failing to give) the jury a particular direction of law — no discrete question of law arises.[9] Rather, the appeal court reviews the evidence as it was presented to the jury and asks itself whether — on that factual material — it was reasonably open to the jury to convict the accused.

14 Having reviewed the whole of the evidence, we would answer that question affirmatively. In our view, it was open to the jury to be satisfied beyond reasonable doubt that Cardinal Pell was guilty of the offences charged. That is, there was nothing about A's evidence, or about the opportunity evidence, which meant that the jury 'must have had a doubt' about the truth of A's account. It is not enough, as

---

7 *SKA v The Queen* (2011) 243 CLR 400, 405 [12] (French CJ, Gummow and Kiefel JJ) ('*SKA*').

8 *M v The Queen* (1994) 181 CLR 487, 493 (Mason CJ, Deane, Dawson and Toohey JJ).

9 We note that, for the purposes of judicial review, the question whether a finding of fact was reasonably open on the evidence before the decision-maker is conventionally characterised as a question of law: *S v Crimes Compensation Tribunal* [1998] 1 VR 83, 89–91.

the authorities make clear, that one or more jurors 'might have had a doubt'.[10]

15 These reasons will first address what senior counsel for Cardinal Pell described as the appropriate 'judicial method' for dealing with the unreasonableness ground. We then deal with the critical question of A's credibility and reliability. As will appear, the submission for Cardinal Pell was that the jury 'must have had a doubt' about A's account, the content of which was variously said to be false, improbable and impossible. Finally on this ground, we deal with the aspects of the evidence said to constitute 'solid obstacles in the path of a conviction'.

16 Ground 2 concerns a ruling by the judge which prevented the defence presenting to the jury what was said to be a 'moving visual representation of its impossibility argument'. Ground 3 concerns whether the jury panel was present when the arraignment took place. For the reasons given by Weinberg JA, whose judgment we have had the advantage of reading in draft, we would refuse leave to appeal on both grounds. Accordingly, although we would grant leave to appeal on the unreasonableness ground, we would dismiss the appeal.

17 It should be noted that there is no ground of appeal challenging any aspect of the judge's charge to the jury. As the parties acknowledged during the hearing, his Honour's charge was exemplary. Like his conduct of the entire trial, it was clear, balanced and scrupulously fair.

Approaching the unreasonableness ground

18 The legislature has specified that an appeal against conviction must be allowed 'if the appellant satisfies the court that the … verdict of the jury is unreasonable or cannot be supported having regard to the evidence'.[11] The words of the statute define the test which faces Cardinal Pell and dictate what this Court must do. If we are satisfied that the convictions were 'unreasonable or cannot be

---

10 *Libke v The Queen* (2007) 230 CLR 559, 596–7 [113] (Hayne J).

11 *Criminal Procedure Act 2009* s 276(1)(a).

supported having regard to the evidence', then we 'must allow the appeal'.[12]

19 The approach which an appellate court must take when addressing the unreasonableness ground was defined, authoritatively, by the joint judgment of Mason CJ, Deane, Dawson and Toohey JJ in *M v The Queen* ('*M*').[13] Their Honours said that 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.[14]

20 Importantly, the Court in *M* went on to say:

> 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. That is to say, where the evidence lacks credibility for reasons which are not explained by the manner in which it was given, a reasonable doubt experienced by the court is a doubt which a reasonable jury ought to have experienced.[15]

21 Subsequently, in *Libke v The Queen* ('*Libke*'),[16] Hayne J (with whom Gleeson CJ and Heydon J agreed) elucidated the *M* test in terms which emphasise the high hurdle which an appellant must overcome:

> But the question for an appellate court is whether it was *open* to the jury to be satisfied of guilt beyond reasonable doubt, which is to say whether the jury *must*, as distinct from *might*, have entertained a doubt about the appellant's guilt. It is not sufficient to show that there was material which might have been taken by the jury to be sufficient to preclude satisfaction of guilt to the requisite standard.[17]

---

12 Ibid.

13 (1994) 181 CLR 487. The relevant statutory provision was not in identical terms to s 276(1)(a) *Criminal Procedure Act 2009* but used the same terminology. In that case, s 6(1) of the *Criminal Appeal Act 1912* (NSW) provided, so far as relevant, that the court must allow an appeal against conviction if the court is 'of opinion that the verdict of the jury should be set aside on the ground that it is unreasonable, or cannot be supported, having regard to the evidence'. See also *Jones v The Queen* (1997) 191 CLR 439, 452 (Gaudron, McHugh and Gummow JJ); *MFA v The Queen* (2002) 213 CLR 606, 614–15 [25] (Gleeson CJ, Hayne and Callinan JJ), 623 [57] (McHugh, Gummow and Kirby JJ).

14 *M* (1994) 181 CLR 487, 493.

15 Ibid 494.

16 (2007) 230 CLR 559.

17 Ibid 596–7 [113] (emphasis in original) (citations omitted).

22 This seminal statement echoed language used by other members of the High Court, both in *M* and previously. Thus, in *Chidiac v The Queen* ('*Chidiac*'),[18] Dawson J had said:

> If upon the whole of the evidence a jury, acting reasonably, was *bound to have* a reasonable doubt, then a verdict of guilty will be unsafe and unsatisfactory …[19]

In *M,* Brennan J expressed agreement with this formulation,[20] and McHugh J said that the correct test was:

> whether a reasonable jury must have had a reasonable doubt about the accused's guilt.[21]

23 In *R v Klamo* ('*Klamo*'),[22] Maxwell P (with whom Vincent and Neave JJA agreed) summarised the approach required by *M* and *Libke* and said:

> In other words, the question posed in *M v R*, namely:
>
> > Was it reasonably open to the jury to be satisfied beyond reasonable doubt of the accused's guilt?
>
> requires the court of criminal appeal to decide:
>
> > whether the state of the evidence was such as to preclude a jury acting reasonably from being satisfied of guilt to the requisite standard.
>
> To adopt some helpful metaphors from recent interstate appellate decisions, the question is whether there was a 'solid obstacle to reaching a conclusion beyond reasonable doubt' or whether, instead, the 'path to a conviction was open'.[23]

24 Senior counsel for Cardinal Pell accepted that the relevant formulations were effectively interchangeable. That is, to say that the jury 'must have had a doubt' was simply a different way of saying that it was 'not reasonably open' to the jury to conclude beyond reasonable doubt that the offences had been committed. Counsel

---

18 (1991) 171 CLR 432.

19 Ibid 451–2 (emphasis added).

20 (1994) 181 CLR 487, 501–2.

21 Ibid 525. See also *MFA* (2002) 213 CLR 606, 622–3 [53]–[54] (McHugh, Gummow and Kirby JJ).

22 (2008) 18 VR 644.

23 Ibid 653–4 [40] (citations omitted).

submitted that the 'not reasonably open' formulation was to be preferred, since it had 'the huge advantage of repeating the word in the statute'.[24] Consistently with the authorities, the written case for Cardinal Pell accepted — and invoked — the 'solid obstacle' metaphor from *Klamo.*

25 As already noted, the submission for Cardinal Pell was that, on the whole of the evidence, we as appellate judges should have a reasonable doubt about whether the offences were committed. Following the *M* approach, it was said, we should then take what was referred to in argument as 'the second step'. That is, we should ask ourselves whether the jury's 'advantage in seeing and hearing the evidence' was capable of resolving that doubt. The submission for Cardinal Pell was that, whatever the jury's advantage might have been, it could not dispel the doubts which would necessarily be engendered by our review of the evidence.

26 This concept of the jury's 'advantage' warrants further examination. As already noted, that advantage must be considered by the appeal court if it becomes necessary to take the 'second step', that is, if there is a 'doubt experienced by [the] appellate court'.[25] More generally, the concept invites attention to the differences in character and function between the appellate court and the jury. The High Court has said repeatedly that the jury is 'the constitutional tribunal for deciding issues of fact' and that, accordingly, the setting aside of a jury's verdict on the unreasonableness ground is a serious step.[26] It is appropriate, therefore, to address this issue at the outset.

The jury's advantage

27 Traditionally, of course, the jury in a criminal trial had what McHugh J in *M* described as the 'incomparable advantage' of seeing and hearing the witnesses for

---

24 See *MFA* (2002) 213 CLR 606, 624 [60]–[61] (McHugh, Gummow and Kirby JJ).

25 *M* (1994) 181 CLR 487, 494 (Mason CJ, Deane, Dawson and Toohey JJ).

26 *MFA* (2002) 213 CLR 606, 621 [49]; *R v Baden-Clay* (2016) 258 CLR 308 — see [29] below.

themselves.[27] By contrast, the appeal court had recourse only to the transcript of the evidence. Thus, in *Whitehorn v The Queen* ('*Whitehorn*'),[28] Dawson J said:

> In particular, a court of appeal does not usually have the opportunity to assess the worth of a witness's evidence by seeing and hearing that evidence given. Moreover, the jury performs its function within the atmosphere of the particular trial which it may not be possible to reproduce upon appeal. These considerations point to important differences between the functions of a jury and those of a court of appeal. A jury is able, and is required, to evaluate the evidence in a manner in which a court of appeal cannot.[29]

28 Subsequently, in *Chidiac*,[30] Mason CJ said:

> The constitutional responsibility of the jury to decide upon the verdict and the advantage which the jury enjoys in deciding questions of credibility by virtue of seeing and hearing the witnesses impose some restraints upon the exercise of an appellate court's power to pronounce that a verdict is unsafe.[31]

29 More recently, in *R v Baden-Clay* ('*Baden-Clay*'),[32] a unanimous High Court said:

> It is fundamental to our system of criminal justice in relation to allegations of serious crimes tried by a jury that the jury is 'the constitutional tribunal for deciding issues of fact'. Given the central place of the jury trial in the administration of criminal justice over the centuries, and the abiding importance of the role of the jury as representative of the community in that respect, the setting aside of a jury's verdict on the ground that it is 'unreasonable' … is a serious step, not to be taken without particular regard to the advantage enjoyed by the jury over a court of appeal which has not seen or heard the witnesses called at trial.[33]

30 In recent years, however, the gap between the position of the jury and that of the appeal court has narrowed in important respects. Reforms to the procedure for the trial of sexual offences have led to the pre-recording of a complainant's examination in chief and — in the case of child complainants — of the 'special

---

27 *M* (1994) 181 CLR 487, 517.

28 (1983) 152 CLR 657.

29 Ibid 687.

30 (1991) 171 CLR 432.

31 Ibid 443.

32 (2016) 258 CLR 308.

33 Ibid 329 [65] (citations omitted) (French CJ, Kiefel, Bell, Keane and Gordon JJ).

hearing' at which the complainant is cross-examined in the presence of a judge.[34] Pre-recording has the singular advantage that, in the event that a trial is aborted or a successful appeal results in a retrial, the complainant is not required to give evidence a second time.

31 Pre-recording also means that, in an appeal against conviction in such a case, the appeal court can view for itself the video recording of the complainant's evidence. In this case, both A's examination in chief and the cross-examination by counsel for Cardinal Pell were recorded. The examination in chief was pre-recorded, and the cross-examination was recorded as it took place in front of the jury at the first trial. When the first trial resulted in a hung jury, the recorded evidence was able to be played at the second trial.

32 Given the centrality of A's evidence, this Court proposed to the parties in advance of the appeal hearing that each member of the appeal bench should view the video recording in advance. The defence's primary submission was that we should not watch any of the evidence. Their secondary submission, in the event that we disagreed, was that in addition to A's evidence the Court should view the video recording of the evidence given by a number of the opportunity witnesses, as nominated by the defence.[35] It was pointed out, correctly, that this would avoid the risk of imbalance identified in *SKA*.[36] We have proceeded on that basis.

33 Indeed, we have approached our task by trying to put ourselves in the closest possible position to that of the jury. We have done so by reading the transcript (which runs to approximately 2000 pages), watching some of the oral evidence and attending a view of the Cathedral. For the same reason, we have refrained from looking at material that was not before the jury but was available to us. Jurors are

---

34 *Criminal Procedure Act 2009* pt 8.2, divs 6–7.

35 As is now customary, the entire trial was recorded. The defence nominated the following witnesses: Charles Portelli, Maxwell Potter, Daniel McGlone, Jeffrey Connor, Peter Finnigan, Geoffrey Cox, John Mallinson, Rodney Dearing, David Dearing, Luciano Parissi, Robert Bonomy.

36 (2011) 243 CLR 400, 410 [28]–[29] (French CJ, Gummow and Kiefel JJ).

told that they must decide the case on the basis of the evidence before them. They do not know about evidence that has been excluded, nor do they even know that an application for exclusion of particular evidence has been made. We have not sought to search for material or reasons connected with any such application.

34 For the same reason, we have not read A's two police statements. They were referred to in his cross-examination but were not in evidence before the jury. On the other hand, we have each read the judge's reasons for granting leave to the prosecution to cross-examine some of the witnesses.[37] We also read the respective written cases and listened to the oral submissions of the parties on the appeal. Inevitably, matters were put to us with some slight differences in emphasis from the way they were put in closing submissions at the trial.

35 In those circumstances, what remains of the jury's 'incomparable advantage'? This Court does not, of course, 'perform its function within the atmosphere of the particular trial'.[38] And there are other important differences which are likewise unaffected by the appellate court's ability to view recorded evidence and participate in a view. The first is that jurors hear the witnesses in an unbroken sequence and are able to undertake continuous evaluation of the evidence — both individually and collectively — as the case progresses.[39] The review of evidence by appellate judges is, by contrast, both fragmented and elongated and, for the most part, done individually.[40]

36 The second difference is that the experience of viewing oral evidence in a courtroom is superior to the two-dimensional view of a witness seen on a video recording. While we were in the same position as the jury in relation to A's evidence and other recorded evidence, the jury had the advantage of seeing and hearing, at

---

37 See [152]–[154] below.

38 *Whitehorn* (1983) 152 CLR 657, 687 (Dawson J).

39 In a civil context, see *Fox v Percy* (2003) 214 CLR 118, 126 [23] (Gleeson CJ, Gummow and Kirby JJ), and the cases there cited.

40 See *Glover v The Queen* [2015] NSWCCA 285, [104] (McCallum J).

close quarters, almost all of the opportunity witnesses.[41]

37 The third difference is that of collective deliberation. Each juror engages with 11 others whose only common attribute is that each has been present for the entirety of the evidence, the final addresses and the judge's charge. Related to this is the effect of the requirement for unanimity (or a very high majority).[42] As Heydon J said in *AK v Western Australia*:

> It cannot be easy to obtain unanimity or a high majority amongst quite a large number of decision-makers reflecting the diversity of the sections of the community they belong to, the diversity of human personality and the diversity of human experience. The process must tend to generate its own discipline — cause a careful scrutiny of the evidence, a dilution and sloughing away of individual prejudices, a pooling and sharing of human experience, a solemnity of decision-making.[43]

38 In contrast, appellate judges do not have to agree with one another. They form their views independently of each other and without the benefit of the processes that a jury has for joint decision-making. Judges give written reasons for their decisions. A jury does not. In our experience, independent decision-making supported by a process of detailed writing is different from collective decision-making. In many respects, the independence of each judge is the antithesis of the jury's collective responsibility.[44]

39 It is not necessary for the purposes of disposing of this appeal to elaborate on the significance of these differences. (For the reasons set out below, we do not 'experience a doubt' about the truth of A's account or the Cardinal's guilt, and hence have not found it necessary to take 'the second step'.) But it can be said with confidence that no advance in technology can ever replicate the unique features of jury deliberation and decision-making. Even if consideration of the

---

41 Apart from A's evidence, the only recorded evidence viewed by the jury was the evidence of six choristers and a wine maker.

42 See *Juries Act 2000* s 46.

43 (2008) 232 CLR 438, 477–8 [103].

44 The notion of collective responsibility is not inconsistent with the duty of each juror to determine guilt or innocence on the evidence led at the trial: *Papazoglou v The Queen* (2015) 45 VR 457, 505–10.

unreasonableness ground necessitated sitting through a video replay of the entire trial, those features mean that an appeal court can never be in as good a position as the jury.

40 In *Baden-Clay*, after affirming the 'abiding importance' of jury trials in the administration of criminal justice, the High Court said:

> With those considerations in mind, a court of criminal appeal is not to substitute trial by an appeal court for trial by jury.[45]

Recognising and respecting the differences we have identified should help to ensure that no such substitution occurs.

41 Finally, we would respectfully adopt what was said by McHugh, Gummow and Kirby JJ in *MFA v The Queen* ('*MFA*'), as follows:

> A jury is taken to be a kind of microcosm of the community. A 'verdict of [a] jury', particularly in serious criminal cases, is accepted, symbolically, as attracting to decisions concerning the liberty and reputation of accused persons a special authority and legitimacy and hence finality.[46]

The Crown case

42 This section of the reasons repeats the summary of the Crown case as set out in the appeal documents. The summary should be understood as representing the prosecution's version of the relevant events. It provides essential context for the analysis which follows.

43 **The first incident (Charges 1–4):** The prosecution case was that after Sunday solemn Mass in the latter part of 1996, Cardinal Pell committed a number of sexual offences against two choristers who were then 13 years old. The prosecution relied upon the evidence of A,[47] namely, that he and his friend B had detached themselves

---

45 *Baden-Clay* (2016) 258 CLR 308, 330 [66] (French CJ, Kiefel, Bell, Keane and Gordon JJ).

46 (2002) 213 CLR 606, 621 [48]. See also *R v BJB* [2005] NSWCCA 441, [34] (Rothman J).

47 It may not be entirely correct to say that A's evidence was uncorroborated. To an extent his evidence was supported by reference to knowledge that he possessed which he could not have come by unless he was telling the truth. In any event, there is nothing particularly unusual in a jury convicting an accused on the strength of a so-called 'uncorroborated' complainant. A finding of guilt in such circumstances does not give rise, in and of itself, to a

from the choir during its procession out of the Cathedral. A said that they re-entered the Cathedral via the south transept. The two then made their way along the sacristy corridor. They entered the Priests' Sacristy, an area which was off-limits to choristers. A had no recollection of ever being in this room before. Evidence was given by Charles Portelli that, during the latter part of 1996, the Priests' Sacristy was being used by the Archbishop for robing and disrobing due to the unavailability of the Archbishop's Sacristy.

44 Once inside the Priests' Sacristy, A and B made their way to an alcove in the corner (described as a wood-panelled area resembling a storage kitchenette with cupboards) which was a little bit concealed. There they located some sacramental wine. This was from the panelled area in the cupboards. They began 'swigging' the wine. They had barely opened the bottle and taken a couple of swigs when Cardinal Pell entered the room alone. He was wearing robes. Cardinal Pell planted himself in the doorway and said something like 'What are you doing in here?' or 'You're in trouble'. The boys froze and then Cardinal Pell undid his trousers or his belt. He started moving underneath his robes.

45 B was saying 'Can you let us go? We didn't do anything'. After pulling B aside, Cardinal Pell pulled out his penis and grabbed B's head. A could see B's head being lowered towards Cardinal Pell's genitalia. B started squirming. He was struggling. A could see Cardinal Pell's hands around the back of B's head. B was crouched before Cardinal Pell and his legs were flailing around a bit. B's head was being controlled and it was down near Cardinal Pell's genitals. A heard some whimpering and heard B's discomfort. He saw that B's face looked terrified. This took place for barely a minute or two (Charge 1).

46 Then Cardinal Pell turned to A and pushed his penis into A's mouth. A was pushed down and crouching or kneeling closer to the corner of the room where the cupboards were. Cardinal Pell was standing. His penis was erect. A was 'freaking

---

conviction being unsafe or unsatisfactory.

out'. This happened for a short period of time. It would not have been any more than two minutes (Charge 2).

47 Cardinal Pell then instructed A to undo his pants and to take them off. A dropped his pants and underwear. Cardinal Pell started touching A's penis and testicles with his hands (Charge 3). As he did this, Cardinal Pell was using his other hand to touch his own penis (Charge 4). Cardinal Pell was sort of crouched, almost on a knee. These two instances of touching took a minute or two.

48 The two boys made some objections but did not quite yell. They were sobbing, in shock, and whimpering. During the offending, Cardinal Pell told them to be quiet, trying to stop them from crying.

49 After Cardinal Pell had stopped, A gathered himself and his clothing. He and B exited the Cathedral the same way as they had entered, via the sacristy corridor to the south transept. They entered the choir room very quickly after what had happened and rejoined some of the choir who were mingling around and finishing up for the day. The two then left the Cathedral precinct. A did not complain to anyone, including his parents on the ride home or at any time after. Nor did he ever discuss the offending with B.

50 **The second incident (Charge 5):** At least a month after the first incident, again following a Sunday solemn Mass at St Patrick's Cathedral, A was processing with the choir back through the sacristy corridor towards the choir room. As A was walking between the entry to the Priests' Sacristy and the Archbishop's Sacristy, Cardinal Pell pushed himself up against A on a wall and squeezed A's testicles and penis over his robes. Cardinal Pell was robed at the time. He did not say anything. A did not tell B about the second incident.

51 A made a complaint to police in June 2015. B died in 2014, having never made any complaint to police. When asked by his mother in 2001, at age 17 or 18, whether he had ever been 'interfered with or touched up' when he was in the choir, B said 'No'.

52 The prosecution called 23 other witnesses at trial. Most of these witnesses were involved or associated with Sunday solemn Mass at St Patrick's Cathedral during the relevant period. As mentioned earlier, most of these witnesses gave evidence as to the general or normal procedure followed at Sunday solemn Mass in late 1996 and early 1997 and, in particular, as to the movements of the choir and of those involved in the Mass. We discuss their evidence in detail below.

PART I: THE ASSESSMENT OF CREDIBILITY AND RELIABILITY

53 The critical issue in this trial was whether A's evidence was credible and reliable. As the judge told the jury in his charge:

> In order to convict you must be satisfied beyond reasonable doubt that [A's] account is true. That is, that the offences, as described by him, actually happened.

To assist the jury in assessing the evidence, his Honour explained the difference between credibility and reliability:

> Broadly speaking, credibility concerns honesty; is the witness telling the truth; and reliability is different. The witness may be honest, but have a poor memory, or indeed be mistaken. So there are those two aspects to a witness' evidence, and I am sure that corresponds with your day-to-day experience in life in judging people.

54 Ordinarily, one person's assessment of the credibility of another person is an intuitive judgment, made without reflection or analysis. In a criminal trial, however, the jury will very often be asked to be both reflective and analytical in their assessment of a witness's credibility, especially when the witness's evidence is — as it was here — critically important.

55 So it was in the present trial in relation to A's evidence. The prosecutor invited the jury to reflect and to analyse. First, he submitted, they should

> step back for a moment and simply think about the overall impression that you were left with by [A's] evidence when it finished …

And then:

> What was the overall impression you were left with? Did he strike you as being an honest witness? An accurate historian? Was he being frank with

> you in his evidence? Did he appear to be recounting actual events and actual experiences that he'd had? …
>
> Next, did he have the sort of memory blanks you would expect a person to have about unimportant details or peripheral matters, the sorts of things you'd expect a person not to recall with clarity, given the passage of time and given their lack of significance to the actual event itself. The sort of things you'd have a query about, you'd have reservations about if indeed he did remember.
>
> Alternatively, ask yourselves did he come across as a dishonest witness? A person who is gilding the lily, a person who was embellishing things at every opportunity that he had; making things up, exaggerating things, plugging holes when he could, putting a positive spin on things and recounting peripheral matters when you wouldn't expect a person to be able to do that?

56 In his book, *Evidence, Proof and Probability*,[48] Sir Richard Eggleston identified a number of considerations which a judge will typically take into account in the assessment of a witness's credibility.[49] As jurors are typically asked to take into account similar considerations, Sir Richard's list provides a helpful framework within which to review the parties' submissions about A's credibility. The relevant passage was as follows:

> What are the factors that a judge takes into account when deciding whether a witness is telling the truth? They may be listed as follows:
>
> 1) The inherent consistency of the story: if the evidence of the witness contains internal contradictions, it cannot be accepted as a whole. The question may be which part to reject.
>
> 2) Consistency with other witnesses: this, of course, involves making an assessment also of the other witnesses, which in turn requires consideration of the factors here set out in relation to those witnesses also.
>
> 3) Consistency with undisputed facts: these include documentary evidence (if not subject to attack), facts admitted by the parties, or matters of common knowledge or experience.
>
> 4) The 'credit' of the witness: in addition to the observation of his performance in the witness-box, this will include … evidence of bias against a party; or evidence of a general reputation for mendacity.
>
> 5) Observation of the witness: this includes physical manifestations of truthfulness or mendacity, or of uncertainty, and also characteristics observable in the witness-box or capable of being tested there (hearing

---

48 Richard Eggleston, *Evidence, Proof and Probability* (Weidenfeld and Nicolson, 2nd ed, 1983).

49 Ibid 192–3.

and eyesight, capacity to judge distance or height) …

6) The inherent probability or improbability of the story.[50]

57 We note that 'observation of the witness' is but one of the factors listed here, and it appears well down the list. Appropriately, the judge in the present case instructed the jury that there were 'just too many variables to make the manner in which a witness gives evidence the only, or even the most important, factor'. In our consideration of the evidence we have likewise borne in mind the caution sounded by the High Court in *Fox v Percy* about 'the dangers of too readily drawing conclusions about truthfulness and reliability solely or mainly from the appearance of witnesses'.[51] As far as possible, the Court said, conclusions should be arrived at

> on the basis of contemporary materials, objectively established facts and the apparent logic of events.[52]

58 In the present case, the Crown has consistently maintained that the jury were entitled to accept A as a credible and reliable witness. The defence, on the other hand, has consistently maintained that he could not be believed. On appeal, the contention for Cardinal Pell was that the jury could not have been satisfied beyond reasonable doubt that A's account was true.

59 In support of their respective contentions, both sides rely on considerations of the kind identified by Sir Richard Eggleston. Thus, the Crown points to aspects of A's account of the first incident as being consistent with undisputed facts about the layout and furnishing of the Priests' Sacristy at the relevant time. A's knowledge of such details is said to confirm the truth of his statement that he was there when the alleged offending took place. Reliance is also placed on what could be gathered from 'observation of the witness'. More than once, senior counsel for the Crown in this Court submitted that A was a 'compelling' witness.

60 The defence, for its part, contends that the record of the trial reveals:

---

50 Ibid.

51 (2003) 214 CLR 118, 129 [30] (Gleeson CJ, Gummow and Kirby JJ).

52 Ibid 129 [31].

- inconsistencies between A's evidence and the evidence of the opportunity witnesses;
- inconsistencies between his evidence and what are said to be undisputed facts;
- that A consciously altered his evidence when challenged, thus demonstrating his untruthfulness; and
- the inherent improbability of A's story.

61 The defence attack on A's credibility and reliability comprised three distinct strands. The first was that A's account was simply false. Either he was a liar, who had modified his fabricated story 'when faced with impossibilities and difficulties', or he was recounting a fantasy which he had, over time, come to believe was true. According to the appeal submission:

> [A's] account was not simply implausible, he also changed it repeatedly in critical ways, when he was presented with facts which exposed its impossibility. At best, these repeated alterations revealed him to be uncertain and unreliable about critical particulars of his own narrative. At worst, he demonstrated a tendency to deliberately alter crucial elements of his story on numerous occasions when confronted by solid obstacles. These repeated attempts to make two factually impossible allegations marginally more realistic ultimately failed.

62 The second strand was that of inherent improbability. A's claims were 'so implausible that a reasonable jury must have had a reasonable doubt'. According to the appeal submission:

> [A] claimed in the first incident that Pell had engaged in visually unambiguous sexual acts, immediately after a solemn Mass, in a room that he must have expected those involved in the ceremony to enter as those acts were occurring, having left open a door to a well-traversed corridor, without making any suggestions of secrecy despite the considerable noise that [A] claimed he and [B] made during the alleged abuse, and in spite of private lockable rooms being available to Pell only a short distance away. And in the second incident, [A] claimed that 6 foot 4 inches Pell, fully robed, pushed his way, somehow, through a procession and then violently sexually assaulted [A], completely unperturbed by having a corridor of choristers as eye witnesses to his sexual offending.

63 Thirdly — and this was the contention most prominently advanced both at

trial and on appeal — it was factually impossible for the offending to have occurred as alleged. According to the appeal submission:

> No matter what view was taken of [A] as a witness, it was simply not open to the jury to accept his word beyond reasonable doubt. That is so because: (i) *the combined evidence of the witnesses, with the sole exception of [A], if accepted, showed that the offending was impossible;* and (ii) there was no rational reason to reject this evidence.[53]

64 Before the jury and again in this Court, each of these contentions was supported by detailed reference to the evidence given by A and by the opportunity witnesses. In pt II of this judgment, we review that evidence and the competing appeal submissions. Before doing so, it is appropriate that we express our general conclusions on the effect of the evidence. Although the contentions of falsity, improbability and impossibility were all directed at undermining A's credibility and reliability, it is convenient to deal with each contention separately.

The story was false

65 The defence in a criminal trial bears no onus at all. As a matter of forensic reality, however, a defendant faced with accusations from an apparently credible complainant will usually look to put before the jury reasons why the complainant's account should be doubted. Identification of a motive to lie may suggest such a reason. As the High Court said in *Palmer v The Queen* ('*Palmer*'):

> Cross-examination is permissible and evidence is admissible to establish that a complainant has a motive to make and persist in false allegations.[54]

In the same case, McHugh J said:[55]

> When a serious allegation is made against a person, one of the first inquiries most persons make in testing the truth of the allegation is to ask whether the person making the allegation has any motive for fabricating it. Any facts that suggest a motive are regarded as throwing light on the probability of the allegation being untrue.

---

53 Emphasis added.

54 (1998) 193 CLR 1, 6 (Brennan CJ, Gaudron and Gummow JJ).

55 Ibid 24–5 [58].

66 In our experience, it is common in sexual assault trials for it to be put to the complainant in cross-examination that they had a reason to invent the allegations.[56] For example, where the alleged perpetrator was at the relevant time in a relationship with the complainant's mother, it may be suggested by the defence that the complainant fabricated the allegations in order to break up the relationship.[57]

67 These realities are anticipated in the *Evidence Act 2008* ('*Evidence Act*'), which makes admissible (as an exception to the credibility rule) evidence which 'tends to prove that the witness … is biased or has a motive for being untruthful'.[58] Provision is also made for the introduction of evidence of a prior consistent statement, if it is suggested that 'evidence given by the witness has been fabricated or re-constructed (whether deliberately or otherwise)'.[59]

68 As mentioned earlier, the contention of falsity advanced two alternative hypotheses. The first was that A was a cunning and calculating liar, who had realised after being cross-examined at the committal that he had gaps to fill in his story and who then set about inventing additional pieces of evidence to fill those gaps. As was properly conceded by senior counsel for Cardinal Pell in this Court, this was a contention of deliberate and purposeful fabrication.

69 The second, and rather different, line of attack was that A's account was all a fantasy, a product of his imagination. For example, defence counsel suggested to A that his account of the second incident was 'the product of fantasy. Total fantasy'. In final address, counsel submitted that A's evidence was 'a product of fantasy which he might have come to believe after so many years because people who fantasise sometimes come to believe their fantasies'.

---

56 See, eg, *TP (a pseudonym) v The Queen* [2012] VSCA 166, [28]–[30] (Warren CJ, Redlich and Hansen JJA); *Woods (a pseudonym) v The Queen* [2014] VSCA 233, [24] (Hansen JA).

57 See, eg, *FG (a pseudonym) v The Queen* [2012] VSCA 84, [14] (Bongiorno JA); *Mathis (a pseudonym) v The Queen* [2014] VSCA 118, [5] (Maxwell ACJ).

58 *Evidence Act* s 106(2)(a).

59 Ibid s 108(3)(b).

70 'Imagined' is quite different from 'invented', as counsel for Cardinal Pell accepted in this Court. The defence were, of course, entitled to advance fabrication and fantasy as alternative hypotheses. But what the hallmarks of fantasy might be was never explained to the jury, or to this Court. Nor was any motive identified which might have explained what were said to be A's deliberate fabrications.

71 As we have emphasised — and as the judge correctly instructed the jury — there was no obligation on the defence to suggest such a motive. But, in the absence of any such suggestion, the jury were left with the bald assertion of fabrication. As the High Court said in *Palmer*, proof of a motive to lie weakens a complainant's credibility.[60] Here, the absence of any defence hypothesis about why A might have invented these allegations meant that his credibility was not damaged on that account.

72 In advancing the fabrication hypothesis, senior counsel for Cardinal Pell repeatedly put to A in cross-examination at trial that he had realised, after being cross-examined at committal, that there were difficulties in his story which he would have to fix up. It was for this reason, counsel suggested, that A had 'concocted' or 'invented' new pieces of evidence. We examine a number of these alleged concoctions below.[61]

73 It is sufficient for present purposes to say that we saw nothing in A's answers under cross-examination to suggest that he had been caught out or had tripped himself up. And, where his responses involved any alteration of — or addition to — what he had said previously, the changes seemed to us to be typical of what occurs when a person is questioned on successive occasions, by different people, about events from the distant past.

74 Recollection can be revived by all sorts of stimuli, the most obvious being repeated requests by different people to recall particular events. A had provided

---

60 (1998) 193 CLR 1, 9 [9] (Brennan CJ, Gaudron and Gummow JJ).

61 See [197]–[231] below.

two statements to police and, by the time of this trial, had been cross-examined at length twice, first at the committal and again at the first trial. His recollection was also prompted by a 'walkthrough' at the Cathedral, undertaken in 2016 for the purpose of showing police where the incidents had taken place.[62] This was the first time A had been back in the Cathedral since he was 13 years old and — as he told the jury — it made him realise that a plan he had drawn earlier for police was mistaken.

75 The jury were well equipped to decide whether any changes in A's account over time revealed him to be dishonest or, alternatively, unreliable. As McHugh J said in *M*:

> It is the everyday experience of the courts that honest witnesses are frequently in error about the details of events. The more accounts that they are asked to give the greater is the chance that there will be discrepancies about details and even inconsistencies in the various accounts. Of course, it is legitimate to test the honesty or accuracy of a witness's evidence by analysing the discrepancies and inconsistencies in his or her accounts of an incident. In a case where accuracy of recollection is vital — such as the account of a conversation in a fraud case or the description of a person where identity is the issue — discrepancies and inconsistencies in the witness's account may make it impossible to accept that person's evidence, no matter how honest he or she appears to be. But in other cases, discrepancies and inconsistencies may be of far less importance if the honesty of the witness, as opposed to the accuracy of the detail, is the crucial issue. If a jury thinks that the demeanour of the witness or the probability of occurrence of the witness's general account is persuasive, they may reasonably think that discrepancies or even inconsistencies concerning details are of little moment.[63]

76 In his charge, the judge noted the defence argument that changes and inconsistencies in A's evidence undermined his credibility. He directed the jury that they needed to decide for themselves whether such inconsistencies were important to their assessment of his credibility. To assist their consideration, his Honour gave the jury a direction in the form provided for by s 54D(2)(c) of the *Jury Directions Act 2015* ('*JDA*'), as follows:

> When you are assessing the evidence, also bear in mind that experience shows the following. One, people may not remember all the details of a sexual offence or may not describe a sexual offence in the same way each

---

62 A video recording of the walkthrough was before the jury, and we have viewed it ourselves.

63 (1994) 181 CLR 487, 534.

> time. Two, trauma may affect different people differently, including by affecting how they recall events. Three, it is common for there to be differences in accounts of a sexual offence. For example, people may describe a sexual offence differently at different times to different people or in different contexts. And finally, both truthful and untruthful accounts of a sexual offence may contain differences.

77 A further indication of A's credibility, in our view, was his admitted uncertainty about a number of matters which, if the story had been invented or was an entrenched fantasy, he might have been expected to describe with confidence. Striking examples of this were:

- his uncertainty about whether Cardinal Pell closed the door in the first incident;
- his lack of recall as to whether he had screamed or called out during the first incident; and
- his uncertainty about which hand Cardinal Pell had used in the second incident.

78 In testing the fabrication hypothesis, it is relevant that there were features of A's account which — had he been fabricating — he might have been expected to construct differently. For example, it might be thought surprising that — on A's account — Cardinal Pell did not close the door after entering the Priests' Sacristy. But, as already noted, A said he could not recall whether it was closed or not. He thought it was not 'wide open'. In our view, the jury could properly reason that a person fabricating a story would have been more likely to say that the door was closed, precisely in order to remove the potential difficulty of explaining how it was that noises made inside were not heard outside.

79 To similar effect was A's evidence that Cardinal Pell had not ordered the boys to keep quiet about the first incident. This might also be thought to be somewhat surprising. A juror might well have assumed that, if such conduct had occurred, the perpetrator would have been likely to threaten the victims into silence. In final address, senior counsel for Cardinal Pell submitted that, if it were a true story, Cardinal Pell would have taken the boys to his office and locked the door.

Afterwards, it was submitted, he would have said to them, 'Don't you dare tell anyone else because God will strike you dead'.

80 In our view, the jury were also entitled to view this aspect of A's account as supportive, rather than destructive, of his credibility. The fact that his account of the incident did not include the making of any such threat tended against the contention that he had made it up.

The failure to complain

81 Defence counsel cross-examined A at length about his failure to say anything to anyone about the alleged assaults until many years later. It was put to A — as it was later put to the jury — that his silence was 'proof that it didn't happen'. Counsel laid particular emphasis on the fact that A had never spoken to B about either incident. The submission to the jury was that 'if what happened really happened they would have discussed it.'

82 In cross-examination, defence counsel put to A that:

> It would have been inevitable that one or other of you would've asked the other the next day, or even during the next week, 'Have you told anyone?' or, 'What are we going to do about it, if anything?'.

And again:

> if it happened, either you or [B] would have asked each other, 'What are we going to do?', wouldn't you?

83 A responded as follows:

> No, I think you're assuming so much about us. I think you're assuming that we were um across, across timelines and historical dates and also across the gravity of such an incident. We were — we were young kids. We were just trying to get by and we had no, no — we didn't want to rock any boats. It's the last thing we wanted to do. … We were nursing, we were carrying forward a lot of hopes and dreams of our working-class families and it meant so much to us to maintain and preserve what we had and the fact that that happened and, and didn't happen so quickly, it started and finished such a quick, quick amount of time and that we went back resuming life and not much really infiltrated us after that. So we continued trying to live our lives as we were before. … I mean, how is that unreasonable? How is that unreasonable to try and, and explain that to you? How can you think that we were so pragmatic and tactical about everything that we would be discussing

> the nature of — of going forward or — why would I ask [B] why his mother, ah, was or wasn't informed when I didn't even want to think about it myself?

84 As counsel continued to press him, A gave extended explanations for his long silence. His answers combined two different themes. The first was that what had occurred was something he could not comprehend. 'We couldn't fathom what had happened to us'. It was so completely out of his ordinary experience, and so terrifying, he said, that:

> part of the way I dealt with it was not to speak to anyone about it and to completely push it into the darkest corners and recesses of my brain.

A said at one point:

> it was completely an anomaly … out of stream … Completely against the grain of how we were living our lives … it came into our lives and it exited just as quickly.

85 The second theme was that he was anxious to do nothing to jeopardise his future at the school, on which the hopes of many in his family rested. A was asked whether it had occurred to him that he should warn B, after the second incident, that there might be 'a continuing interest in him'. A said it had not and, when asked to explain, he said:

> Because the incidents were isolated, where they were compartmentalised and they were pushed away from my normality. They were absolutely isolated and ripped out of my mainframe which was - which was heading towards trying to be a young academic, you know, kid in a rich school trying to survive and trying to get through and trying to impress everyone in my family and trying to — to do something that — that I had the — I hadn't done before, you know. That meant a lot to me. That meant a lot to me. And the fact that — that that was jeopardised, and the fact that - and it didn't matter what jeopardised it. I could not bear the fact of — of letting down everyone in my life. Everyone around me had a lot of hopes in me on attending St Kevin's [College], you know. That was the main drive. I wanted to stay at St Kevin's. I wanted to be a part of that school, and I wanted to succeed in a rich private school environment. And I wanted that with my own head.

86 These responses seemed to us to be entirely plausible, as did A's statement that he had 'no intention of telling anyone, ever'. There was, in our view, no reason to doubt that A was 'horrified … terrified' by what had happened and, hence, would have buried the memories. Nor that he had done so because he knew he would

never speak to anyone about it. It was perfectly understandable for him to have ruled out that possibility. He had been caught red-handed, in a prohibited place, and anything he said about Cardinal Pell was almost certain to be disbelieved. What followed in his evidence also had the ring of truth:

> It's something I've carried for the whole of my life, … and coming forward took a — took a courage much later on for me to be able to even think about coming forward.

87 On the appeal, senior counsel for the Crown singled out these passages as demonstrating why A should be viewed as 'a very compelling witness'. Both the content of the answers, and the manner of their delivery, were said to be such as to eliminate any doubt a juror might have had. In our view, this was a very significant part of A's evidence. It was rightly characterised as compelling, both because of the clarity and cogency of what A said and because of the complete absence of any indication of contrivance in the emotion which A conveyed when giving his answers.

88 As has often been recognised, delay in complaint is not uncommon in cases such as this. In *R v BJB*,[64] for example, McClellan CJ said:

> In circumstances where children are the alleged victims of sexually inappropriate conduct, the combination of the disempowerment of the child and the authority figure of the perpetrator, together with the social pressures associated with causing conflict with the family or generally airing that which is in the past often leads to the suppression of these complaints until an older age.[65]

89 The legislature has addressed this issue by making provision for the jury to be directed on delay in complaint where that issue is raised.[66] In this case, the judge gave such a direction, as follows:

> Specifically, you have heard that the complainant, [A], made some police statements I think in 2015, so that is nearly 20 years after the offending is alleged to have occurred, and we sit here today, I think on my calculations, some 22 years or thereabouts, but in any event, the point is, there is a

---

64 [2005] NSWCCA 441.

65 Ibid [37].

66 *JDA* s 52.

> significant delay, and I want to give you some legal directions which relate to the issue of failure to complain and delay.
>
> The first one is this. Experience shows that people react differently to sexual offences and there is no typical, proper or normal response to a sexual offence. Some people may complain immediately to the first person they see, while others may not complain for some time, and other[s] may never make a complaint. It is a common occurrence for there to be delay in making a complaint about a sexual offence.

Conclusion

90 Directly addressing the falsity contention, senior counsel for the Crown opened his oral submissions by asserting that A

> was a very compelling witness. He was clearly not a liar. He was not a fantasist. He was a witness of truth.

In our view, that submission should be upheld. The jury were entitled to reject the falsity contention. (We have viewed A's evidence twice — first, before we had reviewed the other evidence and heard the arguments in the appeal and again afterwards. As it happens, the jury took a similar course, asking shortly after they commenced their deliberations to be provided with the recording of A's evidence.)

91 Throughout his evidence, A came across as someone who was telling the truth. He did not seek to embellish his evidence or tailor it in a manner favourable to the prosecution. As might have been expected, there were some things which he could remember and many things which he could not. And his explanations of why that was so had the ring of truth.

92 For example, during cross-examination A said that his memory of Archbishop Little (Cardinal Pell's predecessor) was not 'indelibly marked' in his brain. The following exchange then took place:

> Q: But you'd seen [Archbishop Little] for — since you've joined the choir for at least half a year at Masses; hadn't you?
>
> A: Yes, but I — as a 12-year-old boy, wasn't looking at the facial features of, of the priests. I was looking at the sheet music, I was trying to adhere to a pretty strict regime as a choirboy. I was trying to do my best job as a choirboy and I knew then that just like any other pursuit like this, it was ah, quite serious on my performance and my behaviour mattered a lot. So, I was more focused on being um, doing the right thing as a choirboy

> than looking at how individuals looked up on the altar. *The only time I really had time to focus was when a horrible incident happened to me and I, I can remember quite a bit about that*.[67]

93 Nothing about A's account of the events suggested that it was either fabricated or a product of his imagination. As we have already indicated, there were features of his account, and of the way his testimony unfolded, which strongly indicated that it was neither of those things. Of course, A's evidence could not be considered in isolation. Any first impression of him had to be constantly, and critically, re-evaluated in the light of the opportunity evidence.[68] Having done that for ourselves, we were not prompted at any stage to doubt the veracity of his evidence.

94 The impression we gained from reading the transcript of A's cross-examination reinforced the impression we had gained from watching the recording of him giving evidence. Nothing about his answers under cross-examination suggested that he was concocting, or embellishing, or 'fantasising'. On the contrary, both the content of what he said and the way in which he said it — including the language he used[69] — appeared to us to be entirely authentic.

95 There was, of course, no witness who could independently verify any aspect of A's account of the alleged assaults. (We deal with B's denial later in these reasons.) But, as the Crown submitted on the appeal, the credibility of his account was considerably enhanced by the accuracy of his description of the Priests' Sacristy. He was able to describe in some detail the layout and furnishing of the alcove where he and B were discovered by Cardinal Pell. As the Crown pointed out, A correctly placed the wine area in the alcove, not where it is currently located.

96 More striking still was the fact that A identified the Priests' Sacristy as the setting. At all other times, Cardinal Pell would have robed — and disrobed — in the

---

67 Emphasis added.

68 *SKA* (2011) 243 CLR 400, 409 [24] (French CJ, Gummow and Kiefel JJ).

69 Ibid 411 [31].

Archbishop's Sacristy. Exceptionally, however, that Sacristy was temporarily unavailable at the end of 1996 because its furniture was under repair. As a result, Cardinal Pell was — at the time of the alleged offending — having to use the Priests' Sacristy to disrobe after Mass.

97 In our view, the jury were entitled to view these 'undisputed facts' as independent confirmation of A's account of having been in the Priests' Sacristy in that period. There was nothing to suggest that his knowledge of those matters could have been obtained otherwise. A's evidence was that he had never been in the Priests' Sacristy before. In cross-examination, he accepted, but did not recall, that he had been taken on a tour of the Cathedral when he first joined the choir. He said that he had no recollection of being shown the sacrisities on such a tour, but did not dispute it. The jury were entitled, in our view, to discount the possibility that going on such a tour would have explained A's detailed knowledge — and recollection 20 years later — of the interior of that particular room.

Improbability

98 The defence also relied on arguments from improbability (or implausibility). These were powerful arguments. It was, of course, highly improbable that someone in Cardinal Pell's position would have acted in the way alleged, in the circumstances in which he was alleged to have done so. In the first incident, there was a high risk of discovery; there was a high risk that one or other of the boys would cry out; and there was a high risk that they would report him. The risk to his reputation, and position, was enormous. The second incident, though much briefer, was even more brazen.

99 Early in his final address, defence counsel posed the question to the jury: 'Who in their right mind would take the risk of doing what [A] says happened?' As senior counsel for the Crown correctly pointed out, however, an individual may take a risk — even a high one — in circumstances where most other people would not. As is illustrated by the proven allegations of repeat offending by a high-profile

defendant in *Hughes v The Queen*, sexual offending does sometimes take place in circumstances carrying a high risk of detection.[70]

100 Another illustration is provided by *Rapson v The Queen* ('*Rapson*').[71] In that case, a priest who served as a teacher and later as vice-principal at a boys' secondary school was convicted of five charges of rape and eight charges of indecent assault against boys in his charge.[72] As recorded in the sentencing judge's reasons,[73] one of the indecent assaults occurred in the presence of two other priests and three other boys; two others were committed in the school infirmary in the presence of several other boys; and all five rapes were committed in the office which the offender occupied as vice-principal. On three of those occasions, he had gone to the victim's dormitory late at night and ordered him to come to the office. This Court commented as follows:

> Plainly enough, he could have chosen a variety of other locations for this purpose, including locations away from school premises. What is distinctive about his use of the office, apart from anything else, is that it was a location which embodied, and reinforced, his authority over the boys at the school.[74]

101 In *WEA v The Queen ('WEA')*,[75] this Court rejected an interlocutory appeal by a person charged with — and subsequently convicted of[76] — numerous sexual offences committed against five female members of his extended family while they were children. The Court agreed with the trial judge that the (alleged) offending was committed 'in circumstances of remarkable brazenness'.[77] And, in *Morris v The*

---

70 (2017) 344 ALR 187, 203–4 [57]–[60] (Kiefel CJ, Bell, Keane and Edelman JJ). See also *R v Bauer (a pseudonym)* (2018) 359 ALR 359, 378–9 [59] (Kiefel CJ, Bell, Gageler, Keane, Nettle, Gordon and Edelman JJ); *Papazoglou v The Queen* (2014) 45 VR 457, 461 [14] (Maxwell P).

71 (2014) 45 VR 103.

72 On a Crown concession, the Court of Appeal allowed his appeal against conviction and ordered a retrial. On the retrial, Rapson was again convicted on all eight charges: *DPP v Rapson* [2015] VCC 610.

73 *DPP v Rapson* [2015] VCC 610.

74 *Rapson* (2014) 45 VR 103, 114 [34] (Maxwell P, Nettle and Beach JJA).

75 Unreported, Court of Appeal, Whelan and Coghlan JJA, 22 February 2013, cited in *Rapson* (2014) 45 VR 103, 112–113 [27]–[29].

76 *DPP v Wright* [2013] VCC 1300.

77 *WEA* (Unreported, Court of Appeal, Whelan and Coghlan JJA, 22 February 2013), [28].

Queen,[78] a schoolteacher pleaded guilty to representative charges of indecent assault against six pupils in his charge. In a number of instances, the teacher had touched the pupil's genitals while the pupil was sitting on the teacher's knee reading a book in front of the class.[79]

102 It is unnecessary for present purposes to speculate as to why a person might pursue sexual gratification in such obviously risky circumstances. Each case must, of course, be determined on its own facts. What these other cases do show, however, is that the existence of a high level of risk did not, in and of itself, oblige the jury to have a reasonable doubt that the alleged offending took place.

103 As with the issue of A's silence after the offending, evaluating these questions of improbability involved the making of judgments about human behaviour. The jury were well placed to make those judgments. They had the advantage not only of a far wider range of life experience than that of three judges but of being able to draw on each other's experiences in the course of their deliberations. These questions were, moreover, at the heart of this trial. They were clearly, and repeatedly, raised with the jury during the defence closing and again in the judge's charge.

104 More than once, senior counsel for the Crown in this Court submitted that questions of this kind were 'quintessentially' matters for the jury. This is a notion which is often invoked in appellate consideration of the unreasonableness ground.[80] It implies that there are certain issues which juries, because of their character and composition, are peculiarly well placed to decide. The further implication is that, on such issues, the appeal court should somehow defer to the decision which the jury, by inference from their verdict, must have made.

---

78 *Morris v The Queen* [2016] VSCA 331.

79 Ibid [13]–[18] (Maxwell P and Cavanough AJA).

80 In *Gillard v The Queen* (2003) 219 CLR 1, for example, Gleeson CJ and Callinan J said that the assessment of the accused was 'quintessentially a jury question': at 15 [29]. In *R v Henderson* (2009) 22 VR 662, Warren CJ (with whom Vincent and Dodds-Streeton JJA agreed) said that whether the disputed evidence of prosecution witnesses was to be accepted 'was quintessentially for the jury to decide': at 697 [174].

105 Thus, at one point, senior counsel for the Crown invited the Court to 'pay due deference to this jury verdict'. When pressed as to what this meant, counsel explained that he was endeavouring to give content to the High Court's affirmation of the role of the jury as 'the constitutional tribunal of fact.'[81] He also submitted that the importance of the jury system rested on the fact that '[t]welve people from … all walks of life can bring their common understanding of life together'.

106 In our view, there is no room for any notion of deference on an appeal such as this. As explained earlier, the task for each member of the appeal court in considering the unreasonableness ground is to review the whole of the evidence and decide whether the guilty verdict was reasonably open on the evidence. For that purpose, each appeal judge makes an individual evaluation of the (im)probabilities of human behaviour when such questions arise. And we have each done that in the course of considering the evidence in the present case.

107 At the same time, in deciding whether the factual conclusions expressed in the verdict were reasonably open to the jury, we bear in mind that

> the purpose and the genius of the jury system is that it allows for the ordinary experiences of ordinary people to be brought to bear in the determination of factual matters. It is fundamental to that purpose that the jury be allowed to determine, by inference from its collective experience of ordinary affairs, whether and, in the case of conflict, what evidence is truthful.[82]

And, further:

> Experience suggests that juries, properly instructed on the law (as they were in this case), are usually well able to evaluate conflicts and imperfections of evidence.[83]

108 These considerations inform the appellate court's view of what the High Court in *Baden-Clay* called 'the boundaries of reasonableness within which the jury's function is to be informed'.[84] It follows that, in deciding whether a guilty verdict

---

81 As to which, see *Knight v The Queen* (1992) 175 CLR 495, 511.

82 *Doney v The Queen* (1990) 171 CLR 207, 214 (Deane, Dawson, Toohey, Gaudron and McHugh JJ).

83 *MFA* (2002) 213 CLR 606, 634 [96] (McHugh, Gummow and Kirby JJ).

84 (2016) 258 CLR 308, 329 [65].

was reasonably open, an appeal court should be slow to substitute its own judgments about human behaviour for those made by a jury.

109 As evidenced by their verdict, this jury rejected the improbability arguments. In our view, it was reasonably open to them to do so. We are 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.

110 As to the first incident, we can readily picture two choirboys deciding on the spur of the moment to break away from the procession once the pressure of public performance at Mass was released, and venturing into an area which was strictly out of bounds. The 'swigging' of the altar wine seems to us to be just the kind of thing which might occur in an adolescent escapade.

111 Nor — leaving aside the obvious risks to Cardinal Pell to which we have already referred — were the circumstances in which he came upon A and B such as to render the allegations of sexual offending so improbable that the jury must have had a doubt about them. On the contrary, the circumstances rendered the boys acutely vulnerable and powerless — and palpably so. They had been discovered, by the most powerful person in the Cathedral hierarchy, in the course of committing acts of serious disobedience and gross disrespect.

112 Nor do we regard the description of the second incident as being so improbable as to entail a reasonable doubt. As discussed more fully below, a fleeting physical encounter of the kind described by A can be readily imagined. Jurors would know from common experience that confined spaces facilitate furtive sexual touching, even when others are in the same space. And the act of squeezing the genitals is, itself, unremarkable as a form of sexual assault.[85] On A's account, this was opportunistic offending, just as the first incident had been. On this occasion, however, it was over almost immediately. As he said in evidence-in-chief: 'Just a quick, he squeezed and kept walking. It was something that was a complete and

[85] See, eg, *DPP v Rapson* [2015] VCC 610, [5]–[7] (Judge Parrish).

utter whirlwind. It was very quick.'

113 What does seem improbable to us — referring again to the defence's 'fabrication' hypothesis — is that A would have thought to invent a second incident if his true purpose was to advance false allegations against Cardinal Pell. Having to construct and maintain a story of a second and subsequent assault could only have made the undertaking much more difficult and risky for A, markedly increasing the likelihood that the whole story would unravel when tested.

Impossibility

114 As mentioned earlier, it was a central part of the defence case at trial that A's account could not be accepted because what he purported to describe was simply impossible. It could not have occurred. Thus, early in his cross-examination, senior counsel for Cardinal Pell put to A that his account was 'in fact, impossible. Your account of the incidents couldn't have happened.'

115 In final address, senior counsel for Cardinal Pell told the jury:

> What we say is, it's not true because it's impossible basically. There was simply no opportunity.

Counsel submitted to the jury that the timing as described by A was 'impossible' and that his description of the second incident made it 'completely impossible' for Cardinal Pell to have confronted A as alleged.

116 The written case for the appeal was just as emphatic, stating:

> There was a significant body of evidence demonstrating, in various ways, that the offending not only did not occur but could not have occurred.

When, however, the implications of this submission were being explored in argument, senior counsel for Cardinal Pell submitted that it had not been necessary for the defence to couch its case at trial in the language of impossibility, as the defence bore no onus to make good any factual contention. Accordingly, before we examine the impossibility contentions on their merits, it is necessary to review the course of the trial to see how the defence position on impossibility was articulated

before the jury.

117 Early in his opening address, senior counsel for Cardinal Pell told the jury that:

> there will be evidence before you from a number of people about the liturgical and ecclesiastical nature of a Sunday solemn Mass, and it will be significant to understand it in this case, *because the principal issue will be is it practically possible, was it practically possible or probable that George Pell, the man George Pell was alone with two young choristers*, 13 year olds, and that he was alone within the ten minutes or so from the conclusion of the solemn mass on one of the two Sundays.[86]

118 The 'principal issue' in the trial, as here defined by defence counsel, would be whether there had been the opportunity for Cardinal Pell to commit the offences. A little later, counsel submitted that the evidence from the other witnesses would show that it was impossible for the offending to have occurred, such that the jury would not be able to accept A's account:

> What is on trial is [A's] evidence and the extent to which you are prepared to accept it beyond reasonable doubt because it is his evidence, and it is his evidence not supported by other evidence, and that is something of considerable significance. It is not supported by other evidence in this case. Indeed, the other evidence in this case goes the other way and tends to *demonstrate that what he says is, in some instances, you might think, practically impossible, and in other instances highly improbable, and when you compound the sort of practical impossibilities with the improbabilities, one of you is a mathematician, you compound all those things, you come to the conclusion that you cannot accept what [A] says is true. So that's the issue*.[87]

119 And further:

> We raise 12 issues. *Some of them are issues of what we say are practical impossibility in the circumstances*, *some issues that we say are highly improbable*. The first one that we say is practically impossible in the context of evidence that you will hear, and I won't go into it obviously because this is not my function at this stage. My function at this stage is to outline to you where the areas of contentions are and what the issues are.
>
> *We say it is not practically possible* that Archbishop Pell was robed in archbishop's robes and alone immediately after Sunday solemn Mass and following the time thereafter when procession takes place after the event. *It is practically impossible* because the allegation that is made against him is that he

---

86 Emphasis added.

87 Emphasis added.

> enters the sacristy, the Priests' Sacristy, from the front door. It's not like he's been in the archbishop's sacristy and has gone through the other way.
>
> …
>
> And the evidence will be that others disrobed in the Priests' Sacristy, people who are described as concelebrants, other priests visiting, other dignitaries, the Dean of the cathedral for most occasions. *That will be an issue that's to be considered, whether he is ever left alone when robed, because if he is not you would not be able to find that [A's] story is true. It's just not possible. That's why we say it's practically an impossibility …*
>
> …
>
> Provisionally one looks at crime, for those of you who watch television, by saying let's look at opportunity, let's look at means, let's look at motive, and the point of contention between the Crown and us is first of all *there was no opportunity on the evidence as you will hear. That's the issue, was there an opportunity, on the evidence, a credible opportunity*.[88]

120 Following the close of evidence, the prosecutor addressed the jury first. At the outset, he identified the 'critical issue' as being whether the jury accepted beyond reasonable doubt that what A said occurred 'actually did occur'. He continued:

> The Crown also presents, as it's obliged to do, a number of people who say, 'Well, hang on, I recall circumstances that perhaps aren't conducive to those things happening', and so that means that you need to look at those circumstances *to see if that really means that it could not have happened, or whether it simply means there was less opportunity for it to happen*, but nevertheless did happen, and there's a difference between no opportunity and a reduced opportunity.[89]

121 The prosecutor submitted that the evidence did not remove the opportunity for the offending to have occurred. On the contrary, he said, it was 'entirely possible' that Cardinal Pell had been in the Priests' Sacristy, robed but alone, on the occasion of the first incident. He reminded the jury of defence counsel's opening address and of the reliance placed on 'improbabilities and impossibilities':

> By using that expression ['it's entirely possible'] I'm not seeking for one moment to reverse the onus of proof or to lower the standard of proof. *I'm simply using that wording in that way because you'll recall that at the outset, during my learned friend's opening response or opening address, he put forward a number of improbabilities and impossibilities to [A]'s account, and so that's why I'm wording it in that way, because what the Crown says is that upon proper scrutiny of the*

---

[88] Emphasis added.

[89] Emphasis added.

> *evidence, [A]'s account [with]stands those suggested improbabilities or impossibilities* because the evidence suggests that on that day, the day of the first incident, whether it be 15 December or 22 December 1996, or whatever day in the second half of 1996 it occurred. The evidence suggests that [A] and [B] did detach from the procession group. The evidence suggests that Archbishop Pell had left the front steps, that he had returned to his sacristy in a period shortly after [A] and [B] had entered it, and he had entered that sacristy alone and unaccompanied and remained so for a period of time, and those things can be satisfied beyond reasonable doubt.

122 In their final address, counsel for Cardinal Pell provided the jury with a set of slides as an aid to understanding. The slides contained a number of categorical statements about impossibility, each accompanied by references to the evidence. The slides variously stated:

- 'The timing of [A's] story is impossible.'
- 'It is not possible Pell was in the Sacristies only a few minutes after the end of Mass.'
- 'It is not possible that Pell was robed and alone after Mass.'
- 'It is not possible that two choirboys could be raped in the Priests' Sacristy after Mass by Pell undetected.'

In developing his submissions by reference to these slides, defence counsel repeatedly used the words 'impossible' and 'not possible'.

123 In his charge to the jury, the judge summarised the respective cases. The prosecution's case, his Honour said, was that A's account should be accepted because he was a 'powerful and persuasive' witness. His Honour continued:

> In terms of whether his account fits with the other evidence in the case [the prosecutor] says that it does, it is not inconsistent with the other evidence in the case, and the prosecution contend that it is entirely possible that the opportunity arose for this offending to have occurred in the manner alleged by [A]. Generally it was submitted to you that one needs to distinguish between practices and protocols developed over time as described by many witnesses from what actually occurred on the specific occasions, particularly the occasion of the first incident.

124 The defence case, his Honour said, was that A's allegations were 'false, they are fanciful and are the product of fantasy'. He continued:

> [Defence counsel] argued that for the offending to have occurred there needs to have been the opportunity *and the evidence just does not support that there was a real or substantial possibility of this offending having occurred*.

…

> The defence case is also that it is simply not possible for Cardinal Pell to be in the sacristies when the evidence is that he was on the front steps greeting parishioners for at least 10 minutes immediately after Mass.
>
> …
>
> The defence argues that it was just not possible for Cardinal Pell to be left alone for more than a moment while robed after mass, relying upon the traditions of the church and Portelli's role as master of ceremonies.[90]

125 Finally, his Honour directed the jury that, in deciding whether A's account was 'true beyond reasonable doubt', they must consider all of the evidence including the evidence from the church witnesses. He said:

> Broadly the evidence from the church witnesses about processes, practices and recollections as to how things worked goes to *the issue as to whether there was a realistic opportunity for this offending to have taken place*.[91]

126 It seems clear that the defence had made a considered forensic decision to express this part of the defence case in the language of impossibility. This was evident from the start, in defence counsel's opening address. The purpose of the impossibility contention was quite simple, as counsel told the jury in that address. It was to create a doubt in the jury's mind about whether A's account could be true.

127 There were, moreover, perfectly sound forensic reasons for using the language of impossibility. The defence wanted to persuade the jury that, even if they rejected the contentions of fabrication and fantasy, and even if they rejected the arguments about improbable brazenness, they should nevertheless accept that the events simply could have not happened as A alleged. To make good that argument it was necessary to persuade the jury that the opportunity evidence established 'practical' impossibility, thereby excluding any realistic opportunity for the offending to occur. That is doubtless why defence counsel in cross-examination pressed for answers to the effect that a particular practice was not merely 'common' but 'invariable'.

---

90 Emphasis added.

91 Emphasis added.

128 The defence having advanced these impossibility contentions, it was for the prosecution to rebut them by showing that — on the evidence — the offending was not impossible and that there had been a realistic opportunity for it to occur. The prosecution's case was that the opportunity evidence left open the realistic possibility that Cardinal Pell was where he was alleged to have been on the particular occasions. The jury did not, therefore, have to have a doubt in that regard.

129 As this analysis demonstrates, the prosecution bore the burden throughout the trial of proving beyond reasonable doubt that there was a realistic opportunity for the offending to take place. The prosecution also bore the burden of proving beyond reasonable doubt that the particular sexual acts took place. Thus at all stages of the trial the burden of proof rested with the prosecution. Similarly in this appeal, while the defence maintained its submissions based on 'impossibility', we have borne steadily in mind that there was and is no onus whatsoever upon Cardinal Pell to prove impossibility.

130 If any of the evidence showed impossibility, in one respect or another, then the jury must have had a doubt. If, for example, the evidence had shown that the Priests' Sacristy was not in use at the relevant time, or that the south transept doors had for some time been permanently closed, then A's account must necessarily have foundered on those 'undisputed facts'. The unreasonableness ground must necessarily have succeeded.

131 In the next section, we consider the evidence relied on by the applicant to establish the impossibility contentions as articulated in the written case. It is, of course, of the very nature of an impossibility argument that it seeks to show with sufficient certainty that the events could not have happened as alleged. That was the forensic purpose which the defence sought to achieve. When in that context we speak of uncertainty, we are not referring to uncertainty about A's evidence. Rather, we seek to explain why the opportunity evidence fell short of establishing the certainty which the argument of impossibility asserted.

132 That opportunity would be a key issue in the trial was made clear in the judge's pre-trial ruling under s 38 of the *Evidence Act*[92] with respect to some of the opportunity witnesses. As the judge said in that ruling:

> I have decided to grant the prosecution leave to cross-examine the witnesses on a relatively narrow basis namely to test and challenge any categorical and unqualified assertions which effectively allow for no realistic possibility of departure from a practice, which in turn excludes any possibility of opportunity for the offending conduct to have taken place.

133 This formulation of the issue is illustrated by his Honour's consideration of the evidence of Potter and Portelli on the question of whether wine might have been left out in the Priests' Sacristy, so as to allow the 'realistic possibility' that it was discovered (and drunk) by A and B, as A claimed. On this point, his Honour concluded, Potter's evidence was unfavourable because:

> It seems perfectly clear to me that Potter allows for no such possibility.

His Honour reached a different conclusion in relation to Portelli, however. Referring to Portelli's statement that '[t]o my recollection everything used was always left locked away', his Honour said:

> Portelli is also allowing for a degree of uncertainty in his memory. Portelli's evidence does not exclude, or purport to exclude, the realistic possibility of the wine having been left out as described by the complainant.

134 The issue as joined between the parties at trial was that which the judge correctly defined, that is, whether the opportunity evidence 'excluded any possibility of opportunity for the offending conduct to have taken place.'

The appeal contentions

135 That the advancing of the 'impossibility' contentions reflected a considered forensic decision by the defence is confirmed by the fact that Cardinal Pell's written case for the appeal took exactly the same approach. As noted earlier, the principal submission was that the jury must have had a doubt because all of the evidence

---

[92] So far as relevant, s 38 provides that a party who called a witness may, with the leave of the court, question the witness, as though the party were cross-examining the witness, about evidence given by the witness that is unfavourable to the party.

(other than A's) 'showed that the offending was impossible'. There was, it was said, a 'body of unchallenged evidence of impossibility'. And the focus was, again, on the absence of opportunity:

> The evidence as a whole provided no opportunity for the offending described by [A] to have occurred.

136 Echoing the language of the slides shown to the jury, most of the specific factual propositions in the written case were expressed in the language of impossibility. For example:

- 'The timing of the alleged assaults was impossible';
- 'It was not possible for Pell to be alone in the sacristies only a few minutes after the end of Mass';
- 'It was not possible for two robed sopranos to leave an external procession without being noticed';
- 'It was not possible for [A] and [B] to be absent from the choir room unnoticed'; and
- 'The criminal acts attributed to Pell were physically impossible'.

137 As will appear, each factual proposition in the written case was accompanied by a table setting out the evidence relied on in support. In oral argument, senior counsel for Cardinal Pell explained that these tables were an attempt

> to pull together the strands by which the activities, ritual, practice, customary, traditional, and in some cases even after 22 years remembered, of the … cathedral staff, *combined to render either literally impossible, or so unlikely it's of no realistic possibility,* the notion of those three persons … alone in that room for five to six minutes, meaning undisturbed, nobody coming in …[93]

(This was, of course, a reference to the first incident. The tables, which we address in detail in pt II of these reasons, also dealt with the second incident.)

138 To illustrate the impossibility contention in relation to the first incident, counsel referred to the evidence of Portelli as to Cardinal Pell's practice of staying on

---

[93] Emphasis added.

the front steps of the Cathedral, at the west door, to greet parishioners after the conclusion of Mass. (That evidence is examined in detail below.) Given that evidence, counsel submitted, 'the law of physics tells us that it is literally, logically impossible for the offending to have occurred'.

139 Counsel then submitted that this was 'in the nature of alibi evidence'. The effect of alibi, counsel argued, was as follows:

> It's normally not just raising the reasonable doubt. It simply renders impossible the offending. If I was in New Zealand, I was not in Australia for the offending alleged to have occurred in Australia.

Cardinal Pell's location at the west door, it was said, 'suffices entirely for alibi purposes as would being across the Tasman'.

140 The concepts of alibi, impossibility and opportunity are, of course, closely connected. In this trial, however, the defence evidently made a deliberate decision to avoid using the word 'alibi'. The word was not used in the defence closing, and senior counsel for Cardinal Pell specifically asked the judge not to use it in his charge to the jury. Instead, as we have said, the defence chose to use the language of impossibility in order to raise a doubt about whether there was a realistic opportunity. As often occurs in cases like this, the defence argument was that the evidence excluded the opportunity for the offending to occur.[94]

141 It was never submitted by the defence — nor conceded by the prosecution — that an acquittal must follow if the opportunity evidence left open a 'reasonable possibility' that Cardinal Pell stayed on the steps at length after both Sunday Masses in December 1996. Nor did the defence seek a direction from the judge to that effect. We note that a direction in those terms is often sought — and given — when alibi is raised as a defence.

142 Thus, in *R v Kanaan* ('*Kanaan*'),[95] the New South Wales Court of Criminal

---

94 See, eg, *Jones v The Queen* (1997) 191 CLR 439, 449–50; *Papazoglou v The Queen* (2014) 45 VR 457, 492 [175]–[177], 500 [209] (Maxwell P); *Thornton v The Queen* [2017] NSWCCA 86, [87]–[88], [101], [212]–[213] (Ward JA).

95 (2005) 64 NSWLR 527, 559 [135] (Hunt AJA, Buddin and Hoeben JJ) ('*Kanaan*').

Appeal said that the issue raised by alibi was 'whether there is a reasonable possibility that the accused was at Y, rather than X, at that time.' The Court suggested that, in such a case, an appropriate direction to the jury would be:

> The Crown must establish beyond reasonable doubt that the accused was at X at the relevant time. The Crown cannot do so if there is any reasonable possibility that he was at Y at that time, as asserted by the alibi evidence. The Crown must therefore remove or eliminate any reasonable possibility that the accused was at Y at the relevant time, and also persuade you, on the evidence on which the Crown relies, that beyond reasonable doubt he was at X at that time.[96]

143 Having read all of the opportunity evidence and watched some of it, we are 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. (In pt II of the reasons, we explain that conclusion by reference to the evidence relied on in support of each of the individual impossibility contentions.)

144 The issue of Cardinal Pell's robes is a good example. As already noted, the contention on the appeal was (as it had been before the jury) that the acts alleged to have been committed by Cardinal Pell in the first incident were 'physically impossible'. Reliance was placed on categorical statements by Portelli and by Potter that it was not possible to pull the alb to the side while the cincture was tied at the waist.[97]

145 In response, senior counsel for the Crown invited the members of the Court to try on the robes. They were an exhibit at the trial and, we were told, had been available to the jury in the jury room during their deliberation. Counsel for Cardinal Pell did not demur.

---

96 Ibid. This is the form of the alibi direction set out in the NSW Criminal Trial Courts Bench Book: Judicial Commission of NSW, *Criminal Trial Courts Bench Book*, [6-000]. We note that there is no equivalent alibi direction in the Victorian Criminal Charge Book. See also *R v Merrett* (2007) 14 VR 392, 396–7 [16]–[18] (Maxwell P).

97 As described in the evidence, an alb is an ankle-length tunic, containing two slits (one on each side), to allow access to trouser pockets. A cincture is a rope which is tied around the waist over the alb 'like a belt'. The cincture is knotted several times to keep it in place. The cincture is positioned above the slits in the alb.

146 In final address, the prosecutor invited the jury to feel the weight of the alb and 'assess its manoeuvrability as a garment'. This gave the jury the opportunity, counsel submitted, 'to assess whether what [A] described as having occurred is physically possible or impossible.' Having taken advantage of that opportunity ourselves, we consider that it was well open to the jury to reject the contention of physical impossibility.[98] The alb was neither so heavy nor so immoveable as the evidence of Portelli and Potter had suggested. To our observation, it was well capable of being manoeuvred — while the cincture was firmly tied at the waist — in a way that might be described as being moved or pulled to one side or pulled apart.

147 We deal finally with a defence submission, advanced both at trial and on the appeal, that the prosecution case rested on 'mere possibility'. Thus, in final address, senior counsel for the defence submitted:

> The case for the prosecution is to be summed up in three little words, 'it is possible'. It is possible that what [A] says could have happened if, and only if, et cetera, but it is possible. We say that is a theoretical possibility in the face of the evidence that you've heard, and you do not establish a serious, or indeed, for that matter, any criminal case by alleging that something is possible in the face of evidence which renders it either impossible, or highly improbable, or even just improbable.

148 On the appeal, senior counsel for Cardinal Pell characterised the prosecution case, in relation to evidence of established Cathedral practice, as being to the following effect:

> It's possible the practice wasn't followed all the time. So the reasonable doubt raised by the practice said to be invariable, apparently disappears.

This was said to be impermissible reasoning:

> That's not how a jury could reasonably reason, particularly when no attempt is made to chase, as we would put it, to find out anything that would cast light on the probability, likelihood, of the practice being departed from in the fashion necessary for the opportunity to be available on the dates in question.

149 With respect, this is a mischaracterisation both of the Crown case and of the reasoning process which it was open to the jury to apply. The Crown case was not

---

[98] For another instance of inspection of clothing by an appeal court, in connection with a similar ground, see *R v Habib* [2005] NSWCCA 223, [76] (Simpson J) ('*Habib*').

based on mere possibility. As the judge instructed the jury, mere possibility 'is clearly not enough'. On the contrary, the prosecution argued that the account given by A was so obviously truthful that the jury could be satisfied, beyond reasonable doubt, that the events had occurred as he described them. A's evidence was said to provide a sure foundation for guilty verdicts.

150 As described earlier, the defence sought to undermine A's credibility by seeking to demonstrate that the events simply could not have occurred as he described them. As junior counsel for the defence put to the judge, regarding the animation sought to be relied on in final address, its purpose was:

> to assist in showing that what Cardinal Pell said in his record of interview is right. This is impossible. It could not have happened.

Ground 2, which concerns the animation, describes it as 'a moving visual representation of [the] impossibility argument'.

151 An argument of impossibility, if supported by the evidence, is effectively unanswerable.[99] As we have said, the onus of proof required the prosecution to defeat that argument. It was both necessary and sufficient for that purpose to persuade the jury that the events were not impossible and that there was a realistic opportunity for the offending to occur.[100]

The opportunity evidence

152 As noted earlier, the prosecution called evidence from a number of witnesses as to processes and practices at the Cathedral at the relevant time. Before the trial began, the prosecution sought an advance ruling under s 38 of the *Evidence Act*, for leave to cross-examine a number of those witnesses on the basis that the evidence which they would give would be unfavourable to the prosecution.

153 In his ruling, the judge summarised the basis of the prosecution application in

---

[99] See, eg, *Starri v SA Police* (1995) 80 A Crim R 197, 201–2 (Legoe AJ). See also *Habib* [2005] NSWCCA 223, [68]–[69] (McLellan AJA), [77], [112] (Simpson J).

[100] See, eg, *R v R, PA* [2019] SASCFC 19, [133]–[138] (Parker J); *Casey v The Queen* [1995] WASC 77.

these terms:

> The prosecution says that a number of its own witnesses will give evidence to the following effect:
>
> - Certain practices existed at the time of the alleged offending;
>
> - These practices — if followed — were inconsistent with the offending having occurred;
>
> - These practices were followed with such strictness that there was no possibility, or no realistic possibility, that the offending occurred.
>
> The prosecution confirmed that it did not seek to challenge the evidence of the existence of these practices. Rather, the prosecution sought to test the evidence with a view to showing that what the complainant contends says happened was possible or realistically possible, by way of an exception to the practice.

154 His Honour ruled that, if a witness gave evidence to the effect that what A asserted was 'not realistically possible', this would be 'unfavourable' evidence within the meaning of s 38(1)(a) of the *Evidence Act*. Applying that test, his Honour gave leave for several of the opportunity witnesses to be cross-examined with respect to particular matters. In the event, there was very limited cross-examination pursuant to that grant of leave.

155 As noted earlier, the judge identified for the jury the issue to which the opportunity evidence was relevant:

> the evidence from the church witnesses about processes, practices and recollections as to how things worked goes to the issue as to whether there was a realistic opportunity for this offending to have taken place.

156 He then elaborated on the notion of opportunity in these terms:

> In relation to the first charged episode that opportunity includes the opportunity for two choristers to separate from the procession unnoticed and without being admonished or stopped; the opportunity for two choristers to gain access to the unlocked priest sacristy via the south transept, again without being noticed, admonished or stopped; the opportunity for Cardinal Pell to enter the priest sacristy very soon after the conclusion of Sunday solemn Mass, indeed within minutes; the opportunity for Cardinal Pell to enter the priest sacristy alone and unattended by any church official whilst robed; the opportunity for Cardinal Pell to remain in the priest sacristy alone without being interrupted for a period of time so as to do the things he is said

> to have done according to the account of [A]; the opportunity for Cardinal Pell to have committed the sexual acts with his penis in the manner described by [A] whilst he was in his robes and vestments; the opportunity for two choristers to then join the choir late without being noticed and admonished.
>
> In relation to the second episode of offending that opportunity includes the following: the opportunity for Cardinal Pell to be present at another Sunday solemn Mass at least one month after the first alleged incident; the opportunity for Cardinal Pell to have been in the sacristy corridor with choirboys very shortly after the conclusion of Sunday solemn Mass and not on the steps; the opportunity for Cardinal Pell to have been in the sacristy corridor alone and unattended by any church official whilst robed.
>
> They are the sort of opportunities that have received a lot of attention and focus throughout this trial. You will appreciate that [A's] account requires each of these opportunities to have arisen and to have occurred.

157 The submission for Cardinal Pell in this Court was that the opportunity evidence 'constituted a catalogue of at least 13 solid obstacles in the path of a conviction'.[101] The evidence given by the opportunity witnesses was said to be 'starkly and fatally inconsistent with [A's] account'. To avoid what was said to be the prosecutor's 'flawed' approach in closing, this Court needed to 'grapple with the effect of the whole of the evidence — including its combined effect'.

158 According to the submission:

> The evidence as a whole provided no opportunity for the offending described by [A] to have occurred. For that offending to have been possible, not only would each of the independent impossibilities … had to have occurred, but they would *all* have to have occurred in the same 10–15 minute period.[102]

The opportunity evidence was summarised in these terms:

> The catalogue of impossibilities results from the evidence of almost two dozen Crown witnesses who, each in their own way and from their own perspectives, supported each other in the picture they painted of: a regimented choir; a diligent assistant who did not leave the new Archbishop's side; a Priests' Sacristy which was a 'hive of activity' in the 10–15 minutes after Mass; and an Archbishop who greeted parishioners on the steps from the very first occasions he said Sunday Mass at the Cathedral. As a body of evidence they stood in stark and diametric opposition to [A's] allegations.

159 Having read (and in some cases watched) the evidence of all of the

---

101 Citing *Klamo* (2008) 18 VR 644, 654 [40] (Maxwell P).

102 Emphasis in original.

opportunity witnesses, we accept that there was general consistency, and substantial mutual support, in 'the picture they painted' of what occurred at the Cathedral before, during and after Sunday Mass in the period when Cardinal Pell was Archbishop. This is, of course, unsurprising since a defining feature of religious observance is adherence to ritual and compliance with established practice.

160 At the same time — and just as unsurprisingly — the evidence of the opportunity witnesses varied in quality and consistency, and in the degree of recall, both as between witnesses and within the evidence of individual witnesses. There are at least two possible explanations for this. First, as senior counsel for Cardinal Pell accepted on the appeal, the passage of 22 years between the alleged events and the trial meant that there was, inescapably, a real degree of uncertainty attaching to the memories of the opportunity witnesses. Secondly, attempting to recall particular events is all the more difficult when the events being described are — as they were here — of a kind which was repeated week after week, year after year, and involved the same participants, in the same setting, performing the same rituals and following the same routines.

161 We do not overlook the fact that the two Masses in December 1996 were the first two occasions on which Cardinal Pell had said Sunday Mass following his installation as Archbishop. While we would not expect the witnesses to remember these occasions in any great detail, the first Mass at least was not just another Sunday Mass. It might be expected that witnesses would recall in general terms that day as the first of Cardinal Pell's Sunday Masses. But, on the critical issue of whether Cardinal Pell stood on the steps of the Cathedral on the day of the first or second Mass, and if so for how long, the recollection of the opportunity witnesses must necessarily be affected by their recollection of the ritual that developed thereafter.

162 On A's account, by contrast, there was every reason for him to remember the particular conduct which he alleged had occurred. It was not to be expected that he would recall the dates with any precision, nor other incidental and unimportant matters. But the particular conduct, and the locations, are likely to have been fixed

in his memory in a way which could not be said of anyone else except (on his account) Cardinal Pell. In contrast to the 'standing on the steps' ritual, there were only two incidents for A to remember. Given the nature of those events, there was a very good reason for him to recollect them.

163 As the judge made clear to the jury, the lapse of time between the alleged assaults and the trial was productive of forensic disadvantage for Cardinal Pell. His Honour gave a detailed direction to the jury on that subject, in accordance with s 39 of the *JDA*.[103] He pointed out that Cardinal Pell had lost the opportunity to do a number of things, namely:

- to make enquiries, or explore the alleged circumstances, at or close to the time of the alleged offending;
- to ask the church witnesses about any specific recollection of the dates in question and whether they recalled accompanying him on the particular occasions;
- to call evidence from the then administrator of the Cathedral, who had been present at Sunday Masses in the relevant period but was now mentally infirm;
- to test A's evidence fully, given his inability to recall specific detail because of the passage of years; and
- to call evidence from B.

164 We have kept those matters firmly in mind in our review of the evidence.

'Ebb and flow'

165 In relation to the individual witnesses, it is the invariable experience of those who sit in trials that the progression of a witness's evidence from examination in

---

[103] The matters the judge must inform the jury about under s 39 are 'the nature of the disadvantage experienced by the accused' and 'the need to take the disadvantage into account when considering the evidence': *JDA* s 39(3)(a). The judge 'must not say, or suggest in any way, to the jury that it … would be dangerous or unsafe to convict the accused' or 'that the victim's evidence should be scrutinised with great care': at s 39(3)(b).

chief through cross-examination to re-examination is marked by what might be called 'ebb and flow'. That is, the examination in chief will more often than not leave the evidence in a state favouring the party calling the witness, following which cross-examination will typically have the effect of diminishing the probative value and/or credibility of the witness's evidence, following which there will be an attempt in re-examination to recover lost ground.

166 So it was in this trial, and the impression of 'ebb and flow' was the more strongly reinforced with each successive witness called. The overall effect created by the evidence was that of uncertainty and imprecision. It was not in doubt that there were routines and practices in place at the Cathedral, and that these were followed Sunday after Sunday. But no witness could say with certainty that these routines and practices were never departed from.

167 For example, Connor was repeatedly asked in cross-examination to confirm — and did confirm — that various practices were 'invariable'. But a review of his evidence as a whole shows that, as might have been expected, Connor could do no more than confirm that these were established practices. In cross-examination, Connor agreed that he could not recall any occasion when the Priests' Sacristy had been unlocked and unattended. In re-examination, however, he confirmed that on occasions he would arrive at the Sacristy door after Mass to find it unlocked. Asked whether Potter would at that time have been 'off doing something else', Connor could only say that Potter 'would be usually there waiting for us'.

168 Nor could any witness say with certainty that it was simply impossible for two choirboys to have slipped away from the post-Mass procession, as A claimed he and B had done. As the prosecutor pointed out in final address, there was evidence that, on one occasion, a choirboy had left the procession early. Of all the opportunity witnesses, only one recalled this occurrence.

169 For the reasons already given, it would have been surprising had any opportunity witness used the language of certainty. Even in a regimented setting

like the Cathedral, statements about human behaviour can rarely be made with certainty — especially where the question is, 'Could that have happened?'.

170 What emerges, therefore, is not a 'catalogue of impossibilities', as the applicant contends,[104] but a catalogue of uncertainties and possibilities. So far from the evidence of individual witnesses supporting each other to establish impossibility, the evidence of the successive witnesses served only to confirm that what A claimed had occurred was not impossible. Plainly enough, uncertainty multiplied upon uncertainty does not — cannot — demonstrate impossibility. Moreover, the Crown could rely on the evidence in discharging its burden to establish that there was a realistic opportunity for the offending to have occurred.

171 The point is, we think, powerfully illustrated by the fact that both parties filed substantial summaries of evidence in support of their respective appeal submissions. The schedule attached to Cardinal Pell's written case ran to some 44 pages, summarising the evidence said to reinforce the 'obstacles' identified in the written case. The Crown's responding table ran to some 32 pages. Shortly before the hearing, Cardinal Pell's representatives filed nine individually-bound volumes which incorporated, with respect to each topic, both sides' contentions and the relevant transcript extracts. The Crown responded with a document of its own, running to some 37 pages, which senior counsel handed up during oral argument.

172 Having reviewed this extensive documentation, we make two points about it. First, it demonstrated that on almost every point both applicant and respondent could find one or more statements in the transcript which supported their respective contentions in the appeal. Given what we have already said about 'ebb and flow', this is unsurprising.

173 Secondly, the fact that each side could call in aid such a substantial body of material drawn from the evidence reinforces our conclusion that the jury were not compelled to have a doubt. That is, there was room for debate about the effect of the

---

104 See [158] above.

evidence — both of individuals and as a whole — on almost every point. More importantly, there was always a well-founded and proper basis for rejecting evidence that conflicted with the central elements of A's account of the offending.

174 Having reviewed all of the schedules of evidence and material placed before us on this appeal and having reviewed the evidence for ourselves, we are not persuaded that the jury must have had a reasonable doubt about the guilt of Cardinal Pell. Before turning to the more detailed review of that evidence, we address three separate matters, each of which was said on the appeal to have constituted an obstacle to conviction, namely:

- B's denial of having been sexually assaulted;
- Cardinal Pell's denials in his record of interview; and
- the failure of the prosecution to call Father Egan, the priest who celebrated Mass on 23 February 1997, the day on Crown alleged the second incident had occurred.

B's denial

175 As noted earlier, when B was asked by his mother in 2001 whether he had ever been offended against while in the Cathedral choir, he said that he had not. (By agreement, the content of this conversation was put before the jury through the informant.) According to the submission for Cardinal Pell, the jury could not convict unless it could 'set aside' B's denial. The contention in oral argument was that the fact of the denial was sufficient to raise a reasonable doubt and that, in order for that doubt to have been dispelled or resolved, there would need to have been 'something in the nature of a rejection' of B's denial.

176 The submission for the Crown was that the jury were entitled to 'reject the hearsay evidence' of B's denial. According to the written case:

> Sadly, an unwillingness by a victim of child sex abuse to disclose to those closest to him is all too familiar. Without speculating, there may be many reasons why a teenager might so deny abuse when questioned by his mother.

It was said that, in final address, the prosecutor had made a submission to this effect and had done so

> by agreement as between the parties thereby absolving the Crown of the need to call expert evidence on the question concerning whether victims of sexual assault necessarily complain or even admit to such assault upon questioning. Thus, by agreement, it was left open to the jury to be persuaded by this argument if they saw fit to do so.

177 There was some discussion in argument about the genesis of this agreement and whether any such expert evidence would have been admissible.[105] The Court was subsequently provided with correspondence between the parties' legal representatives, which had resulted in the prosecutor making the following submission to the jury, without objection, in his final address:

> [W]hilst a denial of sexual abuse by [B] may mean that the sexual abuse did not occur, it does not necessarily mean that is the case. There may be reasons why a 17 or 18 year old male would not want to tell his mother that he was sexually abused as a child. Whilst we cannot speculate, and of course there is no evidence from [B] or anyone that knew him, those reasons may include embarrassment, shame and/or a desire to protect his mother or an unwillingness to burden her. Perhaps he did not want to perceive himself as a victim or be considered less than manly.

178 Defence counsel's final address to the jury did not engage with this submission. He referred on a number of occasions to B's denial but it was given no particular prominence in the defence submissions. By contrast, and consistently with the approach taken in cross-examination, counsel laid particular emphasis on A's failure to say anything to B about either alleged incident.

179 The evidence of B's denial was a significant matter which the jury had to address in their deliberations. But it was only one of the factors which they had to consider in deciding whether they were satisfied that A was a truthful witness and whether what he said could be accepted beyond reasonable doubt. The defence

---

105 Counsel for the applicant referred to the judgment of Gleeson CJ in *HG v The Queen* (1999) 197 CLR 414, 419–29. *JDA* s 46(3)(d)(i) provides that the trial judge must inform a jury that experience shows that 'people may react differently to sexual offences and there is no typical, proper or normal response to a sexual offence.' Section 53 of the *JDA* provides that, if requested by the prosecution, the trial judge may 'direct the jury that there may be good reasons why a person may not complain, or may delay in complaining, about a sexual offence'.

were right, in our view, to concede that the prosecutor should be able to advance possible explanations for B having denied the occurrence of something which had actually taken place. These were explanations based on 'common sense and ordinary human experience'.[106] The jury were well able to assess the possibility that it was a false denial.

180 Accordingly, the evidence of B's denial, while it weighed against the Crown's case, did not of itself oblige the jury to have a reasonable doubt.

Cardinal Pell's denials

181 As noted earlier, Cardinal Pell voluntarily participated in a record of interview with police. The interview took place in October 2016. At the outset, Cardinal Pell was given the opportunity to read a prepared statement, in which he said:

> From what I have been told, the allegations involve vile and disgusting conduct contrary to everything I hold dear and contrary to the explicit teachings of the Church which I have spent my life representing. They're made against me knowing that I was the first person in the Western world to create a church structure to recognise, compensate and help to heal the wounds inflicted by sexual abuse of children at the hands of some in the Catholic church. I intend to answer all the questions asked of me.

And further:

> The most rudimentary interview of staff and those who were choirboys at the Cathedral in that year and later would confirm that the allegations are fundamentally improbable and most certainly false …

182 The informant then proceeded to describe the allegations which comprise the first incident. Cardinal Pell then gave a lengthy response in these terms:

> most things on these or this story is counterfactual and with a bit of luck I'll be able to demonstrate … point by point. … The first thing is that after every Mass … I would stay out at the front of the Cathedral and talk to people. … The altar servers … would go back to their vesting area where they would take off their garments. Their parents would be hanging around waiting … and the choirmaster or his assistant would make sure that they were all changed and into their clothes and off the premises and then they would lock it up. … So there would be no time after the Sunday Mass for them to be

---

106 *Irwin v The Queen* (2018) 262 CLR 626, 646 [50] (Kiefel CJ, Bell, Gageler, Nettle and Gordon JJ).

> cavorting in the — in the Sacristy before they went to change and go away … while in fact the Archbishop and my Master of Ceremonies were out the front of the Cathedral as I always did … and while the Sacristan and his assistant would be in the — in the Sacristy cleaning up, bringing out the — the vessels and that from Mass.

183 When the informant began to describe the alleged sexual assaults, Cardinal Pell responded in these terms:

> Oh, stop it. … What a load of absolute and disgraceful rubbish. Completely false. Madness. All sorts of people used to come to the Sacristy to speak to the Priest. … The Sacristans were around, the altar servers were around. … They should have been on their way to change their vestments.

He repeatedly described the claims as 'completely false' and later as

> a load of garbage and falsehood and deranged falsehood. … My Master of Ceremonies will be able to say that he was always with me after the ceremonies … until we went back to the carpark or back to the Presbytery. The Sacristan was around. The altar servers … were around. … People were coming and going. They couldn't have dallied too long in the Sacristy because every brother — the choirmaster would have been keen to get away, to get them dressed and get away.

184 When the second alleged incident was described, Cardinal Pell said:

> Well that's completely false and as I'll be able to demonstrate, I was out at the front of the Cathedral then. … I was always out at the front of the Cathedral. I never came back with — with the kids.

185 These were, plainly enough, emphatic denials. It does not follow, however, that they obliged the jury to have a doubt about A's allegations. The jury had, of course, to give appropriate weight to the denials but it was of the very essence of their task — as it is in every contested trial — to decide whether the evidence led by the prosecution established the guilt of the accused, notwithstanding the denials.

The absence of Father Egan

186 The Crown case was that the second incident had occurred on Sunday 23 February 1997. This was the next occasion after 22 December 1996 on which Cardinal Pell had attended Sunday Mass in the Cathedral. On that Sunday, however, Cardinal Pell was only presiding. He was not celebrating the Mass.

187 The Mass on 23 February was celebrated by a Father Brendan Egan. Father Egan was not called as a witness at the trial. The trial transcript reveals that the non-calling of Father Egan was mentioned only briefly in the defence final address at trial, and was not mentioned at all by the judge in his charge to the jury. That no exception was taken on this point by trial counsel tends to confirm that it was not seen as an issue of any significance in the trial.

188 On the appeal, however, Father Egan's absence was given considerable prominence from an early point in the oral submissions on behalf of Cardinal Pell. The absence of Egan was said to be 'an extraordinarily significant obstacle in the way of the Crown maintaining the proposition that it is not [an] unsatisfactory verdict on the second episode'. The submission continued:

> So not being able to know what Father Egan would say about what he saw on that occasion of him celebrating Mass with the Archbishop presiding, in our submission raises and leaves at the very least a reasonable doubt concerning whether the complainant's account is accurately describing anything that ever happened.

189 In answer to questions from the Court, senior counsel for Cardinal Pell confirmed that this was not a complaint about the fairness of the conduct of the trial. Nor, in our view, could it have been. We were told by senior counsel for the Crown — and this was not disputed by counsel for Cardinal Pell — that the defence had made no request to the prosecution for Father Egan to be called, or even for investigations to be made with respect to him. It was common ground that the defence had made their own inquiries about the 23 February occasion and that all witnesses whom the defence had asked the prosecution to call — such as McGlone and Connor — had been called.

190 Rather, as counsel for Cardinal Pell made clear, this submission went directly to the unreasonableness ground:

> The absence of a person who could have cast light on the reliability of, say, a complainant's account will directly go not always and only through the prism of fair trial, but will directly go to the raising and leaving of reasonable doubt.

In support of the argument, counsel read the following passage from the joint

judgment of Gleeson CJ, Hayne and Callinan JJ in *MFA*:

> In jurisdictions where unanimity is required, such as New South Wales, every juror must be satisfied beyond reasonable doubt of every element in the offence. In the case of sexual offences, of which there may be no objective evidence, some, or all, of the members of a jury may require some supporting evidence before they are satisfied beyond reasonable doubt on the word of a complainant. This may not be unreasonable. It does not necessarily involve a rejection of the complainant's evidence. A juror might consider it more probable than not that a complainant is telling the truth but require something additional before reaching a conclusion beyond reasonable doubt. The criminal trial procedure is designed to reinforce, in jurors, a sense of the seriousness of their task, and of the heavy burden of proof undertaken by the prosecution. A verdict of not guilty does not necessarily imply that a complainant has been disbelieved, or a want of confidence in the complainant. It may simply reflect a cautious approach to the discharge of a heavy responsibility.[107]

191 We reject this submission. Self-evidently, what Father Egan might have said is unknown. The question for this Court is whether, on the evidence led by the prosecution, it was open to the jury to be satisfied beyond reasonable doubt that the second incident occurred. No speculation about what Father Egan might have said can assist in answering that question. This is no more than a corollary of the general proposition that a jury 'should not speculate about the evidence which might have been given by those who were not called'.[108]

192 Nor does the argument derive any assistance from *MFA*. That was a case about inconsistent verdicts. The appellant had been charged with nine sexual offences alleged to have been committed against the same person on four separate occasions. The jury acquitted him on seven counts and convicted on two, relating to one occasion. The question was whether those seemingly inconsistent verdicts could be reconciled.

193 The High Court held, unanimously, that they could.[109] Later in the same joint judgment, Gleeson CJ, Hayne and Callinan JJ explained their conclusion in these terms:

---

107 (2002) 213 CLR 606, 617 [34].

108 *Dyers v The Queen* (2002) 210 CLR 285, 293–4 [13]–[15] (Gaudron and Hayne JJ) ('*Dyers*').

109 *MFA* (2002) 213 CLR 606.

> In the present case, there is an obvious explanation of the differences between the verdicts on the various counts in the indictment. The jury might reasonably have considered that, notwithstanding the differences between the evidence of the complainant and MA, and making due allowance for the age of MA, and the possibility of some confusion on his part, the evidence of the complainant in relation to the occasion the subject of counts 7 and 8 gained significant support from the evidence of MA. There was no such support in relation to any of the other counts; and in relation to counts 1 to 6 there was the unexplained absence of evidence from people who were said to be eye-witnesses, and the resulting *Jones v Dunkel* warning. In those circumstances, it was open to the jury to be satisfied beyond reasonable doubt of the appellant's guilt on two counts notwithstanding their unwillingness to convict him on the others.[110]

194 As can be seen, the critical factor in this analysis was the *presence* of a confirmatory witness, whose evidence provided 'significant support' to the complainant's evidence on counts 7 and 8, and hence provided a rational explanation for the difference in verdicts. That reasoning has been frequently applied in appeals where the 'inconsistent verdicts' ground is raised.[111] So far as we are aware, it has never been suggested that *MFA* stands for the proposition that the absence of a witness can, of itself, create a reasonable doubt.

195 Moreover, the failure to call witnesses had an altogether different significance in that case. As appears from the above extract, the trial judge in *MFA* had given a *Jones v Dunkel* warning in respect of the prosecution's failure to call witnesses who had been interviewed.[112] That is, the jury were entitled to infer that, because those witnesses had not been called, their evidence would not have assisted the prosecution case. In the present case, there was no basis on which such a warning could have been sought, or such an inference drawn.[113]

PART II: THE EVIDENCE IN DETAIL

196 We turn now to examine the evidence in more detail. We begin with the

---

110 Ibid 618 [36].

111 See, eg, *Reeves (a pseudonym) v The Queen* (2013) 41 VR 275, 286 [45] (Maxwell ACJ); *Ayol v The Queen* [2014] VSCA 151, [12] (Weinberg JA); *Thrussell (a pseudonym) v The Queen* [2017] VSCA 386, [117] (Maxwell P, Santamaria JA and Beale AJA).

112 (2002) 213 CLR 606, 612 [20] (Gleeson CJ, Hayne and Callinan JJ).

113 See *Dyers* (2002) 210 CLR 285, 291 [6] (Gaudron and Hayne JJ).

attack on A's credibility.

Fabrication and invention

197 The 'fabrication' line of attack was first directed at A's evidence of how he had rejoined the choir after the first incident. Defence counsel began by putting to A that he was 'making up a story of how [he] rejoined the choir'. A denied this and continued:

> I'm saying that there was obviously a way that we rejoined the choir, and I'm — I'm not a hundred per cent sure how it happened.

Counsel then referred to the transcript of the committal hearing, which A agreed he had been given in order to prepare himself for the trial. It was put to A that he had read the transcript and had realised that he had to fill the 'gap' about how he and B returned to the choir after the first incident.

198 The key exchanges between defence counsel and A on this topic should be set out in full:

> Q: You were given [the transcript] to read in order to prepare yourself for the trial, weren't you?
>
> A: Yes.
>
> Q. And did you read it?
>
> A: I didn't read it that — that thoroughly.
>
> Q: At all? That thoroughly. But you did - - - ?
>
> A: I — I looked at it. I noted that it was there, and had a look at it, and that was it.
>
> Q: How do you look at something without reading it?
>
> A: You have a look, and you see what it is, and you don't read it.
>
> Q: I see. So, your situation is — by the way, the police gave it to you, did they?
>
> A: It was dropped off by a police officer, yes.
>
> Q: Yes. Do you remember who?
>
> A: No.

Q: You were told that you ought to read it before the trial?

A: Um, I was told to look over my statement.

Q: Only your statement?

A: And, um, if I wanted to, to look over the transcript.

Q: Yes?

A: It was — it was there in my possession to look at.

Q: Why did you think the transcript was given to you?

A: For my reference.

Q: References to the evidence you gave at the preliminary hearing. Right?

A: Yes.

Q: But you never read it. You expect us to believe that?

A: Yes.

Q: Not even out of curiosity as to what it was that I asked you and what it was that you said?

A: I, um, tried to explain to you that I looked at it and I flicked through the pages, but I did not thoroughly read the transcript.

Q: Well, so, you did read some, didn't you?

A: Ah, yes.

Q: You read enough to know that this business about how you left the sacristy out of the south entrance and then somehow rejoined the choir at the metal gate, that that's a complete fabrication. It's a new invention with which you came up after the preliminary hearing?

A: No.

Q: You read enough to realise that, didn't you?

A: No.

Q: Do you realise its significance, of saying that?

A: No.

Q: Are you serious?

A: No, I don't.

199 A little later, counsel challenged A about his communications with the

informant:

> Q: And [the informant] never asked you for an explanation of how you got into the sacristy after processing out of the western door; is that what you tell us?
>
> A: I can't recall having that conversation, yes.
>
> Q: And you never offered him any explanation after a fairly torrid cross-examination about how it's impossible, what you say is impossible. You never offered him any explanation about how you say it was possible; is that right?
>
> A: No-one spoke to me about the impossibility of it after the – – –
>
> Q: Did you – – –
>
> …
>
> Q: I'm sorry?
>
> A: Yeah, um, no-one spoke to me about the impossibility of what happened. After the — after the committal. No-one spoke to me about that.
>
> Q: Did you offer yourself [to] anyone an explanation about how it was possible?
>
> A: Um, I wasn't prompted in any way and I had no, I had no lead to know that I was to offer any extra information. I'm not an expert on giving um, ah, witness testimony so I wasn't aware that me leaving out that or not being prompted about that specific part was my responsibility to, you know, I wasn't aware. I was just following the procedure of taking a — of giving a statement.

200 In the same way, it was said, A had never given an explanation of how he had returned his vestments and sheet music. The following exchange took place.

> Q: Before [giving evidence-in-chief], you had realised, did you not, that that was going to be a serious issue for you? You did realise that?
>
> A: No, no.
>
> Q: What? You never thought that it would be an issue for you at all, serious or otherwise?
>
> A: No, I didn't think of it at all, to be honest.
>
> Q: You didn't. And yet, when you were asked about returning the — sorry, asked about going back into the choir room, you gave this completely circuitous route of going back into the choir room, didn't you, which you had never offered to anyone before Friday?

A: I'm not sure if I had or hadn't.

201 In our view, it was open to the jury to accept these responses as both plausible and truthful, and as indicating that A did not approach his evidence in a strategic or calculating fashion. On the contrary, he appeared to be comfortable in the account he had given, and had evidently seen no need to try and bolster it. Moreover, it seems to us unsurprising that A would not have read the committal transcript through. We think it would be most unusual for a person who had given evidence on an earlier occasion to put themselves through the experience of re-reading the transcript of being cross-examined.

202 A's statement that he had not read through the committal transcript was consistent with the manner and content of his responses. His statement that he did not realise the significance of his answer about how he rejoined the choir seemed to us to be authentic. There was no sign of the discomfort which might have been expected had he been trying to preserve the coherence of a fabricated story.

203 Nor, in our view, was it an indicator of fabrication that there was a more direct route by which A and B could have returned to the choir room. As A acknowledged, it would have been more direct for them to have proceeded through the sacristy corridor to the entrance to the choir room, rather than retracing their steps out through the south transept door. Defence counsel put squarely to A that it was because he had realised he had never given an adequate explanation that he had invented this 'completely indirect route'. In our view, the jury were entitled to reject the contention of fabrication. A provided a cogent explanation of why they had left externally rather than internally.

204 The 'invention' line of attack was also adopted concerning what defence counsel described as the system of 'strict accountability' for the return of gowns and music after Mass. A's recollection of the relevant 'system' was, as might have been expected, hazy. It was put to him that he knew, after the committal, that he had to 'come up with some explanation' about how he had returned his vestments and the

sheet music after the first incident. He denied that and said:

> I don't think I've come up with much of an explanation now, either. And I don't have much knowledge at all about the sheet music.

205 Another topic to which this approach was applied concerned Cardinal Pell's movement of his robes during the first incident. In his first police statement, A had said that Cardinal Pell 'was wearing robes and he moved them to the side and exposed his penis'. Under cross-examination at the committal, A said that Pell had 'pulled aside his robe … and he pulled out his penis'. When asked then whether Pell had pants underneath his robes, A answered: 'I'm not too sure'.

206 In his examination in chief at the trial, A said that Cardinal Pell 'undid his, his ah, his trousers or his belt. Like, he started moving his, underneath his robes …'. It was put to A in cross-examination that he had 'invented' a reference to 'pants' because he 'appreciated … that that created a problem for [him]'. When A responded by asking 'What problem?', counsel reminded him that the contention put to him at committal was that it was 'impossible with those robes to just pull them aside and expose a penis'. A responded:

> He could push aside his robes. He did push aside his robes. … He created an opening by opening his robes.

207 When asked how Cardinal Pell had undone his pants, A said — plausibly, in our view — that he had 'no distinct recollection of the exact hand movements' of Cardinal Pell. On A's account, he would have had only the briefest glimpse of these movements and he had neither the time nor the occasion to pause and reflect on what he had just seen. The jury were entitled to accept that A's clearest memory would have been of what happened next.

208 A was subjected to a lengthy attack in cross-examination about his misidentification of a particular door during the walkthrough. A had identified as the door which led to the choir room what was in fact a door leading out of the building. He admitted error readily, exactly as a truthful person might be expected to do. There was no suggestion of anxiety in A's response; nor any indication that

he felt a need to justify himself.

209 We should add that, having watched the walkthrough video ourselves, this seems to us to have been an immaterial error. Moreover, as noted earlier, the occasion of the walkthrough was the first time that he had been in the Cathedral since he was 13. A said:

> I hadn't been in the building since I was in the choir and my recollection of exactly where the rooms were wasn't um, ah, wasn't, um, as good as I thought it was, as far as that hallway was concerned. I have — I have some very strong memories of particular areas in that Cathedral, but um, not all the — not all the doorways and the hallways.

The changes in A's account

210 We referred earlier[114] to the tables which accompanied Cardinal Pell's written case. The final table, Table N, was headed '[A's] key changes when confronted by the impossibility of his allegations'. The table was divided into nine different topics. In relation to each topic, the table identified what were said to be changes in A's evidence made by him once he realised that some aspect or another of his account was 'impossible'.

211 The first topic was the timing of the alleged offending. In his first statement to police in June 2015, A said that the alleged assaults had taken place in 1997, a few months into Cardinal Pell's tenure. He placed Cardinal Pell's appointment as Archbishop as having taken place about six months after he had started at St Kevin's College (following the award of a choral scholarship to attend the school). The references to 1997 were errors. As A acknowledged under cross-examination, he had mistakenly thought that he had started in grade 7 in 1997 at St Kevin's. In fact, he started in grade 7 in 1996 and Cardinal Pell was appointed Archbishop of Melbourne in that same year.

212 According to the first police statement, the first incident had occurred

---

114 See [137] above.

'probably around spring, a few months into Archbishop Pell's tenure'. When asked by defence counsel how long before Christmas the first incident had occurred, A said he could not recall. Asked to 'just give us an idea', he said:

> It was towards um, ah, the second half of that half of the year, but I can't give you any um, exact times or dates.

213 In answer to further questions, A said that he did not know when Cardinal Pell had been appointed, nor when his inauguration as Archbishop had taken place at the Exhibition Buildings. When defence counsel suggested that the date was 16 August 1996, A responded that he did not know but that he would not dispute the date. The following exchange then took place:

> Q: And you say, do you, that after that occasion, Cardinal Pell would say Mass at the Cathedral a number of times?
>
> A: Yes.
>
> Q: And indeed, at committal and elsewhere you have maintained that he was quite a regular Sunday Mass deliverer, if I can put it that way, between the inauguration on 16 August and these events, is that right?
>
> A: I can't give you any regularity as to – – –
>
> Q: How many times do you reckon he said mass at on a Sunday between his inauguration in August and the end of 1996?
>
> A: I can't guess as to that, what that is either.
>
> Q: You can't guess. Does that mean that you also cannot dispute that he only said two Sunday Masses at St Patrick's in 1996?
>
> A: No, I – – –
>
> Q: Do you dispute it?
>
> A: I don't dispute.
>
> Q: Thank you. And that those Sunday masses, the 11 o'clock Sunday masses at St Patrick's Cathedral at which he said Mass were on 15 December 1996 and the 22 December 1996?
>
> A: No.
>
> Q: You cannot dispute that?
>
> A: No.

214 Defence counsel then drew attention to a Mass which had been celebrated on Saturday 23 November 1996, for the Vigil of Christ the King. When asked to confirm that it was an evening Mass, A responded:

> I don't know of such — of the vigil. I don't — have no idea.

The following exchange took place:

> Q: You would have [sung] at that Mass. You were obliged to, weren't you?
>
> A: I was obliged to sing at all the events at the Cathedral. It was part of my scholarship.
>
> Q: Yes. You do not recall missing out [on] the first Mass that was being said by Archbishop Pell as archbishop at the Cathedral. You don't recall that?
>
> A: No.
>
> Q: Do you suffer from any failures of recollection normally?
>
> A: No.
>
> Q: Going back to the two occasions at which he said Sunday Mass at the Cathedral on 15 and 22 December, those two events — two incidents to which you refer — would have had to take place on 15 December 1996 and 22 December 1996, would they not?
>
> A: Ah, no, I – I — I can't — I can't tell you with any certainty what dates they happened.
>
> Q: I'm putting to you and you told us that the best you could reconstruct after your errors were pointed out to you by [the informant] — best recollection and the best evidence you could give was that both these incidents took place in 1996?
>
> A: Yes.
>
> Q: You adhere to that, do you not?
>
> A: Yes.
>
> Q: If it be the case that Archbishop Pell only said Sunday Mass in 1996 on 15 December and 22 December, then if you're telling us the truth, those two incidents would have had to have occurred — the first one on 15 December and the second one on 22 December. It makes sense, doesn't it?
>
> A: I'm not too sure if he was saying Mass that day. He could've been involved. Um, he was at the — the Cathedral for — for a period of time, um, ah, not necessarily just saying Masses. He was – – –

Q: No, look. You're not trying to squirm out of the fact that the allegation you make is that these two incidents happened after choir singing – – – -?

A: Yes.

Q: – – – on Sunday solemn Mass?

A: Yes, it's when it happened.

Q: Each one on Sunday solemn Mass. Right?

A: Yes.

Q: If the only times that Archbishop Pell said Sunday solemn Mass after he became archbishop — if the only times were 15 December and 22 December, then those incidents would've had to have occurred then, would they not, if they took place at all?

A: I'm not saying that he was saying the solemn Mass. I don't — I don't recall if he was actually leading the mass or if he was a part of the clergy on the, um — on the altar that day or — I don't recall.

Q: Your position has always been that these incidents occurred when he was saying Sunday mass, and they occurred straight after Sunday Mass — that's Sunday solemn Mass — towards the end of 1996. Is that right? That's always been your position?

A: Yes.

Q: So, if that has always been your position, why do you now say you don't recall whether he'd said solemn mass or not solemn mass on the occasions when these incidents are said to have happened?

A: Because I don't know if he was running the Mass as the leader of the Mass, or if he was contributing to the mass on the day. Um, I know it — it was a Sunday solemn Mass, but it doesn't necessarily mean he was leading, um, the — the — the Mass for that day.

Q: Well, he was the celebrant. And in due course there'll be a diary showing when he was celebrating Mass, solemn Sunday Mass, and each Sunday of 1996 is covered in that diary. Now, he was the celebrant on those two occasions, 15th and 22nd. You accept that?

A: Yes, I'll take your word.

Q: In full robes and having gone in in full procession and come out in full procession. Do you accept that?

A: Yes.

215 The contention in the schedule is in these terms:

In response to the challenge, [A] altered his evidence to claim that he was not

> sure if Pell was saying mass on the day of the first incident. Pell, he claimed, could have just been 'involved' or 'contributing' at a time prior to a handover when Pell started to take control of the masses.

216 In our view, there is no basis for suggesting that A was here making a strategic, calculated, alteration to his evidence in order to preserve his own credibility or the cogency of an invented story. On the contrary, these exchanges seem to us to be entirely consistent with A's understandably hazy recollection of the timing and the surrounding circumstances, as illustrated by his initial error about the year in which the incidents took place. It is hardly surprising that he had no clear recollection of what Cardinal Pell's role in the Mass had been. His first recollection, he had told the jury, was of 'being in that room'. A's responses seem to us, once again, to be those of an honest witness, who readily acknowledged the limits of his recollection.

217 The next topic said to involve changes in A's evidence concerns the point at which A and B detached themselves from the choral procession before the first incident. In neither of his police statements did A tell police that he and B had left the procession as it was moving around the outside of the Cathedral. In his evidence-in-chief he said:

> just we sort of broke away from the main choir group. Um, it was sort of scattered and a bit chaotic as a bunch of kids are, I suppose, after a Mass. And we managed to separate ourselves from that group. … I don't recall specifically when we broke away.

218 In the 2016 walk-through, A said that the choir would come up and down the internal sacristy corridor every Sunday, before and after Mass. It was put to him in cross-examination that he had not mentioned an outside procession when speaking to the police, either in his statements or in the walk-through. He agreed, saying, 'We never spoke about it'. He agreed that he had never turned his mind to the idea of an external procession until he was cross-examined at the committal. The contention in Table N was that A had been prompted by the cross-examination at the committal and

> now claimed that there was an external procession on the day of the first

incident and he and [B] left it as it travelled outside.

219 Once again, we reject the contention that this sequence of events revealed disingenuous alteration of evidence. It was, of course, entirely proper for the defence to point out that, prior to the committal, there had been no reference to an external procession. As we have mentioned, however, A's evidence-in-chief was that the first thing he recalled was 'being in that room'. It seems unsurprising that his recollection was confined to being in the Priests' Sacristy and that, at least on his early accounts, he believed this was to be explained by the choir's having processed internally, through the sacristy corridor. It is unremarkable that, when his attention was drawn to other objective circumstances, A accepted that his recollection was mistaken.

220 From A's point of view, the route by which he and B had found their way into the Priests' Sacristy was not central to what had occurred. Rather, the memory he had retained was of what had occurred inside that room (and even that recollection was incomplete). That is understandable and consistent with human experience. If there is an unexpected incident, what happened leading up to it, or the route taken to arrive at the site of the incident, may assume little or no importance for the person affected. That person may well ask, 'What does it matter how I got there? What matters to me is what happened when I got there.' The detail of the events and circumstances before and after the incident may not be retained.

221 A third topic concerned whether A and B could have rejoined the choir unnoticed after the first incident. A's evidence-in-chief was that, after the alleged assault, he and B 'got up and … left the room. … [We went] back into the … general choral change area. … We walked … out … at the south entrance and around.' A said that he could not recall changing out of his robes afterwards, or who had picked him and B up that day, but he did remember being in the car on the way home and 'sort of thinking about it'.

222 In cross-examination, it was put to him that Brother Finnigan had sent a

circular to parents giving details of rehearsals proposed for the November–December period. The notice stated that there would be rehearsals between 12:00 pm and 12:45 pm on Sunday 15 December and again on Sunday 22 December. A said that he had no recollection of attending any such rehearsal.

223 He accepted that Mr Finnigan conducted such rehearsals 'as though they were military exercises' and would take note of people who failed to attend. It was then put to him that his description of what happened was 'just impossible'. A denied that. When asked why it was not impossible, he responded:

> Because I was orally raped in a … room after Mass.

Asked again, he responded:

> Because I was assaulted in a room after Mass and that's why I'm here.

224 Pressed about the 'appointments for rehearsals immediately after Mass', A sought clarification from defence counsel about whether Cardinal Pell had been present at any other Mass except for 15 and 22 December. It was then put to him — and he accepted — that on both of the occasions when he had allegedly been assaulted, Cardinal Pell was present at the Mass and had said Mass. It was then put to him, once again, that his account was 'in fact, impossible'. A said he disagreed. When pressed, he said:

> That's not true. No, I don't accept that. … Because what happened did happen and it happened … in a moment straight after a Mass.

225 It is true, as the applicant submits, that A provided no basis for reconciling his account with the post-Mass rehearsals. On the other hand, as the Crown points out, the relevant witnesses had no independent memory of those rehearsals actually having taken place. Cox's evidence was that he had no doubt that rehearsals took place because they were both listed in Finnigan's circular letter. He said that he had entered one of the dates in his diary (although he could not recall which) but he had perhaps not entered the other one.

226 Similarly, Mallinson had no actual recollection of any rehearsals in December

1996. His evidence was that rehearsals after Sunday Mass did not happen very often but when they did, he supposed it was in the month of December leading up to Christmas. When asked which year, he responded 'There again, I mean I can only resort to the fact that I have something written down in the calendar or whatever.'

227 Importantly, the evidence showed that it was realistically possible for the first incident to have occurred on a day when there was a rehearsal. Finnigan's evidence was that post-Mass rehearsals sometimes took place in the choir room and sometimes in the Cathedral. Even if the rehearsal was in the Cathedral, he said, the choristers were likely to have returned to the choir room before rehearsal. They would have disrobed and would then have gone back into the Cathedral. Mallinson's evidence on this point was to the same effect. Another former chorister said that, on a normal day, it could often take up to 10–15 minutes for the entire choir to disrobe and leave the rehearsal room.

228 It was then said that A had altered his evidence about how quickly he and B had returned to the choir room after the first incident. When asked in cross-examination when they got back, he answered:

> I'm not too sure. We got back there very, very quickly after what had happened. … And there was still — there was still people around.

It was pointed out to A that, in his first police statement, he had said:

> I remember we were late to get out the front of the church for who was picking us up that day.

He confirmed in evidence that 'We were out a bit later than usual. … It wouldn't have been much longer than 10, 15 minutes later than usual.'

229 Contrary to the applicant's contention, there was no relevant alteration in A's evidence here. There was no inconsistency between his statement that he and B had been late for the pick-up by parents and his statement that they had left the Priests' Sacristy 'very, very quickly'.

230 The following exchange then took place:

Q: How did you get back to the choir room on the first occasion?

A: Um, we walked out the south entrance and joined — rejoined the rest of the choir that was still mingling around and finished up for the day.

Q: That's the first time you've ever said that, isn't it? Is this the very first time that you've just concocted that?

A: To tell you that I met up with everyone like we normally do after church?

Q: Yes. When you left the southern transept. You just made this up on the spot, haven't you?

A: No.

Q: Well, so what, is this the situation now that you tell us? That you leave the southern transept and you rejoin the choir before going back to disrobe after the first incident?

A: Sorry?

Q: Is that what you now say?---No, there were — there were bunch of kids everywhere. We - - -

…

[Judge]: Answer the question thanks, [A].

A: There were a bunch of children everywhere, um, it was pandemonium every Sunday after church. Um, we pretty much left after the incident and rejoined what was half of the choir or a lesser amount of the choir who had finished um, getting changed for the day. Um, people weren't really marked on if they were late um, after — after a mass. It was more about getting in, changing, meeting up with your parents. Um, it was absolute chaos. You had a lot of kids at the age of 12, 12 years old running around, um, trying to find their way out of there as soon as possible. Um, we just rejoined the rest of cohort after what had happened. That's all.

Q: You were actually - - - ?

A: We didn't — we didn't walk into an empty robe room and — and de-robed. It - - -

Q: You and [B], went back into the robing room with the rest of the choir, did you?

A: Well, we had to, we will still in our robes.

Q: I asked you a simple question?

A: Yes.

Q: Did you and [B] re-enter the choir room with the rest of the choir?

A: Yes.

Q: And is this the first time that you have ever said this, and that includes first, second — and first statement, second statement, cross-examination or evidence-in-chief at the preliminary hearing and cross-examination at the preliminary hearing. You never ever, – – – ?

A: It's the first – – –

Q: – – – ever said this to anyone before, is that correct?

A: That's the first time I was specifically asked um, – – –

Q: No, it's the first time you ever mentioned it to anyone specifically or otherwise?

A: That's the first time I've specifically been asked this so, yes.

231 In our view, it was open to the jury to conclude that A was not here concocting his answers. What he said had the ring of truth, as did his response when the same topic was raised with him later in the cross-examination. Defence counsel put to A that, when the choir processed externally, the expectation was that they would process to the entrance to the Knox Centre and 'go straight to the choir room'. A responded:

> Um, on a perfect day. On a perfect day, yes, but I'm telling you what, there was quite a few days when there were people loitering around in that area for a quite a while or time. And um, as far as Brother Finnigan's concerned in his schedules, um, we didn't adhere to them as often as [he] would probably like to think. We were a bunch of kids on a Sunday after mass, running around like pork chops, outside a cathedral. We snuck off for a small period of time and re-joined the choir after a very small period of time. Now, unless you were there and looking at this procession coming out of the cathedral on this particular day, there was no way you'd be able to — to um, with any confidence tell anyone how it went on that day, because every day was different. The way that these kids would gather or how belligerent they felt on the day, would all be a bearing on how organised and how orderly everyone was before they departed.

The 'solid obstacles' to conviction

232 We turn finally to deal with each of the other matters said to have constituted a 'solid obstacle' to conviction.[115] As we have emphasised, the defence did not have to prove anything in this trial. But, as noted earlier, the appeal submission put forward a series of factual contentions, each of which was said to have been

---

115 *Klamo* (2008) 18 VR 644, 654 [40] (Maxwell P), citing *R v Shah* [2007] SASC 68, [4] (Doyle J).

established by the opportunity evidence. This Court's task is to evaluate those contentions by reference to the evidence relied on in support. (In what follows, we will take as our headings the contentions as articulated in the applicant's written case. The lettering A–M corresponds with the labelling of the respective tables of evidence in the written case.)

A. The timing of the alleged assaults was impossible

233 The applicant here draws attention to A's evidence that the offending occurred in the second half of 1996 and that the second incident was 'over a month' after the first. He points to the acceptance by A in his evidence, and by the Crown in its final address, that Cardinal Pell said Sunday Mass at the Cathedral on only two occasions in that period — 15 and 22 December 1996. It follows, according to the argument, that A's account is 'impossible'.

234 We are not persuaded by this argument. On the evidence, Cardinal Pell did not say Sunday Mass in the Cathedral twice in 1996 'over a month apart.' But that does not mean that the jury must have had a reasonable doubt about his guilt. This is because the argument rests on the false premise that the Crown's case depended on the two incidents having happened in 1996. That was the effect of A's evidence. But that was not the way the case was put to the jury. The Crown case was that the second incident occurred on 23 February 1997, being the next occasion on which Cardinal Pell was present at Sunday Mass.

235 We referred earlier to A's frank acknowledgement of his uncertainty about dates. Any other response from him would have been surprising, in our view. As we have already said, A's account of having tried to suppress the memory of what happened was entirely plausible. In those circumstances, he is unlikely to have had a clear recollection of dates.

236 At the same time, although he made clear that he could not state with certainty on which dates the incidents happened, A did confirm that his 'best

recollection and the best evidence [he] could give' was that both incidents took place in 1996. In our view, the jury were entitled to view this as an honest answer. Indeed, if A had responded by suddenly suggesting 1997 as a possibility, they would have had occasion to wonder about his credibility.

237 For the reasons we have given, it was open to the jury to conclude that A was mistaken in his recollection. Consistent with the Crown case, the jury had A's evidence that the two incidents were over a month apart and he could not say definitively which year. This is the kind of detail about which honest witnesses make mistakes, as McHugh J said.[116]

238 As senior counsel for Cardinal Pell pointed out in this Court, the Crown case at trial proceeded on the assumption that A's recollection was, in this respect, mistaken. It is important to emphasise, however, that the identification of 23 February as the date caused no unfairness. The defence were given the necessary particulars in sufficient time to enable them — as counsel confirmed on the appeal — to make inquiries 'of people who in the nature of things … would have been in the vicinity of this offending, either to see it, or to have it reported to them'.

B. It was not possible for Pell to be alone in the sacristies only a few minutes after the end of Mass

239 According to the written case:

> There was unchallenged evidence that: (i) a number of witnesses recalled Pell on the front steps greeting parishioners the first times he said Sunday solemn Mass as Archbishop in 1996; and (ii) Pell's practice (from when he started as Archbishop) was to stand on the steps greeting parishioners after Mass for more than 10 minutes unless, rarely (and not in 1996), he had another appointment in which case Portelli would need to disrobe with Pell so Portelli could drive the Archbishop to the other engagement.

240 The written case for Cardinal Pell contended that 'the recall of Portelli and McGlone of those occasions [the two Masses in December 1996] included providing an effective alibi to Pell for the offending'. In final address, the prosecutor had

---

116 See [75] above.

described McGlone's evidence as 'effectively' providing an alibi for the first Mass. As noted earlier, however, trial counsel for Cardinal Pell did not use the term 'alibi' in his address to the jury and asked the judge not to use it in his charge.

241 In oral argument on the appeal, both sides advanced detailed arguments regarding the evidence of Portelli. The submission for Cardinal Pell was that Portelli's evidence necessarily raised a reasonable doubt about A's account of both incidents. The submission for the Crown was that nothing about his evidence — whether viewed in isolation or taken together with the other opportunity evidence — compelled the jury, or should compel this Court, to have a doubt about A's account.

242 Given the extensive oral submissions, it is necessary for us to discuss the evidence in more detail than will be required for other topics.[117] Although Portelli's evidence was the focus of oral argument, both sides relied on the evidence of a number of other opportunity witnesses in support of their respective written submissions.

243 The evidence bears on two related propositions maintained by the defence: first, that Cardinal Pell was never left alone while he was robed and, second, that on 15 and 22 December 1996 he remained on the Cathedral steps after Mass talking to parishioners, such that he could not have been in the Priests' Sacristy as alleged. We deal first with Portelli's evidence.

Portelli

244 Asked by the prosecutor if the Archbishop's Sacristy was available in December 1996 for Cardinal Pell's robing, Portelli said he had 'no memory of whether it was or it wasn't'. When asked a second time, he recalled that there had been 'a problem'. Contractors had 'shellacked the furniture' in the Archbishop's Sacristy 'with the drawers shut'. As a result, he said, 'all that had to be redone so my

---

117 We have watched the whole of the evidence of Portelli and read the whole transcript of his evidence.

guess is that we probably did not use the Archbishop's Sacristy'.

245 Portelli was then asked whether, in late 1996, processions out of the Cathedral were internal or external. He said that he could not recall. Asked whether he could recall any specific Mass said in the latter part of 1996, he said:

> Well there would've been the Mass of the Vigil of Christ the King, which is the last Saturday of November. There would've been the four Sundays of Advent; I think the Archbishop might have been present at two of those, and then of course the Masses on Christmas Day.

When asked what made him think that Cardinal Pell was present for two of the Sundays in December, Portelli answered:

> He would've been in Sydney for the Bishops' Conference for part of it … The Australian Bishops' Conference used to be held in that part of November, so he would've been away for at least one weekend. Which weekend it was I'm not sure.

246 Portelli was then asked by the prosecutor to describe what would happen at the conclusion of Mass if the choir and clergy were to process out of the Cathedral externally.[118] The following exchange took place:

> Q: Where did you go?
>
> A: We would go down the [main] aisle. If we were processing externally the Archbishop would stop at the top of the stairs to the Cathedral or perhaps just at the bottom of the stairs, and he would greet people as they left.
>
> Q: Are you speaking as a matter of practice now, that is your recollection as to what he would do as a matter of practice?
>
> A: Yes, he always did that.
>
> Q: As opposed to having a specific recollection of any particular Sunday solemn Mass during which he did that, is that right?
>
> A: Yes, that was his normal practice to do so.
>
> Q: Would the period during which he would stop at the front steps to speak with the congregation vary; that is the time varied?
>
> A: It could vary from as little as 10 minutes, say up to 15 or nearly 20. It would depend on what else we had to do that afternoon.

---

[118] This meant leaving by the west door and proceeding around the south side of the Cathedral.

Q: If you had some other engagement to do that afternoon might the period that he stopped be shorter than what you've described?

A: No, not really, it wouldn't be much shorter. It wouldn't make sense to stop for any less time than at least — at least six or seven minutes.

Q: Sure, but was there an occasion or were there occasions, as best you can recall, where the Archbishop might depart from that practice and speak for a short period of time before returning to the sacristy?

A: He may have done so on occasion, yes.

Q: When I say short period of time, I'm speaking of just a couple of minutes?

A: Yes, I suppose that's possible but I don't really recall it, but it's possible.

Q: Monsignor, returning to the sacristy, he would do that not as part of the procession, is that right; in other words he wouldn't be part of the procession as such?

A: By this stage the procession would have disbanded.

247 The prosecutor then asked Portelli about access to the Priests' Sacristy. Portelli confirmed that the Sacristy door would 'sometimes' have been open and accessible. He had earlier said that 'if it were unlocked Max [Potter] would be in there'. The following exchange then took place:

Q: Would there ever be an occasion, Monsignor, where you did not accompany Archbishop Pell back to his sacristy after Sunday solemn Mass?

A: Would there ever have been? There may have been. I can't recall when that would have been, but I certainly would not have been very far because I would have to disrobe myself. So I had to take off what I was wearing and put on my street clothes.

Q: So what's the answer? I think the question was simply was there an occasion or occasions when you did not accompany him back to the sacristy when he went back to the sacristy to derobe, that was the question?

A: Not that I recall, but it is possible that there may have been, but not that I recall.

Q: So in terms of Mr Potter ever having to do that duty instead of you, you would say that's not the case, is that right?

A: No, it's quite possible that he would have. He would have always made sure that I was — he would have made sure that the Archbishop was always accompanied.

Q: That would be in your absence?

A: Yes, in my absence.

Q: So do you remember occasions when you did not accompany Archbishop Pell to the sacristy to derobe?

A: Well, there were two occasions certainly when I was not there. I know that quite clearly.

Q: When you were overseas and when you had a doctor's appointment, is that right?

A: I had surgery, yes.

Q: But apart from that?

A: Not that I recall.

Q: The practice would be what when you got back, left the steps and made your way back to the sacristy what would your practice be?

A: The practice?

Q: In terms of walking back to the sacristy in which Archbishop Pell derobed?

A: Yes, we would [go] back to the sacristy. He would walk to the bench and begin removing various vestments.

Q: Were there occasions, or might there have been an occasion or occasions when having escorted Archbishop Pell back after Mass and having got to the area outside the priest sacristy door where he was to derobe that you didn't actually go in with him, but went off somewhere else; is that possible?

A: Yes, it is possible.

Q: Where might the somewhere else be that you would have gone to?

A: If we had another function in the Cathedral that afternoon I would have gone back to the sanctuary by the back entrance to the sanctuary to make sure for instance that the books were all in place, that the right sermon was in place, and so on.

Q: How long would you be gone for?

A: Two minutes.

Q: So that would include walking from where to the back of the sanctuary, from where to where?

A: Well, if I didn't go back into the sacristy with him I would have walked straight on to the sanctuary from the side.

248 In cross-examination, defence counsel took up the issue of the Sunday Masses in December 1996. The following exchanges took place:

> Q: Now, Monsignor, 23 November 1996, does that accord with your recollection as the first time that the Cardinal had said Mass at the restored Cathedral?
>
> A: That was — yes, that was the first Mass from the new sanctuary.
>
> Q: The following day, the Sunday, he was not there because he went off to the Bishops' Conference?
>
> A: I — I think that's right.
>
> Q: Do you know how long the Bishops' Conference lasted?
>
> A: It usually went for two weeks.
>
> Q: So that would mean that if he was away — and that was in Sydney that year, was it not?
>
> A: Yes, it was always held in Sydney.
>
> Q: So the first time that he would have said Sunday Mass, Sunday solemn Mass would have been on 15 December?
>
> A: That would seem correct, yes.
>
> Q: We have records of him saying Sunday Mass on 22 December, but no other Sunday Masses in December of 1996?
>
> A: That would be correct. Well, there aren't any others.
>
> Q: Does that accord with your recollection?
>
> A: Yes.
>
> Q: Those were in the period of Advent, the 15th and 22nd?
>
> A: Yes.
>
> Q: And you do have recollection of that first Advent on which you served him as master of ceremonies?
>
> A: I did, yes. Yes.
>
> Q: Those would have been particularly — I wasn't going to say anxious times, but you were sort of on probation as it were as his master of ceremonies I guess?
>
> A: The other aspect is however that the Cathedral had been closed for quite a few months. There were a number of bugs in the system that needed ironing out, particularly say with the sound system.

Q: Yes?

A: There was another little practical point which we discovered only after he began to say Mass there, was because of his height and because of the angle for instance on the desk, the reading desk of the Eagle lectern that's there, he couldn't see the bottom line of his text because he wore multi-focal glasses. So we had to have that adjusted. So there were issues like that that needed to be sorted out, but could only be sorted out as it were in use, not - - -

Q: As you went along?

A: As you went along.

Q: You were with him in the same area whilst he was saying Mass?

A: Always.

Q: Going into Mass and coming out of Mass you accompanied him?

A: Always.

Q: Coming out of Mass whether it was an internal procession or an external procession would he go to the steps, or the vicinity of the steps - - -?

A: Yes, yes.

Q: - - - in order to farewell or say hello to the congregations?

A: Since it was the first times that he was actually using the Cathedral there were quite a number of people who wanted to greet him. So, yes, he did wait there.

Q: You would wait with him?

A: Yes, yes.

Q: You did wait with him?

A: I did.

Q: Because you do recall those occasions, those two, don't you?

A: Yes.

Q: Because they're special. Not in the sense of being like Christmas, but they were special because they were the first two times that you accompanied him as his master of ceremonies?

A: Yes. Yes.

Q: On a Sunday Mass?

A: Yes.

249 Later in the cross-examination, there were further exchanges on this subject, as follows:

> Q: Yesterday you discussed an occasion on which you might have to take the shortcut to the sanctuary in order to check that books were there?
>
> A: (no audible response).
>
> …
>
> Q: Do you recall whether that happened on the first two occasions when Archbishop Pell said solemn Mass on Sundays?
>
> A: No, it wouldn't have because those — if there were events in the afternoons of those days they would be listed in that list of engagements that you read out.
>
> Q: Yes?
>
> A: And they're not listed.
>
> Q: Yes. So the situation is this, that you said it wouldn't have happened on those two occasions. You can actually say it didn't, can't you?
>
> A: Yes.
>
> Q: All right. Now, that having been said, we discussed the notion that someone might approach the archbishop and want a private conversation after Mass?
>
> A: M'mm.
>
> Q: And that you would step aside for that?
>
> A: Yes.
>
> Q: But on that occasion you would see the archbishop going with that person, such a person, either to his office or to the sacristy?
>
> A: Yes.
>
> Q: Yes, but he would be with that person?
>
> A: Yes.
>
> Q: And you would be required to immediately rejoin him when that private conversation had ceased?
>
> A: If it ever happened, for instance, - - -
>
> Q: Yes?
>
> A: - - - that he wanted to speak to, say, it would normally be one of the priests who was there.

Q: Yes?

A: If he needed to talk to somebody he would often tell him either before Mass, 'look, I'm going to talk to so-and-so', and so I would simply wait just outside the door.

Q: Yes?

A: Or else if it was a decision he made there and then he would indicate to me, 'Give us a minute', and I would simply make myself busy some distance away.

Q: Those occasions did not happen on the first two solemn Masses?

A: Not that I recall.

Q: We're talking a period of years when it may have happened here and there from time to time, but not in 1996?

A: Yes.

Q: You're agreeing?

A: Yes.

Q: And that is because the 1996 solemn Masses conducted by Archbishop Pell, there were only two of them, and they were memorable to you?

A: Yes.

And later:

Q: All right. And on the first two occasions when he said Sunday Mass, solemn Mass in 96, on the two occasions when he said it, you mentioned the period of time during which he would be standing outside greeting parishioners - - - ?

A: Yes.

Q: - - - and guests?

A: Yes.

Q: You gave a span of time as to which these things might happen. He would be there at least ten minutes, whatever the upper limit is. Is that right?

A: Yes. Yes.

Q: You recall that?

A: I do, yes.

250 Finally, it is necessary to refer to the re-examination, in which the prosecutor

first put to Portelli — and he agreed — that his answers in cross-examination had been 'quite specific' as to his memory of various Masses said by Cardinal Pell in 1996. The prosecutor then invited Portelli to give his independent recollection, as follows:

> Q: In terms of 10 November 1996, you've given evidence as to what occurred on that occasion. Where was it that Mass was said by Archbishop Pell on 10 November?---
>
> A: You'd have to remind me.
>
> Q: And how many occasions?
>
> A: How many occasions, what?
>
> Q: On the 10 November 96?
>
> A: From memory I think there were two.
>
> Q: Do you remember where they were?
>
> A: I'm sorry, I wasn't trying to remember when I was told.
>
> Q: Yes, thank you. If I was to ask you about 17 November, would your answer be the same?
>
> A: Yes, you would — I'm sorry, I don't have the list in front of me.
>
> Q: On 15 December 1996 you said you had a memory of that occasion?
>
> A: Yes.
>
> Q: Where did you go after Mass on that occasion, after Mass had concluded?
>
> A: I'm not sure we had an afternoon appointment that day, did we?
>
> Q: Well I'm asking you. This is the occasion that you say you remembered, it being the first Mass that you say Archbishop Pell said in the newly renovated Cathedral, and I'm asking you where you went - - -?
>
> A: Well it wasn't the first Mass, it was the second Mass that he said in the renovated Cathedral.
>
> Q: I'm speaking about solemn Sunday Mass?
>
> A: Yes.
>
> Q: So, what is the answer; do you know where you went immediately after?

A: I'm sorry I don't have the list in front of me.

Q: 22 December 1996, immediately after?

A: It would be unlikely, but I don't think there was anything in the afternoon that day.

251 While eschewing (as the trial prosecutor had done) any submission that Portelli had given knowingly false evidence, senior counsel for the Crown submitted that Portelli's apparent recollection, as elicited in cross-examination, was incorrect. The re-examination demonstrated, it was said, that he did not have any independent recollection of the particular Sundays in December 1996. Although he had affirmed propositions put to him in cross-examination, he could not — unprompted — answer questions about those occasions. Particular attention was drawn to Portelli's answer in re-examination: 'I wasn't trying to remember when I was told'.

252 In reply, senior counsel for Cardinal Pell submitted that there was nothing to indicate any lack of reliability in Portelli's evidence. It was a 'badge of credibility', it was said, for Portelli to have acknowledged that there was something which he was unable to remember. Further, it was said, it had never been suggested to the jury that Portelli was lying or was partisan or that 'on the specific matters that were important, … his evidence lacked any reliability at all'. According to the submission, the reading and the viewing of Portelli's evidence revealed

> an appropriate, one would have thought, inevitable acceptance that, 'There are some things I can remember, [in] particular when I'm prompted, and there are some things I can't'.

253 In our view, Portelli's evidence — taken as a whole — did not compel the jury to have a doubt about A's evidence. On the contrary, in our view, the jury were entitled to have reservations about the reliability of Portelli's affirmative answers under cross-examination when they were viewed in the light of his answers in examination in chief and re-examination.

254 Such reservations were justified, in our view, by the obvious contrast between the uncertainty of his responses to the prosecutor's questions and his ready adoption of statements put to him by defence counsel about what he recalled. In the

circumstances, it was open to the jury to doubt whether those affirmative answers in cross-examination represented an actual revival of recollection.

255 The reservations were also justified by the improbability — given the lapse of time — of Portelli's having a specific recollection of particular Masses, in the absence of some significant and unusual event having occurred at one or other of them. (One such event was the Mass at which the new Cathedral altar was consecrated, of which both Potter and Rodney Dearing had an independent recollection.) As Portelli told the jury, he would have conducted between 140 and 150 Masses with Cardinal Pell over a period of about five years. While it may be accepted that he had a general recollection of the first time Cardinal Pell said Sunday solemn Mass at the Cathedral, his evidence demonstrated a lack of detailed recollection of the events that took place on that day.

256 Moreover, the jury were entitled to consider Portelli's evidence as a whole, including his answers regarding the impossibility of Cardinal Pell having moved his robes to the side in the way described by A. As we have said, our own observation of the robes revealed Portelli's categorical assertion of physical impossibility to be unsustainable.

Max Potter

257 Similar considerations apply, with even greater force, to the evidence of Max Potter, on which the applicant's submissions also relied. He was the sacristan at the Cathedral for 38 years, during which time he had been involved with hundreds of Masses. His difficulties of recollection became apparent from the very beginning of his evidence-in-chief, when he was asked about Cardinal Pell's use of the Archbishop's Sacristy, as follows:

> Q: In your time with Archbishop Pell did he, that is the Archbishop, always use the Archbishop's Sacristy, or were there occasions when he used the Priests' Sacristy?
>
> A: No, that sacristy was set aside for the person – for the Archbishop's use only. He never used the Priests' Sacristy. Even if we had visiting bishops or cardinals would come in on a rare occasion don't always

dress in the Archbishop's Sacristy.

Q: Was there ever an occasion because the Archbishop's Sacristy wasn't able to be used that he used a room such as the Priests' Sacristy to your recollection?

A: No, not on my — no.

Q: Thank you. I take it from that answer that you never had occasions to, for the purpose of assisting Archbishop Pell robe or derobe, or disrobe, you never had occasion to do that in the Priests' Sacristy?

A: No. No.

258 It was, of course, common ground that at the time of the alleged offending the Archbishop's Sacristy was not in use and that Cardinal Pell was using the Priests' Sacristy for robing purposes. When asked to clarify his evidence, Potter confirmed that:

> The Archbishop always robed and derobed in the Archbishop's Sacristy, never in the Priests' Sacristy.

259 In the same way, when asked about the occasion on which the new altar in the Cathedral had been consecrated, Potter volunteered — unprompted— that this had occurred in 1996. He recalled (correctly) the consecration having been done by Cardinal Pell and a visiting American Cardinal. According to Potter, this occurred 'prior to the first Sunday solemn Mass being celebrated by Archbishop Pell'. Again, it was common ground that the consecration of the altar did not take place until 1997. It was defence counsel, in cross-examination, who invited Potter to correct himself on this point.

260 In the course of the examination in chief, defence counsel objected that the prosecutor had been putting leading questions to Potter, in breach of what was described as the 'protocol' put in place pursuant to the judge's ruling under s 38. Counsel submitted to the judge that it was:

> quite clear that the witness is confused about a number of things and is susceptible to leading questions. For example, my learned friend well knows that the Cardinal O'Brien episode took place in October 1997, not in 96, et cetera, and this witness is particularly susceptible to being led.

261 In the event, however, defence counsel proceeded to put a series of leading questions to Potter in cross-examination, as appears from the transcript extracts set out below. He was, of course, perfectly entitled to do so but the witness's susceptibility to leading questions, to which counsel himself had drawn attention — together with his obvious, and understandable, difficulties of recollection — inevitably reduced the weight to be given to his answers.

262 At one point, defence counsel asked Potter about the preparation for Mass. Potter said that he would unlock the door to the sacristy early in the morning, to lay out the vestments, and would then close the doors. This exchange took place:

> Q: And the situation would be that there would be the vesting process:
>
> A: Yes, yes.
>
> Q: Which I suggest took place in the Priests' Sacristy? If you're not sure or don't recall just say so. This is for the first Sunday solemn Mass?
>
> A: That would probably be the priest 'cause this other room was being – being (indistinct). We used our Priests' Sacristy for most – most of his times.
>
> Q: Yes, but you're talking over a period of some years?
>
> A: Yes.
>
> Q: Rather than the precise time?
>
> A? Yes.

As noted above, Potter had already stated, categorically, that the Archbishop had never robed in the Priests' Sacristy.

263 Potter was then asked about priests arriving at the Priests' Sacristy after Mass:

> Q: And they disrobed in the Priests' Sacristy?
>
> A: Sacristy, yes.
>
> Q: And sometimes they would sit around and talk?
>
> A: Or waiting for the Archbishop to come back. Yes.
>
> Q: When the Archbishop did come back and we won't talk about how long he stayed on the steps, but when he did come back he always came back with Monsignor Portelli did he not?

A: If [he] wasn't there I would meet him, to bring him down.

Q: So he never came back alone?

A: No.

Q: To the sacristy?

A: No.

Q: And the priests had waited for him in the sacristy, is that right?

A: Yes.

Q: And he goes into the sacristy and he then unrobes?

A: Correct, yes.

Q: Can I suggest this to you, that certainly for the first two occasions on which he said Sunday solemn Mass he was assisted by Monsignor Portelli?

A: Yes.

Q: You will have to say whether you recall or not.

His Honour: So you're being asked about now whether you've got a specific recollection of the first two occasions.

Q: Yes. The first two times Monsignor Portelli would have been with him?

A: Yes.

Q: And assisted him to disrobe?

A: Assisted him, yes.

264 And again:

Q: The one thing that you are very clear on is this, is it not, that when the Archbishop was in robes he was never on his own as far as you could observe?

A: No, not in — not in his sacristy. There was always altar servers assisting — priests assisting him at the Mass were there. Monsignor Portelli, the master of ceremonies would be with him ready to indicate when the procession's to start.

Q: There's a very, very long Catholic tradition, it's referred to in a book called Ceremonies of Bishops?

A: Correct, yes.

Q: Did you ever read that?

A: I've got copies of those.

Q: That is a book that goes back many years, is it not?

A: Yes.

Q: Is that a book that effectively says that the Archbishop is not to be left alone?

A: That's — it's the guidelines, yes.

Q: Bishops not to be left alone?

A: Alone.

Q: Let alone Archbishops?

A: Yes.

265 As with Portelli, the contrast with the re-examination is striking. The following exchange took place:

Q: You say you have a specific recollection of the first two Masses that Cardinal Pell said in the newly renovated St Patrick's Cathedral. Is that right, have I got that right, or not?

A: Yes, because I was responsible for setting up all those on those occasions.

Q: But you were responsible for setting up every occasion throughout the five year period that he said Mass on Sunday, is that right?

A: Because the Cathedral was closed and reorganising the new sanctuary, it was on that — those were special occasions and they became a unique occasion, opening the Cathedral for the consecration of the altar and things of that nature.

Q: Who were the altar servers carrying the mitre, for example?

A: I'm afraid I couldn't give you — I'm sorry.

Q: Who was the altar server bearing the crosier?

A: That — the name [escapes] me at the moment - - -

Q: What did they look like?

A: The altar servers were between 12 years of age to 14 to 15. Usually they used to be Year 7, yeah 7 or 8 at the school, - - -

Q: Sorry for interrupting, but you said that you accompanied the mitre altar server and the crosier altar server back to the sacristy and you have an image of those two persons?

A: Well the altar servers, you'd have 30 altar servers, and so they'd be rostered on, on a fortnightly or weekly basis to serve different masses.

266 Potter was then asked in which year the first two Sunday Masses said by Cardinal Pell had taken place. He said it was 1997. This error was noted in the written case filed on behalf of Cardinal Pell, as was Potter's erroneous description of the altar servers as boys between the ages of 12–15 years, rather than (as was the fact) adult men.

267 The written case correctly points out that, in final address, the prosecutor did not argue that Potter 'lacked reliability or was suggestible'. In our view, that circumstance does not detract from the force of the matters we have referred to. The defence conceded in final address that Potter's 'memory may not be terrific' and senior counsel for Cardinal Pell made a similar concession in this Court. In the circumstances, the jury would have been well justified in having doubts about the reliability of Potter's evidence, especially his answers under cross-examination. Certainly, the jury had a solid basis for finding that Potter's evidence did not give rise to a reasonable doubt about Cardinal Pell's guilt.

Daniel McGlone

268 We turn next to the evidence of McGlone. He was an altar server at the Cathedral between 1987 and 1997. He had served at most Sunday Masses during that period but could only recall one occasion when he had served at a Mass celebrated by Cardinal Pell. This occasion had stuck in his memory because his mother had made a rare visit to attend the Sunday Mass and have lunch with him.

269 At the conclusion of the Mass, McGlone walked with his mother to the west door of the Cathedral, where Cardinal Pell was 'doing the meet and greet'. McGlone asked his mother if she would like to meet Cardinal Pell. Following an introduction, Cardinal Pell said to her, 'You must be very proud of your son', to which his mother responded, 'I don't know about that'.

270 McGlone's recollection is that this occurred between October and December

1996. Unlike Potter, he recalled that before the service they had assembled in the Priests' Sacristy. His recollection was that this was the first time that Cardinal Pell had said Sunday Mass in the Cathedral. He confirmed in re-examination that he could not be specific about dates:

> I can't talk about dates. … I just simply don't know the dates …

271 The fact of the encounter between McGlone's mother and Cardinal Pell was not in doubt. There was, however, some uncertainty about the date on which it occurred. McGlone was confident that the occasion of his mother's visit was the first time Cardinal Pell had said Mass in the Cathedral. But, as the prosecution pointed out both at trial and on the appeal, McGlone agreed in re-examination that (contrary to his recollection) he had attended an evening vigil Mass celebrated by Cardinal Pell on 23 November 1996.

272 Accepting, however, that the encounter occurred on either 15 or 22 December 1996, this did not make the first incident an impossibility. It simply ruled out one of those two Sundays, as the prosecutor pointed out to the jury in final address. Consequently, the jury did not on this account have to have a reasonable doubt about A's evidence in relation to the first incident.

David Dearing

273 David Dearing was in the Cathedral Choir from 1993 to 2000. He was asked in cross-examination whether he had ever seen Cardinal Pell in robes without Portelli there. His response was:

> I wouldn't have thought so, no. My recollection is that they were always together.

Asked to describe the distance between Portelli and Pell when they were walking together, Dearing said:

> I described him as his bodyguard.

274 He recalled seeing Cardinal Pell stopping on the stairs at the end of Mass. He said that he had on occasion come back through the Cathedral after taking off his

choir robes and had seen Cardinal Pell still on the main steps. This would, he thought, have been 10 or 15 minutes after the end of Mass. He confirmed that he and his father, who was an adult member of the choir, 'would have' from time to time gone over and spoken to Cardinal Pell.

275 In re-examination, the prosecutor returned to the issue of the physical proximity between Portelli and Cardinal Pell. The following exchange took place:

> Q. You gave some evidence about that in terms of [Portelli] being effectively his bodyguard. You remember those answers?
>
> A: Yeah, I do.
>
> Q: Were you ever, Mr Dearing, in the sacristy corridor where the priests and the Archbishop de-robed after Mass, immediately after Mass when they were de-robing?
>
> A: I don't recall.
>
> Q: In other words, were you in a position to see Monsignor Portelli and Archbishop Pell after they'd left the steps and were coming back to de-robe?
>
> A: Not — not that I can recall, no.
>
> Q: You were asked about your observations of Archbishop Pell at the front steps, and you gave an example, as I understand your evidence, of seeing him 10 to 15 minutes after Mass had finished, when you and your dad were leaving?
>
> A: Yes.
>
> Q: Over the period 1996 to when you left in 2000?
>
> A: Yes.
>
> Q: How many times would you have seen Archbishop Pell still at the front steps when you left, how many times?
>
> A: I don't know that I can put a number on it, but I do know multiple times we went out there and spoke with him out the front.
>
> Q: I know you just said 'I don't know if I can put a number on it', is that the position, that you're not able to put a number on it?
>
> A: I would've said three or four times.
>
> Q: You said, or it was put to you that the adults, whether that be Brother Finnigan or whomever, would call out choristers for doing the wrong thing. How often did Brother Finnigan, or any adult for that matter,

call out someone for doing the wrong thing on the procession back to the choir rehearsal room?

A: I don't think I could put a figure on it, to be honest with you. I just remember that if — if you got out of line you would be spoken to or – – –

Q: How many times – – – ?

A: There would be some repercussions, or.

Q: Sorry. How many times did that occur from your actual recollection?

A: I can remember, I can remember a couple.

Q: Was it a common thing or an uncommon thing?

A: I would have said uncommon.

276 This sequence of evidence from David Dearing exemplifies the 'ebb and flow' to which we referred earlier. His unprompted description of Portelli as the Cardinal's 'bodyguard' was obviously supportive of the impossibility argument. But it was significantly weakened by his evidence in re-examination that he could not recall having seen Portelli and Pell after they had left the steps of the Cathedral — in other words, in the critical period when the first incident was alleged to have taken place. In the same way, his statement about having seen — and spoken to — Cardinal Pell on the steps after Mass assisted the defence. But it was significantly weakened by his statement in re-examination that it had only happened three or four times in four years.

Rodney Dearing

277 David Dearing's father, Rodney, was an adult member of the choir between 1993 and 2002. In examination in chief, he said that, after Mass, Cardinal Pell and Portelli would generally stay at the front door. This was Cardinal Pell's 'general practice'. Rodney Dearing said he was not aware of occasions when that had not occurred, although he acknowledged that, once he himself had exited the Cathedral, he did not thereafter have Cardinal Pell 'under observation'.

278 In cross-examination, defence counsel put to Rodney Dearing that, whenever

he saw Cardinal Pell robed, Pell was with Portelli. Dearing agreed. The same proposition was put a second time and again confirmed. In re-examination, however, the prosecutor asked Mr Dearing to identify the circumstances he had in mind when giving those affirmative answers. He nominated only two, as follows:

> When he would come out at the bit before Mass to join the procession. When I was assisting in clean-up and moving up and down that sacristy corridor occasionally I would see the ushers come through after he'd finished outside, and Monsignor Portelli would be with him then.

Other witnesses

279 The applicant also relied on the evidence of Jeffrey Connor. Although he had no recollection of 'what was happening in 1996', Connor agreed that it was Cardinal Pell's 'invariable practice' to stand on the Cathedral steps after Mass greeting people. The relevant part of the cross-examination is set out later in these reasons.[119] We note that, when first asked whether he had had experience of Cardinal Pell staying on the steps after Mass, Connor replied, 'Yes, it was common practice after a Mass that the Archbishop would greet people'. It was then put by defence counsel, and accepted, that 'with [Cardinal Pell] it was an invariable practice'.

280 Both sides relied on the evidence of Peter Finnigan, the Choir Marshal, whose memory was that '[the] Archbishop or the celebrant, whoever it was, would usually stand on the steps of the western door at the main entrance and greet people.' He agreed that 'it'd be something like' 10 minutes. It was then put to Mr Finnigan that Portelli was 'the impresario … of what was a liturgical sort of drama unfolding'. Finnigan accepted this description but disagreed that it was Portelli's principal function 'to make sure that the Archbishop was looked after':

> No, his principal function then was to make sure the liturgy went — the whole liturgy went well, not just the Archbishop, but all things.

281 Finnigan said that he could not recall Portelli processing out with the Archbishop but accepted that he had never seen the Archbishop alone when he was

---

[119] See [343] below.

robed. When the question was put again, he confirmed that 'as far as I recall' this was so but 'it doesn't mean it didn't happen.' In re-examination, Finnigan said that he had never observed Cardinal Pell standing on the steps at the western door after Mass, but he understood that it was the procedure.

282 The Crown for its part referred to the evidence of Mr Mallinson, the organist and choirmaster. In answer to a question in cross-examination, Mallinson said that he did not recall having seen Cardinal Pell standing outside the Cathedral door speaking to parishioners after Mass. The Crown also relied on evidence from the former choirboys, Mayes and La Greca. According to Mayes, when the choir processed out the west door during the relevant period, he would 'sometimes' see Cardinal Pell on the steps 'or in that area'. Sometimes he would see him still there after he had changed out of his choir robes. According to La Greca, when the choir was turning left to proceed around the outside of the Cathedral, Cardinal Pell would 'sometimes … just wait and speak to the congregation. … Other times he might have just kept on walking with us. I can't recall exactly.'

Conclusion

283 The content of these competing selections from the evidence illustrates why, as we said earlier, the overall effect of the opportunity evidence was that of uncertainty and imprecision. As has been seen, Portelli properly accepted the possibility that Cardinal Pell might on occasion have stayed on the Cathedral steps only 'for a short period of time before returning to the Sacristy'. He also accepted that there may have been occasions on which he did not himself accompany the Cardinal back to his sacristy after Mass and that, even if he had escorted the Cardinal back, he might not have gone into the Priests' Sacristy with him.

284 For the reasons we have given, the jury were entitled to view those answers, and the evidence more generally, as leaving open the realistic possibility that Cardinal Pell was 'alone in the sacristies only a few minutes after the end of Mass'. It was possible that on either 15 or 22 December 1996 he did not stay on the front steps

for long.

C. It was not possible for Pell to be robed and alone in the Priests' Sacristy after Mass

285 According to the written case for Cardinal Pell:

> There was unchallenged evidence that: (i) centuries old Church law, which was always adhered to, dictated that bishops must not be left alone while robed; (ii) Portelli's job was to attend to Pell and make sure that he was never left alone while robed (if Portelli left Pell's side for a few minutes, Portelli would ensure someone else, such as the Sacristan, attended to Pell in Portelli's place); (iii) Portelli recalled being with Pell while Pell was robed on the significant occasions of Pell's first Sunday solemn Masses as Archbishop; (iv) the only reason why Pell would be in the Priests' Sacristy after Mass would be to disrobe — and that was always done with the assistance of at least one other.

286 For the most part, this contention relied on the evidence of Portelli and Potter, which we have already reviewed. The other witnesses relied on by the defence were:

(a) Connor, who said that he could not remember an occasion on which Cardinal Pell, when dressed as Archbishop, had been 'alone in robes, unaccompanied by anyone';

(b) McGlone, who agreed in cross-examination that Portelli's role as Master of Ceremonies was 'an important function in a high Mass', one aspect of which was to 'attend to the principal celebrant'. He agreed that an Archbishop in robes should 'certainly' not be left alone during the course of the ceremonies and that the ceremonies were not complete until the ceremonial robes were removed; and

(c) Mallinson, who confirmed that Portelli's job was to accompany Pell and that, whenever he had seen Pell robed, Portelli was with him.

287 In response, the Crown relied on a different part of Mallinson's evidence. When asked in re-examination whether he had ever seen Cardinal Pell heading back to his Sacristy after Sunday Mass, Mallinson said:

> Probably frequently because he'd been up at the west end of the Cathedral.

Asked whether Pell would be alone or with someone, Mallinson replied:

> Possibly with Father Portelli, or somebody else, even the Dean. He might have been with him.

288 He was then asked whether he had ever seen Cardinal Pell in the Sacristy corridor as he (Mallinson) was making his way along the corridor. He answered, 'Probably many times'. This further exchange took place:

> Q: And again, was he on his own or with anyone?
>
> A: Sometimes he was with somebody and sometimes he would be on his own.
>
> Q: Would he be robed or unrobed?
>
> A: I've seen him both ways. For instance, after he'd gone to the sacristy and disrobed and he'd be in his normal clerical garb.

289 The Crown also relied on the evidence of Robert Bonomy, who was a member of the Cathedral choir from 1990 to 1998. Bonomy said that he had seen Cardinal Pell walking around the corridors 'outside of the Mass itself'. He had seen him both robed and unrobed. On the occasions that he was robed, Bonomy said, Cardinal Pell was sometimes on his own and sometimes with other people. When he was robed and unaccompanied, Bonomy recalled, this would be when the choir was lining up to process through the Cathedral before Mass.

290 Two other former choirboys — Nathan and Mayes — recalled Cardinal Pell coming into the choir room after Mass. Very infrequently, Nathan said, he would be robed. Mayes had a memory of Cardinal Pell coming to the choir room 'in the first five minutes while everybody was still there'. Asked whether Cardinal Pell was robed on that occasion, he answered:

> It was … very rare to see him unrobed. Yeah, he would have been robed.

291 The jury were entitled to come to the view, based on the totality of the evidence, that not only was it possible that Cardinal Pell was alone and robed (in seeming contravention of centuries-old church law) but the evidence did not raise a reasonable doubt in their minds about his guilt.

D. It was not possible that two choirboys could be assaulted in the Priests' Sacristy after Mass by Pell undetected

292 On A's account of the first incident, the door to the Priests' Sacristy was unlocked and the room was unoccupied when he and B entered. The possibility/impossibility of this having occurred depended on a number of issues about both ritual and procedure, which were explored in the evidence of a number of witnesses. The specific questions concerned:

- when the door to the Priests' Sacristy was unlocked;
- when the altar servers returned to the Priests' Sacristy to complete their participation in the Mass by bowing to the crucifix;
- when the clearing away of sacred vessels and other items from the sanctuary commenced, and how long it took; and
- whether the Priests' Sacristy was unlocked and unattended at any time in the post-Mass period.

293 It was common ground that Potter was the person who unlocked the Priests' Sacristy and that he did so after Mass. His evidence was that, after the choir and clergy had processed to the west door, he would go to the sanctuary, where he would wait until parishioners had finished what he called their 'private time' for prayer after the service. This was typically a period of five or six minutes. He would then take books from the sanctuary and unlock the door to the Priests' Sacristy. He would then return to the sanctuary to gather up the sacred vessels and — sometimes with the assistance of the altar servers — would take them back to the Priests' Sacristy.

294 The Crown points out, however, that Potter's evidence (that he would not unlock the Sacristy until after the end of the 'private time') was in conflict with the evidence given by Connor and McGlone, who were altar servers at the relevant time. McGlone's evidence was that, at the conclusion of Mass, the altar servers would lead the procession back to the rear gate. They would then enter the Priests' Sacristy,

which was already 'unlocked and open', bow to the crucifix, exit the Sacristy and commence their duties as altar servers. As the prosecutor reminded the jury, McGlone's evidence-in-chief was that he had not seen the Priests' Sacristy locked. McGlone said:

> A: You'd go in there and my recollection is the doors, internal doors were open.
>
> Q: To the Priest's Sacristy?
>
> A: The Priests' Sacristy. The only one that was ever sort of locked was the Archbishop's Sacristy.

295 Connor's evidence was to similar effect. Having led the procession to the point where the choir could return to the choir room, he said, the altar servers would go directly to the Priests' Sacristy and bow to the crucifix to end the Mass. If Potter was himself acting as an altar server, he would unlock the Sacristy door as they were coming through. If not, the servers would arrive and the door would be unlocked and open. Connor's recollection was that Potter would usually be there waiting for them but he could not say that he was there every time.

296 The effect of the servers' evidence was that the unlocking of the Sacristy door, and their bowing to the crucifix, occurred soon after the procession finished and that, by the time they returned to the sanctuary to assist Potter, the door was already unlocked. On that view, it was quite possible for the Sacristy to have been unlocked and unattended at around the time A said he and B broke away from the procession. The clearing of the sanctuary had, of course, to await the end of the private prayer for parishioners. The Crown case as presented to the jury was that 'there is this hiatus, this gap' during which the first incident had occurred.

297 According to Connor, the altar servers would start the clearing out process, which involved them going back and forth between the Priests' Sacristy and the sanctuary to collect the sacred vessels. According to McGlone, the servers would carry one item at a time. The process would continually involve people going in and out of the Priests' Sacristy. Neither Connor nor McGlone could recall any occasion in

which the Sacristy was left unlocked and unattended during this time. In Connor's experience, it had never happened.

298 The applicant also relies on the evidence of Finnigan, which was less clear. Asked whether the sacristy corridor was busy after Mass, Finnigan responded:

> Immediately after Mass there were people everywhere.

He agreed that there were people 'coming in and going out of the Priests' Sacristy' and said:

> There were people in that area, whether they were in the Sacristy or not there were people in the corridor. … The florist would have also been in the servers' sacristy as well.

299 Dr Cox, the assistant organist, said that — when he was playing the postlude — he would remain at the organ for about 10 minutes. He recalled seeing altar servers

> who were very busy removing materials from the sanctuary, taking them back out to the Sacristy. In fact, the whole area of the sanctuary into the sacristies was a hive of activity and there were people doing jobs.

Unlike Potter, however, Cox's recollection was that the removal of material from the sanctuary would commence 'as soon as the procession had left'.

300 In our view, taking the evidence as a whole, it was open to the jury to find that the assaults took place in the 5-6 minutes of private prayer time and that this was before the 'hive of activity' described by the other witnesses began. The jury were not bound to have a reasonable doubt.

E. It was not possible to leave a procession unnoticed

F. Would be seen by the organist (Mallinson or Cox) in the south transept

G. There were choir rehearsals on 15 and 22 December 1996 which meant (1) A and B's absence would have been readily apparent; and (2) A's description of returning to the choir room where half the choir had left for the day is inconsistent with the first incident occurring on either of the only two dates Pell said Mass in 1996

H. It was not possible to rejoin the choir unnoticed

301 It is convenient to deal with these four contentions together, as a number of the witnesses gave evidence relevant to more than one of them. We start with Peter Finnigan. He had joined the choir in 1990. In 1993 or 1994, he had become the 'choir marshal'.

302 In examination in chief, Finnigan was asked to describe what happened when the choir and clergy processed externally at the conclusion of Mass. He described how the choir would go out the west door of the Cathedral, down the steps, turn to the left and walk back toward the entrance to the choir room. Asked where he would be positioned, he said:

> at the back initially but as soon as I left the Cathedral I would then move on to the side and then to the front [of the procession] … To be the first person there as they went into the choir room so it was being supervised.

303 His position relative to the choir as it processed was understandably seen as relevant to whether he would have seen two choirboys 'nicking off'. On this evidence, Finnigan would set off for the front of the procession 'as soon as [he] left the Cathedral'. In cross-examination, however, he agreed that by the time he got to the southern transept door he would have advanced (only) 'to the side of the choir'. As best he could recall, he would have been between the choir and the southern transept.

304 Asked about the 'mood or the demeanour of the choristers' at the conclusion of Mass, Finnigan said:

> They were often excited. They'd been — you know they were boys, they'd been there since 9 o'clock and they — they were hungry, ready for lunch and ready to be home and, you know, having the afternoon off.

On the return to the choir room, there was no marking of the roll, nor were choristers marked off as they left. If a chorister was late back to the choir room, there was a buzzer at the entrance. If that were pushed:

> The buzzer would go off in the choir room and someone would go out and let them in. … [That would be] probably usually one of the boys closest to the door.

Finnigan said that he would not necessarily know if two sopranos were missing for any length of time from rehearsal, because they did not take a roll. As can be seen, these answers gave little support to the proposition that the boys would inevitably have been noticed by someone in authority if they returned later than the rest of the choir.

305 In cross-examination, Finnigan was asked about what would happen if a choirboy was missing at the conclusion of Mass:

> Q: If two young sopranos were missing for any length of time from the procession or later after the procession from the rehearsal you would know about it?
>
> A: Not necessarily.
>
> Q: How do you mean?
>
> A: Well, because if I'd noticed them missing I would know about it, but if as you said earlier on they managed to slip away without me noticing I wouldn't know, because we did not do — we did not take a roll as they left.
>
> Q: I see. You took a roll at the beginning but not at the end?
>
> A: Yes.
>
> Q: But as I understand your evidence the prospect of anyone whizzing off had never occurred as far as you observed it?
>
> A: No. The boys would know that would be quite a serious thing to do, and other boys would probably tell on them as well.
>
> Q: It was a serious disciplinary offence?
>
> A: Yes.
>
> Q: And reportable as a breach of the choristers' duties to St Kevin's and to the choir — sorry, to the choir?
>
> A: Yes.
>
> Q: And from time to time parents would be notified if people were misbehaving?
>
> A: Yes, they were.
>
> Q: And St Kevin's would be notified if people didn't turn up to rehearsals as they should?
>
> A: Yes.

306 Defence counsel asked Finnigan about a post-Mass choir rehearsal which was scheduled to take place on 15 December 1996. He agreed that there was 'a very tight turnaround' between the end of Mass and the beginning of the rehearsal. Defence counsel then put to him the evidence of Dr Cox, the former organist, that on such occasions the choristers would not go back to the choir room but would stay in the Cathedral following the conclusion of Mass. Finnigan disagreed, saying:

> My recollection is they went back … to disrobe and come back.

307 Finnigan agreed that each chorister had a responsibility to return his robes, but did not accept that missing robes would be noted. Likewise, he confirmed that the choir's music would be collected but denied that, if someone returned crumpled sheet music, he would 'actually bawl them out'.

308 It was put to Finnigan that he was 'on the alert' to make sure that he 'knew at every stage where the young choristers were'. He said:

> To say I was on the alert that would mean I was just constantly looking around, and I wouldn't, but that would certainly be in my consideration, yes.

He agreed that, if two choristers had 'decided to nick off and run into the southern transept' it 'would be pretty unlikely I'd miss that'. Wearing their vestments, they would have been highly visible. 'Unless I was distracted, but most likely I would have seen it.'

309 Both sides relied on this last answer. For Cardinal Pell, this was part of the body of evidence said to demonstrate impossibility. For the Crown, it was precisely the kind of evidence which showed that the events which A described were not impossible.

David Dearing

310 David Dearing recalled the renovations at the Cathedral in 1996 but could not recall when Cardinal Pell had first said Mass at the Cathedral. He confirmed that, after Mass, the choir would sometimes process externally and sometimes internally, depending on the weather. As an alto in 1996, he would have been in the middle of

the procession.

311 Asked about Finnigan's physical position as the choir was processing out of the Cathedral, Dearing said he believed it had varied and that 'from time to time he walked alongside the procession'. He had no actual recollection, however. He based his evidence on a photo he had seen recently. Asked about the mood in the choir when it reached the door to the choir room, he said it was 'like game on to get out of there and go home'. He said 'It could get … a bit rowdy'. Asked whether there had been any bunching up of the choir at that point, he said he 'probably would have thought so'. Asked about the 'level of orderliness or formality' in the choir rooms when the choir returned, he said:

> It could be a bit boisterous in there at that point in time. We were all just wanting to go home.

312 In cross-examination, a number of propositions were put to Dearing about the organisation of the external procession, as follows:

> Q: Going back … to the procession after when it's sort of going on this path that we've looked at along the south side, that's, you've said, you're marching two by two?
>
> A: Yep.
>
> Q: And you've got a clear line of the choristers out in front of you, don't you?
>
> A: Yes.
>
> Q: And similarly it's a straight line the whole way along?
>
> A: Yes, I — I believe so, yes.
>
> Q: So you can see the sopranos?
>
> A: Yes.
>
> Q: That's an orderly and disciplined line?
>
> A: Yes.
>
> Q: And there were some people who made sure it was so?
>
> A: There was, yes.
>
> Q: Brother Finnigan?

A: Yes.

Q: He was a, to your observation, a stickler for making sure that was an orderly line?

A: He was.

Q: And perhaps your dad as well?

A: Yes.

Q: And Dr Cox, if he wasn't at the organ?

A: Yeah, he would have.

Q: But any of the senior people in the choir?

A: Any of the men?

Q: Yes?

A: Yeah.

Q: So if someone started to have a bit of a chat and a giggle – – – ?

A: They would have been told.

Q: They'd be told, 'Quieten down'?

A: Yes.

Q: And if someone attempted to stray out of that line, there would be someone next to them pretty quick to tell them to stay in formation?

A: I would have thought so, yes.

Q: Did you ever see anyone try and deviate from the line?

A: I can't recall it, no.

Q: It would have been a pretty serious breach of discipline, wouldn't it, to run off from that line or walk off from that line?

A: There would have been some — something said, yeah.

Q: You never heard anyone talking about having seen choristers nicking off from that line?

A: Not that I can recall.

…

Q: It would have been a serious disciplinary issue if two young sopranos nicked off from an external procession back into the Cathedral?

A: I would have thought so.

Q: And you never heard or — I think the other half of my question was, that's something that you would remember if you'd heard about that?

A: I — I don't recall.

Q: All right. Certainly that line and that discipline was maintained firstly because Brother Finnigan said so? That's one reason, yes?

A: Yeah. Yeah.

Q: But the choir was in robes and the public face of the Cathedral wasn't it?

A: It was — it was an image thing as well, yes.

Q: So there was an expectation that the order, that the choir had to look disciplined and ordered whilst in a public view?

A: Yes.

Rodney Dearing

313 On the question whether it was possible for two choristers to have left the procession unnoticed, Mr Dearing's answer in examination in chief was:

> It would be — unnoticed, no, I don't think so. Not with ten or so adults at the back, observing, being able to see in front of them. Now the choir dress is very distinctive, you'd notice two boys running off and — if they were running off with — with their robes on, you'd very quickly notice them.

Asked whether he would allow for the possibility that it could have occurred unnoticed, Mr Dearing said:

> No, I don't think it could.

Asked the same question in cross-examination, he answered:

> I don't believe so.

314 Plainly enough, this was Mr Dearing's honest opinion about the probabilities. But it was only an opinion. Quite correctly, he drew attention to relevant features — such as the distinctiveness of the choristers' robes — which made it unlikely that two choristers could have left unnoticed.[120] Equally appropriately, in our view, his answers were couched in the language of uncertainty: 'I don't think so' and 'I don't

[120] Although Portelli gave evidence that up to 350 to 500 tourists would be milling around taking photographs after Mass.

believe so'.

315 The submission for Cardinal Pell points out that Dearing was not challenged on this evidence, notwithstanding the grant of leave to cross-examine if necessary. In our view, given the nature of the evidence and the language of uncertainty to which we have referred, there was no need to challenge it. For a witness to say that he did not believe that a course of events was possible fell well short of establishing that it was impossible.

316 In examination in chief, Rodney Dearing was asked about 'the state of orderliness or formality' in the external procession. He said:

> even though they were young boys, some of them were young boys, order and discipline was required because they were sort of the face of the Cathedral in some respects, so that mucking up wasn't tolerated.

The following exchange then took place:

> Q: Whilst it was required, was it always necessarily maintained?
>
> A: I would think so. The general tone was set for 'This is what you do', and if boys didn't adhere to them, well then they were very soon — it was very soon noticed and they were told.
>
> Q: What about as it made its way closer to the glass door, was the level of formality the same or was there occasions when there was a departure from what was expected?
>
> A: Well, because once they got round the corner I couldn't see them, so I don't know from observation what they might do once they get round the corner there.

In the same way, he thought it was quite possible that the choir would have 'bunched up' as it neared the gate to the choir room, but 'by that stage I couldn't see half of the choir'.

317 In cross-examination, a series of propositions was put to him, as follows:

> Q: Okay, so in terms of the choir, you yourself saw part of your role as supervising the boys?
>
> A: Yes.
>
> Q: And you were keenly aware of the duty of care that the choir had to the younger choristers?

A: Yes.

Q: And to keep them safe?

A: Yes.

Q: At that point in time, in 1996, there was an additional awareness of issues of safety of children?

A: Yes.

Q: And that was, in part, because of discussions in the community about sexual assault of children?

A: Yes.

Q: And that caused you to have particular care in keeping an eye on those youngsters?

A: Yes.

Q: Part of that was you and the others keeping an eye to make sure that no one fell out of line?

A: Yes.

Q: And if someone did, or if someone attempted to, they'd be called back in?

A: Yes.

Q: And they'd be spoken to sharply?

A: They would be.

Q: There would be serious consequences for choristers who even attempted to run off from the procession back into the Cathedral without permission?

A: Yes.

As can be seen, these final answers were all expressed — as they had to be — by reference to what 'would have happened', not what had actually happened on the occasion in question. This is, as we said earlier, the language of uncertainty.

Mallinson and Cox

318 As to whether A and B might have been observed by the organist when they re-entered the Cathedral through the south transept door, A's evidence was that he was not sure if the organist was playing at the time. He could not recall if there were

still people around inside the Cathedral.

319 Mallinson was asked whether, if he were sitting playing the organ at the conclusion of Mass, he would have seen two choirboys come back in through that transept. His answer was:

> No, I wouldn't see them. I have no memory at all.

Sitting at the organ console, he said, he might have been able to see the middle door of the three south transept doors but not the easternmost door, because he thought 'the pillars and things are in the way'.

320 In cross-examination, it was put to Mallinson that if the boys had come in as alleged, they would have had to come past him or Cox. His answer was:

> But you see we — they could've done so, they could've come in that door, if they did, [while] we were still playing the organ … And we didn't see it happen.

When it was again put that 'the odds are that they would've been seen by you or Dr Cox', Mallinson answered:

> No, they wouldn't have been seen by me, I don't think. … Because I'd be busy playing.

321 Defence counsel then asked Mallinson whether, on the assumption that he had stopped playing the organ, he would have seen the two choirboys in their robes. He answered:

> My personal feeling is if they'd nicked off from the procession, I use that word, I think they would be avoiding me.

322 Cox's recollection was that he would remain at the organ for about 10 minutes after the procession left. During that period, he said, there would still be people within the Cathedral:

> People didn't all leave immediately at once. Some of the curious ones would stand behind the glass screen and look at the organist playing which was a source of continuous annoyance.

323 After he had finished playing the postlude, the books and music had to be packed away in a cupboard. Cox was asked whether, had he been standing at that

cupboard, he would have noticed if one or two choirboys ran past. He answered, 'Oh that would be most unusual'. It had never happened as far as he knew and he agreed that, if it had happened, it would have drawn attention.

324 We have already dealt with the evidence concerning choir rehearsals after Sunday Mass.[121] As we have said, none of the opportunity witnesses could confirm that the rehearsals occurred after the Masses on 15 and 22 December 1996. For the reasons given earlier, even if there were rehearsals this did not create an obstacle to the jury accepting A's account.

325 There was also evidence that, during the time when the choirboys were getting changed, there was a lot of activity. For example, David Dearing said that it could be a bit boisterous in the choir room. Mallinson described the putting of the choir robes away in the cupboards as a bit of a 'bun fight'. Another former chorister gave evidence that there would be a 5 to 10 minute period when 60 choristers were in the room, with a lot of talking, everyone getting changed and putting the music away. Another chorister put the time frame as 10 to 15 minutes. The picture painted was that it was a busy time and, without a roll, two choristers rejoining the other choristers late would not necessarily be noticed.

326 In our view, the evidence (including the evidence we have described in this section) falls well short of establishing the defence proposition that, if the first incident had occurred, A and B would have been seen by someone when they left the procession and entered the south transept, or when they rejoined the choir (regardless of whether there was a rehearsal after Mass on the day in question). In other words, the evidence did not compel a finding that there was no opportunity for the offending to have occurred.

---

121 See [222]–[228] above.

I. It was not possible to part Pell's robes

327 We refer to what we have already said on this subject.[122]

J. The second incident could not have happened in 1997 at a Mass said by another priest

328 The written case relies on A's evidence that the second incident occurred in 1996, on an occasion when the Cardinal in full robes had said Mass. It is put that this was contrary to the Crown's case that the incident occurred on 23 February 1997, when the Cardinal presided over Mass wearing choir robes.

329 We have already dealt with the first part of this argument concerning A's evidence about when the second incident occurred. The balance of the contention rests on the acknowledged fact that, on 23 February 1997, Cardinal Pell was not celebrating the Mass but was presiding. There was unchallenged evidence that, when presiding, Cardinal Pell did not wear full pontifical vestments. He wore what was called 'choir dress', which comprised a soutane with a long surplice. It is purple and buttoned up the middle.

330 The defence relies on A's answers in cross-examination. When it was put to him that he was 'pretty familiar' with what Cardinal Pell wore when conducting Sunday Mass, A answered 'I was'. And, when it was put to him that at the time of the second incident Cardinal Pell was 'fully robed', A agreed. He gave the same answer a little later. A was then shown a photograph of Cardinal Pell processing into the Cathedral. He was asked whether what the Cardinal was wearing in the photo was 'full vestments, as far as you can tell', and answered that it was.

331 In re-examination, the following exchange took place:

> Q: Very well. Now, are you able to — as best you recall … at the time of the first incident, describe the robes being worn by Archbishop Pell?
>
> A: I can only describe them as being robes. Um, I, I couldn't pay attention to what was on the robes — what they were made out of, what they

---

122 See [144]–[146] above.

were, how they were exactly being worn before the incident. Um, I didn't have time to concentrate on the fabrics. I, I was obviously being distracted by the incident and I wasn't able to quite see the makeup of the robes.

Q: Are you able to describe the … layers or not?

A: Um, I can only describe that there was a long robe — he was wearing one long robe. I didn't know if there was a robe on top of that or not or I can't recall that.

Q: Now, the same question for the second incident. Are you able to describe the robes worn by Archbishop Pell at that time?

A: Um, I can recall him wearing the over-robe in the second incident. As um, as to what colour or um ah, yes, I have no recollection of that.

332 Once again, in our view, the effect of this evidence falls well short of establishing the 'could not have happened' proposition advanced by the defence. It could certainly have been expected that, even given the shock of being assaulted as he claimed to have been, A would have remembered whether Cardinal Pell was robed or in his regular clerical clothes. Beyond that, however, it seems improbable that he would have had a detailed recollection of what the robes were like, or whether the robes on the second occasion were different from those that had been worn on the first.

K. The second incident could not have occurred unnoticed

333 The second incident was said to have occurred in the Sacristy corridor, through which the choir was processing (internally) after Mass. In his examination in chief, A said:

> There were people walking down that back hallway, um, that goes past the Sacristy and I saw [Cardinal Pell] and he pushed himself up against me on a wall and he squeezed my genitalia.

In cross-examination, A denied that there had been 'a crush of choir people' in the hallway, saying:

> There was a few around but it was quite — quite disorderly.

334 A confirmed that Cardinal Pell had assaulted him 'out of nowhere'. He was then asked to confirm that this had (allegedly) happened 'in view of all the people

who were there'. The following exchange took place:

> A: I don't think it was in the view of anyone.
>
> Q: Oh, but there are people there who would have noticed an archbishop in full robes shoving a little choirboy against the wall - - -?
>
> A: It was - - -
>
> Q: - - - because that's what you're describing?
>
> A: Yes. And it happened like that. It was such a quick um, quick and cold, callous kind of thing that happened. It was - it was over before it even started and it was - I was isolated in a corner for literally seconds. Um, there weren't people sporadically walking down the hallway and um I was obviously not being looked at at that time because someone would have, hopefully, would have reported it.
>
> Q: You were in your choir robes, yes?
>
> A: Yes, I think so.
>
> Q: The Archbishop is fully robed, as we discovered at committal and elsewhere?
>
> A: Yes.
>
> Q: And the hallway has people in it?
>
> A: There were some people in the hallway.

335 Pressed further, A confirmed that Cardinal Pell 'did squeeze me painfully', although he was not sure if he had let out a cry of pain. This exchange then took place:

> Q: And this is in the sight of all these people who were in the corridor?
>
> A: Well, it obviously wasn't.
>
> Q: How could it not be if they're there?
>
> A: Because no-one saw it. No-one reported it.

336 In answer to further questions, A confirmed that Cardinal Pell's actions had been 'clear and violent' and that he had had a 'cold look on his face'. Defence counsel then suggested that the story was 'the product of fantasy'. When A said that he disagreed, the following exchange took place:

> Q: That is a product of your imagination, I suggest to you?

A: You weren't there.

Q: But you were there with 50 other choir people; is that right?

A: I was in that hallway and I was assaulted in that hallway, yes.

337 Portelli's evidence in cross-examination was that he would have been with Cardinal Pell on 23 February 1997 when he was presiding. Asked if Cardinal Pell might have found himself amongst a throng of choristers in the sacristy corridor, he responded, 'Only if they were waiting for him to go past.' When asked if they would be waiting, he said that 'normally they would not be.' He could not recall Cardinal Pell pushing anyone and had not seen him do it.

338 Earlier in these reasons, when dealing with the defence submissions based on improbability, we expressed the view that there was nothing inherently improbable about A's account of this incident. Nor does the evidence relied on persuade us that the incident 'could not have occurred unnoticed'. On the contrary, the various aspects of A's description — assuming them to be true for this purpose — make it a realistic possibility that no-one else (including Portelli) observed the assault.

339 Of necessity, Cardinal Pell must have been in very close physical proximity to A at the time of the assault. The action as described was very brief ('one, two, three seconds') and it would not have required Cardinal Pell to do more than pause momentarily. We would accept, of course, that the sight of Cardinal Pell at close quarters with a choirboy might well have attracted attention but we would assume — as did cross-examining counsel — that all of the others in the corridor were intent on completing the procession, and removing their ceremonial robes, as soon as possible. In that state of affairs, it seems to us to be quite possible that this brief encounter was not noticed. At all events, the evidence once again falls well short of establishing impossibility.

340 Cardinal Pell also relied on the absence of Father Egan as a witness. We have already dealt with that argument.[123]

---

[123] See [186] and following.

L. Pell would not be alone among the choir

341 This contention relies solely on the evidence of Connor. According to the written case, Connor's evidence is said to establish the following proposition:

> Pell would always greet the people even if it was raining or he was presiding — it was his invariable practice. The normal practice occurred on the occasion he presided on 23 February 1997.

342 Connor confirmed that the choir would have been more likely to process internally if it was raining. Asked whether that would affect Cardinal Pell's practice of standing on the steps of the Cathedral to greet parishioners, Connor answered:

> A: I don't think it had any effect really in terms of his greeting. He would always greet the people.
>
> Q: Even if it was raining?
>
> A: Yes, yes.

343 He was asked in cross-examination what would occur after Mass if Cardinal Pell had presided (rather than celebrating the Mass):

> Q: The Archbishop, when returning even after a situation in which he had just been presiding on this occasion, would return in full procession?
>
> A: He'd return via the Cathedral after he'd greeted the people.
>
> Q: Yes, after he greeted the people. Have you yourself had experience of him standing outside the main entrance and greeting people?
>
> A: Yes, it was common practice after a mass that the Archbishop would greet people.
>
> Q: With him it was an invariable practice, wasn't it?
>
> A: Yes.

344 This was not, however, the practice to which Connor was referring when he agreed with defence counsel that he remembered 'following the normal practice' on 23 February 1997. That answer related to a quite different topic, the practice of the altar servers going to the Priests' Sacristy after Mass. It was that practice which Connor recalled had been followed on 23 February.

345 A little later, Connor was asked again about 23 February. He confirmed that the Mass had been said by Father Egan. The following exchange took place:

> Q: He went back in procession with Father Egan, did he not?
>
> A: Yes, he would have.
>
> Q: You say would have - - -
>
> HIS HONOUR: He would have? You are being asked about your specific memory. If you don't recall just say so. You are being asked about whether you have got a specific memory of this occasion?
>
> A: No, I haven't got a specific memory.

346 As can be seen, Connor agreed that it was Cardinal Pell's 'invariable practice' to greet people after Mass. He could not, however, say whether on 23 February Cardinal Pell had come back in procession with Father Egan. Unsurprisingly, he had no recollection of that particular occasion.

M. Pell would not have been in the corridor between the Priests' Sacristy and the Archbishop's Sacristy moments after Mass finished

347 This proposition rests in part on the unchallenged evidence of Portelli that the Archbishop's Sacristy was still closed as at February 1997. This is said to make it inexplicable for Cardinal Pell to have proceeded further along the sacristy corridor than the entrance to the Priests' Sacristy, where he would have disrobed. The defence draws attention to the prosecutor's inaccurate statement in final address that the Archbishop's Sacristy was 'only out of action in late 1996, not 1997'.

348 The point is well taken. But little can be made, in our view, of the fact that Cardinal Pell was still having to use the Priests' Sacristy. Accepting that to be so, there was nothing improbable — much less impossible — about A's account that he was assaulted a short distance past the door to that Sacristy.

349 Reference is also made in the written case to the prosecutor's reliance in final address on the fact that Cardinal Pell was due to say Mass in Maidstone at 3:00 pm on 23 February 1997. At the very end of his address, the prosecutor submitted as

follows:

> Next, the second incident was brief and there would have been a reason for Archbishop Pell, if he'd had other commitments that day, to have been presiding over mass and to have been returning via that corridor on his way to the Archbishop sacristy, as it then was in 1997, earlier than usual.

350 It may be accepted, as the applicant submits, that the fact of the 3:00 pm commitment at Maidstone did not support the prosecutor's speculative suggestion that Cardinal Pell might therefore have been returning to the Sacristy 'earlier than usual' after the 11:00 am Mass. But that did not, of itself, require the jury to have a doubt about A's account of the second incident. It was not in dispute that the choir sometimes processed internally after Mass. A's evidence was that that was how he had come to be in the sacristy corridor when this incident occurred. The fact of the Maidstone commitment had no bearing, one way or the other, on the jury's assessment of the realistic possibility of Cardinal Pell having come down the corridor soon afterwards.

Conclusion

351 Nothing in the tables of evidence which we have analysed in this part of our reasons leads us to the conclusion that the jury must have had a doubt about whether there was a realistic opportunity for the offending to occur, nor a doubt that the particular sexual conduct occurred. That is so whether each table is considered in isolation or in the context of the other evidence. Taking the evidence as a whole, it was open to the jury to be satisfied of Cardinal Pell's guilt beyond reasonable doubt.

PART III: OVERALL CONCLUSION

352 We would refuse leave to appeal in respect of grounds 2 and 3. We would grant leave to appeal in respect of ground 1 (the unreasonableness ground) but, for the reasons we have given, would dismiss the appeal.

WEINBERG JA:

353 The applicant, Cardinal George Pell, is Australia's most senior Catholic prelate. Between 1996 and 2001, he was Archbishop of Melbourne. He was subsequently appointed Archbishop of Sydney, a position he occupied between 2001 and 2014. In 2003, he was also elevated to the rank of Cardinal.

354 On 11 December 2018, after a trial lasting just over a month, the applicant was found guilty of five charges of historical sexual offending against two young boys.[124] He now seeks leave to appeal against conviction.

355 The first four charges on the indictment involved offences that were alleged to have been committed on a date which was unspecified, but said to have been between 1 July and 31 December 1996. The fifth charge involved an offence, also on an unspecified date, but said to have been committed between 1 July 1996 and 28 February 1997. All of these offences were said to have been committed at St Patrick's Cathedral, in East Melbourne, shortly after the applicant had been appointed Archbishop, in August 1996.

356 The application before this Court arises out of a retrial. There had been an earlier trial in August and September 2018, but that jury had been unable to reach agreement. That was so, even after that jury had been told that they could bring in a majority verdict. The jury in the second trial deliberated for almost five days before convicting the applicant. The verdicts were unanimous.

Grounds of appeal

357 The applicant proposes to rely upon three grounds in support of his appeal against conviction. They are as follows:

Ground 1: The verdicts are unreasonable and cannot be supported having

---

124 The applicant was convicted of one charge of sexual penetration of a child under the age of 16, and four charges of committing an indecent act with, or in the presence of, a child under 16.

> 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.
>
> Ground 2: The trial judge erred by preventing the defence from using a moving visual representation of its impossibility argument during the closing address.
>
> Ground 3: There was a fundamental irregularity in the trial process because the accused was not arraigned in the presence of the jury panel, as required by sections 210 and 217 of the *Criminal Procedure Act 2009*.

358 Ground 1 invokes s 276(1)(a) of the *Criminal Procedure Act 2009* ('CPA'). That section reads as follows:

> (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 …

359 In the event that Ground 1 is made out, each conviction would be set aside, and the applicant would be acquitted on all charges. On the other hand, if one or other of Grounds 2 and 3 were made out, that would, at best, result only in an order for a retrial.

The prosecution case — as opened to the jury

360 At the commencement of the trial, the prosecutor, Mr Gibson QC, outlined in broad terms, the nature of the case that he anticipated would be presented to the jury. He said that at 11.00 am, on a Sunday morning during the latter part of 1996, the applicant had celebrated solemn Mass at St Patrick's Cathedral, in East Melbourne. Solemn Mass usually ran for about an hour, or just over.

361 As was usual, the Church choir were singing on the day in question. They were accompanied by an organist, who, at that time, would have been either John Mallinson (the choirmaster in 1996), or Geoffrey Cox (the assistant choirmaster and organist). The choir consisted of a large number of boys whose ages ranged from

12 to 18. There were also a number of adult choristers.

362 The complainant, then aged about 13, and another boy of similar age (hereafter described as 'the other boy'), were among those who performed in the choir on that particular Sunday. Both boys were students at St Kevin's College, in Toorak. Both had obtained scholarships to that school as a result of having successfully auditioned for the Cathedral choir, and both were sopranos in the choir.

363 Once Sunday solemn Mass had ended at about or just after noon, and the choir had finished singing their hymns, the two boys, along with the other members of the choir, took part in a formal procession along the nave. The entire choir then processed, or filed, two-by-two, out through the main door of the Cathedral.

364 The procession was headed by several adult altar servers. There then followed the choir, which was led by the sopranos (these being the younger boys). Next came the altos, the tenors, the baritones, and then the basses. More adult altar servers followed the choir. They, in turn, were followed by any priests, including concelebrants, who had assisted in the Mass. The applicant himself, as Archbishop, would invariably be at the rear of the procession, as Mr Gibson acknowledged he had been on the day in question.

365 Mr Gibson told the jury that, 'customarily, but not always', the procession would leave the Cathedral by walking along the nave to the main door. It would then exit through that door, turn left, and walk along the southern side of the Cathedral in an anticlockwise direction. The choir would process towards an area at the rear of the Cathedral, which he described as the 'sacristy area.'

366 According to Mr Gibson, the choir would then pass through an external corridor (described in this proceeding as the 'toilet corridor'). It would gain access to a building adjoining the Cathedral known as the 'Knox Centre.' Access to that building would be gained through two doors that were kept locked. The first of these was a glass door, and the second, a door leading into what was described as the 'choir rehearsal room.'

367 The practice was that the choirboys would then change out of their robes, in readiness to go home. At the time, they would do so in a room now used as the office for the Director of Music, but which then was known as the 'choir change room' or 'choir robing room.' That room adjoined the choir rehearsal room.

368 Mr Gibson told the jury that normally, but not invariably, the applicant would remain, for varying periods of time, on the steps at the front entrance to the Cathedral. There, he would meet with, and speak to, parishioners as they were leaving the Cathedral.

369 Mr Gibson also told the jury that a short time after Sunday solemn Mass celebrated by the applicant 'in the latter part of 1996', the four offences giving rise to charges 1–4 on the indictment took place. Those offences were said to have been committed during what Mr Gibson described as 'the first incident.'

370 On the other hand, charge 5 involved entirely separate and distinct offending which, Mr Gibson foreshadowed, the complainant would say took place 'over a month later.' The victim of that offending was the complainant alone, and not the other boy. Mr Gibson described this as 'the second incident.'

371 Mr Gibson then opened, in some detail, the complainant's account of events in relation to the first incident. He told the jury that the complainant would say that after Sunday solemn Mass had ended on whatever the particular date happened to be, both he and the other boy took the opportunity 'to have some fun.' They slipped away from the procession, once it became clear that the choir were no longer in the public gaze.

372 Mr Gibson said that the complainant would say that this act of 'breaking off' from the procession had occurred while the choir was making its way back to the change rooms. The complainant would say that the choristers were in a more relaxed and less formal mood at that stage, and that the discipline of the procession had, by that stage, more or less broken down.

373 Mr Gibson told the jury that the complainant's evidence would be that both boys, having separated from the procession, re-entered the Cathedral through one of the doors on the south side, known as the 'South Transept.' Once back inside, they passed through a wooden double door, which happened to be unlocked on the day. They then walked along a corridor that led down to what were known as 'the sacristies.' Mr Gibson said that that corridor was known as the 'sacristy corridor.'

374 The sacristies were private rooms at the rear of the Cathedral. They were off limits to the choirboys, and to members of the public. One of those sacristies was reserved for the Archbishop's exclusive use. The other was for priests to use when vesting and de-vesting.

375 Mr Gibson told the jury that the evidence would be that, in the latter part of 1996, the Archbishop's Sacristy was not available for the applicant to use. Accordingly, he was forced to vest and de-vest in the Priests' Sacristy. Mr Gibson said that this might explain why, as the complainant alleged, the applicant had entered the Priests' Sacristy, shortly after the conclusion of Sunday solemn Mass.

376 Mr Gibson said that the complainant's evidence would be that, as part of their 'fun', both boys entered the Priests' Sacristy, which was unattended at the time.[125] Mass had just ended.

377 Mr Gibson told the jury that the complainant would say that once the boys were inside the Priests' Sacristy, they 'poked around' for a short time. To the left, there was a slightly concealed wooden panelled area. Upon opening a cupboard within, they discovered a bottle of sacramental wine. As they were each taking 'a few swigs' from the bottle, the applicant entered.

378 Mr Gibson told the jury that the complainant would say that the applicant asked the boys what they were doing. He told them that they were in trouble. At

---

125 This was a pivotal aspect of the complainant's evidence. As will be seen, it was squarely at odds with the evidence given by a number of witnesses to the effect that the Priests' Sacristy was invariably a 'hive of activity', in the moments shortly after Sunday solemn Mass had ended.

that stage, the applicant was still wearing the 'full robes', or regalia, that an Archbishop would wear when saying or celebrating Sunday solemn Mass.

379 The complainant would say that the applicant approached the boys and then 'proceeded to manoeuvre his robes so as to pull out his penis.' The applicant then pulled the other boy aside, and made him crouch down in front of him. The applicant remained standing at the time. The other boy asked to be let go. He said that they had 'not done anything', or 'anything wrong.'

380 According to Mr Gibson, the complainant would say that he could see one of the applicant's hands on the back of the other boy's head, and his other at the applicant's genital area. He saw the other boy's head being lowered towards the applicant's groin. Mr Gibson said that this conduct, which the complainant would say occupied no more than a minute or two, gave rise to charge 1 (indecent act with, or in the presence of a child).

381 Mr Gibson told the jury that the complainant would say that moments later, the applicant turned his attention to the complainant. He pushed the complainant down into a position where he was crouching, or kneeling. He then pushed the complainant's head onto his erect penis, so that it was in the complainant's mouth. That act of sexual penetration, the complainant would say, lasted for perhaps a couple of minutes. Mr Gibson said that this conduct gave rise to charge 2 (sexual penetration of a child).

382 Next, Mr Gibson said, the complainant would say that the applicant, having withdrawn his penis from the complainant's mouth, told him to pull down his trousers. He would say that he stood upright, and did as he had been told. The applicant then lowered his body so as to be almost crouched, on one knee. He then began touching the complainant's penis (charge 3), while at the same time placing his hand on his own penis (charge 4) (committing an indecent act with, or in the presence of a child). These acts, the complainant would say, occupied perhaps a 'couple of minutes.'

383 Mr Gibson then told the jury that the complainant would say that after the abuse had ended, both boys went from the Priests' Sacristy to the choir robing room. There, they returned their robes. The complainant would say that he was then driven home. He would say that he never spoke with the other boy about what the applicant had done to them. Nor, for many years, did he speak to anyone else about it. He would say that the reason why he never mentioned the matter until many years later was because he had not wanted to jeopardise his scholarship.

384 In relation to the second incident, Mr Gibson told the jury that the complainant would say that this offence took place 'over a month after the first incident.' He would say that immediately following Sunday solemn Mass, there was the usual procession involving the choir. This time, however, it was an internal, rather than external procession, and took place along the sacristy corridor.

385 As regards this second incident, Mr Gibson told the jury that the complainant would say that the members of the choir were walking along the sacristy corridor, heading towards the choir change room, in order to disrobe. At a point somewhere between the doorway to the Priests' Sacristy and the doorway to the Archbishop's Sacristy, the applicant suddenly rushed at the complainant, and pushed him forcefully against the wall. He then squeezed the complainant's genitals over his robes, inflicting considerable pain. After two or three seconds, he let go and walked off. The complainant would say that, as with the first incident, he never mentioned this second act of sexual abuse to anyone, until many years later.

386 Mr Gibson did not nominate the actual dates upon which these two incidents were said to have taken place. As will be seen, he had good reasons for not doing so. His opening to the jury was based entirely upon the complainant's initial statements to the police, as well as the evidence that the complainant had given at committal. It was obvious that the complainant's account could not be reconciled with the known or readily ascertainable objective facts as to what had been happening at the Cathedral at the relevant time.

387 It should also be noted that Mr Gibson made no mention, in his opening, of what the boys were supposed to have done immediately after the first incident had concluded. He merely foreshadowed, in the most general of terms, that the complainant would say that they had gone to the choir change room to disrobe, and then gone home.

388 As would be expected, Mr Gibson anticipated what the defence case would be, and took pre-emptive steps to meet it. Primarily, that was because he understood full well that the defence case would be presented primarily through evidence to be adduced in cross-examination, of a number of witnesses who were to be called by the Crown.

389 In that regard, Mr Gibson told the jury that it would soon become apparent to them that there were a number of seemingly irreconcilable differences between the complainant's account, and the evidence to be given by a number of those witnesses.

390 Mr Gibson singled out the evidence of Mallinson and Cox (to whom I have previously referred), as well as Monsignor Charles Portelli (the Archbishop's Master of Ceremonies at the time), Max Potter (the Sacristan) and Peter Finnigan (choir marshal).

391 Mr Gibson foreshadowed that there would be evidence to the effect that the procession after Sunday solemn Mass was typically highly regimented, and that this might be at odds with some aspects of the complainant's account.

392 Continuing in this vein, Mr Gibson told the jury that a number of witnesses would say that any choirboy separating or peeling off from an external procession, as it was moving along the outside of the Cathedral, would have been noticed at once, and subject to discipline. He sensibly acknowledged that this evidence could not easily be reconciled with the complainant's account of how the boys had broken away from the choir, and gone back into the Cathedral.

393 Mr Gibson next indicated that a number of witnesses would say that the door

to the Priests' Sacristy was always kept locked when that room was unattended. He told the jury that their evidence too would be difficult to reconcile with the complainant's version of events.

394 A third issue flagged by Mr Gibson concerned the sacramental wine. He said that there would be evidence that the wine was always locked away, securely stored in a vault in the Priests' Sacristy. It was never left out in a cupboard, accessible to anyone who happened to be in that room at the time. That evidence would not accord with the complainant's account.

395 A fourth issue that Mr Gibson anticipated concerned evidence that would be given of what some witnesses would say was the applicant's 'invariable practice' of standing at the steps of the Cathedral, immediately after Sunday solemn Mass. Mr Gibson acknowledged (what ought to have been obvious in any event) that if, on the day of the alleged offending, the applicant had stood on the steps of the Cathedral for an extended period of time immediately after Sunday solemn Mass,[126] that would be 'inconsistent with the offending having occurred within a short period of time, as described by [the complainant].'

396 It should be noted that Mr Gibson was well aware, when he opened the matter to the jury in this way, that the trial judge had previously, in a ruling delivered before the commencement of the first trial,[127] made it clear that, in his Honour's view, if the jury entertained a reasonable doubt as to whether the applicant had stood on the steps for 10 minutes or more, as a number of witnesses claimed, it would have been 'at least likely that this would be fatal to the Crown case.'[128]

---

126 As it later emerged, this had to be either 15 or 22 December 1996.

127 *DPP v Pell (Evidential Ruling No 3)* [2018] VCC 1231 ('*Evidential Ruling No 3*'). The ruling concerned an application by the prosecution pursuant to s 38 of the *Evidence Act 2008* for leave to cross-examine certain witnesses who would be called on the basis that they were 'unfavourable.' It was common ground that that ruling applied also to the second trial.

128 *Evidential Ruling No 3*, [62]. The trial judge noted that Mr Gibson had resiled from his initial position, which was that 10 minutes on the steps would still have allowed for the applicant to have had time to commit the offences specified in relation to the first incident. Some of the witnesses who gave evidence on this subject said that they recalled the applicant having done so on both 15 and 22 December 1996. Others said that it was his invariable practice to do so for between 20 and 30 minutes. When an alibi is raised by the defence, in substance, as it was

397 Mr Gibson added, however, that those witnesses who would speak of the applicant's invariable practice, in that regard, would all be asked about the 'possibility' that it might not have been followed on the day of the alleged offending. He told the jury that that possibility, if it were established, would at the very least lessen the weight to be given to those witnesses' evidence.

398 The next matter raised by Mr Gibson concerned evidence that would be led from a number of witnesses to the effect that, when robed, the applicant was always accompanied, by his Master of Ceremonies, Portelli. The witnesses would say that if Portelli, for some reason, were not present, Potter would fulfil that role.

399 Once again, Mr Gibson acknowledged that this evidence, if accepted, would be 'inconsistent with the offending having occurred when Cardinal Pell was alone', and would therefore be inconsistent with [the complainant's] account.[129]

400 Finally, Mr Gibson pointed to evidence that would be given by a number of witnesses as to the robes worn by the Archbishop when he said Sunday solemn Mass. He said that there would be evidence that these robes were multi-layered, heavy, and cumbersome. He acknowledged that evidence of that nature might be difficult to reconcile with the complainant's account of how the applicant had managed to 'manoeuvre' those robes, so as to expose his penis.

401 Mr Gibson did not, at least in his opening address, advert to the evidence that would be given to the effect that the area around the Priests' Sacristy, immediately after Sunday solemn Mass, was a 'hive of activity.'

---

in this case, the obligation is on the prosecution to eliminate any 'reasonable possibility' that the alibi may have been true. See Judicial Commission of New South Wales, *Criminal Trial Courts Bench Book*, [6-000]; and generally, Judicial College of Victoria, *Criminal Charge Book*, 1.7.70; *R v Murray* (2002) 211 CLR 193, 201–2 [23].

129 *Evidential Ruling No 3*, [62]. Once again, the trial judge made it clear that if there were a reasonable doubt as to whether the applicant was alone, and not accompanied by either Portelli or Potter on the day in question, that would be 'likely to be fatal to the prosecution case.' Self-evidently, that would be so.

The evidence as it developed at trial — some preliminary matters

402 As was to be expected, when the evidence eventually came out at trial, it departed significantly, in certain key respects, from what Mr Gibson had opened to the jury. That was hardly surprising given that the alleged offending had taken place some 22 years previously.

403 By way of preliminary comment, the first point to note is the vagueness, in the case as opened, regarding precisely when the first and second incidents were said to have taken place.[130] Of course, the prosecution is obliged to give sufficient details of any charge so that an accused will know the case that he or she must meet.[131] Generally speaking, the exact date upon which an historical sexual offence is said to have been committed is not of critical importance. Nor can it reasonably be expected to be identified with precision. It is only rarely that the date upon which the offending is said to have occurred becomes an element of the offence.[132]

404 There are some cases, however, where that date, though not elemental, is of pivotal importance, or at least becomes so, during the course of the trial.[133] As will be seen, that was precisely what happened in the present case. It is apparent from the extraordinary vigour with which the defence sought, throughout the trial, to narrow down, and identify, either 15 or 22 December 1996 as the only two dates upon which the first incident could possibly have occurred that this was regarded of vital importance to the defence.

405 From a defence perspective, if those dates could be so identified, the complainant's account that both the first and second incidents took place before

---

130 The complainant could only say that both incidents occurred in 1996, after Sunday solemn Mass celebrated by the applicant.

131 *Johnson v Miller* (1937) 59 CLR 467, 489–90 (Dixon J).

132 Of course, the date may be an element of the offence if, for example, the age of the complainant is itself elemental.

133 See *SKA v The Queen* (2011) 243 CLR 400, 409 [23] (French CJ, Gummow and Kiefel JJ) ('*SKA*'). See also, *R v Pfitzner* (1976) 15 SASR 171, 175 (Bray CJ), *R v H* (1995) 83 A Crim R 402, and *WGC v The Queen* (2007) 233 CLR 66. In all these cases, the date of the alleged offending was of fundamental importance to the disposition of the particular proceeding.

Christmas 1996, but 'just over a month apart', would necessarily be shown to be unreliable. In addition, there was a substantial body of evidence, to which I shall later refer, which was capable of being specifically linked to those two dates, that would tend to undermine the prosecution case.[134]

406 Throughout almost the entire of the trial, Mr Gibson was careful to avoid any concession that, as a matter of practical reality, the first incident could only have occurred on one or other of those two dates. By the end of the trial, however, he had little choice in the matter. It appears to have been accepted by everyone (and certainly by the trial judge), that no other date for the first incident was possible. Indeed, it was on the basis that the first incident must have occurred on one or other of those two dates that the prosecution nominated 23 February 1997 as the date upon which the second incident had occurred.

407 It should also be noted that although Mr Gibson, in his opening address, pre-emptively identified a number of issues that the jury would have to consider (based upon clear differences between the complainant's account, and the evidence expected to be given by other witnesses), ultimately, the defence case went much further than this.

408 One final introductory point at this stage. The applicant was represented by Mr Richter QC, at trial. He eventually put to the jury, in his closing address (which he supported by a PowerPoint presentation), that there were at least 17 'solid obstacles' to conviction.

409 Before this Court, Mr Walker SC reduced Mr Richter's 17 'solid obstacles' to 13. It was submitted that these 'solid obstacles' both individually and collectively, demonstrated that the jury had acted unreasonably in arriving at their verdicts of

---

134 It just so happened that immediately after Mass on those two dates, there were rehearsals for the entire choir. These were scheduled for between 12.00 pm and 12.45 pm. Prior to the trial, the complainant never mentioned these rehearsals, and had no recollection of them. Nonetheless, the account that he gave of his movements, and those of the other boy, after the alleged sexual abuse, could not easily be reconciled with the fact that these rehearsals took place on those days.

guilt, which should therefore be set aside.

The complainant's evidence — in detail

410 Before summarising the complainant's evidence, there are several further introductory remarks that should be made. An unusual feature of this case was that it depended entirely upon the complainant being accepted, beyond reasonable doubt, as a credible and reliable witness. Yet the jury were invited to accept his evidence without there being any independent support for it.[135]

411 Mr Gibson, nonetheless, submitted that the complainant's account of the applicant's sexual abuse was so compelling that the jury should be satisfied to the requisite criminal standard of his guilt.

412 It is a truism that, these days, juries can, and often do, convict in cases of historical sexual offending. They sometimes do so where, as in this case, the complainant's evidence is entirely unsupported.[136]

413 It should also be noted that there are some special features associated with the way that trials involving sexual offending are conducted. As is by no means uncommon in cases of this nature, the jury in the second trial never actually saw the complainant give evidence live in court.[137] They only saw a video recording of that evidence, which was made during the first trial.[138]

---

135 Indeed, there was no evidence from the complainant of his having ever told anyone about what the applicant had allegedly done, until at least 2014. There was no forensic, or other objective evidence, to support his account. There were no admissions, express or implied, upon which the prosecution could rely. The case was built around the complainant alone.

136 In the past, in cases of alleged sexual abuse, juries were warned, in strong terms, of the dangers of convicting in the absence of corroboration. The law has changed in that regard. That makes the task of intermediate appellate courts charged with having to review the safety of convictions in such cases a particularly important and onerous one.

137 *Criminal Procedure Act 2009* ('CPA') s 360(a). It is now common for the evidence of complainants in trials involving alleged sexual offending to be given from locations other than the actual courtroom. Such evidence is often given by playing the pre-recorded testimony of those witnesses.

138 CPA s 362(3). Several other witnesses, whose evidence was recorded during the first trial, were not required to give evidence before the jury in the second trial. Their recorded evidence was simply played to the second jury.

414 The Victorian legislature has determined that evidence given by complainants in cases involving sexual offending may be given in camera.[139] In addition, there are restrictions upon the reporting of their evidence, meaning that in some circumstances, what they said will never be publicised.[140]

415 In recent years, it has been the practice in this State to record all trials conducted in the County and Supreme Courts, and not just those involving sexual offences. This means that in the event that a retrial is ordered, the evidence led at the first trial can simply be replayed to a second jury. Indeed, in some such cases, that second jury never sees a live witness, but views all of the evidence on a screen.

416 The complainant began his evidence in-chief by saying that the first incident took place after the applicant had just said 'Sunday Mass at the Cathedral.' He nominated the date of that offending as being sometime in 'the second half of 1996.' He said that the second incident took place 'over a month' after the first incident.

417 The complainant acknowledged, however, that he could not 'definitively say the year … but from my recollection it was in 1996. I'm fairly certain of the same choral year.'

418 In cross-examination by Mr Richter, the complainant conceded that he could not say 'with any certainty what day they [the incidents] happened.' When it was put to him that, if the first incident took place on 15 December 1996, and if both incidents occurred before Christmas of that year, as the complainant continued to insist, the second incident must, logically, have occurred on 22 December 1996. No other date was possible. In response, the complainant appeared to vacillate somewhat. He said that he was unsure of the exact dates, but reaffirmed that the second incident had taken place before Christmas of that year.

---

139 CPA s 360(d). It is likely that revealing what occurred during an in camera proceeding will constitute a contempt of court.

140 See the *Judicial Proceedings Reports Act 1958*, s 4(1A). As matters stand, the transcript of the complainant's evidence in this proceeding is not available to anyone other than the parties, and, in effect, this Court.

419 When Mr Richter again put to the complainant that the two incidents must, even on the complainant's own account, have occurred on 15 and 22 December 1996, as they were the only two times that the applicant had said Mass at the Cathedral in that year, he replied that he was not

> too sure if [the applicant] was saying Mass that day [of the first incident]. He could've been involved … he was at the … Cathedral for a period of time … not necessarily just saying Masses.

420 Self-evidently, this was a significant departure from the complainant's previous position that the first incident took place after the applicant had said Sunday solemn Mass, and while he was fully robed for that event. Mr Richter specifically put to the complainant that his previous position had always been that the first incident had occurred immediately after Mass celebrated by the applicant. The complainant agreed that this had indeed been his position. However, he now said that he could not be sure whether the applicant had 'said' Mass on the day of the first incident, or whether he had merely been 'leading' the Mass. He again agreed, however, that the Archbishop had been in 'full robes' when the offending took place.

421 Subsequently, in cross-examination, the complainant disagreed with the proposition that the first incident could only have occurred on either of the two December dates nominated. That was despite it having been put to him that the evidence showed conclusively that there were only two dates on which the applicant had celebrated Sunday solemn Mass in 1996, as the complainant himself accepted.

422 When pressed about the procession on the day of the first incident, the complainant said that it had been an external procession. When asked whereabouts in the procession the other boy had been located, relative to himself, the complainant could not say. He indicated, however, that the other boy '… wouldn't have been too far away.'

423 The complainant acknowledged that attendance at '… all the rehearsals and to perform as required in the choir were the conditions of the scholarship.' He accepted

that there were special choir rehearsals on 15 and 22 December 1996, though he could not specifically recall them. He said that he '… was late all the time to [his] rehearsals.'

424 With regard to the first incident, he stated that his '… first specific memory was being in that room [the Priests' Sacristy]', and that he came to be in the area as he and the other boy had broken away from the choir and were 'poking around in the corridors.' When Mr Gibson asked him in evidence in-chief for further detail, he said:

> Um, yeah, just we sort of broke away from the main choir group. Um, it was sort of scattered and a bit chaotic as a bunch of kids are, I suppose, after a Mass. And we managed to separate ourselves from that group.

425 The complainant could not recall where exactly he and the other boy were when they broke away from the rest of the group. However, he said that this had occurred 'quite close' to the end of Mass, and at that stage 'people hadn't changed yet.'

426 In cross-examination by Mr Richter, the complainant agreed that, according to his account, he and the other boy had broken away at a time when the choristers were congregated together outside the metal gate, leading directly into the toilet corridor.

427 The complainant could not recall which of the two boys had left the procession first, or who had prompted the decision to 'nick … off.' He said that the idea of leaving the procession had not been pre-planned.

428 The complainant then said that the two boys had re-entered the Cathedral through the 'south side entrance.' They had gotten into the sacristy area through the internal part of the Cathedral, passing through 'wooden double doors.' He described having gone into the Priests' Sacristy and 'having [had] a look around.' He said that he had not been into that room previously.

429 In cross-examination, however, the complainant conceded having been taken

on a tour of the Cathedral when he first joined the choir. He did not dispute having been shown the various sacristies on that occasion.

430 The complainant said that immediately to the left, after entering the sacristy, there was 'a wooden panelled area … resembling … a storage kitchenette … ' The double doors to the sacristy were '… unlocked, perhaps ajar', with '… one door bolted closed and the other one able to be opened.'

431 When 'poking' through a cupboard, the boys found some wine in a '… dark brown stained bottle.' The wine was red or 'burgundy' coloured, and it was a 'sweet red wine.' The boys began 'having a couple of swigs' in the alcove area. It was at that point, according to the complainant, that the applicant entered the sacristy. He was robed, and alone.

432 The applicant 'planted himself in the doorway' and said something like 'what are you doing here?' or 'you're in trouble.' The applicant then

> … undid his, his ah, his trousers or his belt. Like, he started moving his, underneath his robes …

433 The complainant then said that the applicant

> … pulled [the other boy] aside and then pulled out his penis and then grabbed [the other boy's] head from what I could see and, and um, I can only assume, put his penis in his mouth.
>
> …
>
> I could see his head being lowered towards his genitalia um, and then [the other boy] sort of started squirming. I don't know, not um, he wasn't looking too — he was struggling, you know.

434 In cross-examination, the complainant largely adhered to the account which he had previously given police regarding the actual details of the offending which took place within the Priests' Sacristy. He said that the applicant had moved his robes 'to the side' and exposed his penis. The transcript reads as follows:

> MR RICHTER: [reading]
>
> 'He told us we were in a lot of trouble. I can't recall any other words being said before I watched him take his

penis out. He was wearing robes and he moved them to the side and exposed his penis' right. 'I can't remember exactly what he had on underneath the robes.'

That's what you told the police in your first statement on the 18th June 2015; is that right?

COMPLAINANT: Yes.

MR RICHTER: Was that true?

COMPLAINANT: Yes.

MR RICHTER: So, he just moved his robes to the side and exposed his penis?

COMPLAINANT: Yes.

435 The complainant agreed that his evidence at committal had been that the applicant had 'pulled aside his robe' and 'pulled something apart', thereby revealing his penis. He said the answers he had given at committal had been true.

436 Mr Richter put to the complainant that, at committal, he had been unsure whether the applicant had been wearing pants during the first incident. The complainant agreed that he had given that evidence.

437 The complainant then reiterated that the applicant had 'pushed aside' his robes, and 'created an opening by opening his robes.' He conceded that, despite his having said, at committal, that he had no recollection whether the applicant had had trousers on underneath his robes, he had said before the jury, in examination in-chief, that the applicant had undone his belt. He explained that this was because he '… thought [the applicant] was shuffling his pants or something underneath his robes.'

438 When shown one of the Archbishop's vestments, the alb, which plainly went all the way down to the ground, and clearly could not be 'parted' in any sense, the complainant proffered the suggestion that perhaps 'you can pull it [the alb] up first.' When confronted with the discrepancy between that suggestion, and the evidence that he had previously given regarding this matter, the complainant explained that the applicant had 'pulled [the robes] to reveal his penis, however way that was: up,

across, down, right, left. He pulled it aside to reveal his penis.'

439 Not surprisingly, this was one of a number of matters associated with the complainant's evidence that Mr Richter relied upon when he invited the jury to reject his account, in his closing address.

440 When the complainant was shown the chasuble worn by the applicant, he agreed that it did not have any openings, and that it could not be pulled to the side.

441 The complainant said that the actual offending involving the other boy occurred over '… a small amount of time … barely a minute or two.' He said that the applicant's act of pushing his penis into the complainant's mouth occupied 'a short period of time' that lasted 'only a couple of minutes max.'

442 According to the complainant, after this, the applicant instructed him to '… undo my pants, and take off my pants …' At this point, the applicant 'started touching my genitalia … masturbating … or trying to do something with my genitalia.' While this was occurring, the applicant was 'touching himself … on the penis … with his other hand.' This particular offending took place over the course of a 'minute or two.' Then it stopped, and the complainant put his clothes back on. He said '… we got up and we left the room', and that he and the other boy returned to the 'choral change area.'

443 The complainant said that during the course of the offending, both boys had called out and 'made some … objections.' He claimed, however, that they did not yell. He said that the route they had followed to go back to the choir change room was 'by walking out at the south entrance and around.' He subsequently added that they had left the sacristy in the same way that they had come in.

444 The complainant, shortly thereafter, adjusted his evidence, saying only that 'there was obviously a way that we re-joined the choir … I'm not one hundred per cent sure of how it happened.'

445 When asked why the boys had not re-joined the choir by simply turning right

when exiting the Priests' Sacristy, and therefore only needing to pass through a single door, the complainant said that he had not wanted to '… go through a door in an area that [they] weren't supposed to be in at the time …' He said that he and the other boy had '… got back there very, very quickly after what had happened' and that 'there was still people around.'

446 The complainant said that they '… re–joined the rest of the choir that was still mingling around and finishing up for the day.' He said that '… a few more of the kids had left than usual by the time we'd gotten dressed.' He later insisted that the boys had '… re-joined what was half of the choir or a lesser amount of the choir who had finished … getting changed for the day.'

447 When Mr Richter put to the complainant his evidence from the committal that he did not know where he went after the first incident, and that he could only '… remember being back in the car and driving home after that', the complainant accepted that those had been his answers. He said that they were true. He did not explain how it was that his memory had come to be improved when he gave evidence at the trial. When asked whether he could recall going back to the Knox Centre, he said that he could not.

448 As regards the second incident, the complainant reiterated that this took place immediately after Sunday solemn Mass, and that the Mass had been said by the applicant. The transcript reads as follows:

MR RICHTER:	Can I just take you through — this is supposed to have happened immediately after Mass said by Archbishop Pell. Correct?
COMPLAINANT:	Yes.
MR RICHTER:	No time for Archbishop Pell to stand on stairs and talk to people, right?
COMPLAINANT:	There could have been.

449 The last answer might well be thought to have been prevarication. Clearly, there would not have been sufficient time for the applicant to have stood on the

stairs, talking to people, in the manner described, and still have caught up with the procession in the sacristy corridor.

450 Shortly thereafter, the complainant resiled from some of his earlier answers. He said that the second incident may not have occurred during a procession at all. He added, for the first time, that he was not certain that the second incident took place while the choir were processing.

451 The complainant, in his evidence in-chief, described the second incident as follows:

> COMPLAINANT: We were walking … there were people walking down that back hallway … that goes past the sacristy and I saw him and he pushed himself up against me on a wall and he squeezed my genitalia.
>
> MR GIBSON: When you say 'he' who are you referring to?
>
> COMPLAINANT: George Pell.
>
> MR GIBSON: And when you say, 'My genitalia' are you able to be more specific?
>
> COMPLAINANT: My testicles, my penis.

452 The complainant said that the second incident had occupied only a few seconds. Following what occurred, the applicant '… kept walking.' He said that he did not think that the incident took place '… in view of anyone.' He later accepted , however, that at the time, there were 'some people around in the hallway …' He said that the sexual abuse took place past the doorway to the Priests' Sacristy, 'going on towards the rear of the Cathedral.'

453 In cross-examination, Mr Richter put to the complainant that he had said at committal that the second incident had occurred in the corridor, but 'before you even get to the sacristy area.' He acknowledged that that was so.

454 Finally, the complainant said that the applicant had been dressed, at the time, 'in robes', and that he was wearing what he described as 'the over robe.'

455 From this brief summary of the complainant's evidence, it can be seen that

there was ample material upon which his account could be legitimately subject to criticism. There were inconsistencies, and discrepancies, and a number of his answers simply made no sense.

The evidence from various prosecution witnesses led in support of the defence

456 As indicated, almost the entire body of evidence led in support of the defence case came from witnesses called by the prosecution as a matter of fairness, and at the behest of the defence.

457 All of these witnesses were important, but there were some whose evidence was critical. It can fairly be said that their evidence, if accepted, would lead inevitably to acquittal. The same result would follow, even if the only finding that could be made was that their evidence, as regards the events in question, was a 'reasonably possible' account of what had occurred.

Portelli

458 Portelli had been Master of Ceremonies to the applicant from September 1996 through to the end of 2000. In addition, he was resident priest at the Cathedral between 1993 and 2000. He assisted the applicant with about 30 Sunday solemn Masses, and up to 25 other events throughout the course of the year.

459 The applicant was installed as Archbishop of Melbourne on 16 August 1996. The occasion was marked by a ceremony at the Exhibition Building, in Carlton. That was because the Cathedral had been closed since Easter 1996, while renovations took place. It did not re-open until the last week of November of that year. Sunday solemn Masses had been said at Knox Hall in 1996, but not by the applicant.

460 Portelli specifically recalled the applicant having said Mass, on Sunday 3 November 1996, for the racing fraternity at St Francis' Church, which is located in Lonsdale Street, Melbourne. That Mass commenced at 9.00 am, and continued until at least 10.00 am. Following this, there was morning tea. Portelli said that the

applicant had not celebrated two large Masses on the one day, and that he would not have had time to do so.

461 In re-examination by Mr Gibson, Portelli said that on the day of the racing Mass, the applicant had attended another Mass sometime later that same afternoon. He agreed that the applicant had probably returned to the Cathedral after the morning Mass, before going on to that afternoon Mass.

462 When Mr Gibson suggested to Portelli that there would have been an 11.00 am Mass at the Cathedral on 3 November 1996, and that the applicant might, therefore, have been able to take part in that Mass at that time, Portelli disagreed. He insisted that the 11.00 am Mass would have been said by the Dean, or one of the other priests. He added that it would have been said in the Knox Centre, as the Cathedral was not yet available for use.

463 Accordingly, 3 November 1996 could not possibly have been the date of the first incident despite the prosecution's unwillingness, at that stage, to concede that point.

464 In cross-examination, Mr Richter put to Portelli a detailed list of Masses that had been said by the applicant in November and December 1996, and through to February 1997. Portelli agreed that the applicant had indeed attended, and celebrated, each of the listed Masses. These included the applicant having presided over a Mass at Maidstone at 3.00 pm on 23 February 1997.

465 Portelli said that he particularly recalled a Sunday solemn Mass at the Cathedral on 23 February 1997. On that occasion, the applicant had, for the first time, presided over, rather than celebrated, Mass. He said that his recollection was that a Father Brendan Egan had celebrated that particular Mass.

466 Portelli's evidence was that the first Mass that had been said back at the Cathedral, after the renovations had been completed, had been on 23 November 1996. That was the Mass of the Vigil of Christ the King, which took

place on the evening of the last Saturday of November each year.

467 In cross-examination by Mr Richter, Portelli said that the applicant did not say Mass again at the Cathedral from 23 November 1996 until 15 December 1996. He said that this was the applicant's first Sunday solemn Mass. He insisted that the only two Masses that the Archbishop said at the Cathedral throughout the whole of 1996 were on 15 and 22 December of that year.

468 In relation to the Priests' Sacristy, Portelli said that there had once been a sink 'about 300 mil square', with a single tap in the enclosed area where the vault was located. A shelf was constructed above it where a small bar fridge with a woodgrain front had been placed. It was at that sink that wine would be poured before being returned to the vault. He said that the concertina doors that were said to have had a woodgrain appearance, did not look similar to the current panelled doors, as depicted in various photographs that he was shown.

469 Portelli said that in 1996, the Archbishop's Sacristy was not in use for robing or disrobing. While the works were going on, that sacristy was used to restore a number of large paintings, as well as the stations of the cross, and other furniture. He knew that the Archbishop's Sacristy was not available before 23 November 1996, but could not recall whether it was available for that purpose in December of that year. This was because shellacking work was being done on furniture in that sacristy.

470 Portelli described the items that were stored in the vault in the Archbishop's Sacristy, and those items stored in the enclosed wooden panelled area of the Priests' Sacristy. He said that sacramental wine was 'bought in bulk, maybe twice a year.' He identified Sevenhill Sweet Sacramental White as the only wine that was used in the second half of 1996. He said it was housed in a 'dark bottle', and that there was a large label 'front and back.' He said that the wine would be stored in the vault, unless there were a plague of ants, in which case, it would be put into the fridge. When asked if the wine ever sat on the ledge, adjacent to the fridge, he said 'if so, it

wouldn't be for very long.'

471 Portelli described the vestments worn by the applicant when he said Sunday solemn Mass in the latter part of 1996. These included a crosier, a purple skull cap, a mitre, an alb, a cincture, a stole, a microphone pack, a cross worn around the neck, a green and gold cord worn down the back, a chasuble and, on very solemn occasions, a pallium and dalmatic.

472 Portelli described the alb as a 'free flowing garment that went down towards [the applicant's] shoes' and had a 'slit to the side to allow access to the wearer's trouser pocket.' When asked whether the alb could be pulled, or moved to the side, so as to expose the penis area, he said that this could not be done with the cincture on. He described the alb as containing a vast amount of material, with a circumference of almost four metres. When Mr Gibson asked him what the Archbishop did when he went to the toilet, Portelli sardonically remarked 'well you just don't.'

473 In cross-examination, Portelli demonstrated how the cincture was tied. He said that the tightness of it would stop the alb from being moved sideways, and forwards. He also said that he assisted the applicant with tying the cincture.

474 When asked what the Archbishop would wear when presiding over, rather than saying, Mass, he said that the applicant would be in completely different vestments:

> … he would be wearing what we call choir dress, which is a purple cassock. Over the top of that, there is a white garment called a rotchet, which extends down to the knees and has open arms, and over the top of that is the short purple cape.

475 When Mr Gibson asked Portelli, in evidence in-chief, about the size of the choir, he said there would have been 50 or so boys from Grade 3 through to Year 12. There were perhaps a dozen adult male singers as well. He never entered the choir rehearsal room while the choir was rehearsing, and he had never seen the applicant do so either.

476 Portelli acknowledged that, back in 1996, he had smoked about 20 cigarettes a day. He said that he would sometimes smoke while waiting for the applicant to arrive at the Cathedral. However, he was not permitted to smoke within the Cathedral, so that he would generally do so only in the courtyard or the carpark. When the applicant arrived in preparation for Sunday solemn Mass, Portelli would escort him through the presbytery and into the sacristy. He recalled having escorted the applicant to the Priests' Sacristy for the purposes of robing in 1996, while the Archbishop's sacristy was unavailable.

477 Portelli said that he had constantly accompanied the applicant from the time he arrived at the Cathedral until he de-vested in the sacristy. It was his responsibility to assist the Archbishop in vesting and de-vesting. There were other priests present in the sacristy during robing on Sundays. His practice was to finish robing first, and then to assist the applicant with his vestments.

478 Portelli said that following this, '… we would end up in the Cathedral. Sometimes we went by the external route, other times we went internally.' He could not recall whether, in late 1996, they had processed internally or externally. He said that if there was an external procession after Mass, the Archbishop would stop at the top of the stairs to the Cathedral, and greet parishioners as they left.

479 Portelli said that the procession generally extended for about 40 metres in length, from beginning to end. The altar servers had been instructed, when processing, to take a path that was further away from the Cathedral, rather than the one immediately adjacent to the Cathedral as they headed back towards the choir robing room.

480 Portelli emphasised that the applicant always greeted parishioners after Sunday solemn Mass. He said that this practice would take between about 10 and 20 minutes. He conceded, however, when pressed by Mr Gibson, that 'on occasion', the applicant might not have stopped, for an extended period, at the stairs, though he added that he could not recall any occasion on which the applicant had not done so.

481 In cross-examination by Mr Richter, Portelli said that the applicant would always be at the rear of the procession, being the most senior prelate present. He said that he himself had always accompanied the Archbishop in procession.

482 When asked about the second incident, and the possibility that the applicant could have found himself among a throng of young choirboys in the sacristy corridor, Portelli replied that this could have occurred 'only if they were waiting for him to go past.' He could not recall the applicant ever having pushed anyone. Nor could he recall the applicant seeking to overtake other clerics and altar servers, or thrusting his way into a throng of young choristers.

483 When questioned further about the applicant's practice of greeting parishioners on the steps, and then returning to the sacristy, Portelli said the two of them would remain in each other's company on the way back. He said that he invariably assisted the applicant in disrobing.

484 During cross-examination by Mr Richter, he confirmed that, as a matter of Church history, and Church Law, it was not permissible for the applicant to be left alone from the moment that he entered a Church.

485 In answer to Mr Gibson, Portelli acknowledged that there may have been an occasion, or occasions, where the applicant would enter a sacristy to disrobe without Portelli having accompanied him. He said that this might have occurred, for example, if there were another function in the Cathedral that afternoon, and Portelli had to return, at once, to the sanctuary to make sure that the books and the sermon were in place. If so, Portelli said that he would have been gone for only 'two minutes.'

486 Portelli said that there had been no such two minute absence on either of the first two occasions that the applicant had said Sunday solemn Mass in December 1996. He could be certain of that because there were no events scheduled for either afternoon.

487 In re-examination, Portelli insisted that, so far as he was aware, the applicant had never been alone in the Priests' Sacristy. If there had been a time when Portelli could not accompany the Archbishop, Potter would have ensured that someone was always with him.

488 Portelli was able to recollect two particular occasions when he had not accompanied the applicant into the sacristy. One was in June 1997, when Portelli was overseas. Another was in October 2000, when Portelli had undergone surgery. He could not recall any other time when he had not accompanied the applicant to the sacristy in order to help him disrobe.

489 Finally, Portelli said that he 'always' drove the applicant to wherever he had to go. He was present on every occasion that the applicant said Sunday solemn Mass in 1996, and again in 1997.

490 In re-examination by Mr Gibson, Portelli reiterated that he accompanied the applicant to all his Masses after September 1996.

491 Portelli's account, if accepted, would put a complete end to the prosecution case in respect of both incidents. The same result would follow from that account being regarded as a 'reasonably possible' version of events, because any such conclusion would render the complainant's account literally impossible.

Potter

492 Potter had been the Sacristan of the Cathedral between 1963 and 2001. His role was effectively that of a caretaker, responsible for preparation of the liturgies. He ensured that the sacramental wine, to be used during Mass, was kept in a special 'safe' which was a large vault in the Priests' Sacristy. He said that from 1996 onwards, white wine only, and never red wine, was used. He confirmed that the applicant was never on his own when he was robed.

493 According to Potter, Sunday solemn Mass was always said at 11.00 am. Normally, the Archbishop would be the principal celebrant, though sometimes he

was assisted by two other priests. There would also be Portelli, some eight or so altar servers, and the Cathedral choir, consisting of some 40 or 50 boys and a number of adults.

494 When asked whether he could recall the applicant having ever presided over, rather than celebrated, Mass, Potter said that he could, though that was a fairly rare occurrence. On such an occasion, the applicant would sit on the bishop's chair, dressed in choir robes, rather than the 'full regalia' associated with celebrating Mass.

495 It was Potter's responsibility to prepare the vestments for the Archbishop, laying them out for him to wear. He also had to lay out the vestments for any other priest involved in concelebrating the Mass.

496 According to Potter, the applicant only ever used the Archbishop's Sacristy. He could not recall a time when that room was not available. So far as the procession after Mass was concerned, it would take place outside if the weather was fine, but inside if it were wet.

497 In an external procession, having reached the main door, the choir would walk around the Cathedral to go into the Knox Centre. The applicant would remain at the steps of the Cathedral in order to greet people for sometimes 20 minutes, or half an hour. Potter said that

> In the meantime one of us, Monsignor — Father Portelli and myself would stay with the Archbishop. If Father Portelli was there I would go back into the Cathedral and clear the sanctuary, things from the sanctuary and take them back into the sacristy.

498 When questioned by Mr Gibson, Potter recalled that the renovations at the Cathedral had taken nearly six years to complete. The work was still being done for a time after the applicant had been appointed Archbishop. During that period of several months, the applicant did not celebrate Mass in the Cathedral. Potter added that '… our [sic] bishop's sacristy was not used by him during that period of time.'[141]

---

141 Potter's memory appears to have been prompted in providing this answer.

499 Potter was then asked about the consecration of the new altar in the Cathedral. He was reminded of the visit of an American Cardinal for that special occasion. His recollection was that it took place in 1996. However, he was plainly wrong about that since it was perfectly clear that this event took place in 1997. Potter subsequently acknowledged his mistake, and corrected it.

500 Potter said that one of his duties, prior to Sunday solemn Mass, was to fill the cruets with sacramental wine. He did that in the Priests' Sacristy. There were boxes of wine kept in the vault, with over a dozen bottles in each box. The vault itself was a large walk-in room, with five shelves for storage. He recalled the sink, or secorium, in the Priests' Sacristy, on the left-hand side of the wooden storage cupboard. Any wine not used in the Mass would be washed out in that area. The wine was sacred, and therefore could not be left sitting out. Once blessed, it was not permissible for it to be simply poured into the ground, or to go through normal pipes.

501 When asked whether there might have been times where a bottle that had been used to pour wine into the cruets had not been put into the safe, Potter said:

> … over my years of experience, as soon as I'd finished filling the cruets I immediately put the bottles away and never left them out.

502 Mr Gibson pressed Potter as to whether there might have been an occasion, during Mass, where a bottle of sacramental wine was not put back into the vault, but rather, left in the shelf area. Potter was adamant that this would never have happened, at least as regards Sunday solemn Mass. He said:

> … once the cruets are filled for the 11 o'clock Mass, everything was locked up in the safe. It was not left out openly.

503 Potter said that no wine was ever accessible from the unlocked wooden cupboard. It was his responsibility to make sure that things were stored appropriately after ceremonies. When questioned further as to whether it was possible that a bottle of sacramental wine had been left out, his response was that if this occurred, it would have been a 'rare occasion.' He said that it could really only

happen if there were another Mass following shortly after the 11.00 am Sunday solemn Mass. Then there would be extra cruet sets ready to be filled, in order to be used for that next Mass.

504 Potter said that when Dean McCarthy assumed his role in the Cathedral, he insisted that only white sacramental wine be ordered. This was contained in mostly clear white bottles. He said that the Priests' Sacristy would be locked while Mass was being said, and that he would only unlock it as the procession was going down the centre aisle, along the nave, after Mass. He would do so in order that both he and the altar servers could ferry things from the sanctuary back to the sacristies.

505 Potter's evidence was that once Mass had ended, and the procession had begun, it would take him something like five minutes before he would begin to move items from the sanctuary back into the Priests' Sacristy. These items included the chalice, ciborium, and cruet sets. He would also move candles and the thurible into the altar servers' utility room. He would allow parishioners that five minute opportunity to approach the sanctuary, kneel, and pray. He described this as 'private time.' He said that he would not have unlocked the Priests' Sacristy before that period had elapsed.

506 Potter said that he took part in the procession in the latter part of 1996 because the applicant had been newly appointed as Archbishop, and needed to be introduced to the local practices followed at the Cathedral. At that time, both he and Portelli remained with the applicant, assisting him at the front of the Cathedral, and then escorting him back inside. By that time, the choir would have disrobed, and gone home.

507 Potter described Portelli as having 'often' been with the applicant, meeting parishioners after Mass. He was asked how long such a greeting session would take. He referred to the Archbishop's popularity, and said that it would be 20 to 30 minutes. He added that 'you could almost set a watch' to the way in which the applicant greeted people. He said that he had an actual recollection of the applicant

standing at the front steps in 1996 when he first began saying Mass as Archbishop.

508 When Mr Gibson put to Potter that the applicant may have been at the front steps for a much shorter period of time than 10 minutes, at least on some days, he replied that it would depend on 'what function he was attending afterwards.' However, Potter was insistent that this would not have occurred on the first occasion that the applicant said Sunday solemn Mass. He added 'it took him [the applicant] a while to adjust and [he] stayed in there welcoming people for a couple of months at the Cathedral.'[142]

509 Mr Gibson, having previously sought unsuccessfully to elicit from Potter that the applicant may have stood at the front steps for less than 10 minutes, then asked whether he may have done so for no more than perhaps 10 minutes, or quarter of an hour. Potter accepted that this may have been possible, but added that he could not 'recall him spending just a short time unless there was inclement weather … where he couldn't stand outside …' Potter added that, in any event, an assisting priest would be with the Archbishop and would walk with him. He asserted unequivocally that the applicant would never be unaccompanied, and left on his own. The transcript reads as follows:

> MR GIBSON: And when you say 'in most cases', would there be some cases when priests were not there to assist him but he would be unaccompanied and on his own?
>
> POTTER: No, one of us would go down and greet him at the door and bring him back through the Cathedral.
>
> MR GIBSON: So when you said 'most cases', what were you referring to?
>
> POTTER: If Father Portelli wasn't there, he would let me know. I would go down and greet the Archbishop to bring him back in.
>
> MR GIBSON: Is it possible that whilst you were clearing the sanctuary that Archbishop Pell returned to the sacristy

---

142 As will be discussed later in these reasons, Mr Gibson made a great deal of that answer, before the jury, suggesting that it may have meant that the applicant did not begin the practice of greeting parishioners after Mass until 1997. The defence submitted that this was a distortion of Potter's evidence.

which he was going to de-robe in, and that you weren't present?

POTTER: No, I would always make sure that we looked after him personally. It was my responsibility to make sure the Archbishop — we were there to look after him.

MR GIBSON: Is it possible that Archbishop Pell was — attended his sacristy without you being present after mass?

POTTER: Not to my knowledge, no. Because I had to assist him, unrobe him, his vestments, and make sure the vestments were hung and then hand back his coat — or his coat and things like that.

MR GIBSON: So you say it's not possible that Archbishop Pell was in his sacristy without you present with him after mass?

POTTER: No, we were always there to assist him.

MR GIBSON: Very well. Can you categorically state that Archbishop Pell was never alone when he attended back at his sacristy to disrobe?

POTTER: No, there was always one — there was an assisting priest or one of us on the sacristy would come and greet the Archbishop.

510 If Potter's evidence were to be accepted, or even merely regarded by the jury as a 'reasonably possible' account of the facts, it would logically follow that the prosecution case would fall away. The timeline would simply be too tight.

511 Recognising that fact, Mr Gibson put to Potter, by way of cross-examination that on 5 December 2016, he had had a conversation with Detective Sergeant Christopher Reed, the informant. In the course of that conversation, the topic of the Archbishop having been alone when he returned to the sacristy had come up for discussion. Mr Gibson suggested that Potter had told Reed that it was possible that the applicant had been in the sacristy without Potter having been present. Potter replied:

> If I was doing something special and he was there, but he would have an assistant - - -
>
> … if I wasn't present with him, one of the priests would be with him. So it would mean that I would not have to [be] present all the time. He had someone with him.

512 Mr Gibson also put to Potter that he had told Reed that he could not state categorically that the applicant had never been alone when he returned to the sacristy after Mass. Potter replied:

> … because sometimes I was in another area and when I'd come back in[,] one of the priests or … Portelli would be there but I'm not necessarily say [sic] I saw him every time.

513 Mr Gibson subsequently relied upon Potter's answers to Reed's questions, during this interview, as casting doubt upon the reliability of his evidence. Substantially on the basis of those answers, he invited the jury to put Potter's evidence to one side.

514 When Mr Gibson asked Potter about the Archbishop's robes, he described them in much the same terms as had Portelli. The transcript reads as follows:

> MR GIBSON: The nature of the alb worn by Archbishop Pell was that it would enable or it could be moved to the side, I suggest, to allow exposure of one's penis if one wanted to?
>
> POTTER: I'm sorry, I disagree with that completely, Your Honour, because it's inhumanly impossible because the alb is tied with a cincture and locked in and it can't be moved. The cincture ties around his waist, and then with the cincture then a stole is placed over — in that area as well, and no way could the alb be moved in that area - - -
>
> …
>
> HIS HONOUR: Finish your answer, Mr Potter. Finish your answer. Have you finished your answer?
>
> POTTER: So it'd be impossible because the size of the pockets are small and once the chasuble's on as well — he never walks around with the alb on his own, it's always completely with the vestments, the chasuble covers everything, and there's no way then could he move around with his hands in his pocket or in that area at all.
>
> MR GIBSON: The chasuble of course does not prevent access to the zipper of the trouser or the groin area, does it?
>
> POTTER: What he's wearing no way could he do it.

515 In cross-examination by Mr Richter, and albeit after some prompting, Potter acknowledged his error in having transposed 1997 into 1996 as the year when the consecration of the new altar took place.

516 Potter agreed that the first Sunday solemn Mass, celebrated by the new Archbishop, had been a very significant event. It had been conducted before a packed congregation. He said that he had a specific recollection of that day, and insisted that Portelli had remained with the applicant throughout, in order to assist him.

517 Potter agreed that the Priests' Sacristy, and not the Archbishop's Sacristy, would have been used on that first Sunday solemn Mass. He again insisted, as he did throughout, that the Archbishop would never have been left on his own. He was also adamant that he would not have left the sacristy doors open when departing for Mass. That was because the concelebrant priests had left their coats and valuables in that room.

518 Potter said that the entire Mass would not be over for the altar servers until they had actually gone into the Priests' Sacristy after Mass, and bowed to the cross. He said that there would be a good deal of traffic in and around the Priests' Sacristy after Mass, as items were taken from the sanctuary to that room. He would have been involved in that process. In addition, there would have been priests coming back to the sacristy in order to disrobe.

519 Potter said that the choir was always under the disciplined control of the choirmaster (Mallinson), who was assisted in that regard by the adult members of the choir. He said that he had no doubt about any of these matters. He was adamant that they were all matters of which he had personal knowledge.

520 As with Portelli, if Potter's evidence were to be accepted, this would put an end to the prosecution case. The same would follow if Potter's account were to be regarded as a 'reasonably possible' version of relevant events.

McGlone

521 A significant difference between the evidence led at the first trial, and that adduced during the course of the second trial involved the unexpected emergence of a new and surprise witness, Daniel McGlone. The defence regarded his evidence as being important since, on one view, it provided some support for the evidence of Portelli and Potter as to what might be described as the 'steps alibi.'[143]

522 McGlone was an altar server at the Cathedral in 1996. He served almost every Sunday. He could recall one specific occasion, during that year, when he participated in a procession as an altar server, immediately after a Sunday solemn Mass celebrated by the applicant.

523 McGlone's evidence as to the specific occasion was as follows:

MR GIBSON: On the occasion that you recall specifically serving Archbishop Pell was that an external or internal procession into the Cathedral?

McGLONE: External.

MR GIBSON: Do you specifically recall the procession into the Cathedral?

McGLONE: I believe so.

MR GIBSON: So you have an actual recollection of processing into the Cathedral on this specific occasion; is that what you said?

McGLONE: Well, I would have to say yes.

MR GIBSON: And why is that that you would have such a memory?

McGLONE: I was a bit work proud as — as server, and there was — you know, there's always a sense of excitement when you've got the Archbishop and a sense of pride in what you're doing, and I would — I have a memory of the

---

143 An 'alibi', in this context, of course, means that the accused says 'I was somewhere else at the time this offence was said to have been committed.' One of the main issues in this case was whether, as the defence claimed, the applicant stood on the steps, outside the Cathedral, conversing with parishioners at the very time that he was supposed to have been committing the offences encompassed within the first incident. This was always going to be an important issue. However, it became even more pivotal when, eventually, it became clear that the only dates upon which the first incident could have occurred were either 15 or 22 December 1996. Those were the dates for which the applicant could adduce positive evidence of what was tantamount to an 'alibi.'

first time that George Pell was Archbishop in the Cathedral and I remember being excited by that.

MR GIBSON: When did he become Archbishop?

McGLONE: In 1996.

MR GIBSON: And when specifically?

McGLONE: August I think.

524 McGlone accepted that he could not remember the exact date of the occasion that he described. All that he could say was that it occurred sometime between October and December 1996. His evidence continued:

MR GIBSON: Coming back to this specific occasion at St Patrick's Cathedral about which you recall, into serving for Archbishop Pell, having processed out of the Cathedral, do you recall specifically processing out of the Cathedral, Mr McGlone?

McGLONE: I believe so.

MR GIBSON: What is it about that particular processing that distinguishes it from every other processing that you had for other priests, including Archbishops?

McGLONE: Just that we had Pell with us.

MR GIBSON: Prior to that ceremony commencing, did you know that Archbishop Pell, that is, in the days prior, did you know that Archbishop Pell would be celebrating it?

McGLONE: No.

MR GIBSON: When did you learn of that?

McGLONE: I think almost immediately before we went into the sacristy.

MR GIBSON: And you saw who it was?

McGLONE: M'mm. Yes.

MR GIBSON: Having processed out the front of the St Patrick's Cathedral, that is, the western door, - - -?

McGLONE: Yes.

525 When questioned further about that occasion, McGlone said that he remembered having walked along the sacristy corridor, after Mass, and gone into the

Priests' Sacristy. He recalled that the door to the sacristy was unlocked. That was because the thurifer[144] had gone into and out of that area immediately after Mass was over.

526 The transcript continues:

MR GIBSON: Do you recall what you next did?

McGLONE: I remember being in the room and very conscious because I was aware that my mother was in the — in the congregation, and I remember excusing myself without actually taking on any roles, and, um, then — well, after we bowed to the crucifix — um, and then sort of said, made quick excuses and ran off effectively, and I went down — let's see — if you go from the doors of the priest sacristy you just go straight this time and you then turn left to the main entrance into the Cathedral for the sacristy. Then I went around to the front of the altar, genuflected and went down the nave.

MR GIBSON: So you remember genuflecting, do you?

McGLONE: I always genuflect.

MR GIBSON: Mr McGlone, I am asking you whether you have a specific recollection as to — not as to your practice, what you would always do, but do you have a specific memory of doing that?

McGLONE: I know it sounds a bit mad, but I never not.

MR GIBSON: But do you understand - - -?

McGLONE: I understand - - -

MR GIBSON: - - - I am directing my question to your state of mind and whether you have a positive state of mind back in 1996 of genuflecting after you had come out of the priest sacristy on your way to meet your mother. That's my question?

McGLONE: Well, I do.

MR GIBSON: Very well. Can I ask had anyone else entered the priest sacristy with you when you went into that room after the procession had finished?

McGLONE: Well, the procession — all the servers go into the priest sacristy and then we're in formation and we bow to the

144 The acolyte carrying the incense burner.

crucifix. We're not finished the procession until that happens.

MR GIBSON: At that point is any priest with you?

McGLONE: Well, um, sometimes there is and - - -

MR GIBSON: No, I am asking about this occasion?

McGLONE: I don't recall there being any priests with us.

MR GIBSON: When you left that room you left the door open or closed?

McGLONE: It's like the green room in an opera house, it's open. That's where all the sacred vessels go. So in order to clean up the sanctuary the servers are moving back and forth into that room.

MR GIBSON: So what's the answer to my question?

McGLONE: Well, I don't have the authority to lock the door.

MR GIBSON: So is the answer to my question that the door was left open when you left the room?

McGLONE: Yes.

MR GIBSON: Having genuflected you made your way up the nave you said?

McGLONE: That's right, to try and catch my mum.

MR GIBSON: At what stage had you organised for your mum to be in the congregation?

McGLONE: Well, mum would come up and meet me after Mass to have lunch on occasion, very rarely, and I wouldn't be making the arrangements, mum would.

MR GIBSON: So rarely she would come up and have lunch with you after mass; come to Mass and then meet you afterwards for lunch, is that right?

McGLONE: Yes.

MR GIBSON: How many times would that happen?

McGLONE: I think three times in my life. Unusual for my mum to have lunch with me.

MR GIBSON: Where was she in the — that is what was her position, location in the congregation when you met up with her?

McGLONE: Well, she wasn't in the congregation, she was walking

out and I caught up with her about two–thirds of the way down.

MR GIBSON: What was the state of the congregation, that is how full or empty was the Cathedral at that point?

McGLONE: Well, I had left the group pretty quickly. It seemed to me that it was still emptying out, probably about a third full.

MR GIBSON: What about any music being played?

McGLONE: I can't remember.

MR GIBSON: At the time that you genuflected had the clearing of the sanctuary commenced or not?

McGLONE: I don't believe so. I was the first one out.

MR GIBSON: Were parishioners still praying, that is kneeling and looked like they were praying at that point?

McGLONE: I believe — I believe so, I wasn't really paying attention. There were people around — yes, there were.

MR GIBSON: So there was sort of a period of decorum, was there, where people were still engaged in the aftermath of the ceremony?

McGLONE: Yeah, correct.

MR GIBSON: All right. You said your mother was where when you met up with her?

McGLONE: About two–thirds of the way down the nave.

MR GIBSON: You said that you excused yourself from any roles, that is altar serving roles, so that you could go out to your mother, is that right?

McGLONE: I wouldn't put it as high as that.

MR GIBSON: That was your words, 'Excusing myself from any roles'?

McGLONE: Well, maybe - - -

MR GIBSON: They were your words?

McGLONE: Maybe that's misleading. I just — people were going to start cleaning up and I excused myself from obviously what they were about to do. I didn't specifically say, you know, that, I just said, 'Look, I've got to go. My mum's out the front.'

MR GIBSON: So within how many seconds do you say that you met up with your mother? Within how many seconds after reaching the Priests' Sacristy was it that you met up with your mother two–thirds of the way down the nave?

McGLONE: Well, I wasn't running. I was still wearing a soutane and surplice and I was still sort of on duty in a way, so people were going to see me, so I — I was just walking briskly from that distance to the — to the centre of the nave, genuflected and then briskly walked towards my mother.

MR GIBSON: So are you able to say how many seconds?

McGLONE: Couldn't say.

MR GIBSON: All right. But alter serving clearing duties had not commenced and the sanctuary had not been accessed for clearing duties. Is that right?

McGLONE: Correct.

MR GIBSON: Having met your mum, what happened?

McGLONE: Well, after I met my mum, Mum kept on moving. She's a bit impatient.

MR GIBSON: Can I just stop you. You were meeting your mum for lunch. Is that right?

McGLONE: To be honest, I can't recall why I was meeting her.

MR GIBSON: You wouldn't be having lunch in your soutane and surplice, would you?

McGLONE: No. No, god, no. It was just that I didn't have time to unvest. I had to try and placate my mother.

MR GIBSON: But to be honest, you can't recall why you were meeting her after mass. Is that right?

McGLONE: She could have been checking up on me. It could have been anything.

MR GIBSON: Having met up with your mum, what did you next do?

McGLONE: Well, Mum was sort of, needed to be, sort of, placated, so I met up with her - - -

MR GIBSON: Sorry?

McGLONE: Placated.

MR GIBSON: Your mum had to be placated?

McGLONE: She's got a fiery temper, and - - -

HIS HONOUR: Said a what, sorry?

McGLONE: She has a bit of a fiery temper. She gets a bit impatient and anxious, so I'm talking to her. We walk — we keep walking together until we go out to the front. I'm not sure how we went to the — out the front, whether the door, main doors are still open, and then we end up stopping — there's a sort of little porch inside the Cathedral when you're outside and on the stop [sic] step and we stopped there on the, you know, if you're looking out of the doors to the right–hand side, and I start talking to her, and George Pell is to — on the left–hand side, and he's doing the meet and greet. I'm talking to my mum.

MR GIBSON: Sorry, when you say he's doing the meet and greet, as I understood it, this was the first time you'd served him?

McGLONE: Yes.

MR GIBSON: Yes, keep going?

McGLONE: But to explain then, - - -

MR GIBSON: What did you mean by he's doing?

McGLONE: Frank Little never came out and spoke to the people, and he was, I don't know why he didn't think it was — he didn't do that, but it was something that George Pell did on this occasion and that I recall him doing subsequently where he would actually speak to people after mass.

MR GIBSON: Sure. I just asked you, even if Frank Little didn't do it, and give you say this is the first time you served him, why you didn't say, 'and he was meeting and greeting people', as opposed to, 'he's doing the meet and greet'?

McGLONE: Well, it's something that you see in Anglican Churches a lot, with a vicar at the end church, and it's — in Church circles it's not an unusual phenomenon. It is just unusual at the Cathedral.

MR GIBSON: Yes, continue, please?

McGLONE: So, he — George Pell was doing that. I was talking to my mum. She calmed down a little bit, but in an effort to sort of distract her I asked her whether she would like to meet the Archbishop, and before she really responded to that, I just took her over and said, 'Your Grace, this is my mum', and he said in his usual manner, the sort of way he spoke, 'You must be very proud of your son'. I — I assume it's because I'm still

> wearing my soutane and surplice, and Mum responds by saying, 'I don't know about that', which was embarrassing, of course, and then you know, I just dealt with Mum, managed her and then we — I said to Mum, 'Look, I'm really sorry, I've got to get back to help out with tidying up the Cathedral and — but I won't be very long'.

527 Plainly, McGlone's evidence as to his own movements immediately after Mass on this occasion stood in stark conflict with the complainant's account of events (at least insofar as it referred to one of the only two dates put forward upon which the first incident could have occurred).

528 McGlone's evidence was that he had been in the Priests' Sacristy, along with other altar servers, shortly after Mass had ended, on the day in question. He said that there was a lot going on in and about that area. That description could hardly be reconciled with the complainant's account of how he and the other boy had made their way into the unattended Priests' Sacristy.

529 In addition, McGlone was quite specific about the applicant's practice of meeting with parishioners at the steps of the Cathedral, immediately after Sunday solemn Mass. He said that he had personally witnessed the applicant having done so, on a regular basis, right from the very first time that he said Sunday solemn Mass.

530 In cross-examination, McGlone's evidence was:

> MR RICHTER: You've already talked in terms of Archbishop Pell's new habit of standing on the stairs, and as far as you were aware whenever he said Mass he would stay outside and speak to the congregation?
>
> McGLONE: Well I saw it the first time and then he continued from there on.
>
> MR RICHTER: He made that a tradition, in contradistinction to his predecessor?
>
> McGLONE: The impression was very much that it was a deliberate contrast to the previous administration.

531 It is tolerably clear that McGlone's evidence as to the first occasion on which

the applicant said Sunday solemn Mass could, as a matter of practical reality, only have related to 15 December 1996. It is true that his evidence did not, in terms, exclude the possibility that the first incident (if it occurred at all) took place not on that date, but on the following Sunday, 22 December 1996. This was a point Mr Gibson made in his closing address. In that sense, he argued that McGlone's 'alibi' was, at best, a partial alibi only.

532 However, if McGlone's account were to be accepted, or even to be regarded as a 'reasonably possible' version of events, it would significantly undercut a particular submission put forward by Mr Gibson in his closing address, and upon which the jury were invited to act. That submission referred to the applicant's 'invariable practice' of standing on the steps of the Cathedral, immediately after Mass, as a practice that might not have developed until much later than December 1996. In support of that argument, Mr Gibson drew heavily upon Potter's evidence that there had been 'an adjustment period', after the Archbishop's appointment.

533 If, as McGlone insisted, the applicant had remained on the steps talking to parishioners (and in particular, to McGlone's mother) for an extended period of time on 15 December 1996, that would make it likely that he adopted the same practice thereafter. It would certainly weaken Mr Gibson's argument that the practice did not commence until 1997.

534 McGlone approached the defence after the first trial. He did so, he said, because he realised that he might have important evidence to give in relation to this issue of the applicant having remained on the steps after Mass. McGlone is currently a practising member of the Victorian Bar. He would, no doubt, have followed the proceedings in the first trial with interest.

535 The defence acknowledged that McGlone was by no means a perfect witness. At one point in his evidence, he denied having taken part in the Saturday evening Mass that the applicant had conducted on 23 November 1996. He added that he did not believe in Vigil Masses of that kind. However, a photograph taken at that Mass

showed conclusively that he was in error in that regard. He had, in fact, been present on that occasion, and appeared in that photograph.

536 Nonetheless, Mr Richter submitted that McGlone's evidence regarding the meeting between his mother and the applicant, at the front steps of the Cathedral, had a powerful ring of truth about it. He submitted that it was just the kind of event that would leave an indelible mark in McGlone's memory. It concerned the very first time the Archbishop had said Sunday solemn Mass at the Cathedral. It involved a rare occasion on which McGlone's mother had come to the Cathedral, in order to have lunch with him. Having been suitably embarrassed by what his mother had said to the Archbishop, on that signal occasion, it was submitted that McGlone would be likely to have remembered it.

David Dearing

537 David Dearing was aged about 13 in 1996. He was a scholarship boy in the Cathedral choir, and also attended St Kevin's College. He regularly took part in Sunday solemn Mass.

538 He was asked whether he had ever seen the applicant robed without being in the company of Portelli. His recollection was that they were always together. He described Portelli as the applicant's 'bodyguard', 'shadowing' him at every turn. He recalled the applicant stopping at the front steps to the Cathedral after Mass, and then not seeing him again as the procession kept going around the corner, along the south side of the Cathedral. He also recalled seeing the applicant still robed, standing at the front steps, and talking to parishioners, after he himself had de-vested. That would have been 10 or 15 minutes after Mass.

539 David Dearing said that during the course of an external procession, there was an orderly and disciplined line under the close supervision of Finnigan, who was a stickler for making sure that the choristers were properly behaved. He never saw any of the choristers deviate from the line. If they had done so, something would have been said. This was particularly important while the choir was in public

view. Discipline would be maintained until the choir reached the toilet corridor, and went past the steel gate.

Rodney Dearing

540 Rodney Dearing was David Dearing's father. He had, in the past, been a pastoral associate, or assistant to the priest at various parishes. He himself had been a member of the Cathedral choir from 1993 until 2002. Because he was an adult, and a bass at the time, his position in the procession was towards the rear.

541 Rodney Dearing was asked about the practice associated with the procession after Mass. He said it would continue out the front door of the Cathedral, except for the Archbishop and the Master of Ceremonies, who would remain behind at the main door. He was unaware of any occasion when that did not occur. He could recall, after disrobing, going back around to the front door to say hello to the Archbishop, who would still be there. He said that this occurred reasonably often.

542 Rodney Dearing said that the choir was 'on show' while en route to the choir rehearsal room. Even though they were young boys, order and discipline were required. 'Mucking up' was not tolerated. Such order was always maintained. He agreed, however, that there would be a 'bunching up' in the toilet corridor, proximate to the glass door, once the choir were no longer in public view.

543 When asked whether it was possible for a couple of choristers to separate, unnoticed from the procession, he said 'not with 10 or so adults at the back, observing, being able to see in front of them.' He remarked upon the distinctive choir dress worn by the boys. When Mr Gibson asked him whether he allowed for the possibility that two boys might break away, unnoticed, he said that he did not think that could happen. It had never occurred, so far as he was aware.

544 In cross-examination by Ms Shann, junior counsel at trial and before this Court, Rodney Dearing said that he was aware of the old tradition and Church Law that a Bishop, whilst robed, must never be left alone. He identified a photograph of

the applicant dressed in the particular robes that he had seen the applicant wear in 1996. He said that he was generally one of the last to leave the choir room after the choir had de-vested, and that 'reasonably often' he would see the applicant, still robed, and still talking to parishioners at the front steps of the Cathedral. Whenever Rodney Dearing saw the applicant robed, he was always in the company of Portelli.

545 The transcript of the cross-examination reads as follows:

MS SHANN:	So the prosecution allegation here is that two robed sopranos nicked off from an external procession at some point before the glass doors into the Southern Transept and no one noticed. Is that possible?
RODNEY DEARING:	I don't believe so.
…	
MS SHANN:	If two heads were missing, noticed missing at that point steps would have been taken to locate them?
RODNEY DEARING:	Absolutely.

546 Ms Shann asked him about the sacristy corridor in the period 10 to 15 minutes after Mass. He said that it would have been 'bustling.'

Mallinson

547 Mallinson had been an organist at St Patrick's Cathedral from 1976 to 1999. He also took over the duties of choirmaster during that period. At the time of the second trial, he was aged 84. He gave evidence as to the use of the small choir robing room, later known as the Director of Music room.

548 Mallinson said that whenever he saw the applicant robed as Archbishop, Portelli was with him. If, for some reason, Portelli had to be somewhere else, Mallinson said that he believed Potter would accompany the Archbishop, though he acknowledged that he had no clear recollection of that ever having occurred. He agreed that the applicant was a 'stickler for protocol', and 'conservative in terms of Church liturgy and traditions.' He also agreed that the first time the applicant said

Sunday solemn Mass at the Cathedral on 15 December 1996 was a 'significant occasion.'

549 Mallinson said that if a child had 'nicked off' from the procession, he would have expected to have been told about it. He would have asked questions. He said that Finnigan was 'a bit fierce' and, in effect, a stickler for discipline. He had personally witnessed Finnigan 'bawling people out' for chatting too much during the procession.

550 Around 1996, there was a general awareness, within the Church, of the problem of clerical abuse. Accordingly, great care was taken at that time to monitor the young boys in the choir. Mallinson had no recollection of two choirboys ever having gone missing, even temporarily.

551 Mallinson was by no means a pliant witness so far as the defence were concerned.[145] When Mr Richter put to him that, while playing the organ after Mass, he would have seen two young robed choristers walking back into the Cathedral after the procession, had that occurred, he disagreed.

Cox

552 Cox had formerly been the Director of Music at the Cathedral. He was there throughout the mid-to-late 1990s. He was assistant organist and choirmaster until 1999, and then took over in those roles from Mallinson.

553 Cox had no specific recollection of any Sunday solemn Mass in the latter part of 1996. However, he was able to give evidence as to the routine, or practice, that was followed on those occasions.

554 With regard to the procession outside the Cathedral, he said that the boys tended to chat, though they were discouraged from doing so. They were expected to

---

[145] Mallinson said that he had seen the applicant in the sacristy corridor, both on his own and accompanied by another. He also said that he had seen the applicant robed and unrobed. However, he did not say that he had ever seen the applicant on his own, while robed.

maintain a solemn demeanour until they arrived at the choir room. The formation would break up at about the point when they reached the glass door, which was at the end of the toilet corridor.

555 When asked whether a roll-call was taken after the choir returned to the rehearsal room, Cox said no, but added that there was little opportunity for anyone to go missing.

556 Cox described the sacristy corridor, after Mass, as a 'hive of activity.' Altar servers were very busy removing materials from the sanctuary and taking them back out to the sacristy. This would begin as soon as the procession had left the Cathedral. There would be people putting things away in the Priests' Sacristy. He could specifically recall Potter having been engaged in that activity.

557 Cox recalled that in December 1996, rehearsals had been scheduled after Sunday solemn Mass. He was shown a document concerning these rehearsals, which had been circulated to parents in advance, suggesting that they would begin at 12.00 pm. He described that start time as 'wishful thinking.'

558 Cox said that when he himself took part in the procession, and was behind the choir, he watched the choristers 'like a sheepdog.' He would circle them, making sure that they did not misbehave. In particular, he agreed that Finnigan ensured that no young choristers went missing, and that the procession remained orderly throughout. The procession was seen as part of the Mass until the choir got to the glass door. It was a disciplined group.

559 The transcript reads as follows:

MR RICHTER:	If any young children ran up behind the procession that was lined up at the toilet corridor in order for them to get in with the rest of the choir they'd have to go past a number of adults?
COX:	Well, it simply wouldn't happen.
MR RICHTER:	It certainly never happened in your memory?
COX:	No.

MR RICHTER: It certainly never happened as far as you heard anyone talk about it?

COX: No.

MR RICHTER: And if it had ever happened, if theoretically it had happened it would be a situation where some adult, Brother Finnigan or you or somebody else in authority, some of the grownups in the choir would say, 'Where have you been?'

COX: It never happened.

560 Cox described the scene around the Priests' Sacristy, shortly after Mass had concluded, as one in which there would be a number of persons present. Priests would be there, in order to disrobe. Potter would be present, as would various altar servers returning vessels, and the like, from the sanctuary to the sacristy.

Finnigan

561 Finnigan had previously been a Christian Brother, but left that order in 2003. He had taught at various schools, both in Victoria and interstate. He was also associated with the supervision of choristers at the Cathedral. He was, himself, a member of the choir until Christmas day, 1996. His position at the Cathedral was described as 'choir marshal.' This role was akin to that of a teacher, as he provided supervision and discipline to the choristers.

562 Finnigan described the route that the procession would follow after Sunday solemn Mass as being, in the case of an external procession, out the western door of the Cathedral (the main entrance), and then back into the choir room through the glass door at the end of the toilet corridor. He said that the choristers were required to be in formal procession while waiting to move into that corridor because there were always a lot of tourists present, taking photographs.

563 Finnigan recalled additional Sunday rehearsals in the latter part of 1996. Those rehearsals were held after Mass had concluded.

564 Finnigan said that he would walk behind the choristers while they were in

procession. He would be between the choir and the South Transept as the boys were marching along. He said that if two young boys had 'nicked off', he would have seen them doing so, unless he had been distracted. He had never heard of any such thing happening. He agreed that he was a strict disciplinarian.

565 Finnigan was asked what the Archbishop was doing as the procession moved along. He said that his memory was that the Archbishop would usually stand on the steps of the western door, and greet parishioners.[146]

566 In relation to the rehearsals, Finnigan said that the younger choristers would be expected to sit in the front row. If, for whatever reason, they were not present, there would be empty chairs, plainly visible. He had never noticed anyone missing from the rehearsals. He had a specific recollection of those rehearsals having taken place.

567 Finnigan said that he could recall the two Sunday solemn Masses celebrated by the applicant in December 1996. He could also recall that there were other priests concelebrating on those dates. He knew that they would robe and disrobe in the Priests' Sacristy. He had never seen the Archbishop, on his own, when robed. He said that immediately after Mass, there were people everywhere in the sacristy corridor. They would be coming and going, into and out of the Priests' Sacristy, for at least the next 10 to 15 minutes after Mass had concluded.

Connor

568 Connor had been an altar server at the Cathedral from 1994 until November 1997. Whilst there, he had kept a detailed diary of appointments and events. Included among these were notes as to specific Masses. He recorded the type of Mass, as for example, whether it was a solemn Mass or an ordinary Mass. He also recorded the name of the celebrant and what role, if any, he had played. He spoke of

---

146 This was of considerable significance since Finnigan ceased to be involved with the choir on Christmas day 1996. Accordingly, Finnigan had to be referring to the applicant's practice in December of that year. He could not have been referring to the applicant's predecessor, Archbishop Little, who never adopted that practice at all.

Kairos, the Catholic Church magazine, which set out matters regarding the Cathedral that were of interest to the wider Catholic community. He had attended every Sunday solemn Mass that he could.

569 In September 2018, between the first and second trials, Connor had provided Detective Sergeant Reed with his diary. He had no independent recollection of the events set out therein. However, his evidence was to the effect that the diary contained an accurate record of what had taken place at the relevant time.

570 Connor recalled the applicant having celebrated Sunday solemn Mass. There were two occasions when the applicant had been present at the Cathedral, but not as celebrant. The applicant would then have presided. He would have worn choir dress, a soutane with a long surplice, very different from the Archbishop's robes when saying Mass. He described the soutane as having fake but decorative buttons down the outside.

571 Connor said that the applicant had only celebrated Sunday solemn Mass twice at the Cathedral in 1996. He was asked about an entry in his diary for 23 February 1997, which was the last Sunday of that month. Father Brendan Egan was listed as the celebrant, and the applicant as having presided.

572 In cross-examination, Connor agreed with Mr Richter that the applicant would have been at the rear of the procession, even if he were merely presiding, rather than celebrating Mass. He said that he recalled Portelli having been with the applicant on both of the occasions, in 1996, that the applicant had celebrated Sunday solemn Mass.

573 Connor said that when Mass started, the doors to the sacristies were always locked. In order to gain entry, Potter would have had to unlock them. The Priests' Sacristy remained locked until after Mass had concluded. At that point, Potter would open the doors so that the altar servers could gain access.

574 According to Connor, Potter was always either in the sacristy or going

backwards and forwards between the sacristy and the sanctuary. Connor said this was Potter's invariable practice. He said that it was the same practice as would have been adopted on 23 February 1997. The process of clearing up after Mass would always take 10 minutes or more, with people constantly going into and out of the Priests' Sacristy.

575 Connor could not recall any occasion when that room had been left unlocked and unattended. The applicant would only come back to the sacristy area after he had finished greeting people at the conclusion of Mass. He described this as the applicant's 'invariable practice.'

576 Connor said that he would see the applicant returning from the front steps of the Cathedral, 10 minutes or so after the procession had concluded. He could not recall any occasion when the applicant, while still robed, was unaccompanied.

577 In re-examination, Connor insisted that the applicant would always remain at the front of the Cathedral after Mass, in order to greet congregants. He said that the applicant would do so even if it were raining.

Parissi and Bonomy

578 Parissi had been a member of the Church choir from 1991 through to 2001. He said that after Sunday solemn Mass had finished, he recalled the applicant, on the odd occasion, either coming into the choir room, or at least passing by. The applicant would say 'thank you' and 'congratulations for a well sung Mass.' The applicant was no longer robed by that stage.

579 When asked whether it would have been possible for two of the choirboys to have separated unnoticed from the procession, as it passed the South Transept while making its way back to the choir room, his answer was 'ah no.' He added that it would be hard to miss a chorister, dressed in full robes, running off. He agreed that there was a clear line of sight going down the line of the procession. That line had been two-by-two, marching in unison. Any breakdown in discipline would not have

occurred until the choir had gone into the toilet corridor, and were close to the glass door.

580 Once the choir returned to the choir room, there was a process of hanging up the robes, which were themselves numbered. The boys would also have to return the sheet music, and then sit in their allocated positions until they were dismissed.

581 Bonomy had been a member of the choir from 1990 to 1998. In 1996, he had been aged 15. When asked about the movement of procession, after it had exited from the Cathedral, he said that the choir would 'just process normally out, back into the robe room.' They would go through the glass door. The procession was still orderly at that stage because they were on show for everyone. As soon as the glass door opened, everyone dispersed.

582 Bonomy said that he had seen the applicant in the sacristy corridor, at various times, both robed and unrobed. He only saw him robed and unaccompanied before Mass, but never after Mass.

583 In cross-examination, Bonomy had no doubt that if a couple of young boys in front of him had decided to 'buzz off', he would have seen that happen. He had never heard of any such thing having occurred, and it would be a serious disciplinary offence if it did.

The prosecution and defence cases summarised

584 It can be seen from this summary of the evidence given at trial that, as I have now said a number of times, the prosecution case was based entirely upon the complainant's evidence. Despite the fact that there was no independent support for the complainant's account, the prosecution relied upon his credibility and reliability in order to satisfy the jury, beyond reasonable doubt, of the applicant's guilt.

585 The defence case, on the other hand, was factually complex. It involved, to a considerable degree, a combination of the evidence given by several key witnesses (Portelli and Potter, and to a lesser degree, McGlone) as well the evidence of some 20

or so other witnesses, all of them called by the prosecution at the behest of the defence.

586 Portelli and Potter each said that they had a clear and specific recollection of both of the only two days in December 1996 on which the first incident might conceivably have taken place. Their evidence refuted the possibility that it could have occurred in anything even remotely resembling the complainant's account. McGlone's evidence was generally supportive of the evidence given by Portelli and Potter, though it was of more limited scope, being confined to one of those two days.

587 In addition, there was the evidence of those many witnesses who testified as to matters of practice, described by commentators as 'habit and custom' (Mallinson, Cox, Finnigan, Connor, the two Dearings, Parissi and Bonomy). Their evidence, if accepted, tended strongly to negate the complainant's account, though not as directly as the evidence of Portelli, Potter and McGlone.

588 Of course, there was also other evidence casting doubt upon the prosecution case. There was the hearsay evidence of the other boy's mother, as to his having denied having been sexually abused at the Cathedral while a member of the choir. There was a statement of agreed facts, which, on my reading of it, in no way advanced the prosecution case. Finally, there was the applicant's record of interview, in which he denied having committed the offences alleged against him.

Ground 1 — jury's verdict unreasonable or incapable of being supported by the evidence

The relevant legal principles

589 By virtue of s 276(1)(a) of the CPA, this Court is required to allow an appeal against conviction if it considers that the jury's verdict is 'unreasonable or cannot be supported having regard to the evidence.'

590 The test to be applied when dealing with this ground was set out by the High

Court in *M v The Queen* ('*M*').[147] The question which the members of this Court must ask themselves is whether they think 'that upon the whole of the evidence it was open to the jury to be satisfied beyond reasonable doubt that the accused was guilty.'[148]

591 The decision in *M* requires each member of this Court to make his or her own 'independent assessment' of whether, on the evidence as a whole, there is a reasonable doubt as to the guilt of the applicant. In doing so, the members of the court must give full weight to the jury's advantage in having seen and heard the witnesses give their evidence.[149]

592 As the joint judgment (Mason CJ, Deane, Dawson and Toohey JJ) in *M* states:

> 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. That is to say, where the evidence lacks credibility for reasons which are not explained by the manner in which it was given, a reasonable doubt experienced by the court is a doubt which a reasonable jury ought to have experienced. If the evidence, upon the record itself, contains discrepancies, displays inadequacies, is tainted or otherwise lacks probative force in such a way as to lead the court of criminal appeal to conclude that, even making full allowance for the advantages enjoyed by the jury, there is a significant possibility that an innocent person has been convicted, then the court is bound to act and to set aside a verdict based upon that evidence.[150]

593 There seems to be a misconception within some quarters that when this Court deals with an appeal against conviction, it considers only questions of law, and never questions of fact. Section 276(1)(a) of the CPA makes it clear that this is not so.

594 Of course, the assessment of evidence is primarily a matter for the jury. That task, however, is not reserved exclusively to them. An intermediate appellate court has its own statutory responsibility to discharge in that regard. Otherwise, there

---

147 (1994) 181 CLR 487 ('*M*').

148 *M*, 493.

149 *M*, 492–4. See also, *R v Baden-Clay* (2016) 258 CLR 308, 329–30 [65]–[66] (French CJ, Kiefel, Bell, Keane and Gordon JJ) ('*Baden-Clay*').

150 *M*, 494 (citation omitted).

would be no point to the section as worded.

595 *M* makes it clear that an intermediate appellate court will fail to discharge its duty according to law if it treats questions of credibility and reliability as being of no particular concern when dealing with the reasonableness or supportability of a conviction at trial. The statement that such matters are 'quintessentially' for the jury is, in that sense, a somewhat incomplete account of the task that is reposed by statute in this Court.

596 In *MFA v The Queen* ('*MFA*'),[151] the High Court, clearly aware of the division of opinion that had been exposed in *M*, and other cases, revisited the *M* test. It determined to put to rest any doubts that remained as to whether the majority view, as expressed in the joint judgment in *M*, should continue to be followed, or whether an apparently more stringent formulation, adopted by McHugh J, in his dissent in *M*, should be preferred.[152]

597 In the joint judgment in *MFA*, McHugh, Gummow and Kirby JJ traced the history of the New South Wales equivalent of s 276 of the CPA. Their Honours noted that the statutory formulation in each State and Territory had its source in the *Criminal Appeal Act 1907* (UK).[153]

598 The joint judgment in *MFA* noted that in 1966, the original formula in England had been changed by statute. From that time, the relevant English provision had required appellate judges to consider whether the impugned verdict was 'unsafe or unsatisfactory.' No equivalent expression was to be found in any of the statutes,

---

151 (2002) 213 CLR 606 ('*MFA*').

152 As will be seen, this was once a contentious question that the High Court considered on several occasions. Justice Brennan, in *Chamberlain (No 2) v The Queen* (1984) 153 CLR 521, 604 ('*Chamberlain (No 2)*'), took the view that an intermediate appellate court should exercise its power to substitute a verdict of acquittal for a conviction arrived at by the jury only in 'extraordinary' circumstances. Otherwise, that court would 'usurp the functions of the jury.' As will be seen, that highly restrictive view has not prevailed, and a somewhat broader approach to the question whether a conviction should be set aside as unreasonable is now recognised as correct.

153 7 Edw 7, c 23.

State or Territory, governing appeals against conviction, in this country.[154]

599 Nevertheless, the joint judgment in *MFA* noted that a number of State and Territory judges appeared to have fallen into the habit of adopting the expression 'unsafe or unsatisfactory' when dealing with this particular ground of appeal. Indeed, the High Court itself had used that same expression on occasion, and sometimes still does.

600 In both *Gipp v The Queen*[155] and *Fleming v The Queen*,[156] the High Court specifically deprecated the use of the attempted synonym ('unsafe or unsatisfactory'), rather than the actual words of the statutory formulation ('unreasonable or unable to be supported having regard to the evidence').

601 The joint judgment in *MFA* observed that on one view of the language in the New South Wales provision under consideration, the power of an intermediate appellate court to set aside a jury verdict was to be regarded as very broad indeed. The word 'unreasonable', in particular, lent itself to such an interpretation.

602 The joint judgment in *MFA* made it clear that this seeming amplitude of the language in the section should be restricted, having regard to the context in which the relevant expression appeared. Their Honours said that this conclusion stemmed from the subject matter of the appellate court's decision, that being a 'verdict of the jury.'

603 Importantly, their Honours said:

> Conventionally, the jury has been described as the constitutional tribunal for deciding contested facts … A jury is taken to be a kind of microcosm of the community. A 'verdict of [a] jury', particularly in serious criminal cases, is accepted, symbolically, as attracting to decisions concerning the liberty and reputation of accused persons a special authority and legitimacy and hence finality.
>
> In that context, and against the background of the tradition of the jury trial

---

154 *MFA*, 620 [45].

155 (1998) 194 CLR 106.

156 (1998) 197 CLR 250.

> over the centuries, the setting aside of a jury's verdict is, on any view, a serious step. Hence, it is a step that assigns to the words 'unreasonable' or '[un]supported' in s 6(1) of the [Criminal Appeal] Act a strictness of meaning that, in isolation or in other contexts, those words might not enjoy.[157]

604 The joint judgment went on to repeat the point that had been made in *M*, and that has been emphasised many times since. The jury would ordinarily have an advantage over an intermediate appellate court in assessing the weight to be given to the evidence led at trial, and therefore, in assessing the sufficiency of that evidence to establish guilt beyond reasonable doubt. A court of criminal appeal comprising, normally, three judges who ordinarily saw no witnesses, heard no evidence, and were required to decide the reasonableness and supportability of a verdict by reference only to those passages of evidence to which attention was drawn by the parties, would usually be at a disadvantage, by comparison with the members of the jury at trial.

605 The joint judgment then observed that, unlike the position in England, the legislation in this country did not empower an appellate court to set aside a verdict based upon any 'speculative or intuitive basis.' Presumably, their Honours regarded the expression 'unsafe or unsatisfactory' as having that connotation.[158]

606 Justice McHugh was, of course, party to the joint judgment in *MFA*. Accordingly, he agreed that the majority test in *M* should be applied, in preference to his own narrower formulation when in dissent in *M*.[159] Prior to *MFA*, his Honour had also participated in the joint reasons for judgment in *Jones v The Queen*,[160] where the High Court had adverted to the question of the applicable test. There, the joint reasons stated:

---

157 *MFA*, 621 [48]–[49] (footnotes omitted).

158 The same might be said of the English use of the alternative expression 'lurking doubt' as to the guilt of the accused. See *R v Cooper* [1968] 3 WLR 1225.

159 *MFA*, 623–4 [57]–[61] (McHugh, Gummow and Kirby JJ, Gleeson CJ, Hayne and Callinan JJ agreeing).

160 (1997) 191 CLR 439 ('*Jones*').

> … the test formulated by the majority in *M* must now be accepted as the appropriate test for determining whether a verdict is unsafe or unsatisfactory.[161]

607 In *Jones*, the accused was charged with three acts of sexual intercourse with a young girl. On the complainant's evidence, the acts of intercourse took place when no one else was present save for the complainant and the accused. The jury somehow acquitted on the second count, but convicted on each of the first and third counts.

608 The High Court, by majority (Kirby J dissenting), held that the convictions should be set aside as 'unsafe and unsatisfactory.' That finding was, of course, based upon the apparent inconsistency between the jury's finding on the second count, and its findings on the first and third counts. Importantly, the complainant's evidence was said to be of similar quality on all counts.

609 In *Jones*, Brennan CJ spoke of the advantage that a jury would ordinarily have over an intermediate appellate court because of the opportunity that they had to assess the worth of a witness' evidence by seeing and hearing that evidence given. His Honour also noted that the jury had the advantage of performing their function 'within the atmosphere of the particular trial',[162] something that a court of appeal could not hope to replicate.

610 The joint judgment in *Jones* noted that the complainant's cross-examination had revealed that she had been mistaken about the days of the week on which the first two incidents were said to have occurred. Her account contained several inconsistencies with earlier statements that she had made to police. She acknowledged that she had been confused about dates, but insisted that the events she described had, in fact, taken place.

611 The defence, however, had called a number of witnesses at trial to support the

---

161 Ibid 452 (Gaudron, McHugh and Gummow JJ).

162 Ibid 442 (Brennan CJ), quoting *Whitehorn v The Queen* (1983) 152 CLR 657, 687 (Dawson J, Gibbs CJ and Brennan J agreeing).

accused's claim that he had no opportunity to commit the offences that were the subject of the various counts. The majority held that the jury's finding of not guilty on the second count had so greatly damaged the complainant's credibility that neither of the remaining convictions could be permitted to stand.

612 It was implicit in *Jones* that the acquittal on the second count meant that the jury had rejected the complainant's detailed description of what had occurred on that occasion. Importantly, it was said that this was not a case where the jury had merely failed to be satisfied beyond reasonable doubt of the truth of her account. The acquittal on charge 2 must have entailed positive rejection of her evidence. There have been a number of examples of acquittals entered, on appeal, on the basis of inconsistent verdicts, essentially based on similar reasoning.

613 Subsequently, in *Libke v The Queen* ('*Libke*'),[163] a case that actually concerned the prosecutor's alleged misconduct in the course of a criminal trial, Hayne J expressed the test for an intermediate appellate court (when considering whether the convictions sustained below were 'unsafe or unsatisfactory') in the following terms:

> … the question for an appellate court is whether it is *open* to the jury to be satisfied of guilt beyond reasonable doubt, which is to say whether the jury *must* as distinct from *might*, have entertained a doubt about the appellant's guilt.[164]

614 His Honour, by equating the question whether the jury 'must' have entertained a reasonable doubt, rather than whether it had been 'open' to the jury to be satisfied of guilt beyond reasonable doubt, was thought by some to have reinstated, the narrower approach to the *M* test formerly favoured by both Brennan J in *Chamberlain v The Queen (No 2)*[165] ('*Chamberlain (No 2)*') and McHugh J in *M*.

615 It must be said that the passage in the judgment of Hayne J set out above in *Libke* was written in response to a most perfunctory submission in the High Court in support of the appellant's case. Indeed, his Honour's formulation of the test for

---

163 (2007) 230 CLR 559 ('*Libke*').

164 Ibid 596–7 [113] (citation omitted) (emphasis in original).

165 (1984) 153 CLR 521.

unreasonableness did not find its way into the headnote in the Commonwealth Law Reports. Nor was it referred to, even obliquely, in the summary of arguments put to the Court in that case.[166]

616 In this Court, after *Libke* had been decided, some prosecutors, responding to appeals against conviction brought on the basis of s 276(1)(a), seized upon the formulation adopted by Hayne J, arguing that his Honour's judgment had significantly raised the threshold for success under the *M* test.[167]

617 In *Tyrrell v The Queen* ('*Tyrrell*'),[168] this Court said, about Hayne J's judgment in *Libke*:

> … Hayne J did not restate the test in terms that were more stringent than that in which it was expressed in *M*. Rather, by emphasising that the question is whether the jury 'must' have entertained a doubt about the appellant's guilt, Hayne J gave emphasis to the essential test, to be applied by the appellate court, as to whether it was 'open' to the jury to be so satisfied beyond reasonable doubt.[169]

618 In other words, the use of the term 'must', in *Libke*, should be understood as another way of expressing, appropriately, the requirement that the appellate court ask itself whether it was 'open to the jury', acting reasonably, to convict. It was not intended to depart from the test, as stated, in *M*.

619 The High Court's decision in *M* has, of course, been applied many times. The following are some notable examples of its application by the High Court itself.

---

166 In any event, Hayne J in his judgment in *Libke* at 596–7 footnoted *M* at 492–3, without qualification or comment. That suggests that he did not regard his formulation of the relevant test as being significantly different to that of the majority in *M*.

167 The precise status of Hayne J's observation in *Libke* is, in any event, complicated by the fact that Gleeson CJ, in short reasons, said that he agreed, for the reasons given by Hayne J, that the appeal should be dismissed. Justice Heydon also agreed with Hayne J, though the substance of his judgment dealt solely with the conduct of the prosecutor. He made no mention at all of the barely pressed argument that the conviction was 'unsafe or unsatisfactory.'

168 [2019] VSCA 52 ('*Tyrrell*').

169 Ibid [70]. An application by the Director of Public Prosecutions for Special Leave to appeal against this Court's decision in *Tyrrell* was refused, on the papers, on 7 August 2019. See *The Queen v Tyrrell* [2019] HCASL 220. See also, *Connolly (a pseudonym) v The Queen* [2019] VSCA 125.

620 In *Palmer v The Queen* ('*Palmer*'),[170] which concerned a trial for sexual offences against a 14 year old girl, the accused was asked, in cross-examination, whether he could think of any reason why the complainant would invent allegations against him. He was unable to do so. That was the subject of adverse comment by the prosecutor in his closing address.

621 The High Court held by majority that this entire line of cross-examination by the prosecutor had been illegitimate. It had had a prejudicial effect upon the accused's defence.[171] Questioning of this type had diminished the standard of proof.

622 More importantly for present purposes, however, there was a second ground of appeal which had not been the subject of the grant of special leave. That ground contended that the convictions were 'unsafe and unsatisfactory.' By majority, the ground succeeded, and verdicts of acquittal were entered.[172]

623 On the question whether the verdicts were unsafe and unsatisfactory, the majority noted that the prosecution case had not depended upon the complainant's evidence alone. There was a substantial and cogent body of independent evidence that provided support for her account.

624 On the other hand, the appellant's defence was, in substance, an alibi (albeit an alibi that was not entirely complete). The appellant claimed that on the day, and at the times, of the alleged offending, he was delivering process, as part of his duties as a process server.

625 In the majority judgment, the relevant test in relation to this ground of appeal was expressed in the following terms:

> If the alibi evidence is so cogent as to engender in any reasonable mind a doubt of the accused's guilt, the conviction must be quashed and a verdict of

---

170 (1998) 193 CLR 1 ('*Palmer*').

171 *Palmer* (Brennan CJ, Gordon and Gummow JJ, McHugh J dissenting at 28–9, Kirby J agreeing at 42–3).

172 *Palmer* (Brennan CJ, Gordon and Gummow JJ, McHugh J agreeing at 29–31, Kirby J dissenting at 33–6).

> acquittal entered however cogent the prosecution evidence would otherwise be.[173]

626 In support of the accused's alibi, there was a record of his having used a credit card at a particular service station, at a specific time, and on a specific date. That evidence was generally consistent with, though not absolutely conclusive of, his having been serving summonses in that area at the times stated in the various affidavits of service that were tendered. In other words, it was broadly supportive of the alibi that had been raised at trial.

627 The joint judgment noted that there were several aspects of the complainant's account that might engender some doubts about accepting her evidence at face value. However, these were said to be matters which, had they stood alone, the jury would have had the best opportunity of evaluating and, if they thought fit, discounting for one reason or another.

628 However, the stark inconsistency between the complainant's account and the alibi evidence was not so easily discounted. Moreover, the trial judge's summing up had not sufficiently drawn to the attention of the jury the need to be satisfied beyond reasonable doubt that there was 'no truth' at all in the alibi evidence before they could convict. The fact that there existed even a 'reasonable possibility' that the alibi may have been true meant that the conviction had to be quashed.

629 In *Palmer*, McHugh J agreed that, on the whole of the evidence, the appellant's convictions were unsafe and unsatisfactory. His Honour said that the strength of the accused's alibi was so great that it was not open to the jury to be convinced beyond a reasonable doubt of the appellant's guilt. The date of the offending had become central to the prosecution case. Police enquiries made of persons allegedly served by the appellant on the day in question failed to reveal any witness who could challenge the truth of his alibi.

630 Justice McHugh was particularly critical of the judgment of the Victorian

---

173 *Palmer*, 12 [14].

Court of Appeal. He observed that the members of that Court had approached the alibi, somewhat 'cynically', by raising the possibility that it might have been manufactured. Of course, as his Honour said, there was always that possibility. However, it was impossible to conclude that the alibi was false unless one began with the premise that the complainant's evidence (even supported by her mother) was true. That would necessarily mean that the appellant was guilty. Any such reasoning would, plainly, be circular.

631 Of singular note is McHugh J's observation that the complainant's evidence in *Palmer*, as it appeared from the transcript, was 'very persuasive.' Moreover, his Honour considered that her evidence received considerable support from her mother's testimony, as well as from other circumstantial evidence. Indeed, he went so far as to state that it seemed 'highly likely' that some incident affecting the complainant had occurred on the night in question (or at least on some other night). However, even that finding did not save the convictions. His Honour explained:

> But once the alibi evidence is taken into consideration, it was not possible for the jury to be convinced beyond reasonable doubt that the appellant sexually assaulted the complainant on 4 July [as alleged].[174]

632 The fact that the case against the appellant in *Palmer* was conducted on the basis that the offending took place on a specific date, and not on some other date closely proximate, meant that the convictions had to be set aside. In his Honour's terms, there was a 'significant possibility' that an innocent person had been convicted. That possibility could not be tolerated.

633 In *SKA v The Queen* ('*SKA*'),[175] the primary issue was whether there was sufficient evidence to support convictions on five counts of sexual offences with a minor. Three of those offences were said to have been committed on a single date, at some point within a two month period in 2004. The remaining two offences were said to have been committed on an unspecified date, between 1 and 25 December 2006.

---

174 *Palmer*, 30 [75].

175 (2011) 243 CLR 400 ('*SKA*').

634 The trial judge ruled that the jury had to approach the charges on the basis that the second group of incidents, though pleaded in the broadest of temporal terms, could only have occurred on one of three days, 22, 23 or 24 December 2006. The appellant, and several witnesses for the defence, whose evidence was essentially unchallenged, provided a complete alibi for every one of those three days.

635 The appellant appealed on the ground that the verdicts were perverse and could not be supported, having regard to the evidence. The New South Wales Court of Criminal Appeal dismissed the appeal.

636 The High Court, by majority,[176] reversed that decision. It held that for the New South Wales Court of Criminal Appeal to have determined the appeal satisfactorily, it had been required to determine for itself whether the evidence was such that it was open to a jury to conclude beyond reasonable doubt that the appellant was guilty. The Court of Criminal Appeal had not discharged its responsibilities appropriately in that regard. In order to weigh the whole of the evidence, it had been required to form an opinion as to the date upon which the 2006 offences occurred. It had not done so satisfactorily. This had led that Court into error when considering the sufficiency of the evidence as a whole.

637 The High Court added that whether one episode of offences had occurred was plainly relevant to the conclusion as to the other episode had occurred as well. Accordingly, the appeal was allowed with respect to all offences. Both *M* and *MFA* were cited with approval.

638 It is perhaps ironic, having regard to the way in which the application before this Court has been argued, to note that the appellant in *SKA* had sought to establish that the verdicts were unreasonable by reference to some 13 matters in all. These 13 matters were put forward as what might be described as 'solid obstacles' to conviction. These were said, both individually and collectively, to demonstrate that

---

176 French CJ, Gummow and Kiefel JJ, Heydon and Crennan JJ dissenting.

the complainant's evidence was insufficiently reliable to allow the convictions to stand.

639 In *SKA*, the Court of Criminal Appeal had dismissed these 13 'obstacles' as merely 'jury points.' The High Court expressed strong disapproval of that approach. It suggested that, through the use of that expression, the appellate court had dealt with these matters as unworthy of, or not requiring detailed consideration. Indeed, as the High Court observed, the Court below had not dealt with those matters in any detail at all. The judgment of that Court had contented itself with treating the complainant's account as being sufficient, as a matter of law, to have enabled the jury to conclude, if they accepted her evidence, that the appellant was guilty.

640 According to the High Court in *SKA*, the Court below had also discounted other points validly made by the appellant in an attempt to undermine the complainant's credibility. The Court below had treated these as raising matters that were basically questions of fact for the jury,[177] instead of weighing them as part of its own independent assessment of the evidence as a whole. In that sense, the Court had failed to carry out the requirements laid down by *M*. Accordingly, the matter was remitted to the Court of Criminal Appeal to be reheard.

641 In *Fitzgerald v The Queen*,[178] the High Court quashed a conviction for murder, and ordered that there be a verdict of acquittal. The only evidence linking the appellant to the crime was his DNA, which was found on a didgeridoo located at the crime scene. The defence, at trial, was that the presence of the DNA may have been the result of 'secondary transfer.' It seems that the appellant had, at an earlier stage, shaken the hand of one of the co-accused.

642 The appellate court had described that explanation as extremely unlikely, and dismissed the appeal. The High Court agreed that the explanation was unlikely, but still reversed that decision. It did so by applying the *M* test rigorously, and by

---

177 Or perhaps, in other terms, as 'quintessentially' matters for the jury.

178 (2014) 88 ALJR 779.

bearing in mind the standard of proof required for a conviction.

643 In *Zaburoni v The Queen*,[179] the High Court yet again set aside a conviction pursuant to the *M* test. The appellant had transmitted a serious disease (HIV) to a woman with whom he had been in a sexual relationship. He was aware throughout that he was HIV positive, but had said nothing to her about that. While he was also aware that HIV was a sexually transmitted disease, there was no evidence that he was aware of the extent of the likelihood of the transmission of this disease through unprotected penile-vaginal intercourse. The High Court held that the evidence, at trial, had not been sufficient to support the conviction. It concluded that the verdict was 'unreasonable or contrary to the evidence.' It substituted a conviction for a lesser offence, which did not require proof of the particular intent stipulated as an element of the charge brought.

644 In *Miller v The Queen*,[180] three men, M, S, and P, had all been convicted of murder. The deceased was fatally stabbed by a fourth man, B, in the course of an assault, to which M, S, and P were said to be parties. All four accused had been drinking heavily in the period leading up to the killing of the deceased. The case was left to the jury on the basis of either joint criminal enterprise, or in the alternative, extended joint criminal enterprise.

645 M, S, and P all challenged their convictions in the High Court on the basis that the South Australian Court of Criminal Appeal had erred in holding that the convictions were capable of being supported by the evidence. The High Court held that in dealing with this ground, the appellate court had failed to review the sufficiency of the evidence to sustain the murder convictions. It had not addressed the asserted deficiencies in the capacity of the evidence to establish the nature of the participation of each of M, S, and P in the altercation. Nor had the appellate court assessed the significance of the three men's intoxication to the circumstances surrounding the conclusion of that altercation. The matter was remitted to the Court

---

179 (2016) 256 CLR 482.

180 (2016) 259 CLR 380.

of Criminal Appeal to carry out the *M* task properly.

646 In *R v Baden-Clay* ('*Baden-Clay*'),[181] the respondent was convicted on a charge of having murdered his wife. Her body was found under a bridge, on the bank of a river. By reason of decomposition, the cause of death could not be ascertained.

647 The prosecution case was wholly circumstantial. The respondent had been involved in a sexual relationship with another woman, and had told her that he proposed to leave his wife. The prosecution contended that although the killing may not have been premeditated, the respondent must have become involved in an altercation, in the course of which he killed his wife, with murderous intent.

648 The respondent's defence was that he had nothing to do with his wife's death. He denied having fought with her, or having taken any steps to dispose of her body. He gave sworn evidence to that effect.

649 The Queensland Court of Appeal held that the jury, acting reasonably, could not have rejected the hypothesis raised by the respondent (albeit for the first time on appeal) that there had been a physical confrontation between himself and his wife, in the course of which, he had killed her, without murderous intent. That Court quashed the conviction of murder, and substituted a conviction for the lesser offence of manslaughter.

650 The High Court reversed the decision of the Court of Appeal. It held that the hypothesis on which that Court had acted was not available on the evidence. It was noted that in order for an inference to be reasonable, it had to rest upon something more than mere conjecture. A criminal trial was accusatorial,[182] but also adversarial. The respondent had chosen to conduct his case in a particular way. He should not have been permitted, as he had been, to argue before the Court of Appeal that an entirely different and inconsistent view of the facts should be taken. The hypothesis upon which that Court had decided the case was one that had not been put before

---

181 (2016) 258 CLR 308.

182 *X7 v Australian Crime Commission* (2013) 248 CLR 92, 124 [59].

the jury, and was directly contrary to the respondent's evidence at trial.

651 The judgment in *Baden-Clay* observed that it was necessary to explain why the jury had been entitled, reasonably, to regard the whole of the evidence as satisfying them beyond reasonable doubt that the respondent had acted with murderous intent when he killed his wife.

652 In a passage dealing generally with the role of the jury in criminal trials, the Court said:

> It is fundamental to our system of criminal justice in relation to allegations of serious crimes tried by jury that the jury is 'the constitutional tribunal for deciding issues of fact.' Given the central place of the jury trial in the administration of criminal justice over the centuries, and the abiding importance of the role of the jury as representative of the community in that respect, the setting aside of a jury's verdict on the ground that it is 'unreasonable' within the meaning of s 668E(1) of the *Criminal Code* is a serious step, not to be taken without particular regard to the advantage enjoyed by the jury over a court of appeal which has not seen or heard the witnesses called at trial …
>
> With those considerations in mind, a court of criminal appeal is not to substitute trial by an appeal court for trial by jury. Where there is an appeal against conviction on the ground that the verdict was unreasonable, the ultimate question for the appeal court 'must always be whether the [appeal] court 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.' [183]

653 In *GAX v The Queen* ('*GAX*'),[184] the High Court quashed a conviction for aggravated indecent dealing with a child, and ordered that there be a verdict of acquittal. The appellant had been convicted in the District Court of Queensland. The victim of the alleged offence was the appellant's natural daughter, who was aged 12 at the time. He was said to have touched her on or near the vagina while he was lying in bed with her.

654 The complainant did not say anything about the matter for about a decade or more after the alleged incident. Not surprisingly, her recall of the details

---

183 *Baden-Clay*, 329–330, [65]–[66] (citations omitted). Both the seminal passages in *M*, 494, and in *MFA*, 621–3, were specifically cited in a footnote to the extract set out above. Those passages were plainly approved, and applied, by the High Court.

184 (2017) 91 ALJR 698 ('*GAX*').

surrounding the offence was generally poor.

655 The High Court held that there was a 'real possibility', in the circumstances, that the complainant's evidence had been a 'reconstruction', and was not the product of an actual memory. That 'real possibility' could not be excluded beyond reasonable doubt. More specifically, the complainant's inability to give any precise details of the touching, as well as several marked inconsistencies in her evidence as to the state of her underwear at the time, were said to be suggestive of reconstruction, or what might be termed 'false memory.'

656 Plainly, *GAX* was not a case in which the jury's advantage in having seen and heard the evidence given could provide an answer to the challenge to the sufficiency of the evidence to support the verdict.

657 It can be seen from this brief synopsis of several recent High Court decisions dealing with the application of the *M* test that the principles governing this ground of appeal now appear to be well settled. There are a number of instances, to which reference has been made, where notwithstanding the apparent credibility of a complainant in relation to an allegation of sexual abuse, the countervailing circumstances, including any defence evidence, have led the High Court to quash the conviction, and enter a verdict of acquittal.

658 Of course, such cases are by no means common. Nonetheless, they are perhaps not as rare as some commentators appear to have thought. That is a matter to which I shall return.

659 This Court has applied both *M* and *MFA* on many occasions. A particularly useful example may be *R v Klamo*,[185] a 'baby shaking' case. There, a conviction for manslaughter was quashed, and a verdict of acquittal entered. President Maxwell, with whom Vincent JA and Neave JA separately agreed, set out his understanding of the principles that underlie both *M* and *Libke*.

---

185 (2008) 18 VR 644.

660 His Honour suggested that the question whether a verdict was unreasonable or could not be supported, having regard to the evidence, should be approached on the basis that an intermediate appellate court should consider whether there was a 'solid obstacle to reaching a conclusion beyond reasonable doubt'[186] or whether, instead, a path to a conviction was open.[187]

661 As I have indicated, appeals brought to this Court on the basis of this ground are by no means uncommon. They have rarely succeeded, as would be expected.[188] That reflects the High Court's insistence upon the importance of the jury as the 'constitutional tribunal' for determining facts. No one seriously suggests that appellate judges are, by reason of their training and experience, necessarily better judges of fact than lay jurors. Even if they were, the countervailing importance of trial by jury would weigh heavily against too readily overturning jury verdicts.

662 Nonetheless, as the High Court has made abundantly clear, intermediate appellate courts will abrogate their statutory responsibility if they do not approach this ground of appeal strictly in accordance with the principles laid down in *M*.

663 Accordingly, the task of this Court in dealing with Ground 1 is to carry out an independent assessment, but of the whole of the evidence. Having done so, each member of the Court must consider whether there is, in the mind of that particular

---

186 *R v Shah* [2007] SASC 68, [4] (Doyle CJ).

187 *Morabito v The Queen* [2007] NSWCCA 126, [34] (Mason P).

188 It may be that, as with the line of authority dealing with this ground of appeal in the High Court, the ground has succeeded somewhat more frequently in this Court than is sometimes thought. Professor Jeremy Gans, who has written extensively on this subject, has identified a number of instances in which this Court has, in recent years, quashed convictions, and substituted verdicts of acquittal. Some examples include *Omot v The Queen* [2016] VSCA 24; *Tandy (a pseudonym) v The Queen* [2016] VSCA 229; *Mejia (a pseudonym) v The Queen* [2016] VSCA 296; *Gant v The Queen* [2017] VSCA 104; *Daniels (a pseudonym) v The Queen* [2017] VSCA 159; *Debresay v The Queen* [2017] VSCA 263; *Wade (a pseudonym) v The Queen* [2018] VSCA 304; *Tyrrell v The Queen* [2019] VSCA 52; and *Conolly (a pseudonym) v The Queen* [2019] VSCA 125. The position in other States, in particular, New South Wales, is broadly similar. See, for example, *Wood v The Queen* (2012) 84 NSWLR 581, where a conviction for murder was set aside, and an acquittal entered. Most recently, see *Daaboul v The Queen* [2019] NSWCCA 191, a case involving inconsistent verdicts where Bathurst CJ concluded that, he having a doubt as to the appellant's guilt of sexual offending, that was a doubt that the jury ought also to have had, applying *M*.

judge,[189] a 'doubt' as to guilt. If such a doubt exists, it will ordinarily be a doubt that the jury ought to have had. In that event, a second question must be asked, namely, whether that 'doubt' persists notwithstanding the advantages over the appellate court that are normally ascribed to the jury.

The first limb of the M test — Were there 'solid obstacles' to conviction?

664 Mr Richter's closing submissions were supported by a detailed and intricately prepared PowerPoint presentation, which was shown to the jury. The points made in that presentation were largely replicated in the applicant's written case before this Court, though reduced from 17 'solid obstacles' to conviction to 13.

665 I will set out each of these 'obstacles', and include what I regard as a reasonable and fair summary of the prosecution's response.

(1) The timing of the complainant's story is 'impossible'[190]

666 From the time that the complainant first spoke with police in 2015, he was adamant that both the first and second incidents took place in the very same choral year. Initially, he said, mistakenly, that the year was 1997. However, when prompted by Detective Reed, who had carried out his own enquiries, he corrected that year to 1996.

667 The complainant repeated at trial that he had not 'the slightest doubt' that both incidents took place before Christmas in 1996. To be clear, his evidence was as follows:

> MR RICHTER: And so you had your mind drawn to the mistaken dates and having re-adjusted your mind, you are now — and you told the jury — that these events took place in the second half of 1996, is that right?

---

189 The reference to the 'mind of that particular judge' must be understood to involve a subjective approach to that evidence, as to which of course, reasonable minds may sometimes differ.

190 Although the word 'impossible' was used throughout, it is clear that what the defence sought to convey was 'realistically not possible.'

COMPLAINANT: Yes.

MR RICHTER: And you have not the slightest doubt about that?

COMPLAINANT: No.

…

MR RICHTER: I'm putting to you and you told us that the best you could reconstruct after your errors were pointed out to you by Sergeant Reed — best recollection and the best evidence you could give was that both these incidents took place in 1996?

COMPLAINANT: Yes.

668 The complainant's evidence was that both incidents took place immediately after the applicant had said, or celebrated, Sunday solemn Mass, though at times, he vacillated somewhat regarding that matter. The transcript reads as follows:

MR RICHTER: The incidents, yes, the alleged oral rape and then the squeezing of the genitalia. On both these occasions your account has always been that they were after Sunday Mass delivered by Archbishop Pell; is that right?

COMPLAINANT: He was present at the Sunday Mass, yes.

MR RICHTER: Look, did he deliver Sunday Mass; was that your previous evidence always? That he said Mass?

COMPLAINANT: Yes, he said Mass.

…

MR RICHTER: Can I just take you through — this is supposed to have happened immediately after Mass said by Archbishop Pell. Correct?

COMPLAINANT: Yes.

669 The complainant's recollection was that the second incident took place 'over a month' after the first.

MR RICHTER: How long after the incidents that you've just described was this next incident?

COMPLAINANT: It was over a month, I would say.

670 Mr Richter invited the jury to conclude that a major difficulty with the

complainant's account arose from the fact, eventually established beyond any doubt, that the applicant only ever said two Sunday solemn Masses at the Cathedral in 1996. Accordingly, having regard to the complainant's account, 15 and 22 December of that year were the only two dates upon which either of the two incidents could have occurred.

671 The fact that the applicant said or celebrated Sunday solemn Mass on two dates in 1996 that only became clearly evident when in September 2018, after the first trial, and before the second, Connor's diary suddenly became available. As previously indicated, that diary dealt meticulously with the dates in 1996 on which all Masses had been celebrated at the Cathedral, with the exception of 3, 10 and 17 November. On those dates, it was clear that the applicant had celebrated Sunday Mass elsewhere.

672 Portelli gave this evidence:

> MR RICHTER: Monsignor, you were appointed master of ceremonies to Archbishop Pell, I think it was in September of 96, and that appointment created a special relationship between you and the Archbishop in the sense that you had particular duties relating to him?
>
> PORTELLI: Yes.
>
> MR RICHTER: And one of those duties, well, your duties were basically liturgical and process duties in relation to him?
>
> PORTELLI: Yes, and there were several other matters as well.
>
> MR RICHTER: I was asking you about your recollection of the first two times that the Archbishop said Sunday Mass at St Patrick's in 1996. What I want to take you to is this. There are good reasons for you to recollect those because 1996 was a year at which the Archbishop's presence at St Patrick's in terms of Sunday Masses was very limited and it was- - -?
>
> PORTELLI: Until, yes.
>
> MR RICHTER: Yes, and it was limited because when he was appointed Archbishop he kept up various other engagements to which he had committed himself prior to his appointment?

PORTELLI: Yes, he did.

MR RICHTER: And he kept up other engagements at other parishes and those were all of importance to him as far as you could tell?

PORTELLI: Yes. Yes.

MR RICHTER: You accompanied him on those occasions?

PORTELLI: I did.

MR RICHTER: Yes, you would drive him there and if the jury could look at tab 7 … we have a record of who said Mass and that will be given in evidence by a following witness, between July and November, except for three occasions on which the diarist was absent, but could I ask you this, that so far as other commitments that were had, say, in November, on 3 November do you recall an occasion when the Archbishop said Mass for the racing fraternity, as it were, at St Francis' Church in Melbourne?

PORTELLI: Yes, yes.

MR RICHTER: That was an annual event for the racing fraternity, and it was attended by all sorts of jockeys, trainers, what some people call connections and the like?

PORTELLI: That's right.

MR RICHTER: And it was a large event. Is that right?

PORTELLI: Yes, yes.

MR RICHTER: A little bit like the opening of the legal year. You're aware of that?

PORTELLI: Yes.

MR RICHTER: And that's followed by a morning tea?

PORTELLI: Yes.

HIS HONOUR: What's followed by a morning tea?

MR RICHTER: Sorry, the fraternity of the racing industry, there would be - - -?

PORTELLI: I believe tea was there somewhere.

MR RICHTER: Yes, there would be Mass said, and after Mass there would be conviviality?

PORTELLI: Yes.

MR RICHTER : Non–alcoholic, of course?

PORTELLI: On Sunday morning?

MR RICHTER : Yes. I don't — you've answered that. But there was conviviality in terms of drinks, canapés and the like?

PORTELLI: Yes. Yes.

MR RICHTER : That particular instance, that particular Mass started at 9 am?

PORTELLI: Yes.

MR RICHTER And the Mass itself would have gone until, what, until 10 or thereafter?

PORTELLI: At least 10 o'clock, yes.

MR RICHTER: And thereafter there was the gathering of the racing co-fraternity and there were introductions and discussions with the Archbishop of various kinds?

PORTELLI: Yes, yes.

673 At several points in the trial, Mr Gibson floated the possibility that the first incident may have occurred on Sunday 3 November 1996, rather than on either of the two December dates advanced by Mr Richter. That date in November was, of course, the Sunday on which the applicant had celebrated Mass for the racing fraternity. The theory Mr Gibson put forward was that the applicant would have had time to make his way from St Francis' Church, in the city, to the Cathedral, and still been able to celebrate the 11.00 am solemn Mass that morning. In accordance with that theory, he could then have committed the various offences alleged as having occurred within the Priests' Sacristy. That, in turn, would have allowed for the second incident to have occurred a month or so afterwards, on either 15 or 22 December 1996. This would have enabled the complainant's account to fit coherently within a reasonable timeline.

674 That particular prosecution theory was ultimately all but jettisoned. By the time the trial judge came to charge the jury, it was generally accepted that the Cathedral had been under renovation until 23 November 1996. In the months leading up to that date, solemn Mass had only ever been said at Knox Hall.

Accordingly, the first incident could simply not have taken place on 3 November 1996.

675 Entries in *Kairos* also made it clear that the applicant first celebrated Mass at the Cathedral, as Archbishop, on 23 November 1996. That was a Saturday evening. The article in *Kairos* referred to a packed Cathedral, with standing room only, as the new Archbishop celebrated Mass in honour of Christ the King.

676 Moreover, the minutes of a meeting of the Cathedral Centenary Appeal Committee dated 6 November 1996 were tendered. It was noted that renovation works were expected to be completed by 23 November 1996, though some minor tasks might remain to be done after that date.

677 In the light of this cogent body of evidence, it was hardly surprising that by the time the trial judge came to charge the jury, there was no longer any realistic suggestion that the first incident might have taken place on Sunday 3 November 1996. That meant that the only possible dates available for the offending, outlined in relation to that incident, to have taken place were as the defence had contended all along, 15 and 22 December 1996.

678 The eventual acceptance that these were the only dates upon which the first incident could realistically have occurred was an important, and quite fundamental, change to the way in which the prosecution case was ultimately left to the jury. For reasons that Mr Richter developed in his closing address to the jury, and to which I shall return, it was scarcely surprising that the defence fought so tenaciously throughout the trial to have those dates fixed as the only dates on which the first incident could conceivably have occurred.

The prosecution's response — the timing of the complainant's story is <u>not</u> impossible

679 Once it became clear that the first incident, if it took place at all, must have occurred on either 15 or 22 December 1996, it necessarily followed that the second incident, if it occurred at all, must, in conformity with the complainant's account,

have taken place sometime in the early part of 1997.

680 The prosecution ultimately fixed upon Sunday 23 February 1997 as being that date. In all likelihood, that was because this was the very next Sunday after 22 December 1996 that the applicant had attended Sunday solemn Mass at the Cathedral. Connor's diary, which both parties appeared to accept as reliable, recorded the applicant as having presided over that Mass, though not as having celebrated it. In that sense, the applicant could be said to have 'been involved' with solemn Mass on that day.

681 Mr Gibson invited the jury to find that the complainant, despite having been entirely mistaken in insisting that both the first and second incidents had taken place in the 'same choral year', was nonetheless a compelling witness, whose evidence was credible and reliable, and upon which, they could safely act. He submitted that the complainant may have been wrong as to when these offences were committed, but not as to what had actually transpired.

(2) It is not possible that the applicant was in the Priests' Sacristy within a few minutes of the conclusion of Mass

682 Mr Richter's next submission to the jury regarding 'impossibility' concerned the applicant's movements immediately after having celebrated Mass on each of the two December dates.

683 That submission relied heavily upon the evidence of both Portelli and Potter. Mr Richter argued that Portelli's evidence regarding the applicant's movements after Mass had been clear and unambiguous. Portelli specifically recalled that on each of the first two occasions that the new Archbishop had celebrated Mass at the Cathedral, Portelli had waited with him on the front steps. He had been present while the applicant engaged in conversation with congregants. Each time, that 'meet and greet' had lasted for at least 10 minutes. Portelli added that this was the applicant's invariable practice after Mass thereafter as well.

684 If Portelli's evidence as to the 'meet and greet' on those two December dates were to be accepted,[191] the complainant's account could not, in any realistic sense, be correct. In practical terms, his account would be 'impossible.' The position would be akin to an alibi having been raised, which the prosecution could not, to the requisite degree, disprove.[192]

685 If, on the whole of the evidence, an alleged offence can only have been committed at a specific time, or within a specific period, then, in the face of the equivalent of an 'alibi', the opportunity to commit that offence at that time, or during that period may, for all practical purposes, become an essential element of the offence.

686 It was submitted before this Court that, where the defence puts forward an alibi, or its equivalent, it is not for the jury to ask themselves whether they accept that alibi to be true. The law requires that they must acquit unless satisfied beyond reasonable doubt that the alibi has been entirely disproved.[193] The onus rests upon the prosecution wholly to negate the alibi. In order to do so, the prosecution must eliminate even the 'reasonable possibility' that the alibi might be true.

687 Portelli's evidence on the issue of the applicant having waited on the steps of the Cathedral, after Sunday solemn Mass, on both 15 and 22 December 1996, was as follows:

MR RICHTER: You would wait with him?

PORTELLI: Yes, yes.

MR RICHTER: You did wait with him?

PORTELLI: I did.

---

191 The term 'accepted', in this context, includes merely an acceptance on the part of the jury that Portelli's evidence regarding the 'alibi' was 'reasonably possible.' That is because the 'alibi' would necessarily be a complete answer to the prosecution case, and not merely the negation of a single piece of circumstantial evidence, no matter how significant, upon which the prosecution relied.

192 In effect, the position would be much like that discussed by the High Court in *SKA*.

193 See generally, *R v Small* (1994) 33 NSWLR 575, 595–6.

MR RICHTER: Because you do recall those occasions, those two, don't you?

PORTELLI: Yes.

MR RICHTER: Because they're special. Not in the sense of being like Christmas, but they were special because they were the first two times that you accompanied him as his master of ceremonies?

PORTELLI: Yes. Yes.

688 Later in Mr Richter's cross–examination, the evidence continued:

MR RICHTER: All right. And on the first two occasions when he said Sunday Mass, solemn Mass in 96, on the two occasions when he said it, you mentioned the period of time during which he would be standing outside greeting parishioners - - -?

PORTELLI: Yes.

MR RICHTER: - - - and guests?

PORTELLI: Yes.

MR RICHTER: You gave a span of time as to which these things might happen. He would be there at least ten minutes, whatever the upper limit is. Is that right?

PORTELLI: Yes. Yes.

MR RICHTER: You recall that?

PORTELLI: I do, yes.

689 Mr Richter submitted that Portelli would have had good reason to remember the first two occasions on which the new Archbishop celebrated Sunday solemn Mass at the Cathedral.

690 It will be recalled that Portelli acknowledged that there might have been an occasion when the applicant may not have remained on the steps, speaking to congregants, after Mass. He said that if there had been such an occasion, it would have been rare. Even so, he insisted, he would have remained with the applicant at all times, in accordance with Church Law.

691 Mr Gibson's re-examination of Portelli, which legitimately took the form of

cross-examination, did not challenge his basic assertion of having specifically recalled each of the first two occasions on which the applicant said Sunday solemn Mass at the Cathedral. Mr Gibson did not put to Portelli that he was lying, he having previously specifically eschewed any such suggestion.[194] Importantly, nor did Mr Gibson suggested to Portelli that he was attempting, whether consciously or otherwise, to assist the applicant's defence.

The prosecution's response — It is possible that the applicant was in the Priests' Sacristy within a few minutes of the conclusion of Mass

692 In his closing address, Mr Gibson accepted, just as he had when he opened the case to the jury, that a substantial number of witnesses had given evidence that, taken as a whole, stood in stark conflict with the complainant's account.

693 Mr Gibson invited the jury to distinguish between what he described as two separate questions. The first was whether, as the defence contended, something simply could not have happened ('impossibility'). The second was whether, as the prosecution argued, the evidence upon which the defence relied in that regard, really went no further than to establish that there was simply less opportunity for the offending to have occurred.

694 Mr Gibson properly and correctly identified as a fundamental issue for the jury to consider whether, as the defence claimed, the applicant had, after Mass on 15 and 22 December 1996, remained on the steps of the Cathedral, for an extended period of time. He recognised that if that were so, the prosecution case with regard to the first incident could hardly succeed. He invited the jury to conclude that those witnesses whose evidence supported that 'alibi' should not be accepted, and did so on the basis that their recollection of events was unreliable.

695 In the alternative, Mr Gibson invited the jury to find that even if the applicant had stood on the steps for a while after Sunday solemn Mass on those two December

---

194 That is a matter to which I shall return later in these reasons for judgment.

dates, he would have done so for a short period, which would have allowed for the offending as described by the complainant to have occurred.

696 Mr Gibson submitted that, having regard to the evidence as a whole, it was 'entirely possible' that the applicant had not remained on the steps for 10 minutes or more, on the dates in question. And if he had remained on the steps, on one of the two December days, it was 'entirely possible' that he had not done so on the second.

697 Mr Gibson recognised that there were dangers in approaching this issue of what I have described as 'the alibi' on the basis of whether it was 'entirely possible' that the applicant may not have stood on the steps for an extended period of time. He told the jury that by using the expression 'entirely possible', he had no intention of reversing the onus of proof, or in any way lowering it. He said that he was simply responding to a defence submission that had been couched in the absolutist language of 'impossibility.'

698 Mr Gibson did, however, invite the jury to reject the evidence of McGlone. He contrasted what he described as McGlone's professed memory of the meeting between his mother and the applicant on the steps of the Cathedral (which, he submitted, was likely to have been of peripheral significance, at best, so far as McGlone was concerned), with the complainant's memory of having been sexually abused (which he submitted must surely have been of the most profound importance in his life).

699 When Mr Gibson came to deal with Portelli's evidence, he focused upon the language that Portelli had used in certain of his answers. He suggested that some of Portelli's evidence had been vague, and qualified. He argued that Portelli's memory had to be regarded as suspect. For example, Portelli could only say that it 'seemed correct' that the first time the applicant celebrated Sunday solemn Mass as Archbishop 'would have been' 15 December 1996. At another point, Portelli said, in answer to that same question, that this 'would be correct.'

700 Mr Gibson, despite having made it clear that he was not suggesting that

Portelli had lied, commented upon his 'excellent memory' in cross-examination, but observed sardonically that his memory was 'not as good …' when it came to re-examination. He noted that Portelli claimed to have a specific and quite vivid recollection of the first two Sunday solemn Masses said by the applicant, but could not recall, unaided, whether the applicant had said Sunday solemn Mass on either 10 or 17 November 1996. Nor could he recall whether, assuming that the applicant had done so, where that Mass had taken place.

701 Mr Gibson proffered yet another alternative theory. He submitted that the applicant's practice of standing on the steps of the Cathedral immediately after Sunday solemn Mass might not have commenced in December 1996, but might have begun much later, in 1997.

702 In support of that particular variant of the prosecution case, Mr Gibson reminded the jury that Portelli had acknowledged that early on in the applicant's tenure, 'there were a number of bugs in the system that needed ironing out.' He invited them to treat that answer as supporting his submission that the practice of remaining on the steps did not begin until significantly later in the applicant's tenure as Archbishop.

703 Finally, on this point, Mr Gibson noted that both the applicant, in his record of interview, and Portelli, in his evidence, had agreed that if there had been another engagement scheduled after Sunday solemn Mass, the meeting on the steps with congregants might be curtailed.

704 Although there was no actual evidence of another engagement of that kind scheduled on either 15 or 22 December 1996, Mr Gibson raised the possibility that there may have been such an engagement.

705 Mr Gibson also reminded the jury that Portelli, though apparently clear as to what took place on the two December dates, had not been able to recall specifically

whether the processions on those dates had been internal or external.[195] He invited the jury to find that Portelli's memory was, therefore, unreliable.

706 As far as the other witnesses who spoke of the applicant's 'invariable practice' of remaining on the steps were concerned, Mr Gibson submitted that this 'practice' may not have developed until much later, in 1997. He did not address the difficulty associated with that particular argument arising from Finnigan's evidence that he had seen the applicant standing on the steps, talking with parishioners after Mass, before he left his position at the Cathedral, which it will be recalled, was Christmas 1996.

707 When it came to McGlone's evidence, Mr Gibson submitted that it should be positively rejected. He invited the jury to conclude that if the incident concerning McGlone's mother took place at all, it was more likely than not that it had occurred in 1997, rather than 1996.[196] He added that, even if the jury rejected that particular submission, McGlone's 'alibi' would still only be good for one of the two dates in December. That would mean that the other date might be the occasion upon which the first incident occurred.

(3) Not possible that the applicant was robed and alone after Mass

708 Mr Richter submitted that the evidence showed that Church Law going back many centuries made it clear that no Bishop (including, of course, an Archbishop) could ever be left alone in church, while robed. It was Portelli's responsibility, as Master of Ceremonies, to remain with the applicant continuously whilst he was robed.

709 It was further submitted that Portelli was an experienced occupant of that office, having previously performed that role with Archbishop Little. Moreover,

---

195 Whether or not that is a fair statement of Portelli's evidence will become apparent later in these reasons, it being submitted on behalf of the applicant that, after giving the matter some brief thought, Portelli was well able to recollect that it was an external procession.

196 There does not seem to have been any evidence at all to support that particular contention.

many witnesses agreed that, after the applicant's appointment as Archbishop, Portelli was always in company with the applicant. As indicated, he was described as being like a 'shadow' or 'bodyguard'.

710 Portelli's evidence was that he had a clear recollection of the first two occasions upon which the applicant said Sunday solemn Mass at the Cathedral. He insisted that he had been with the applicant the whole time on both those days.

711 With regard to the second incident, Portelli's evidence was as follows:

> MR RICHTER: Yes, the protocol is?
>
> PORTELLI: The protocol is that the most senior person is always the last in a procession. So, therefore, if it's the Archbishop he is always the last, regardless of whether he is saying the Mass or whether he is presiding at the Mass, he is always last.
>
> MR RICHTER: Was there any occasions you can recall of the Archbishop processing back to the sacristy, pushing anyone aside or pushing anyone?
>
> PORTELLI: No.
>
> MR RICHTER: Or trying to overtake other clerics and altar servers and pushing his way into the throng — or a throng of choristers?
>
> PORTELLI: No.
>
> MR RICHTER: Had you ever seen him pushing anyone?
>
> PORTELLI: No I have not.
>
> MR RICHTER: He was such an obvious man, he was what, about six foot four at that stage?
>
> PORTELLI: Yes, he was.
>
> MR RICHTER: Can I take you to another subject, if I may, and it is this. The duties of a master of ceremonies is historically significant, is that correct, in - - -?
>
> PORTELLI: There — there is, yes, quite a deal of precedent that's associated with it.
>
> MR RICHTER: There's a whole history associated with that office?
>
> PORTELLI: Yes, there is.

MR RICHTER: And it is a specific Church office?

PORTELLI: It is.

MR RICHTER: Is the master of ceremonies to either the Pope or to an Archbishop?

PORTELLI: Yes.

MR RICHTER: Masters of ceremonies have been known since the 5th Century?

PORTELLI: They have.

MR RICHTER: Yes, you've studied Church history?

PORTELLI: I have.

MR RICHTER: In fact, masters of ceremonies have been specifically named since the 15th Century or thereabouts?

PORTELLI: Yes, absolutely.

MR RICHTER: And their duties are spelt out in a number of learned works, some of which go back centuries?

PORTELLI: Yes, they are.

MR RICHTER: And the thrust of those works is that an Archbishop is not to be left alone?

PORTELLI: He — he can't be.

MR RICHTER: When he's robed?

PORTELLI: M'mm.

MR RICHTER: Yes?

PORTELLI: From actually the moment he enters a Church.

MR RICHTER: Yes, and you were steeped in that learning by the time you became master of ceremonies to Archbishop Pell?

PORTELLI: Well, I had already performed the same functions for Archbishop Little for three years.

MR RICHTER: I see. So you knew precisely what that entailed?

PORTELLI: Yes.

MR RICHTER: And there was no occasion of which you are aware when Archbishop Pell, when robed as Archbishop or robed as presiding, was left alone by you, or if you had to walk into the sanctuary, for example, as you've discussed yesterday - - -?

PORTELLI: Yes.

…

MR RICHTER: Do you recall whether that [you going to see to the books in the sanctuary] happened on the first two occasions when Archbishop Pell said solemn Mass on Sundays?

PORTELLI: No, it wouldn't have because those — if there were events in the afternoons of those days they would be listed in that list of engagements that you read out.

MR RICHTER: Yes?

PORTELLI: And they're not listed.

MR RICHTER: Yes. So the situation is this, that you said it wouldn't have happened on those two occasions. You can actually say it didn't, can't you?

PORTELLI: Yes.

MR RICHTER: All right. Now, that having been said, we discussed the notion that someone might approach the Archbishop and want a private conversation after Mass?

PORTELLI: M'mm.

MR RICHTER: And that you would step aside for that?

PORTELLI: Yes.

MR RICHTER: But on that occasion you would see the Archbishop going with that person, such a person, either to his office or to the sacristy?

PORTELLI: Yes.

MR RICHTER: Yes, but he would be with that person?

PORTELLI: Yes.

MR RICHTER: And you would be required to immediately re–join him when that private conversation had ceased?

PORTELLI: If it ever happened, for instance, - - -

MR RICHTER: Yes?

PORTELLI: - - - that he wanted to speak to, say, it would normally be one of the priests who was there.

MR RICHTER: Yes?

PORTELLI: If he needed to talk to somebody he would often tell

him either before Mass, 'Look, I'm going to talk to so–and–so', and so I would simply wait just outside the door.

MR RICHTER: Yes?

PORTELLI: Or else if it was a decision he made there and then he would indicate to me, 'Give us a minute', and I would simply make myself busy some distance away.

MR RICHTER: Those occasions did not happen on the first two solemn Masses?

PORTELLI: Not that I recall.

MR RICHTER: We're talking a period of years when it may have happened here and there from time to time, but not in 1996?

PORTELLI: Yes.

MR RICHTER: You're agreeing?

PORTELLI: Yes.

712 Mr Richter noted that Mr Gibson had not challenged Portelli's evidence regarding the nature of his duties as Master of Ceremonies. That was so, even though the trial judge had granted Mr Gibson leave to cross-examine Portelli as to the reliability of his evidence (though not as to its truth).

713 Mr Richter invited the jury to recall that Portelli had gone on to say that if, for some reason, he could not be with the Archbishop for a few minutes or so, someone else would have assumed that role. For example, if there were another special Mass scheduled at the Cathedral that afternoon, and Portelli had to spend two minutes or so collecting items from the sanctuary before re-joining the Archbishop to assist him in disrobing, Potter would inevitably have remained with the applicant throughout. However, Portelli had insisted that nothing of that kind had occurred on either 15 or 22 December 1996. Any such special Mass would certainly have been listed in *Kairos*, and none had been so listed.

714 Portelli said that if the applicant had gone into the Priests' Sacristy after Mass on either of those dates, his only reason for doing so would have been to de-vest. He emphasised that the applicant would only ever have disrobed with Portelli's

assistance. He said that disrobing involved dealing with sacred vestments, and was regarded as part of the liturgy.

715 Mr Richter submitted that McGlone's evidence supported Portelli in that regard. McGlone said that an Archbishop in robes could never be left alone, at least during the course of the ceremonies. Those ceremonies continued until the Archbishop had actually de-vested. He said that the vestments were not simply holy, but blessed. They were sacred. There were specific prayers to be said both when vesting and de-vesting.

716 Portelli said that he could remember having helped the applicant robe when he first said Mass as Archbishop at the Cathedral. He added that concelebrating priests would have been present in the Priests' Sacristy at the time the applicant both robed, and disrobed.

717 Mr Richter submitted that Portelli's evidence on this issue was also supported by Potter. He said that if Portelli happened not to be available to remain with the applicant for any particular reason, he, Potter, would ensure that either he, or another priest or priests, were there to look after him.

718 In that regard, it is appropriate to return to the extract of Potter's evidence on this subject, set out at [509] of these reasons.

The prosecution's response — It <u>is possible</u> that the applicant was robed and alone after Mass

719 Mr Gibson, in his closing address, submitted that it was 'entirely possible' that on either 15 or 22 December 1996, the applicant had not been accompanied by Portelli when he made his way back to the Priests' Sacristy after Sunday solemn Mass.

720 Mr Gibson noted that Portelli had agreed that he could not specifically recall having been in the applicant's company for every minute of the period following Mass, although he had qualified that answer by saying that he would not have been

very far away. He had explained that was because he, himself, would have had to disrobe.

721 Mr Gibson reminded the jury that Portelli had agreed that there may have been times when he did not remain in constant proximity to the Archbishop, immediately after Mass, although he said that such occasions would have been rare. He could not recall this ever having happened. If it had, he would have been separated from the applicant for no more than 'a minute or two.' He would, in any event, have made certain that someone else accompanied the Archbishop at all times.

722 In relation to Potter's evidence that the Archbishop was never left alone when robed, Mr Gibson relied heavily upon the discussion that Potter had had with Detective Reed in December 2016, to which I referred at [511]–[513] of these reasons. As previously indicated, Potter had acknowledged on that occasion that he could not state categorically that the applicant had never been on his own when he returned to the Priests' Sacristy. Mr Gibson submitted that Potter's concession to that effect rendered his seemingly exculpatory evidence regarding this matter effectively worthless.

723 However, it should be noted that Mr Richter submitted that this was greatly to overstate the effect of Potter's 'concession' to Detective Reed. Potter's evidence was that, so far as he was aware, Portelli had always been with the applicant when they returned to the sacristy to disrobe. According to Potter, the only exception to that might have been the rare occasion when Portelli himself was required to say a Mass later that day.

724 The prosecution's detailed schedule of evidence, attached to its written case before this Court, pointed to the evidence of several other witnesses, none of whom were able to say unequivocally that the applicant was always accompanied by Portelli (or someone else) after Mass.[197] Mr Gibson relied upon that fact.

---

[197] It need hardly be said that evidence of that kind cannot be transformed into positive evidence that the applicant had been unaccompanied by Portelli or someone else. There was, however, evidence from David Dearing to the effect that he could recollect having seen the Archbishop

(4) Not possible that the boys could be sexually abused by the applicant in the Priests' Sacristy after Mass, undetected

725 Mr Richter observed that Potter said that he would unlock the Priests' Sacristy about five minutes after the end of Sunday solemn Mass, just as the altar servers started to return. The practice was that these altar servers, in two groups, would enter the Priests' Sacristy. They would then all bow to the cross, thereby completing the ceremonial aspect of the procession.

726 Potter's evidence in that regard was supported by McGlone, who said that the act of bowing to the cross in the Priests' Sacristy signified the end of the procession, at least so far as the altar servers were concerned. Until that act of bowing had taken place, the procession continued.

727 Potter also gave unchallenged evidence to the effect that concelebrant priests, who would be bringing up the rear of the procession, would themselves de-vest in the Priests' Sacristy after Mass. He said that some of the priests would talk among themselves, while waiting for the Archbishop.

728 According to Potter, the adult altar servers[198] would move in and out of the Priests' Sacristy. They would ferry vessels from the sanctuary, and store them away in the vault. In addition, Dean McCarthy, who was officially the parish priest of the Cathedral, would bring the Sunday collection into the sacristy. The money would be put into the priests' safe, or vault, so that it could later be transferred into the presbytery.

729 Potter described the various sacred items that were cleared from the sanctuary, and brought into the Priests' Sacristy. All of this, he said, would be done within about 5 to 15 minutes of the completion of Sunday solemn Mass. These items included chalices, processional crosses, ewer basins, cruet sets, books, folders and wine.

---

robed, and unaccompanied, in the sacristy area, albeit at some unspecified point in time.

198 Of whom there were generally between 6 and 12.

730 According to McGlone, the process of clearing up the sanctuary meant that the Priests' Sacristy was only ever momentarily left unattended, after Sunday solemn Mass. He said that each altar server would only carry one item at a time, and they did not dawdle. They simply picked up the item in question, and took it straight back to the sacristy.

731 Connor had this to say:

> MR RICHTER: The process of clearing up after Mass would invariably take ten minutes plus?
>
> CONNOR: Correct.
>
> MR RICHTER: And that would continually involve people coming into the sacristy and going out of the sacristy?
>
> CONNOR: Correct.
>
> MR RICHTER: Do you recall any - - -
>
> HIS HONOUR: You're talking about the priest sacristy there, Mr Richter, or the worker sacristy?
>
> MR RICHTER: The priest sacristy. The priest sacristy?
>
> CONNOR: Yes.
>
> MR RICHTER: Do you recall any occasion on which the priest sacristy was ever left unlocked and the door open and unattended by anyone?
>
> CONNOR: No, I can't.
>
> MR RICHTER: You can't recall. If there had been a momentary failure of attendance it would not be more than a matter of seconds or half a minute?
>
> CONNOR: Certainly.

732 Potter added that after the Archbishop had said Sunday solemn Mass, the position around the sacristy area was as follows:

> MR RICHTER: Let's put it this way. (To witness) When you were not in the sacristy were you aware as to what the altar servers were doing?
>
> POTTER: Taking things what I gave them from the sanctuary to put in the sacristy, and then they would come back out — out — out, and to see if there was anything else to come off the sanctuary.

MR RICHTER: Would there have been more than — sorry, by then would the priests have arrived back from the procession?

POTTER: They would — they would arrive back and disrobe.

MR RICHTER: And they disrobed in the priest sacristy?

POTTER: Sacristy, yes.

MR RICHTER: And sometimes they would sit around and talk?

POTTER: Or waiting for the Archbishop to come back. Yes.

…

MR RICHTER: So, Monsignor Portelli comes back with the Archbishop. There are people in the sacristy waiting for the Archbishop?

POTTER: Yes.

MR RICHTER: They say their goodbyes?

POTTER: Yes.

MR RICHTER: Everyone unvests?

POTTER: Yes.

MR RICHTER: And then Portelli and the Archbishop, can I suggest, go off to have lunch at the presbytery?

POTTER: Correct, yes.

733 If Potter's evidence regarding the altar servers' practice, in moving items from the sanctuary to the Priests' Sacristy, represented a version of events that was 'reasonably possible' on both the key December dates, the complainant's account of what took place during the first incident would almost certainly have to be rejected. The timeframe within which the offences alleged could conceivably have been committed would simply become too tight.

734 Potter's evidence regarding movements around the Priests' Sacristy after Mass was supported by Finnigan.[199] He said that when the Archbishop celebrated Sunday solemn Mass, there were almost always a number of other priests acting as

[199] Again, it must be remembered that Finnigan left his position at the Cathedral at Christmas 1996. That made his evidence, regarding the practices that were followed prior to his departure, of critical relevance, and it might be thought, powerfully exculpatory.

concelebrants. These other priests would vest and de-vest in the Priests' Sacristy. They would arrive there immediately after Mass had ended, and remain there for at least the next 10 to 15 minutes or so. In addition, Finnigan said that there were a number of other people in the sacristy corridor at that time, including Potter and the florist.

735 Potter's evidence was also supported in that regard by Cox. He said that when he returned to the choir room after the postlude, in order to put away the sheet music that had been used that day, the procession was already at the glass door. He said that he would walk along the sacristy corridor. Although the 'hive of activity' had simmered down by that stage, there were still one or two priests in the sacristy who were talking as they were de-vesting. There were also altar servers in the altar servers' sacristy.

736 Mr Richter noted that even the complainant had acknowledged, in his evidence in-chief, that the applicant was 'always assisted' by concelebrant priests when he said Mass. He submitted that those priests would have had nowhere else to go, once Mass had ended, other than to return to the Priests' Sacristy, in order to de-vest.

737 Mallinson agreed that both the Priests' Sacristy and the sacristy corridor were crowded in the 5 to 10 minutes after Sunday solemn Mass had ended. His evidence on this topic was as follows:

MR RICHTER:	At that stage is there any action taking place as in altar servers, Mr Potter fussing around, cleaning up things?
MALLINSON:	A lot of people in the corridor often, yes.
MR RICHTER:	Yes?
MALLINSON:	Choir people coming out of the — from where they've left their robes and books and things, back through the corridor, some of them, not all.
MR RICHTER:	Yes?
MALLINSON:	And the clergy and so on, yes.
MR RICHTER:	It was a busy place?

MALLINSON: Yes.

MR RICHTER: So by the time the choir has gone through the corridor it's a busy place - - -?

MALLINSON: Yes.

MR RICHTER: - - - further down near the sacristies. Yes?

MALLINSON: Yes. - - - Yes.

738 Rodney Dearing said that in the 10 to 15 minutes after Sunday solemn Mass, he would see Potter, various altar servers, and concelebrant priests in the sacristies, and in the sacristy corridor area. He described the entire sacristy area as 'bustling.'[200]

739 As regards the second incident, Connor said that he had a specific recollection of 23 February 1997. That was because, on that day, the Archbishop had presided, rather than celebrated, Mass. Connor said that this was a rare event. He recalled that the procession that day had been conducted in accordance with 'normal practice.' He also recalled having taken part in the clearing up of various items from the sanctuary. He added that Potter was always either in the sanctuary, or going between the sanctuary and the sacristy, backwards and forwards. He recalled Potter having unlocked the Priests' Sacristy in order to let in the altar servers. He described that as being the invariable practice after Sunday solemn Mass.

740 Connor added, with reference to both incidents, that during the 5 to 15 minutes after Mass had ended, when the Priests' Sacristy was first unlocked, there would always be at least 10 people going into and out of that room, and many others congregating around the doorway.

741 Mr Richter submitted that this evidence, taken as a whole, concerning what regularly took place during the 5 or 10 minutes after Sunday solemn Mass, made it clear that the area around the Priests' Sacristy was always very crowded, 'bustling', and a 'hive of activity.' The complainant's account could not, in any way, be

---

[200] Once again, this evidence would be difficult to reconcile with the complainant's account of the first incident.

reconciled with that body of evidence.

The prosecution's response — It <u>is possible</u> that the boys could be sexually abused by the applicant in the Priests' Sacristy, after Mass, undetected

742 Mr Gibson submitted that there was no reason why the jury could not have accepted the complainant's evidence with regard to both incidents.

743 With reference to an argument that it was improbable that the applicant would have committed the offences embodied within the first incident, in the Priests' Sacristy, in a crowded area, with the door to the sacristy open (or at least not said to have been closed), the prosecution referred to the 'schedule of evidence' attached to the respondent's written case before this Court. It noted that the complainant had not agreed that the 'crying and calling out' of the two boys, as he described it, would certainly have been overheard in the sacristy corridor. His evidence was that they were 'barely whispering', sobbing and whimpering, but not yelling and screaming.

744 The complainant had, however, agreed that when the other boy said 'can you let us go?' it was in an 'elevated voice.' He also agreed that the other boy's voice would have been able to have been heard, in the sacristy corridor, if the door to the Priests' Sacristy was not shut.

745 However, the respondent submitted that the complainant's use of the term 'an elevated voice' could mean almost anything. The complainant said that he did not think that the door to the Priests' Sacristy had been wide open at the time of the first incident. He did not say that he specifically recalled it having been open. He was simply not sure whether the door had been open or closed.

746 As regards McGlone's evidence, Mr Gibson submitted that, despite the criticisms that he had levelled at it, there were some aspects of McGlone's testimony that assisted the prosecution case. McGlone said that after Sunday solemn Mass, the altar servers would lead the procession back to the rear metal gate, opening into the toilet corridor. They would then enter that corridor, heading towards the Knox

Centre. That description was said to be consistent with the complainant's overall version of events.

747 According to McGlone, the altar servers would enter the Priests' Sacristy, which was already unlocked at that stage, bow to the crucifix, exit the sacristy, and commence their duties as altar servers. It followed, so Mr Gibson submitted, that shortly after the conclusion of Mass, the Priests' Sacristy would already have been unlocked. The theory was that it would therefore have been accessible to the complainant and the other boy.

748 Potter said that he would unlock the Priests' Sacristy shortly after Mass had concluded. At this time, the choir would be processing outside the Cathedral grounds, on their way into the Knox Centre. The defence case was that the Priests' Sacristy would only ever have been 'momentarily' unattended. However, Mr Gibson submitted that Potter's evidence did not go quite that far.

749 Moreover, Potter said that he would not begin cleaning the sanctuary and returning items to the sacristies or the utilities room until the procession had cleared from the Cathedral. He would also give parishioners an opportunity to walk to the sanctuary in order to pray. He would not disturb people who were doing so for some five or six minutes, in order to ensure that they were given that private time.

750 Mr Gibson submitted that Potter's evidence that he would not have unlocked the Priests' Sacristy until that five or six minutes had elapsed, should be rejected. It was said to be at odds with the evidence of McGlone (and indeed, Connor as well), to the effect that Potter would open the Priests' Sacristy so that the altar servers could bow to the crucifix, signifying the end of Mass.

751 Mr Gibson also pointed to evidence given by Cox, to the effect that the sacristies were sometimes open when he walked back to the Knox Centre after playing the postlude.

(5) Only a 'madman' would attempt to sexually abuse two young boys in the Priests' Sacristy immediately after Sunday solemn Mass

752 During the course of his closing address to the jury, Mr Richter put forward a submission in precisely these somewhat florid terms. He sought to justify that submission by reminding the jury that, as regards the first incident, there were literally dozens of people, including a number of adults, who would have been congregating around the area of the Priests' Sacristy shortly after the conclusion of Sunday solemn Mass. Anyone could have walked into that room at any time, and immediately seen what was going on. This would have been not just risky behaviour on the part of the applicant, but in Mr Richter's submission, verging on 'madness.'

753 In addition, there were adults in the choir who, on the evidence, were charged with the responsibility of looking after the younger choristers. The Archbishop himself had been newly appointed, and it was widely understood, in 1996, that there was strong public encouragement to report clerical sexual abuse. This would have rendered the offending even more of a risk.

754 Mr Richter noted that the complainant himself had not suggested that the applicant had shut the door to the sacristy when he entered the room. It would be extraordinary to think that he would have offended in the manner described by the complainant, with the door even partly open.

755 Moreover, Mr Richter noted that there was no ambiguity whatever about the nature of the acts alleged. If anyone had entered the sacristy and witnessed those acts, they could not possibly be explained away.

756 In addition, there was nothing to have prevented either of the boys from leaving the room while the other was being attacked. There was nothing to suggest that the applicant had previously been acquainted with either of them. There was no suggestion that he had engaged in any grooming. There was no evidence that the applicant had ever threatened either boy. Nor had he said to them that they were

not to tell anyone what had occurred.

757 Finally, Mr Richter submitted that although offences involving sexual abuse of children were, almost always, committed in private (and often after a period of grooming), the complainant's account was that the applicant had carried out these acts in the Priests' Sacristy against two boys, in company with each other. That meant that if one of them subsequently made a complaint, the other could corroborate it.

The prosecution's response — Not correct that only a 'madman' would attempt to sexually abuse two young boys in the Priests' Sacristy immediately after Sunday solemn Mass

758 In sentencing the applicant, the trial judge dealt with a submission made by Mr Richter, on the plea, to the effect that the only inference to be drawn from the offending was that the applicant had not been acting rationally at the time.

759 The trial judge rejected that submission, and in sentencing the applicant, said:

> As to what drove you to offend in such a risky and brazen manner, I infer that, for whatever reason, you were in fact prepared to take on such risks.
>
> I conclude that your decision to offend was a reasoned, albeit perverted, one and I reach that conclusion to the criminal standard.
>
> To accept the argument of your counsel would mean that every offender who commits an offence which is brazen, out of character, and spontaneous, must be considered to have some form of mental impairment, or some lapse in a capacity to reason or to think rationally. There is no basis in law or in principle for this proposition…[201]

760 In its submission to this Court, the prosecution fixed upon the trial judge's conclusion that the applicant's decision to offend had been 'reasoned, albeit perverted' as its response to Mr Richter's 'madness' submission.[202]

---

201 *DPP v Pell (Sentence)* [2019] VCC 260 ('Sentencing remarks') [65]–[67].

202 It might be thought that the trial judge's comment about the applicant having shown no signs of mental impairment was directed to a submission for sentencing purposes that he could not have been acting rationally at the time. That comment had nothing to do with his Honour's assessment of the level of the brazenness of the offending, or how risky the behaviour would have been.

(6) Not possible for the boys to have 'nicked off' from an external procession without being seen by a single person

761 Mr Richter noted that the complainant had acknowledged that, on the day of the alleged first incident, the choir had been lined up two-by-two, as they left the Cathedral after Sunday solemn Mass. The procession was en route to the choir changing room. It was an external, rather than internal procession.

762 According to Mr Richter, the evidence showed that the procession was formal and disciplined. It was common ground that both boys would have been marching towards the front of the procession, just behind the adult altar servers. There would then have been a number of older choristers immediately behind them. These would have been followed by other altar servers, and concelebrant priests, with the applicant, if he were still in the procession, making up the absolute rear.

763 In addition, Finnigan, Cox and Rodney Dearing were, according to their evidence, full participants in the procession. They would have been located towards the rear. They would have been in a position to clearly see two young choirboys, fully robed, break away from the rest of the group and go back into the Cathedral. The adults in the procession would have understood that the younger boys were in their care. It was clear that there was a need to maintain discipline among the choir, particularly when the boys were in public view.

764 Mr Richter submitted that there was unchallenged evidence that 'nicking off' from the procession, without permission, would have been regarded as a serious disciplinary breach. Had any such thing occurred, it would have been noted and acted upon. There was simply no evidence, apart from the complainant's account, that any such 'nicking off' had ever taken place.

765 Mr Richter further submitted that whereas one person might not have noticed two young boys breaking away from the formal procession, it was inconceivable that 40 or more would have seen nothing.

766 Rodney Dearing made it clear that, from his position in the rear of the

procession, he would have seen anyone coming back the other way, from the area close by the toilet corridor. He insisted that he had never seen it happen. He said that he did not believe it possible for this to have occurred.

767 Parissi supported Rodney Dearing in that regard. He said that it was impossible for the two boys to have broken away from the procession in the way that the complainant described. They would unquestionably have been noticed, and subject to discipline.

768 Christopher Doyle was said to provide further support as regards this matter. He had been a member of the choir from 1994 to 1999, and was aged 15 in the latter part of 1996. He sang at Sunday solemn Mass at that time, and also regularly attended choir rehearsals.

769 Doyle was asked about the possibility of two young choirboys having broken away from the procession after Sunday solemn Mass, while the rest of the choir were returning to the choir robing room. The transcript reads as follows:

> MR RICHTER: Yes, but marching back you would notice if [the complainant] and [the other boy] had decided to nick off?
>
> DOYLE: Absolutely.

770 Stuart Ford gave evidence to the same effect. In late 1996 he was aged 14 and had been a member of the Cathedral choir for some years. He knew both the complainant and the other boy. By reason of his age, he would have marched behind them in the procession. The transcript of his evidence reads as follows:

> MR RICHTER: In processions they would be in front of you, wouldn't they?
>
> FORD: Yes.
>
> MR RICHTER: If either of them, or both of them, decided to escape from the procession at any stage as it was marching back through the choir room you would have noticed?
>
> FORD: I believe I would have, yes.

771 Bonomy was even more emphatic. He said that if in the course of the

procession, a couple of 'young kids' in front of him had 'decided to buzz off' he would have seen it happen. Even if he had not seen it, he would have heard about it, and he never had.

772 David Dearing insisted that if anyone had split off from the procession, in the way that the complainant described, this would have been a serious breach of discipline. It was not something that he could recall ever having occurred.

773 David Dearing was asked by Ms Shann about certain answers that he had given during the committal hearing. Referring to the role played by Finnigan in supervising the choristers, his evidence was as follows:

> MS SHANN: And at line 13, so were you asked these questions and did you give these answers, and I'll just read out a little to chunk to you and then just ask you about that. Just to set the scene, it's some questions about Brother Finnigan.
>
> Question: 'He saw to it that the procession, or you understood from him and perhaps from your father as well, that the procession had to stay in line formation up until you were back in the building?'.
>
> Answer: 'Absolutely'.
>
> Question: 'And any deviation from that would be called out?'.
>
> Answer: 'Definitely'.
>
> Question: 'And would be the subject of some form of disciplinary action?'
>
> Answer: 'Yeah, I would've, I would've thought so, yeah.'
>
> Question: 'But you're saying 'I would've thought so'. It never happened to your knowledge that boys got out of line?'
>
> Answer: 'Not that I can recall, no. I always remember us being all together and going in, yeah.'
>
> Question: 'In terms of those in front of you in that line, it's the case isn't it that you had a

clear view, you're all marching two by two, right?'

Answer: 'Yep, yeah, yep.'

Question: 'And you had a clear view of the people that were in front of you?'

Answer: 'Yes.'

Question: 'And if someone had of — has nicked off or two people had of nicked off in front of you in that line you would've seen them?'

Answer: 'Yeah, you would of.'

Were you asked those questions?

DAVID DEARING: Yes.

MS SHANN: And did you give those answers?

DAVID DEARING: Yes, I did.

774 Finnigan was asked whether, had two robed choristers 'nicked off' from the procession, he would have noticed. He said that dressed as they were, in red and white vestments, they would have been highly visible, and he had never heard of any such thing happening. His evidence reads as follows:

MR RICHTER: The notion of a couple of boys nicking off without being seen either by you or by another 30 or 40 pairs of eyes behind had you ever heard of it happening?

FINNIGAN: No, I haven't.

MR RICHTER: Was there ever any talk about it ever having happened, amongst the boys or anyone else?

FINNIGAN: No.

775 Cox was even more adamant that the complainant's account of having 'nicked off' from the procession could not possibly be correct. His evidence on this subject can be found at [559] of these reasons for judgment.

776 The defence also pointed to the evidence of four other choirboys, all of them aged about 12 or 13 in 1996. These were Aaron Thomas, Farris Derrij, Andrew La Greca, and David Mayes. All these witnesses said that there had never been an

occasion, of which they were aware, when two young choristers had just 'nicked off' from the procession. They all said that had any such thing occurred, it would have been noticed.

The prosecution's response — It <u>is possible</u> for the boys to have 'nicked off' from an external procession without being seen by a single person

777 The prosecution relied upon the complainant's evidence that, by the time the procession had arrived in the general area of the South Transept, leading up to the metal gate, the choir had become scattered and 'a bit chaotic.' He said that it was just at that point that both he and the other boy had broken away.

778 The complainant said that he and the other boy had been 'towards the back' of the procession when they broke away. He said that this was at a time where the choristers were congregated together outside the metal gate. He added that Finnigan's strictures as to decorum were not as effective as Finnigan would have liked to have thought.

779 Portelli said that there were large numbers of tourists gathered outside the Cathedral following every Sunday solemn Mass. There may have been anywhere between 350 and 500 people in that general area. Derrij, La Greca and Doyle all agreed that as the procession approached the metal gate, it became 'a little less orderly', in the sense that the two lines were no longer as straight as they had previously been, and people were talking to each other.

780 Finnigan agreed that once Mass had ended, the choristers were often excited. He insisted, however, that he would have seen two young boys 'nicking off', had any such event occurred. He did, however, qualify that answer by saying that he might not have done so if, for whatever reason, he had been distracted.

781 David Dearing said that once the choir 'hit the steel gate', it was 'like game on' to get out of there, and go home. It could get a bit rowdy. The choir would be 'bunching up' at that point.

782 Cox said that he occasionally left the rear of the procession when he heard the choirboys 'arcing up' in front. The physical formation of the choir probably broke up about the time they arrived at the glass door, which was at the end of the toilet corridor.

783 Parissi agreed that by the time the choir reached the glass door, everyone was in a rush, anxious to get back into the choir room and disrobe. He conceded that it was possible that two young choristers may have detached themselves from the procession somewhere near the South Transept, and that he had not witnessed that event.

(7) Had the boys left the procession, as the complainant alleged, they would have been seen by the organist, whether it happened to be Mallinson or Cox, in the area of the South Transept

784 Mr Richter relied upon Cox, in particular, in support of his submission that the complainant's account of having 'nicked off' from the procession was, at the very least, highly improbable.

785 Cox said that if he had been playing the organ on either 15 or 22 December 1996, he would have been in a position to see if anyone dressed in choir robes had gone past him. So far as he was aware, that had never happened. Had it occurred, he would have stopped the boys at once and questioned them about what they were doing.

The prosecution's response — <u>Not correct</u> that had the boys left the procession, as the complainant alleged, they would have been seen by the organist, whether Mallinson or Cox, in the area of the South Transept

786 The prosecution noted that Mallinson's evidence was that he usually played the organ at Sunday solemn Mass, though often assisted by Cox. From his position as organist he would not be aware of anything else going on in the Cathedral. His focus would have been directly ahead, and not to the side. The console of the organ was quite high, and there was a lot to think about.

787 According to Mallinson, two choristers could have passed him while he was playing the organ, and he might not have seen them. Accordingly, Mr Gibson submitted, Cox's evidence should not be regarded as having any great probative value.

(8) Not possible to be away from the choir for that length of time, unnoticed

788 Mr Richter noted that according to the complainant, the other boy and himself would have been alone in the Priests' Sacristy, with the applicant, for about six minutes or so. However, if his account were true, they would have had to have been away from the choir for a significantly longer period than that.

789 This would have included the time needed to walk from the procession and break away from it somewhere between the South Transept and the toilet corridor. It would also have included the moments spent 'poking around' in the sacristy itself, before locating the wine, and the time taken to swig it.

790 In addition, it would have included the time required, after the abuse had ended, for the boys to make their way through the Cathedral and back to the South Transept, turn left, and walk around the outside of the Cathedral, before re-entering through the metal gate. The boys would have had to walk along the toilet corridor, buzz, or ring the bell, in order to have been let in through the glass door and then wait for that door to be opened. They would then need to have gained access through the separate locked door to the choir rehearsal room.

791 Of critical importance to the defence case, and emphasising the necessity of fixing 15 and 22 December 1996 as the only dates upon which the first incident could have occurred, choir rehearsals took place on those dates, immediately after Sunday solemn Mass had ended. These rehearsals were scheduled for between 12.00 pm and 12.45 pm. This was fully documented.

792 Finnigan said of those rehearsals:

MR RICHTER: But the one thing you do recall is this, that those rehearsals took place?

FINNIGAN: Yes.

793 Cox agreed:

MR RICHTER: But one of those rehearsals took place?

COX: Well I have no doubt that they both took place because they're both here in documentary evidence, yeah.

794 Mallinson also agreed that the rehearsals took place on those dates, and that they were conducted immediately after Sunday solemn Mass.

795 The fact that Sunday solemn Mass would ordinarily not end until at least 12.00 pm, or shortly thereafter, and that there would then be a break of at least several minutes before rehearsal could actually begin, meant that the 12.45 pm finish that had been advertised would involve a tight turnaround. It was, of course, important that the rehearsals finish at about that advertised time as parents had been alerted to the fact that there would be rehearsals on those days. They would have been waiting at the Cathedral, in order to collect their children.

796 Mallinson said the process of disrobing after Mass would usually take about five minutes. Mr Richter submitted that had two young boys been missing from rehearsal, their absence would have been immediately apparent to all. Some of the adults would have gone looking for them at once.

797 The transcript regarding this issue reads as follows:

MR RICHTER: Do you recall an occasion after Mass when all the choir boys were in the choir room and anyone turned up some time later and rang the bell, a choir boy in robes, or two boys in robes; do you recall any such occasion?

MALLINSON: No. I can recall occasions when in the middle of rehearsal between 9.30 and 10.30 prior to Mass choir boys or choir men were late for rehearsal and the bell would ring. Somebody would go out and open the door so they could come in and join the rehearsal, but not otherwise.

MR RICHTER: Not otherwise. Thank you very much. Now, I want to ask you about — pardon me, Your Honour. Certainly

not at rehearsal after Mass?

MALLINSON: No, we'd presume they were all there.

798 Mr Richter submitted that having regard to the extremely narrow timeframe within which the two rehearsals after Mass had to be completed, and the time that must have been taken if the complainant's allegations were true, any rehearsal would, well and truly, have begun well before the two boys could have made it back to 're-join' the rest of the choir. Their temporary absence, and late arrival, would undoubtedly have been noticed.

The prosecution's response — It <u>was possible</u> to be away from the choir for that length of time, unnoticed

799 The complainant did not recall any special choir rehearsals, after Sunday solemn Mass, on either 15 or 22 December 1996. However, he accepted that such rehearsals may well have taken place. He agreed that he was obliged to attend all rehearsals of that kind, as a condition of his scholarship. When asked whether he had reported late to the rehearsals, his response was 'I was late all the time to my rehearsals.'

800 Before this Court, the prosecution noted that the complainant had not been cross-examined as to where, precisely, those extra rehearsals had taken place.[203]

801 Finnigan could not precisely recall, but thought that the rehearsals may have been conducted in the Cathedral itself, under the organ. Cox had no specific recollection of the rehearsals, but he had no doubt that they had taken place. Mallinson said that there were rehearsals after Sunday solemn Mass had concluded, but he had no specific recollection as to where they had been conducted. He commented that they might have been held in the choir room, in the Cathedral itself, or perhaps in both places. However, if a rehearsal had been held in the Cathedral, it would have been after the choir had already disrobed.

---

[203] It is difficult to see the point of that observation, given that the complainant's evidence was that he had no recollection of these rehearsals at all.

(9) Not possible to re-join the choir unnoticed

802 Mr Richter submitted that the complainant's account of his movements, and those of the other boy, after the alleged abuse had ended, would involve their having adopted a lengthy and indirect route from the Priests' Sacristy back through the Cathedral, outside and along the southern wall, and into the toilet corridor and through the glass door. It would have been far simpler for the boys to have turned right, rather than left. They could then have gone directly to the choir rehearsal room, a short distance away, rather than following the elaborate path described. This would have avoided some of the delay necessarily involved in re-joining the choir.

803 Indeed, Mr Richter submitted that for the complainant's account to be at all credible, the boys would somehow have had to negotiate through two locked doors, the glass door at the end of the toilet corridor, and the door to the choir rehearsal room itself.

804 Mallinson, Cox and Finnigan all made it clear that if, by chance, someone happened to be locked out in the toilet corridor, on the other side of the glass door, they could sound a buzzer, which could be heard in the choir rehearsal room. If that buzzer (or perhaps bell) sounded, someone from within would be told to go to the glass door, and to open it. Mallinson could not recall anyone ever having come late to rehearsal, after Sunday solemn Mass.

805 According to Finnigan, if the rehearsals took place in the choir rehearsal room, as would be likely, all of the members of the choir would have been expected to go back to that room immediately after Mass. His evidence was as follows:

MR RICHTER:	… Mass actually usually overran 12 o'clock, didn't it?
FINNIGAN:	Not — not by long. Maybe only a minute or two.
MR RICHTER:	Yes by some minutes or whatever, but rehearsal being compulsory, all the choir choristers would be expected to go back to the choir room for that rehearsal?
FINNIGAN:	Yes.

MR RICHTER: And if there were any missing, sopranos would be sitting where? In the front?

FINNIGAN: In the front rows.

MR RICHTER: Yes, there would be empty chairs?

FINNIGAN: There would be empty — yes.

MR RICHTER: And did you notice anyone missing from those rehearsals?

FINNIGAN: No, I didn't.

806 Ms Ellis, junior counsel to Mr Gibson at trial, directed Cox's attention to the documentary evidence, which notified parents that there would be rehearsals for the choir on 15 and 22 December 1996. The transcript of his evidence reads as follows:

MS ELLIS: You will see in that document that there is a reference to two scheduled rehearsals on a Sunday in December 1996. You see the entry 'Sunday December 15'?

COX: Yes. And the 22nd, 'Rehearsal after Mass', yeah.

MS ELLIS: At 12 to 12.45 pm?

COX: Wishful thinking, because Mass usually overran 12, so what Mr Mallinson would have thought was, 'As soon as we can after 12', yes, m'mm.

MS ELLIS: Would there be a break after Mass, before rehearsal began?

COX: Not as I recall because the idea was to maximise the use of the time and — I can't speak about these specific occasions but the routine when such post–Mass rehearsals were scheduled is that the choir, rather than processing out would remain in place. They were a captive choir, if you like, and Mr Mallinson would begin the rehearsal as soon as it was decent to do so, because the choir was all there ready to go. I mean, you know, it takes another ten minutes to take them out and then bring them back in and all that. It's all a waste of time, so that would — the time would be saved by not having them process out, 'No, we're going to rehearse today', would happen in situ, in place, and they were there ready.

807 Because there was such a tight turnaround between the end of Sunday solemn Mass, sometime shortly after 12.00 pm, and the commencement of the rehearsals, it was submitted that it was highly unlikely that the complainant and the other boy

could simply have turned up late for rehearsal, without their absence having been noticed.

808 There was clear evidence that any such absence would have had serious consequences. Cox said, in relation to this matter:

> MR RICHTER: This would have been a situation in which no one could nick off from that without being noticed, not a young child?
>
> COX: No. Well, if they needed to they would seek permission.
>
> MR RICHTER: To go to the toilet?
>
> COX: Yeah, yeah.
>
> MR RICHTER: So it just never happened that anyone nicked off from that?
>
> COX: It was not a free for all.
>
> MR RICHTER: No. It was quite regimented I take it?
>
> COX: M'mm.
>
> MR RICHTER: And discipline was maintained?
>
> COX: M'mm.
>
> MR RICHTER: It had to be maintained for two reasons, because at that stage there might still have been some parishioners who were leaving possibly?
>
> COX: M'mm.
>
> MR RICHTER: And decorum had to be maintained for those who were in holy garments?
>
> COX: (No audible response.)
>
> MR RICHTER: Yes? You will have to say yes?
>
> COX: Yes, they had a job to do.
>
> MR RICHTER: It would be very easy to see if any of the young sopranos were missing?
>
> COX: Well, they were — they were in regimented routine until the end of the rehearsal in the Cathedral.
>
> MR RICHTER: No one was missing as far as you could tell?

COX: No, that's correct.

809 As previously indicated, the complainant's evidence on this aspect of the matter was that, having just been sexually abused by the applicant, he and the other boy had re-joined 'the rest of the choir.' He said that some members of the choir were still 'mingling around and finishing up for the day.'

810 Mr Richter submitted that this account of having re-joined the choir in that way made no sense. On both 15 and 22 December 1996, it was clear that the choir as a whole must still have been present, as they were in the midst of rehearsals. Some members of the choir, or the 'rest of the choir' could not, by then, have remained.

811 In other words, Mr Richter submitted, that the fact that there happened to be rehearsals on those two December dates was a critical factor, telling strongly against the credibility, and reliability, of the complainant's account.

The prosecution's response — It <u>was possible</u> to re-join the choir unnoticed

812 The prosecution noted that the complainant was unsure of how he and the other boy had got back to the choir room. He had, however, said that they had done so very quickly and added that there were still people around.

813 The complainant's evidence was that by the time he and the other boy had dressed, a few more boys than usual had already left. He said that they would only have been about 10 or 15 minutes late in re-joining the choir. When they did so, some choristers were still mingling around, and finishing up for the day. Probably half the choir, or less than half, were still there, getting changed.

814 The complainant could not explain how he and the other boy had gained access to the choir room. He thought, however, that they might have knocked on the door, which had then been opened.

815 The prosecution then referred to evidence given by a number of witnesses to the effect that a 'buzzer' or bell could be sounded in the choir rehearsal room, if

pressed from outside the glass door. That could have explained how the boys had managed to re-join the choir. It was submitted that the fact that no one could recall this having happened was hardly surprising.

(10) Not possible to 'part' the applicant's robes

816 Once again, as previously indicated, the complainant said that when the applicant entered the Priests' Sacristy, 'he moved his robes to the side and exposed his penis.' That description accorded broadly with what he had told the police on 18 June 2015, when he made his first statement to them. It also accorded, generally, with his evidence at committal.

817 Mr Richter questioned the complainant closely as to that earlier evidence:

> MR RICHTER: So, he just moved his robes to the side and exposed his penis?
>
> COMPLAINANT: Yes.
>
> MR RICHTER: Yes. The next occasion on which you gave a description was on – sorry, you were challenged about this at the committal at p 98 and 99, Your Honour. What you said when I was cross–examining you, was this, at p 98, Point 5, I see. You said,
>
> > 'All I know is he was there in front of the door.'
> >
> > Question: 'Yes, and what did he do?'
> >
> > Answer: 'He approached us.'
> >
> > Question: 'Yes, and?'
> >
> > Answer: 'He pulled aside his robe.'
> >
> > [Question:] 'He what?'
> >
> > [Answer:] 'And he pulled out his penis.'
> >
> > Question: 'I'm sorry. You said he pulled aside his robe?'
> >
> > Answer: 'He pulled out his penis.'
> >
> > [Question:] 'No, no, no, you said he pulled aside his robe; didn't you?'

Answer: 'I said, yeah — he pulled his — he pulled something apart and revealed his penis.'

Now, were those questions asked and did you give those answers?

COMPLAINANT: Yes.

MR RICHTER: Were they true?

COMPLAINANT: Yes.

MR RICHTER: On the next page, you were asked this at 99.4 — at 99.1,

[Question:] 'I suggest to you it's impossible, I suggest, it's impossible.'

And that was about pulling aside the robe and pulling out his penis.

'It's impossible, I'd suggest, it's impossible.'

And you said:

[Answer:] 'I think it's possible for anyone to pull their penis out, if they want to.'

Question: 'Did he have pants underneath his robes?'

Answer: 'I'm not too sure.'

Now, that was what you said in March of this year at the preliminary hearing. Is that right?

COMPLAINANT: Yes.

MR RICHTER: Was it true?

COMPLAINANT: Yes.

MR RICHTER: Now, when it came to giving evidence on Friday before the jury, what you said was this:

'He sort of planted himself in the doorway and said something to, ah, the lines like, 'You're in' — you know, 'What are you doing here?' or 'You're in trouble' or something like that. And then, yeah, there was this moment when we all just sort of froze. And then he undid his — his, ah — his trousers or his belt. Like, he started moving underneath his robes.'

Now, you just made that up, didn't you, on Friday?

COMPLAINANT: No.

MR RICHTER: Because … when it came to the committal, you didn't even know whether he had pants underneath his robes. Is that right?

COMPLAINANT: No.

MR RICHTER: When you say no, you mean you're agreeing with me. You said you didn't know. Is that correct?

COMPLAINANT: Ah, I could assume.

…

MR RICHTER: Sorry. (To witness) The question was:

'Did he have pants underneath his robes?'

Answer: 'I'm not too sure.'

Right?

COMPLAINANT: Yes.

MR RICHTER: Did you refer at committal to his undoing any pants?

COMPLAINANT: Um, I refer the whole - - -

MR RICHTER: Did you refer at committal to his undoing any pants?

COMPLAINANT: Um, yes.

MR RICHTER: Where? What did you say?

COMPLAINANT: Sorry? That he loosened — just — just what has been read. I said that it seemed like he was unfastening himself in that area, um, or unbuckling something.

MR RICHTER: You didn't - - -?

COMPLAINANT: And I said it was his pants.

MR RICHTER: Did you refer to unbuckling something, did you?

COMPLAINANT: No. I — I was — the whole reason I was talking about that area was he was adjusting something in that area, and, um - - -

MR RICHTER: What you said was,

'He pulled aside his robe.'

Then you said,

'He pulled something apart and revealed his penis.'

Right? I can't see a reference to pants or to belt. Correct?

COMPLAINANT: Yep.

MR RICHTER: So, the first time that you ever mention pants, ever mention pants and undoing a belt, is on Friday before this jury. Is that right?

COMPLAINANT: Yes, I — it must've been.

MR RICHTER: Yes, it was, you see. And that was something that you just invented when giving evidence because you knew that the robes could not be pulled aside?

COMPLAINANT: No.

MR RICHTER: You were challenged about the pulling aside of the robes, were you not, at the committal?

COMPLAINANT: Yes.

MR RICHTER: And it was put to you that your description was impossible with those robes. Correct?

COMPLAINANT: No. I disagree. I think you can pull robes aside if you want to.

MR RICHTER: No, no. Just listen to the question that was being put to you, that that was impossible with those robes to just pull them aside and expose a penis. That's what was being put to you at the committal in March. Correct?

COMPLAINANT: Yes.

MR RICHTER: You appreciated, that having being put, that that created a problem for you, didn't you?

COMPLAINANT: Ah, what problem?

MR RICHTER: Well, if he couldn't push aside his robes, then your description of him pushing aside his robes and exposing a penis was impossible?

COMPLAINANT: He could push aside his robes. He did push aside his robes.

MR RICHTER: I see. And, what, there was an opening in the robes, was there?

COMPLAINANT: No. He created an opening by opening his robes.

818 Once again, as previously indicated, evidence was led at trial that the robes worn by the applicant during Sunday solemn Mass in 1996 included an alb, over which would be draped a chasuble. The alb was tied with a cincture. The applicant would also have worn a stole. The alb and the chasuble were themselves tendered.

819 Portelli, who was thoroughly familiar with the vestments worn by the applicant in 1996, gave evidence that the alb could not be moved to the side in the way the complainant had suggested. Nor could it be parted. Potter's evidence was to the same exact effect.[204]

820 Mr Richter submitted that the net effect of their evidence was that it would be impossible to part the alb, or to pull it to one side so as to expose the penis, as the complainant alleged. The point was not so much whether it would be 'possible' for a person wearing the various vestments described to expose his penis. Plainly, that could be done. What could not, however, have occurred was that the alb was, in some way, 'parted' or 'pulled to one side.' Mr Richter was strongly critical of the complainant's explanation of how he had come to give that description at committal, when clearly, it was at odds with the objective evidence. The complainant was said, in effect, to have been tailoring his evidence to meet the fact that his initial description of the 'manoeuvre' had been shown to be entirely wrong.

The prosecution's response — It <u>was</u> possible for the applicant's to have moved his robes in such a way as to expose his penis

821 The prosecution submitted that the complainant had never actually said that the applicant had 'parted' his robes.[205] Rather, it was submitted that the complainant's evidence was merely that the applicant had 'moved his robes to the side', and thus exposed his penis.

---

204 See [514] of my reasons for judgment.

205 It is true that the complainant did not use the term 'parted' in his evidence at trial. Nor did he do so in either of his initial statements to the police. He did, however, say at committal, that the applicant had 'pulled something apart' and revealed his penis. See [434]–[435] of my reasons for judgment.

822 In cross-examination, the complainant insisted that 'you can pull robes aside if you want to.' He reiterated that '[the applicant] did push aside his robes.' He added that the applicant had 'created an opening by opening his robes.' Again, as indicated, the complainant explained that 'by pulling it aside, I was saying that he pulled it to reveal his penis, however way that was: um, up, across, down, left. He pulled it aside to reveal his penis.'

823 Not surprisingly, as indicated, Mr Richter focused heavily upon these differences in the complainant's account as telling strongly against his credibility and reliability. It was submitted that his willingness to adjust his evidence in order to meet the challenge based upon suggested 'impossibility' was a serious discrepancy that could not simply be overlooked.

824 Portelli accepted, as is clear from an examination of the alb itself, that although it is clearly capable of being lifted up, thereby allowing the penis to be exposed, it most certainly cannot be parted, pulled or pushed to one side. Again as indicated, the problem with the complainant's account was not so much with the physical impossibility of exposing the penis, but with doing so in anything remotely like the manner that the complainant himself, at various times, and in various ways, described.

825 The prosecution submitted that the jury had viewed the alb, the chasuble and the cincture. In those circumstances, and bearing in mind that the alb could certainly be lifted up entirely to allow the penis to be exposed, the fact that the complainant's description of what had occurred, could not possibly be correct, did not matter. A young boy recounting traumatic events of more than 20 years ago might well have mistakenly recalled the precise manner in which the offending had occurred.

(11) Improbable that wine was available for swigging

826 Potter said that he never left the sacramental wine out after Sunday solemn Mass. He conceded, however, that one or other of the priests who celebrated Mass at night, or during the week, might have done so. He insisted that once the cruets had

been filled for the 11.00 am Mass, 'everything was locked in the safe. It was not left out openly.'

827 As previously indicated, the complainant said that the wine that the boys had 'swigged' was red. The transcript reads as follows:

COMPLAINANT: Yes, I, I saw it was red wine. It was red wine.

…

MR RICHTER: [reading the complainant's committal evidence]

'The bottle was ah, you know, like an off coloured sort of green–y amber bottle and it was a nice label on it and, yeah, it was like, it was sweet kind of.'

Question: 'Sweet red wine, was it?'

[Answer:] 'Something like that.'

[Question:] 'Well, you drank; did you?'

[Answer:] 'We had a swig.'

[Question:] 'Out of the bottle or what?'

[Answer:] 'I think so.'

[Question:] 'And it was the usual sacramental wine; was it?'

Answer: 'I don't sample sacramental wines that often.'

Question: 'But you had had sacramental wine; is that right?'

Answer: 'Yes, but I don't remember it's something.

Question: 'No, but you remember its colour; don't you?'

Answer: 'M'mm. It was in a murky bottle.'

Question: 'But it looked to you like normal sacramental wine; did [it]?' ...

COMPLAINANT: Yes.

…

MR RICHTER: And were [those answers] true?

COMPLAINANT: Um, I just want to say — you mentioned burgundy.

MR RICHTER: Were they true? Were they true?

COMPLAINANT: Yes, they were.

…

MR RICHTER: And so when I asked you at committal this year about the colour of the wine, you assumed that it was red; didn't you?

COMPLAINANT: It was red.

MR RICHTER: It was red. All right, it was red and that's the answer you stand by. The fact is, if I put to you it was white wine that was used and there's an explanation for that, you say, 'No, it's not true. It was red wine.' Right?

COMPLAINANT: It was red wine. The bottle that we looked at and drank out of was red wine.

828 A number of witnesses gave evidence that Dean McCarthy never used red wine during any of the Masses that were held in 1996 or 1997. For health reasons, he insisted that white sacramental wine only be used.

829 Pre-recorded evidence from the first trial was played to the jury from a witness named John May. He had been the manager of Sevenhill Winery in South Australia from 1972 to 2001. He said that the principal function of the winery was to supply altar or sacramental wine for use in the Catholic Church. Sevenhill sacramental wine was supplied to a distributor in Victoria, who sold it in bulk to the Cathedral.

830 May described the bottles that were supplied for sacramental wine in 1996 as having been light green. During cross-examination, he emphasised the light colour of the bottles as being '… white … with a tinge of green.' This was the case for both red and white sacramental wine. He said that they were entirely transparent, and that one could not mistake red wine for white. He added that both types of white sacramental wine that were produced at the time were light coloured, and easily differentiated from red wine.

831 Mr Richter submitted that May's evidence stood in stark contrast with the complainant's account that the wine they had swigged had been contained in a 'murky' bottle. The complainant insisted, however, that the evidence that he had given at committal, as to the 'murky' appearance of the bottle had been true and correct.

The prosecution's response —<u>Not</u> improbable that wine was available for swigging

832 In its schedule of evidence to its written case, the prosecution did not address this particular submission. It therefore mounted no written challenge to it before this Court. Nor did Mr Boyce QC, the respondent's counsel before this Court, deal with it in the course of his oral submissions.

833 I would infer that the prosecution did not regard this as a matter of any great significance. Certainly, taken on its own, that may be so. However, none of these so called 'obstacles' to conviction were intended to be considered entirely in isolation.

(12) The complainant may have been in the Priests' Sacristy on other occasions, whilst a chorister

834 The complainant, in his evidence in-chief, described a wooden panelled storage kitchenette of some kind in the Priests' Sacristy. In his recorded walk-through at the Cathedral, which was played to the jury, he said that the appearance of the sacristy was 'unchanged.'

835 However, Potter gave unchallenged evidence to the effect that the entire kitchen area that could now be seen in the Priests' Sacristy had only been installed in about 2003 or 2004, long after the applicant had ceased to be Archbishop.

836 With regard to the complainant's having been able to give a general description of the Priests' Sacristy when he made his initial statement to the police, Mr Richter submitted that this was not surprising. The complainant did not dispute having been shown around the Priests' Sacristy at some point in 1996, perhaps in the

early part of that year. His evidence on that subject was as follows:

> MR RICHTER: You were taken, were you not, on a tour of the Cathedral when you joined the choir?
>
> COMPLAINANT: I would have, yes.
>
> MR RICHTER: And you were shown the sacristies?
>
> COMPLAINANT: I have no recollection of that, no.
>
> MR RICHTER: Do you dispute it?
>
> COMPLAINANT: Um, no.

The prosecution's response — challenge to the weight to be given to this 'concession'

837 In its schedule of evidence before this Court, the prosecution did not address this particular submission. It therefore mounted no written challenge to it.

838 Mr Boyce did, however, address this issue in oral argument. He contended that the complainant's ability to give the police a broadly accurate description of the layout of the Priests' Sacristy, when he first spoke to them in 2015, provided at least some support for his account of the first incident. He also added that there was no positive evidence of the complainant having been taken on any tour of the Cathedral, or through the Priests' Sacristy.

839 In addition, Mr Boyce submitted that it was significant that the Archbishop's Sacristy was unavailable in December 1996. The applicant would therefore have had to use the Priests' Sacristy at that time. That might explain why he would have gone directly to that sacristy on the day of the first incident. That too would arguably lend some credence to the complainant's account.

(13) Compounding improbabilities re the first incident

840 Mr Richter submitted that each of a large number of independently improbable, if not 'impossible', things would have had to have occurred within a very short timeframe (perhaps 10 minutes or so), if the complainant's account of the

first incident were true.

841 The matters relied upon by Mr Richter in support of that 'compounding improbabilities' submission were:

- the applicant does not remain on the front steps.
- he is alone when he enters the priest's sacristy.
- Portelli does not enter to help the applicant disrobe, or to disrobe himself.
- Potter is not there to assist in the disrobing.
- Potter is not moving between the sanctuary and the Priests' Sacristy.
- the altar servers are not moving between the sanctuary and the Priests' Sacristy.
- there are no concelebrant priests in the Priests' Sacristy, or for some reason, they do not disrobe.
- 40 people, some of whom are adults, do not notice the complainant and the other boy break away from the procession.
- the complainant and the other boy enter the choir room, having gone through two locked doors, without anyone having noticed; and
- the complainant and the other boy enter a choir rehearsal which they were required to attend, after being missing for more than 10 minutes, 5 anyone having noticed.

842 By 'compounding improbabilities', Mr Richter was plainly inviting the jury to approach the matter using a form of probabilistic analysis (without using that expression), demonstrating that the complainant's account could not possibly satisfy the requirement of proof beyond reasonable doubt. I shall return to this particular submission later in these reasons.

The prosecution's response — not specifically addressed

843 In its schedule of evidence, the prosecution did not address this particular submission. Nor did it do so in the course of oral argument before this Court. Nonetheless, I infer that the answer that it would have given to this argument was that the complainant's evidence was so compelling, so credible and reliable, that any notion of compounding improbabilities would be overcome.

(14) If what happened really took place, the complainant and the other boy would have discussed it between themselves

844 Mr Richter submitted that, based upon their close friendship at the time, the boys' need to know if either had said anything about the matter would have meant that they would, inevitably, have discussed it between themselves at some point. Moreover, after the second incident, it was said to be unlikely that the complainant would not have told the other boy what had occurred.

The prosecution's response — applicant's submission should be rejected

845 In its schedule of evidence, the prosecution did not address this particular submission. It was, however, addressed by Mr Boyce in oral argument. Implicitly at least, the prosecution relied upon a legal difficulty associated with this particular submission.

846 Section 4A(2) of the *Jury Directions Act 2015* ('JDA') provides that in cases of an appeal under the CPA, this Court's reasoning must be consistent with how a jury would be directed in accordance with the JDA. Accordingly, a number of the key provisions of that Act, dealing with evidence of sexual offending, are applicable to this Court when considering whether these convictions should be permitted to stand.

847 Section 51 of the JDA sets out a series of prohibited statements, and suggestions, in relation to delay, and unreliability, on the part of complainants in

sexual abuse cases. Section 52 provides that where there has been delay in making a complaint, the trial judge must inform the jury that experience shows that people may react differently to sexual offences, and that there is no typical, proper, or normal response to such offences.

848 A trial judge must also inform the jury that some people may complain immediately, while others may not do so for some time. Still others may never make a complaint. The jury should also be told that delay in making a complaint in such cases is a common occurrence.

849 Section 53 provides that, if asked by the prosecution to do so, the trial judge in such cases may direct the jury that there may be reasons why a person may not complain, or may delay in making a complaint.

850 In the light of these provisions (to which I will shortly return), the complainant's evidence that he never, at any stage, discussed the matter of the applicant's sexual abuse with the other boy, and his stated reasons for not having done so, could hardly, on its own, provide a 'solid obstacle' to conviction. At best, it would be but a small factor to take into account in assessing the reasonableness of the verdict.

851 In any event, and without recourse to these provisions, I would hesitate long and hard before drawing the inference that the complainant's failure to speak to the other boy about what he claimed had been done to both of them meant, of itself, that the complainant's evidence should be rejected. Mr Richter's submission, in this regard, was in my view, singularly unpersuasive.

(15) The second incident could not have gone unnoticed

852 The complainant said that, as with the first incident, the second incident took place immediately after Sunday solemn Mass. He initially told police that that particular Sunday solemn Mass had been 'said' by Archbishop Pell.

853 The complainant's evidence before the jury was that the entire choir was

exiting the Cathedral, en route to the choir room, when he was suddenly, and for no apparent reason, pushed forcefully against a wall by the applicant. He agreed that, on his account, the procession that day would have had to have been an internal procession. He accepted that the normal order of the choir procession would have been followed. That meant that the younger boys, such as himself, would have been towards the very front. They would then have been followed by the older choristers, including some adults, and then finally, the altar servers.

854 The complainant said that there was a 'clutch' of choirboys, relieved after having finished Sunday solemn Mass, who were rushing through the sacristy corridor in order to get to the robing room when the second incident took place.

855 Mr Richter put to the complainant that the applicant was always accompanied by someone when he returned to the sacristy, in order to disrobe, after Mass. However, the complainant's account of the second incident had the applicant somehow, alone and unaccompanied, in the midst of the choir, rather than in his usual position at the very rear of the procession. At that stage, according to the complainant, without warning, the applicant singled the complainant out, and launched a forceful attack upon him.

856 The complainant's description of this offending was as follows:

MR RICHTER: Yes. And out of nowhere the Archbishop physically assaults you. Is that what you say?

COMPLAINANT: Yes.

MR RICHTER: In front of all those people?

COMPLAINANT: Yes.

…

MR RICHTER: Oh, but there are people there who would have noticed an Archbishop in full robes shoving a little choir boy against the wall - - -?

COMPLAINANT: It was - - -

MR RICHTER: - - - because that's what you're describing?

COMPLAINANT: Yes. And it happened like that. It was such a quick um,

quick and cold, callous kind of thing that happened. It was — it was over before it even started and it was — I was isolated in a corner for literally seconds. Um, there were people sporadically walking down the hallway and um I was obviously not being looked at, at that time, because someone would have, hopefully, would have reported it.

…

MR RICHTER: So the Archbishop in his full — oh you said and, of course, the choir numbered what, about 50 people?

COMPLAINANT I would say so.

MR RICHTER: And in the middle of that, number of people, the Archbishop in his full regalia shoves you against the wall violently, yes?

COMPLAINANT Yes.

MR RICHTER: Which hand did he use?

COMPLAINANT I'm not certain.

MR RICHTER: Well, with which hand did he hold you to the wall?

COMPLAINANT I'm not — I'm not certain what hand.

MR RICHTER: With which hand did he grab your testicles and your penis?

COMPLAINANT I'm not certain.

MR RICHTER: But he squeezed you painfully?

COMPLAINANT He did squeeze me painfully, yeah.

857 Mr Richter submitted that the complainant's account of this second incident was so highly improbable as to be incapable of acceptance. The idea that a six-foot-four-inch fully-robed Archbishop, in the presence of a number of choristers, including at least several adults, as well as some concelebrant priests, would attack a young choirboy in a public place, push him violently against a wall, grab him hard by the testicles and squeeze for several seconds, to the point of inflicting considerable pain upon the complainant, was said to border on the fanciful.

The prosecution's response — it <u>was</u> possible that the second incident went unnoticed

858 According to the prosecution's schedule of evidence, attached to its written case before this Court, the complainant's account left open the possibility that at least the second incident (if not the first as well) had taken place on a day when the applicant was not actually celebrating Mass. That meant, for example, that he may merely have been presiding over Mass on that day. That reconstruction of the complainant's evidence resulted, eventually, in the submission to this Court that the second incident would, in all likelihood, have taken place on 23 February 1997.

859 The prosecution noted that the complainant had not been cross-examined about the actual colour of the applicant's robes on the day of the second incident. It had not been put to him, for example, that the applicant would have worn an entirely different type of robe if he had been merely presiding, as distinct from celebrating, Mass.

860 The prosecution noted that the complainant had only been asked by Mr Richter whether the Archbishop had been 'fully robed' on the day of the second incident. He agreed that this was so. The prosecution submitted:

> To assert that [the complainant] agreed (when shown a photo of the alb and chasuble the applicant wore when he '*said* mass') and confirmed they were his full vestments is somewhat misleading. The wording 'said mass' is used in the applicant's Schedule as if his evidence was referring to the occasions in which he was present but not presiding.[206]

861 Connor's diary identified 23 February 1997 as the day that the applicant had presided over Sunday solemn Mass. Connor noted that the celebrant on that day had been Father Brendan Egan. Portelli, of course, recalled that he had been with the Archbishop at Sunday solemn Mass on that day. He recalled it as an unusual event.

862 Turning more directly to the complainant's account of the second incident, the prosecution submitted that, according to the complainant, the entire episode had occupied only a matter of a few seconds. The complainant had merely said that the

---

206 (emphasis in original).

applicant was 'in robes.' That did not necessarily mean the robes of an Archbishop saying or celebrating Mass.

863 The prosecution noted that the complainant had never suggested that the applicant had been 'alone' at the time the second incident took place, but merely that he had been 'on his own', whatever that may have meant. The fact that the Archbishop's sacristy might not have been available for use at that time did not mean that the applicant would not have been walking along the sacristy corridor, past the Priests' Sacristy.

864 The prosecution submitted that although there may indeed have been a number of people present in the sacristy corridor at the time of the second incident, it was 'entirely possible' that none of them had actually witnessed the assault upon the complainant. He himself had said 'I don't think it was in view of anyone.' The weight to be given to his evidence on that point was quintessentially a matter for the jury.

865 The prosecution submitted that nothing adverse to the complainant's credibility or reliability could be drawn from the failure of the police to interview Father Egan, or take a statement from him. That was so, despite the fact that as the celebrant on the day of 23 February 1997, it was highly likely that he would have been in company with the applicant, in procession, after Sunday solemn Mass had been concluded. Accordingly, he would have been in a position to see what, if anything, took place in the sacristy corridor.

(16) The second incident could not have taken place at all, or on 23 February 1997

866 In addition to the criticisms, outlined above, levelled by Mr Richter at the details of the complainant's account of the second incident, there were said to be other problems with his evidence relating to this matter.

867 For example, the jury were asked to consider why the police had never

properly investigated 23 February 1997. Before this Court, Mr Walker made great play of the fact that Father Egan, the priest noted in Connor's diary as having celebrated Mass on that day, had never once been interviewed by police. That was so, even though they had been provided with Connor's diary as far back as September 2018. This was well before the second trial commenced.

868 When questioned as to why Father Egan had never been interviewed, Detective Reed could give no explanation, and certainly no satisfactory explanation. As indicated, it was submitted that if Father Egan had indeed, celebrated Mass on the day in question, he would certainly have been in the company of the applicant, immediately after Mass had ended.

869 The evidence in support of that particular submission was given, at least in part, by Connor:

> MR RICHTER: The situation with Father Egan, the practice, invariable practice — well, it can't be an invariable practice.
>
> HIS HONOUR: It can't be.
>
> MR RICHTER: The invariable practice was for the Mass sayer, whoever it was, to go back to the priest sacristy to disrobe in '96?
>
> CONNOR: Correct.
>
> MR RICHTER: And at the beginning of '97?
>
> CONNOR: Correct.
>
> MR RICHTER: You have no precise recollection of the Archbishop coming in on that occasion, coming back?
>
> CONNOR: No.
>
> MR RICHTER: Had he not come back with the Mass sayer that would have been something that you would have noted — noticed I should say?
>
> CONNOR: I would think so, but I can't say yes.

870 By the time the prosecution closed its case at trial, it seems to have been at least tacitly accepted by Mr Gibson that the second incident, if it occurred at all, had probably taken place on 23 February 1997. No later date would have fallen within

the terms of the indictment, as drafted.

871 Mr Walker, in oral argument before this Court, submitted that there was not a scintilla of evidence to link the supposed second incident to that particular date, as distinct from any other date in 1997.

872 Once it became clear, as it eventually did, that the first incident could only have occurred on either 15 or 22 December 1996, the prosecution had, somehow, to reconstruct its case in order to accommodate the complainant's evidence, as best it could. It had done so by nominating a date upon which the second incident could, theoretically, have occurred.

873 Based upon Connor's diary, 23 February 1997 was clearly a date upon which the applicant presided over Sunday solemn Mass at the Cathedral. However, he did not say, or celebrate Mass on that day. Mr Walker submitted that the prosecution must have chosen that date as the date of the second incident because it happened to be the very next time, after 22 December 1996, that the applicant was at the Cathedral on a Sunday, 'in connection with' Mass.

874 The parts of Connor's diary that were tendered did not go beyond February 1997. That meant that no consideration could be given as to whether the second incident, if it occurred at all, might have taken place in March, April, or even May 1997. Had any of those dates been nominated, there may have been any number of answers to a case, newly particularised, as involving offending of the kind described in charge 5.

875 As previously noted, Portelli gave quite specific evidence regarding 23 February 1997. He said that he recalled having been with the Archbishop on that date. It was a memorable occasion because it was the first time that the applicant had presided over Sunday solemn Mass said by another priest. It was also, and in any event, a rare occasion.

876 Connor too recalled 23 February 1997. He insisted that normal practice had

been followed on that day. His evidence was as follows:

> MR RICHTER: On 23 February do you have a recollection of an occasion where the Cardinal was presiding?
>
> CONNOR: Yes.
>
> MR RICHTER: It was a rare occasion?
>
> CONNOR: Yes.
>
> MR RICHTER: And on that occasion you remember following the normal practice?
>
> CONNOR: Yes.

877 By 'normal practice', Connor meant that even though it was possible that there had been an internal procession on that day, the applicant would still have remained close by the front steps of the Cathedral, meeting congregants, immediately after Sunday solemn Mass. According to Connor, the applicant would have followed that practice, even if it had been raining. Connor's evidence was as follows:

> MR GIBSON: If it was an internal procession, what would happen? You'd come — well, you tell us?
>
> CONNOR: After Mass was ended we'd process down the centre of the Cathedral. We would — the Archbishop or the priest would stop at the great west door. If the weather was inclement they would greet the people on the inside of the Cathedral doors or on the porch, but the Cathedral — but the procession of servers and choristers would then process down the side of the Cathedral aisle and then in to the sacristies via the Southern Transept.

878 Connor said that even if the Archbishop had been presiding, rather than celebrating Mass, he would have been in his usual position, at the rear of the procession.

879 Portelli agreed, insisting that the Archbishop would always be at the rear of the procession, and always accompanied by Portelli. He said:

> The protocol is that the most senior person is always the last in a procession. So, therefore, if it's the Archbishop he is always the last, regardless of whether he is saying the Mass or whether he is presiding at the Mass, he is always last.

880 Portelli's evidence was that, as at February 1997, the Archbishop's Sacristy was still not in use. Accordingly, so Mr Richter submitted, there would be no reason for the applicant to be anywhere near the particular point in the sacristy corridor at which the complainant alleged the second incident had taken place.[207] That location was beyond the Priests' Sacristy, and between it and the Archbishop's Sacristy. If the Archbishop were to de-vest, he would have done so in the Priests' Sacristy, and not moved on beyond it.

881 It was further submitted that there was no reason whatever for the Archbishop to have been in any particular hurry on that day. Records showed that he had a 3.00 pm Mass at Maidstone that afternoon. However, that was less than 30 minutes' drive away.

The prosecution's response — it <u>was</u> possible that the second incident took place on 23 February 1997

882 The prosecution relied upon the evidence of Potter and Portelli to the effect that the applicant had presided, but not celebrated, Mass on that specific date. That at least established that he had been present at the Cathedral on the date nominated.

(17) Even the other boy said that the first incident never took place

883 Detective Reed gave evidence that, in a statement to police, the other boy's mother said that she had questioned her son in 2001 as to whether he had ever been sexually abused while in the choir. He had told her that he had never been so abused.

884 That evidence was, of course, hearsay. However, not only was there no objection taken to it, but the prosecution readily, and fairly, accepted that the jury should be made aware of it. Nonetheless, there would always be an issue as to what

---

207 It should be noted that the complainant's evidence at committal indicated that he was quite uncertain as to where, precisely, in the sacristy corridor, the second incident had occurred. He identified several possible locations when asked to indicate by drawing where in the corridor the attack upon him had occurred.

weight, if any, should be accorded to it.

885 Mr Boyce conceded that the other boy's denial of ever having been sexually abused in the way described by the complainant was a matter properly to be taken into account by this Court when considering whether Ground 1 was made out.

886 Mr Richter submitted that there was no reason why the other boy's denial to his mother of having ever been so abused should not be given its full and ordinary weight. Taken together with all of the other evidence led in the trial, it represented yet another 'solid obstacle' to conviction.

The prosecution's response — relevant but should carry little weight

887 In its written case, the prosecution did not address the applicant's submission regarding the other boy's denial of having been abused. As indicated, Mr Boyce accepted that this was a matter that the jury had been required to take into account. Self-evidently, it was also a matter to be taken into account by this Court in dealing with this ground of appeal.

888 Mr Boyce submitted, however, that the evidence of the other boy's denial to his mother of having been sexually abused should be given very little weight. He submitted that what we now know of the characteristic behaviour of victims of sexual offending, and of their reluctance to speak about their experiences meant that the other boy's denial should effectively be put entirely to one side.

An overview of Mr Richter's '17 solid obstacles' to conviction

889 Mr Richter submitted that although not each of his 17 'solid obstacles' to conviction might carry the same weight, at least when viewed cumulatively, they had to give rise to reasonable doubt.

890 Mr Richter submitted that this had to be so, even if, contrary to his primary argument to the jury, they took the view that the complainant was doing his best to be truthful. He reminded the jury that even the most honest of witnesses, recounting

events of long ago, can have their memory distorted. He correctly noted that there were a number of proven instances whereby witnesses have 'remembered' things that never actually happened, even though they genuinely believed that they had, and convincingly described them in detail. It was in that context that Mr Richter used the term 'fantasist.'

891 Mr Richter submitted that the only way in which it could be said that at least some of these 'solid obstacles', taken together, did not raise, as a 'reasonable possibility' that the complainant's account might be unreliable, would be if the jury were, somehow, to regard him as so utterly credible and reliable, as to overcome all of these 'obstacles.'

892 Mr Richter at trial (and Mr Walker before this Court), submitted that bearing in mind the many inconsistencies in the complainant's account (a number of which at least were said to be highly significant), and the fact that there was no independent support of any kind for his allegations, it had not been open to the jury, acting reasonably, to be satisfied beyond reasonable doubt of the applicant's guilt.

893 Having been asked, by the applicant, to find that these verdicts were unreasonable, or that they could not be supported, having regard to the evidence, the High Court's decision in *M* requires this Court to ask itself whether it thinks, on the whole of the evidence, that it was reasonably open to the jury to decide beyond reasonable doubt that the applicant was guilty. It is in that sense that this Court must ask itself whether the jury acting reasonably 'must' have had such a doubt.

894 The applicant has launched a multi-pronged attack upon the reasonableness and supportability of these convictions. He relies upon two main submissions in support of that attack.

895 First, he says that the complainant's evidence, taken on its own, was neither sufficiently credible, nor reliable, to have enabled the jury, acting reasonably, to be satisfied of his guilt. Secondly, he says that the evidence led at trial presented a

number of 'solid obstacles' which, at least taken together, stood in the path of conviction.

Assessment of complainant's evidence

896 The starting point in applying the *M* test, in this case, must be an independent assessment of the complainant's credibility and reliability.[208]

897 The factors that any trier of fact, whether judge or jury, will ordinarily take into account when deciding whether the evidence of a particular witness is credible and reliable include: the inherent consistency of the witness' account; the consistency of that account with those of other witnesses; the consistency of that account with undisputed facts; the 'credit' of the witness (based upon matters which include, for example, demeanour); any relevant infirmities of the witness; and, importantly, the inherent probability or improbability of the evidence in question.[209]

898 In assessing the weight to be accorded to the complainant's evidence in this case, it must be borne in mind that, this being a trial for sexual offending, there are a number of special rules that govern a proceeding of that nature. As highlighted earlier, s 54D(2)(c) of the JDA requires a trial judge to direct a jury that 'experience shows' that people may not remember all the details of a sexual offence, or may not describe that offence in the same way each time. In addition, the jury must be directed that trauma may affect different people in different ways, including as to their capacity to recall events. Finally, they must be told that complainants commonly give different accounts at different times when describing the details of sexual offences that they allege were committed.

899 Once again, I note that s 4A of the JDA requires this Court, in dealing with an appeal against conviction based upon Ground 1, to 'reason' in a manner consistent

---

208 The term 'credibility' is generally used to reflect the veracity, or truthfulness, of a witness. That is by way of contrast to the reliability of that witness' evidence.

209 Sir Richard Eggleston, *Evidence, Proof and Probability* (Weidenfeld and Nicolson, 2nd ed, 1983) 192–3.

with how a jury would be directed in accordance with s 54D.[210] The impact of s 4A poses other questions for this Court to resolve in carrying out the *M* test.

900 Mr Boyce, in his opening submissions in this Court, put the prosecution case both succinctly and forcefully. He asserted 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.

901 Mr Boyce went on to describe the complainant's evidence as 'credible, clear and entirely believable.' He said that this view of the complainant was 'reflected in the jury's verdict.'[211] Indeed, Mr Boyce submitted that the complainant's evidence had 'grown in stature' throughout the trial, in the face of vigorous cross-examination.

902 Mr Boyce submitted that merely viewing the recording of the complainant's evidence would, on its own, demonstrate why the jury had convicted the applicant, which, he submitted, they were well entitled to do.

903 In that regard, Mr Boyce invited this Court to consider with particular care one highly emotional exchange at trial between Mr Richter and the complainant, which lasted several minutes. That exchange arose when Mr Richter challenged the complainant as to why he had never discussed with the other boy either of the two incidents.

904 The context was that the complainant was being asked about the nature of his relationship, in 1996, with the other boy. He said that they had become close friends. They had slept over at each other's homes. Subsequently, they remained in contact, though they were no longer such 'firm friends.'

905 Mr Richter challenged the complainant's failure ever to have discussed with the other boy the applicant's alleged sexual abuse of both of them. The complainant,

---

210 *Pate (a Pseudonym) v The Queen* [2019] VSCA 170, [69] ('*Pate*').

211 That last submission seems to involve a non sequitur. The question whether the jury's verdict was unreasonable cannot be resolved by reference to the fact that the jury convicted.

clearly in an agitated state, replied that 'it was completely an anomaly and it was something that really … out of stream with how we were living our lives at the time.' It was something that the boys had tried to 'purge' out of their systems. It was something that the complainant '… could not fathom.'

906 Plainly, this line of cross-examination seemed to cause the complainant a good deal of distress.[212] Mr Boyce submitted that the complainant's appearance and demeanour, in response to this line of questioning, showed him to be both a truthful and reliable witness. He submitted that moments of high drama in a trial of this kind provided a clear answer as to why the jury had accepted the complainant's account, and put to one side all of the other evidence, which appeared to cast doubt upon his reliability.[213]

907 Mr Walker, in his submissions before this Court, argued that a few minutes of highly emotional testimony, given in circumstances that could hardly be explored, represented far too slender a basis upon which to rest a conviction in a case with so many obvious weaknesses.

908 The one matter upon which Mr Boyce particularly relied in support of the complainant's account concerned the evidence given by Detective Reed. He spoke of the complainant's knowledge, when he first approached the police, of the general layout of the Priests' Sacristy. In that regard, Mr Boyce noted that the complainant's evidence, at trial, had been that he had never been in the Priests' Sacristy prior to the date of the first incident, or indeed since. He posed the rhetorical question, how then

---

212 It was never made precisely clear, through further questioning, precisely what it was that was causing the complainant such apparent distress. Of course, given the accusatorial nature of a criminal trial, the possibility cannot be ignored that distress can be confected. It is also possible that distress can result from some cause other than reliving a truthful and traumatic account of having been sexually abused. In addition, it must be remembered that there may be sound reasons why, from a forensic perspective, a cross-examiner would be ill-advised to explore these possibilities. Moreover, s 32C of the *Evidence (Miscellaneous Provisions) Act 1958* imposes significant constraints upon cross-examination which may impinge upon that subject.

213 Of course, it should not be forgotten that a different jury, at the first trial, had viewed essentially the same evidence given by the complainant as did the jury in the second trial. That first jury had been unable to agree, even when directed that they might bring in a majority verdict. That might suggest that Mr Boyce's submission as to the unanswerably compelling nature of the complainant's evidence might be something of an overstatement.

could the complainant have gained that knowledge of the layout of the sacristy?

909 However, as Mr Richter pointed out in his 17 'solid obstacles' to conviction, that particular submission had to be qualified. As previously indicated, the complainant conceded in cross-examination that shortly after he first joined the choir in 1996, he had been given a guided tour of the Cathedral. He also acknowledged that he may have been shown 'the sacristies' on that occasion.

910 The complainant's evidence regarding this point is set out at [836] of these reasons. In substance, he conceded that he may have seen the inside of the Priests' Sacristy when taken on his introductory tour of the Cathedral. That answer was said to have taken at least some of the sting out of Mr Boyce's submission, and indicated that his summary of the complainant's evidence on this issue was incomplete.

911 The applicant's written case before this Court argued that, even taking the complainant's evidence in isolation, there had to be serious concerns as to both his credibility and reliability.

912 In that regard, it will be recalled that the High Court in *M* stated that if the evidence under consideration by an appellate court contains 'discrepancies, displays inadequacy, is tainted or otherwise lacks probative force,' this may lead the appellate court to conclude, notwithstanding the advantages ordinarily enjoyed by a jury, that there is a significant possibility that an innocent person has been convicted. If the appellate court so concludes, it is bound to act and set aside the verdict. Mr Walker submitted that this formulation, taken directly from *M*, applied specifically to the facts of the present case.

913 In assessing the weight to be given to the complainant's evidence, it must be remembered that the events of which he was speaking were alleged to have taken place more than 20 years previously. It was submitted that this fact, on its own, had to raise questions as to the reliability of his memory (as well as the memories of all others who may have been present at the relevant time).

914 Clearly, any trier of fact assessing the evidence of a witness must make allowance for the undisputed fact that memory fades over time. That is, of course, true of the complainant's account. It is equally true, however, of the evidence given by those witnesses called by the prosecution, whose accounts were exculpatory in this case.

915 Mr Walker submitted that on a fair assessment of the complainant's evidence, both through reading the transcript and through viewing his recorded testimony, he had frequently adjusted, added to, and indeed embellished the account that he originally gave to police in 2015. He submitted that whenever the complainant was put under significant pressure in cross-examination, he tended to prevaricate, and would give answers that were, in some cases, quite inconsistent with his earlier evidence. Indeed, on occasion, he gave answers that not even he could possibly have believed to be true.

916 In that regard, Mr Walker pointed to a number of the matters concerning the complainant's evidence outlined earlier in the summary of Mr Richter's PowerPoint presentation to the jury. In particular, he focused upon the timing of the events, the description the complainant gave as to the details of the offending (including his vacillation as to the manner in which the applicant had 'manoeuvred' the vestments), the very different and, so it was said, quite inconsistent accounts as to how the boys had managed to break away from the procession unnoticed, and the complainant's evidence regarding their having re-joined the choir.

917 Clearly, it is important to be aware of the risk of giving too much credence to matters such as demeanour, when evaluating the evidence of a witness.[214] In the past, there has been a great deal of misplaced confidence in the capacity of a judge, or any other decision-maker, to discern the truth, on the basis of demeanour alone.[215]

---

[214] Michael Kirby, 'Judging: Reflections on the Moment of Decision' (1999) 18 *Australian Bar Review* 4, 7–8; Michael Kirby, 'Where does the truth lie? The Challenges and Imperatives of Fact-Finding In Trial, Appellate, Civil and Criminal Courts And International Commissions of Inquiry' (2018) 41(2) *University of New South Wales Law Journal* 293, 298.

[215] For example, *Wigmore on Evidence* (1970) Macnaughton Revision Vol III § 276 speaks of the jury judging credibility by noting the 'readiness and promptness' of a witness' answers or the

918 The High Court has observed that it can be dangerous to place too much reliance upon the appearance of a witness, rather than focusing, so far as possible, upon other, more objectively reliable matters. These might include, for example, contemporary documents, clearly established facts, scientifically approved tests, and the apparent logic of the events in question.[216]

919 Empirical evidence has cast serious doubts upon the capacity of any human being to tell truth from falsehood merely from the observations of a witness giving evidence. That is particularly so in the artificial and stressful circumstances of a courtroom. There is today a substantial body of scholarly writing which cautions against giving too much weight to demeanour when assessing the probative value of evidence.[217]

920 Lord Devlin observed that, in his opinion, the respect given to findings of fact based on the demeanour of witnesses was not always deserved. He doubted his own ability, and sometimes that of other judges, to discern from a witness' demeanour, or the tone of his or her voice, whether that witness was telling the truth.[218]

921 A witness who speaks hesitantly might simply be cautious, or taking the time to fabricate or embellish. An emphatic witness can be deceptive, or even convince himself or herself that what the witness is saying is true. A witness who looks the judge straight in the eye, rather than casting his or her eyes on the ground, can be

---

reverse, the 'directness or evasiveness' of his answers, the 'frankness of equivocation', the 'responsiveness or reluctance' to answer questions, the 'silences', the 'explanations' and the 'contradictions.' See for example, the views of the Full Court as to the potential importance of demeanour in *R v Simic* [1979] VR 497.

216 *Fox v Percy* (2003) 214 CLR 118, 129 [31] (Gleeson CJ, Gummow and Kirby JJ) ('*Fox v Percy*'). Their Honours noted that there was a recent awareness of scientific research casting doubt upon the value of demeanour as a basis for assessing credibility. This did not 'eliminate the established principles about witness credibility; but it tend[ed] to reduce the occasions where those principles are seen as critical.'

217 See for example, Loretta Re, 'Oral v Written Evidence: The Myth of the 'Impressive Witness'' (1983) 57(12) *Australian Law Journal* 679. This article reflects similar views to those expressed in Australian Law Reform Commission, *Evidence* (Interim Report No 26, vol 1, 1985) [797]–[800], which led to the *Uniform Evidence Law*.

218 Lord Patrick Devlin, *The Judge* (Oxford University Press, 1st ed, 1979) 63, quoting Justice McKenna, 'Discretion' (1974) 5(1) *The Irish Jurist* 1, 10 with approval.

telling the truth, or lying, with no way of knowing other than by relying on nothing more reliable than intuition.

922 The Australian Law Reform Commission, in its ground breaking work that led ultimately to the enactment of the *Uniform Evidence Law*, reviewed a great deal of psychological research concerning the demeanour of witnesses. That research almost universally concluded that facial reaction and bodily behaviour were unlikely to assist in arriving at a valid conclusion about the evidence of most witnesses.[219]

923 Lord Justice Atkin, when a member of the English Court of Appeal, had this to say regarding demeanour as a guide to credibility:[220]

> an ounce of intrinsic merit or demerit in the evidence, that is to say the value of the comparison of evidence with known facts, is worth pounds of demeanour.

924 These days, there are many more indicia of both credibility and reliability than demeanour on its own. Some of these can be characterised as 'objective.'[221] Accordingly, demeanour is frequently relegated to a less prominent position in the assessment process than it has in the past. Judges often, in their charges to juries, warn of the dangers of giving too much weight to this factor, and certainly more weight than it should properly bear.

925 In the present case, the prosecution relied entirely upon the evidence of the

---

219 Perhaps 'body language' can be of more assistance to a trained observer than to a lay juror, or even an experienced judge. The point is simply that one needs to be cautious about saying that something is 'quintessentially' a matter for a jury because it involves, to a significant degree, assessment of demeanour. That is the starting point of the analysis as to probative value, and not the conclusion at which one ultimately arrives.

220 *Société d'avances Commerciales (Société Anomyne Egyptienne) v Merchants' Marine Insurance Co. ('The Palitana')* (1924) 20 Lloyds L Rep 140, 152. His Lordship's observation was cited by the High Court in *Fox v Percy*, 129 [20].

221 Contemporaneous records, electronically preserved or written, are an example of such 'objective evidence.' So too, movements can be tracked by tracing mobile phone links to particular towers. It is common to have regard to CCTV footage, and to make use of listening device product and telecommunication interception evidence in criminal trials. DNA, whether entirely justifiably or not, is regarded as being in a class of its own in terms of reliability. It is widely recognised now that identification evidence is often unreliable, despite its convincing nature when given by witnesses who express certainty, but can be shown to have been mistaken.

complainant to establish guilt, and nothing more.[222] There was no supporting evidence of any kind from any other witness. Indeed, there was no supporting evidence of any kind at all. These convictions were based upon the jury's assessment of the complainant as a witness, and nothing more.

926 Mr Boyce, in his submissions to this Court, did not shrink from that having been the entire prosecution case at trial. Indeed, as indicated, he invited the members of this Court to approach this ground of appeal in exactly the same way. He asked this Court to focus upon the complainant's demeanour in assessing his credibility and reliability, and to treat that matter as decisive. And, as previously indicated, he relied heavily upon a particularly emotional exchange between the complainant and Mr Richter as to why the complainant had never told anyone, at the time, about either incident, or discussed it with the other boy.

927 It is, of course, entirely legitimate for the prosecution to invoke these matters in answer to the challenge to these convictions. They must be weighed in the scale, but they must also be considered in the light of the evidence as a whole. That includes the body of clearly exculpatory material elicited from the various witnesses called by the prosecution. And one should not ignore the applicant's own strong denials of any wrongdoing, as alleged, in his record of interview.

928 In my view, Mr Walker was justified in submitting that the complainant did, at times, embellish aspects of his account. On occasion, he seemed almost to 'clutch at straws' in an attempt to minimise, or overcome, the obvious inconsistencies between what he had said on earlier occasions, and what the objective evidence clearly showed.

---

222 In basing his submissions wholly upon the complainant's credibility and reliability, Mr Boyce did not address the standard form of charge to the jury governing the assessment of witnesses, as set out in the Victorian Judicial College, *Criminal Charge Book* [1.6.1], [3.5.1]. Trial judges today are expected to direct juries, both at the commencement of a trial, and in their final charge, that they should not jump to conclusions based on how a witness gives his or her evidence. Juries are told that looks can be deceiving. Importantly, they are warned that 'there are too many variables to make the manner in which a witness gives evidence the only, or even the most important factor' in their decision. The trial judge in the present case gave the jury that direction. The members of this Court should, I think, approach the issue of the complainant's credibility and reliability in exactly the same way.

929 If the complainant's evidence stood alone (therefore putting to one side each and every one of the 17 'solid obstacles' to conviction upon which Mr Richter relied at trial), I would not conclude that his allegations, in respect of the first incident in particular, were fabricated. I might not say the same with regard to his allegations in respect of the second incident, though it is unnecessary to arrive at a final conclusion regarding that matter. At the same time, I would not myself be prepared to say, beyond reasonable doubt, that the complainant was such a compelling, credible, and reliable witness that I would necessarily accept his account beyond reasonable doubt.

930 Mr Richter's suggestion at trial that the complainant is now, or may have been a 'fantasiser', presents difficulties. By that suggestion, I understood him to have been implying that the complainant may, somehow, have come to believe in the truth of his allegations, despite the fact, so it was submitted, that they were without substance.

931 There are proven cases of 'false memory' of that kind, including, in particular, in relation to sexual offending.[223] The recent decision of this Court in *Tyrrell* provides a classic illustration of an apparently compelling witness whose account had to involve a substantial measure of complete fantasy. In that case, the fact that the prosecution was brought more than 50 years after the alleged offending was, in itself, a portent of unreliability. Such a prosecution would never have been brought even as recently as 20 or so years ago, and if it had, it would have been stayed as an abuse of process.

932 Nor can it be doubted that some complainants in cases involving sexual abuse, including of children, have fabricated their allegations. Just within the past few weeks, a major scandal involving false allegations of that kind has erupted in England, and received enormous publicity.

---

[223] There is a significant body of academic literature dealing with what is sometimes described as 'false memory syndrome.' Such cases may be rare, but they have been proved to exist.

933 The facts were as follows. On 27 July 2019, The Times reported that a man named Carl Beech had been sentenced on the previous day to 18 years' imprisonment for having, between 2012 and 2016, made a number of false allegations of historical sexual abuse. Those allegations were directed against a number of establishment figures, some of whom were no longer alive. They included former Prime Minister, Sir Edward Heath. Beech had falsely claimed that, as a child, when aged between 7 and 15, he had been a victim of persistent sexual abuse by a 'gang of paedophiles.'

934 The police were said to have carried out an intensive investigation into these allegations. They clearly regarded Beech as a credible and reliable witness, notwithstanding the fact that there was no independent support at all for any of his allegations. Some of those allegations were inherently improbable, bordering on the preposterous. Yet, various media organisations took up Beech's cause, broadcasting his claims on national television, and clearly implying that they should be taken as truthful and reliable.

935 The judge who sentenced Beech described him as 'intelligent and resourceful.'[224] Despite the implausibility attaching to a number of his claims, and his established history of regularly adjusting and embellishing the details surrounding them, some of those who came into regular contact with him seemed only too willing to make allowance for all of the many discrepancies in his account.

936 Without overstating the matter, which after all, involves nothing more than a single, though widely reported, instance, which may be something of an aberration,[225] the Beech case should serve as a reminder that we are dealing with

---

224 *R v Beech* (Newcastle Crown Court, Goss J, 26 July 2019), [1]. Beech's case is, no doubt, extreme, and must surely be a rare example of successful falsification of allegations of this kind. It is not, however, unique.

225 In recent years, there has been a good deal of empirical research into jury verdicts, focusing upon the extent to which they should be regarded as questionable or doubtful. The most persuasive of these analyses was that of John Baldwin and Michael McConville, *Jury Trials* (Clarendon Press, 1979). The methodology adopted was generally sound, and certainly more convincing than that previously employed in Harry Kalven Jr and Hans Zeisel, *The American Jury* (Little, Brown and Company, 1966). Baldwin and McConville devote an entire chapter to what they describe as 'doubtful convictions.' Through the examination of one particular

some of the most serious allegations that can be levelled at any member of this community. Allegations of that kind should always be scrutinised with care by both police and prosecuting authorities.

937 Returning to the present case, this trial involved a most detailed and comprehensive challenge to a prosecution case. That attack was largely based upon the unchallenged testimony of a significant number of witnesses, all of whom were of good character, and reputable. It was not suggested that any of them had lied. Those who recalled relevant events had good reason to do so. Mr Walker submitted that the evidence that they gave, whether viewed individually or collectively, was more than sufficient to establish that the complainant's account, in its specific detail, was 'realistically impossible.'

938 In substance, Mr Walker submitted that this had always been a weak case, built upon an account, by the complainant, that was itself highly improbable. Of course, the fact that an alleged incident can be described as 'improbable' does not mean that the evidence concerning that incident is untrue. And, of course, a conviction for an offence can be based solely upon the evidence of a witness who is sufficiently credible and reliable, even if that witness' account is properly described as implausible.

939 Bearing that in mind, and before proceeding finally to my conclusion on Ground 1, I will say something briefly about a number of unusual features of this singular case, beyond those which I have previously identified.

Inferential reasoning

940 Unusually, the defence case at trial, and again before this Court, was heavily dependent upon what is known as inferential reasoning. In other words, the defence, though protesting constantly about the difficulty of having to prove a

---

study, they observe a number of convictions in England, where at least two of the following groups: the judge, the prosecutor, and the police, disagreed with the verdicts of the jury, and would have acquitted. They argue, cogently, that these results suggested that the verdicts in those cases were questionable.

negative, presented a largely circumstantial case in answer to the complainant's allegations. Given the historical nature of the matters alleged, there was really no other option available.

941 The defence case was intended to establish that these allegations could not be accepted, or at least not beyond reasonable doubt. They were, to use Mr Richter's terms, 'impossible' or, more accurately, impossible in any practically realistic sense.

942 That line of defence meant that the jury had to consider a large number of factual issues, each of which might be regarded as a strand in a cable. Some of these factual issues were quite complex. The jury's task was made more difficult by the need constantly to bear in mind that the burden of proof in respect of each and every element of each offence remained throughout upon the Crown. The defence 'needed' only to raise a reasonable doubt.[226]

943 The vast majority of criminal trials these days involve a combination of direct and circumstantial evidence. Prosecutors routinely rely upon inferential reasoning, either on its own to prove guilt, or at least to bolster the credibility of prosecution witnesses who give direct evidence.

944 Evidence of habit is a form of circumstantial evidence that can be highly relevant in determining a fact or facts in issue. The fact that someone was in the habit of acting in a given way has always been regarded as relevant to the question whether that person acted in that way on the occasion into which the court is inquiring.[227]

945 Professor Wigmore, in his classic treatise on evidence, dealt extensively with the weight to be given to evidence of habit or custom. He observed that to the extent that such evidence suggested an invariable regularity of action, 'this fixed sequence

---

226 Although, it might be said, that even that way of putting the matter is potentially misleading, and adversely so to the defence.

227 Rupert Cross, *Evidence* (Butterworths, 3rd ed, 1967) 30. See generally, *Joy v Phillips, Mills & Co. Ltd* [1916] 1 KB 849, 854 (Phillimore LJ).

of acts tends strongly to show the occurrence of a given instance.'[228] Habit established a regular practice of meeting a particular type of situation with a specific type of conduct. Habit evidence could be highly persuasive of proof of conduct on a particular occasion. Habit was regular and repetitive behaviour, and could be a reliable indicator of probable conduct.[229]

946 Evidence of habit or custom is inferential in nature. Its probative value may be reduced by showing, if that can be done, that on occasion, the particular habit or custom may not have been followed. That was exactly the approach followed by the prosecution in this trial.

947 It does not follow that evidence of habit or custom, if so qualified, no longer has any probative value. To say, as Mr Gibson did, repeatedly, in his closing address that it was 'entirely possible' that on 15 or 22 December 1996, a habit or custom otherwise clearly established may not have been followed, does not mean that the evidence concerning that habit or custom can simply be put to one side.

948 Proof of opportunity is always an integral aspect of a prosecution case. It may be that the issue of opportunity does not specifically arise in the particular circumstances of a given case. However, if it does, there can be no doubt that the prosecution must establish that such opportunity existed, and do so to the requisite degree.

949 As mentioned earlier, where the defence consists of what is, in substance, an alibi, the onus always rests upon the prosecution to establish, beyond reasonable doubt, that the alibi should be rejected. It must be understood that no onus ever rests upon an accused to establish the truth of any alibi, once it has been sufficiently raised. The 'reasonable possibility' that the alibi might be true will, of itself, negate opportunity. The existence of that 'reasonable possibility' must therefore result in an

---

228 *Wigmore on Evidence* (1983) Tillers Revision Vol IA § 92.

229 Ibid § 93.

acquittal.[230]

950 As indicated, it is really most unusual for the defence, in a criminal trial, to rely upon inferential reasoning to meet the prosecution case.[231] In this case, both Portelli and Potter gave direct evidence that, if accepted, provided a complete answer to the complainant's evidence with regard to the first incident. Their evidence as regards the applicant remaining on the steps after Mass was, in substance, 'alibi' evidence.

951 To the extent that the evidence of Portelli and Potter was that one or other of them always remained with the applicant while he was robed in the Cathedral, it also provided a complete answer to the complainant's account (though perhaps not in a way that would appropriately be characterised as an 'alibi').

952 Even a mere 'reasonable possibility', unrebutted by the prosecution, that what Portelli and Potter said might be both truthful and accurate, would give rise to a complete defence, and would necessitate an acquittal. Once again, it must be remembered that at trial, the prosecution did not suggest that either man had lied. In these circumstances, I consider that I should proceed on the same basis, though I would have arrived at that conclusion irrespective of the approach taken by the prosecution, at trial.

953 Of course, the defence case went well beyond mere reliance upon Portelli and Potter. There was also the evidence of McGlone, far from perfect though it may have been, in some respects. Certainly, his evidence, if accepted, as to the meeting between his mother and the applicant, would considerably undermine the complainant's account.

---

230 See generally, *Palmer*, where evidence of an alibi said to have been cogent but by no means dispositive was sufficient to persuade the High Court that a conviction was unsafe and unsatisfactory.

231 There have been examples of accused persons relying upon what used to be called similar fact evidence in order to implicate others in the commission of a charged offence, and exonerate themselves. See *R v Chee* [1980] VR 303, and *Re Knowles* [1984] VR 751 where, in both cases, the defence relied upon a pattern of behaviour on the part of another person as circumstantial evidence of an exculpatory kind.

954 Each side presented its closing submissions to the jury in a forceful, but somewhat extravagant, manner. The prosecution argued that the complainant's evidence was so obviously truthful, and reliable, so compelling, that no matter what the rest of the evidence led in the trial might suggest, there could be no reasonable doubt as to the applicant's guilt. The defence argued that the complainant's account was by no means as compelling as the prosecution submitted. In any event, however, the whole of the evidence led at trial meant that the complainant's account could not be accepted. His detailed description of events, whichever version of it one considered, was 'impossible', at least realistically speaking. Self-evidently, that had to equate to reasonable doubt.

955 Mr Richter's submission that the complainant's account was 'impossible' was pitched at that level for effect, so far as the jury were concerned. However, there was a risk that it set a forensic hurdle that the defence never actually had to overcome. The prosecution had to establish guilt beyond reasonable doubt. The onus in that regard never shifted. Something considerably less than 'impossibility' was clearly sufficient to create such a doubt.

956 The trial judge was well aware of the difficulties associated with the way in which each party dealt with 'impossibility.' His Honour did his best to ensure that the jury were not misled by the use of that somewhat misleading term. He directed them with great care in relation to this issue.

957 The trial judge, in his charge, first gave the jury what might be described as the usual directions with regard to circumstantial evidence, and the drawing of inferences. He warned them not to speculate. He told them that they were concerned with reasonable inferences only, and not with mere surmise or conjecture.

958 A possible difficulty with that form of direction, in the present case, was that the prosecution were not relying upon inferential reasoning at all. Rather, it was the defence who were seeking to rely upon certain 'evidential facts', going to 'habit or

custom.' It was these facts which were said to give rise to inferences inconsistent with guilt.

959 Throughout the trial, the prosecution sought to meet this 'impossibility' line of defence by eliciting from each of the witnesses who gave evidence as to habit or custom that it was possible that the particular practice described had not been strictly followed at all the material times.

960 Not surprisingly, many of those who were called to give such evidence allowed for that 'possibility.' However, even accepting that a particular practice may not always have been followed, evidence of the possibility that this may have been the case cannot be a complete answer to the proposition that evidence of habit or custom can be sufficient, on its own, to create a reasonable doubt.

961 In other words, the answer to the question posed by Mr Gibson as to whether it was 'entirely possible' that one or more of the practices may not always have been followed, would not justify putting that evidence completely to one side. Still less would it justify moving from such an answer, and acceptance of its truth, to a finding of guilt.

962 That argument for the defence was said to be strengthened by the fact that these were not just general patterns of behaviour, or habits or custom in a broad sense. Rather, they described modes of conduct that were subject to particularly rigorous and strong norms. Some of the practices identified were required by Church Law, and liturgical rules. There could never be any departure from them, and the evidence was that there was strong reason to believe that, save in rare cases, they would be followed.

963 The trial judge carefully emphasised that the issue joined between the parties was not to be resolved simply on the basis that, if it were shown to be 'possible' for the applicant to have been present at the time and place alleged by the complainant, that of itself could be sufficient to enable the jury to convict.

964 Nonetheless, speaking with the benefit of hindsight, and from a clearly different perspective, I believe that it may have been better had the potentially misleading term, 'impossible', been entirely avoided. Whether or not it was possible for the applicant to have committed the offences embodied within the first incident depended largely upon the view that was to be taken of the evidence of 'alibi', and of the constant accompaniment of the applicant by Portelli. It also depended upon the evidence concerning the 'hive of activity' at the Priests' Sacristy, shortly after the conclusion of Sunday solemn Mass.

965 It was for the prosecution to negate that evidence. Even the 'reasonable possibility' that what the witnesses who testified to these matters may have been true must inevitably have led to an acquittal. That was because the complainant's account could not be reconciled at all with any such finding.

Conflicts between the complainant's evidence and that of various witnesses supportive of the defence

966 As the High Court made clear in *Liberato v The Queen*,[232] when a case turns on a conflict between the evidence of a prosecution witness and that of one or more defence witnesses, a jury should never be told that their task is to consider who is to be believed. That is quite simply the wrong question.

967 Yet, it is a question that a jury, uninstructed, would almost certainly be inclined to ask. Whatever the answer to that question might be cannot legitimately conclude the issue of whether the prosecution has proved its case beyond reasonable doubt.

968 That is why juries are told that even if they prefer the evidence led on behalf of the prosecution (and indeed, positively disbelieve any witnesses called on behalf of the defence), they cannot convict the accused unless they are satisfied beyond reasonable doubt of his or her guilt. In addition, juries are told that they cannot convict if there is a 'reasonable possibility' that the defence case put forward as a

---

232 (1985) 159 CLR 507.

complete answer to the prosecution case has substance. Such a state of mind, on the part of a juror, equates as a matter of law, to a reasonable doubt.

969 An appellate court dealing with a challenge to a conviction, which contends that the verdict was unreasonable or cannot be supported having regard to the evidence, must approach the matter of conflicting evidence in exactly the same way. Accordingly, it is not now, and never has been, a question of whether the complainant was to be preferred as a witness to, for example, Portelli, Potter, McGlone, Finnigan, or any other particular witness who gave exculpatory evidence.

Section 38 of the Evidence Act 2008

970 In carrying out the first limb of the *M* test, it is necessary to have regard to the way in which the various witnesses called by the prosecution, at the request of the defence, were approached at trial.

971 In that regard, consideration must be given to s 38 of the *Evidence Act 2008* ('*Evidence Act*'). That section replaced the common law with respect to what used to be known as 'hostile witnesses'. Its enactment brought about a profound change to well-established common law principles, and the way in which criminal trials are currently conducted.[233]

972 It is no longer necessary that the party calling the witness establish that he or she is 'unwilling to tell the whole truth' before allowing cross-examination. It is now sufficient, as the threshold for an application for leave under the section, that the witness gives 'unfavourable evidence', does not appear to be making a genuine attempt to give evidence, or has made a prior inconsistent statement. If leave is granted, the party calling the witness may cross-examine him or her, including as to matters relevant only to credibility.

973 The term 'unfavourable' is not defined in the Act. It is clear, however, that it imposes a significantly lower threshold than did the term 'hostile' at common law.

---

[233] *Meyer (a pseudonym) v The Queen* [2018] VSCA 140, [182] ('*Meyer*').

974 Stephen Odgers suggests that the full width of any entitlement under s 38, and the criteria for the proper exercise of discretion to permit cross-examination, remain to be settled.[234] The section does not, in terms, permit general cross-examination.[235] Each area of cross-examination that is proposed requires specific leave.

975 On the other hand, as Heydon JA (as his Honour then was) noted in *R v Le*,[236] while it will often not be right to grant leave on the widest possible basis, at least at the outset, a judge should avoid 'distributing small dollops of leave in response to repeated small-scale applications.'

976 During the first trial, the prosecution, having resolved to call a large number of witnesses whose evidence was clearly going to be 'unfavourable' to its case against the applicant, sought leave from the trial judge, in advance, to cross-examine a number of those witnesses.[237] Mr Gibson made clear that he did not seek to challenge any of the evidence to be given by those witnesses as to the existence of various 'practices' engaged in at the time of the alleged offending. Rather, he would focus upon the 'possibility' that there may have been exceptions to those practices, which would, therefore, have allowed, in a physical sense, the offending to have occurred.[238]

977 Those witnesses whose evidence was singled out by Mr Gibson as 'unfavourable' included Portelli, Potter, David Dearing, and Parissi. In a comprehensive ruling concerning s 38, the trial judge summarised the evidence to be given by each of these witnesses as regards the first incident as follows:

---

234 Stephen Odgers, *Uniform Evidence Law* (Thomson Reuters, 12th ed, 2016), 194.

235 In *Meyer*, the majority (Priest and Kaye JJA) made it clear that, in their opinion, leave to cross-examine an unfavourable witness under s 38 should be cast in narrow terms, so as to focus solely upon the matters giving rise to the conclusion that the evidence to be given is unfavourable to the case presented by the party calling the witness, or perhaps the use of a prior inconsistent statement, or statements, to impugn credibility.

236 (2002) 54 NSWLR 474, 488 [73].

237 *Evidential Ruling No 3*, [1].

238 *Evidential Ruling No 3*, [4].

> The effect of the evidence of Charles Portelli and Max Potter is that it was impossible for the accused man to have found himself alone in the Cathedral, whilst robed, after the celebration of Sunday Mass. Specifically, one or other of them would always escort the accused back to the Sacristies for disrobing.
>
> Their evidence, if accepted, excludes any realistic opportunity for this offending to have occurred.
>
> It is plain to me that the evidence of Charles Portelli and Max Potter conflicts with the account of the complainant. I am satisfied their evidence is relevantly 'unfavourable'.[239]

978 His Honour ruled, however, that neither David Dearing nor Parissi should be regarded as relevantly 'unfavourable'.

979 Similarly, in relation to the applicant's having invariably greeted parishioners on the steps of the Cathedral, shortly after Sunday solemn Mass, the three witnesses singled out were Portelli, Potter, and Cox. The trial judge declined, in their case, when dealing with that issue, to make an advance ruling as to whether they were unfavourable. He foreshadowed that he would only consider the effect of their evidence after it had been given. He did, however, draw attention to the following matters:

> The Crown pointed to the evidence of a number of witnesses to the effect that the accused attended on the steps of the Cathedral for a lengthy period of time after Mass during which time he greeted parishioners. While the times might vary as to how long the accused stood on the steps for, it seems common ground that these times are inconsistent with the offending having occurred as described by the complainant. Most of the witnesses indicated that the accused would be there for a period of 20 minutes or more.
>
> …
>
> In his statement Charles Portelli said that the accused would invariably stand at the front door of the Cathedral and greet people, which could take at least 20 minutes. This admits of some deviation from the practice. Though not explicit, his committal evidence seems to be more absolute.
>
> Max Potter says that the accused would meet people at the front of the Cathedral and usually talk to people for some time, which varied between 20 and 30 minutes. He does not address the question of whether this occurred on every occasion explicitly, but on one reading this is implied.
>
> The evidence of Geoffrey Cox is in a similar category. At the committal, Cox agreed that the accused would remain on the steps at the entrance of the Cathedral speaking to guests for 20 minutes. Again, it is not clear whether he

---

239 *Evidential Ruling No 3*, [30]–[32] (footnote omitted).

allows for any deviation from this practice.

> Certainly, if the accused was engaged in a meet and greet on the steps of the Cathedral for 20 minutes or so after every Sunday Mass then he could not have been in the Sacristy offending against the complainant, as the complainant alleges.[240]

980 As regards David Dearing, the prosecution case, at least as initially formulated, was that had the applicant stood on the steps of the Cathedral for no more than about 10 minutes or so, on the day of the first incident (whenever that was), that would still have enabled him to have returned to the Priests' Sacristy in time to commit the offences alleged.

981 As the argument developed, however, Mr Gibson appeared to retreat somewhat from that position. He eventually accepted that a 'meet and greet' on the steps for even 10 minutes or so would have been irreconcilable with the complainant's account of either of the two incidents.

982 With regard to the 'manoeuvrability' of the Archbishop's vestments, the trial judge set out his understanding of the effect of the evidence to be given by Portelli, Potter and Rodney Dearing as follows:

> Charles Portelli, Max Potter and Rodney Dearing do not give evidence which explicitly and literally means that this was not possible. However the substantive effect of their evidence is that it is improbable.[241]

983 Accordingly, his Honour held that the evidence of these three witnesses was relevantly 'unfavourable'. That was so, notwithstanding his entirely appropriate appreciation of the fact that the complainant's description of the mechanics of the actual offending had to be viewed through 'the prism' of a 12 or 13 year old boy, recounting events more than 20 years after they were said to have taken place.[242]

984 With regard to the ability of the two young boys to gain access to the sacristy corridor, and the Priests' Sacristy, Potter's evidence that the double doors into the

---

240 *Evidential Ruling No 3*, [56]–[60] (emphasis in original).

241 *Evidential Ruling No 3* [65]

242 *Evidential Ruling No 3* [72].

sacristies were always kept locked, unless they were in use for official purposes, was 'unfavourable'. So too, at least provisionally, was Portelli's evidence on that subject.

985 With regard to the complainant's ability to access the wine in the sacristy, Potter's evidence was held to be unfavourable. However, Portelli's evidence in support of Potter was treated by his Honour as based largely on deference to Potter's recollection. It was therefore not relevantly unfavourable.

986 As regards the ability of the boys to separate from the procession, the trial judge held that the evidence of David Dearing, Rodney Dearing and Parissi was unfavourable, but not the evidence of Cox.

987 Importantly for present purposes, in his Honour's consideration of whether or not to grant leave, he observed that '… if the jury entertained a reasonable doubt as to any of [a series of five specifically designated topics[243]], it is at least likely that this would be fatal to the Crown case.' With respect, that was an entirely correct observation, and mirrored the way in which both Mr Gibson and Mr Richter understood and conducted the case below.

988 It is important to note that at the time of the s 38 ruling, the trial judge made it clear that he would not permit any cross-examination, on the part of the prosecution, to the effect that either Potter or Portelli, 'whether consciously or unconsciously', held any allegiance to the applicant.[244] His Honour explained:

> … this trial is being conducted within a broader atmosphere of a perceived cover–up of child abuse within the Catholic Church. I have made reference to this in my ruling on the Suppression Order.
>
> In my view, terms such as allegiance or loyalty, especially in the context of this case, are very loaded terms. They are pregnant with suggestions of a

---

243 These topics were: (1) that the applicant was alone at the time of the offending, (2) that the applicant did not greet parishioners on the steps of the Cathedral after Mass, (3) that the vestments worn by the applicant were able to be manoeuvred so as to expose a penis, (4) that the complainant and the other boy were able to access the sacristy corridor, and (6) that the complainant and the other boy would have been able to break away from the procession undetected. Topic 5 pertained to the ability of the complainant and the other boy to access the wine in the Priests' Sacristy, and plainly, was of less significance than the remaining topics identified by his Honour.

244 *Evidential Ruling No 3* [112].

> deliberate or calculated decision to protect the accused or perhaps the Church for reasons of obedience. If such questioning does not raise the issue of perjury, it goes perilously close. It risks the impression being left that these witnesses are lying, or being less than truthful, and that they are doing so out of a sense of devotion and expectation.
>
> In my view, it would be unfair to the accused to allow such questioning, in circumstances where the prosecution, on the state of the evidence as it stands, eschews any allegation that these witnesses are lying.
>
> …
>
> As for a suggestion of 'unconscious allegiance', I don't see how the witnesses can be questioned about this. If it is 'unconscious,' then it is not a question the witnesses could possibly answer.[245]

989 Finally, his Honour made it clear in his ruling, that as he understood Mr Gibson's position, there would be no challenge to any of the witnesses with regard to whether there existed, in 1996, the particular practice or practices, in respect of which, evidence would be given.[246] He said:

> I have decided to grant the prosecution leave to cross–examine the witnesses on a relatively narrow basis namely to test and challenge any categorical and unqualified assertions which effectively allow for no realistic possibility of departure from a practice, which in turn excludes any possibility of opportunity for the offending conduct to have taken place.[247]

990 It can be seen that the s 38 ruling delivered prior to the first trial was both detailed, and carefully reasoned. It can be said that, in that regard, his Honour did exactly what was expect of him. He considered each of the proposed witnesses, and whether his evidence met the test of being 'unfavourable.' If so, he set out in detail exactly what the prosecution would be permitted, or not permitted to do, pursuant to the leave granted.

991 The importance of this ruling is that it was carried over, and applied in the second trial. On 7 November 2018, almost immediately after the jury in that trial had been empanelled, his Honour said to counsel that 'the program is going to be the

---

245 *Evidential Ruling No 3* [114]–[116], [119].

246 Ultimately, Mr Gibson's suggestion to the jury that the applicant's practice of standing on the steps after Sunday solemn Mass may not have developed until 1997, at the earliest, seems difficult to reconcile with his Honour's limitation on cross-examination, as expressed in the ruling.

247 *Evidential Ruling No 3* [129].

same as last time.' That statement was clearly intended to convey to counsel that all of the rulings given during the first trial would apply again to the conduct of the second trial, and it was so understood.[248]

992 Several days later, Mr Gibson raised with his Honour his concern as to whether, having been granted leave to cross-examine a number of his own witnesses, he was obliged to put to them specifically, in accordance with the rule in *Browne v Dunn*,[249] any theory as to how they may have been 'mistaken' in their recollection of key events.

993 The trial judge ruled in relation to Potter that, having regard to his age, and apparent infirmity, Mr Gibson would be able to put that particular submission to the jury, without having raised the matter in cross-examination.

994 Subsequently, Mr Gibson sought leave to cross-examine McGlone, it being recalled that he had not given evidence in the first trial. Clearly, McGlone's evidence was 'unfavourable' to the prosecution case. Leave was granted, but in a restricted form, going only to memory, and not to truthfulness. The trial judge did not allow cross-examination directed towards establishing partiality or bias on McGlone's part, having regard to what he perceived to be the background of prejudice associated with the applicant's involvement in the Catholic Church's general response to sexual abuse of children, on the part of clergy.

995 In accordance with the trial judge's ruling, Mr Gibson did not, at any stage, suggest to any of the witnesses who gave 'unfavourable' evidence that they were lying. Nor did he put to them that they were biased, either consciously, or

---

248 These rulings included the s 38 ruling, and, importantly, a separate ruling regarding the operation of s 32C of the *Evidence (Miscellaneous Provisions) Act 1958*. That ruling, delivered prior to the first trial, was to the effect that the complainant could not be cross-examined as to any past confidential communications that there may have been between himself and a medical practitioner or counsellor, arising out of any mental health issues that he may have had. There is no challenge to that ruling before this Court. It may be of interest to note that a not dissimilar constraint upon cross-examination appears to exist in New South Wales, having regard to s 293(3) of the *Criminal Procedure Act 1986* of that State, which recently was held to preclude cross-examination of a complainant in a rape case as to a number of proven false allegations of rape that she had made in the past. See *R v RB* [2019] NSWDC 368.

249 (1893) 6 R 66.

subconsciously,[250] in favour of the applicant. Accordingly, no direction as to the effect of *Browne v Dunn* was sought. Nor was any such direction given.

996 An intermediate appellate court, when applying the *M* test, must bear in mind that the prosecution at trial chose not to suggest to any of the witnesses called that their evidence was untrue.[251] It would be quite unfair to make any such finding now, without that matter having been canvassed at trial.

997 The applicant, in both his written case and in counsel's oral submissions before this Court, referred repeatedly to the fact that these witnesses had given 'unchallenged' evidence, of an exculpatory nature. It was submitted that when considering the weight to be given to that exculpatory evidence, the fact that it had never been suggested that these witnesses were lying, or even that they were subconsciously biased, had to be borne in mind. That submission was not challenged, and has obvious force.

Section 39 of the JDA — Significant forensic disadvantage

998 When the *Evidence Act* was enacted, it contained a number of provisions that dealt with what was termed 'unreliable evidence.' These provisions replaced the common law on that subject, which required warmings to be given as to the dangers of convicting in the absence of corroboration.

999 One such provision was s 165B, headed 'Delay in prosecution.' That section was subsequently repealed, and replaced by s 39 of the JDA. Section 39 provides that defence counsel may request the trial judge to direct the jury on 'forensic disadvantage experienced by the accused' by reason of the delay between the alleged offence and the trial.

1000 The trial judge may so direct the jury, but only if satisfied that the accused has

---

250 Perhaps a better term than 'unconsciously.'

251 This was, as I have said, the prosecutor's choice, and not simply the trial judge's ruling on the s 38 application.

experienced a 'significant forensic disadvantage.' However, the judge may not say or suggest in any way that it would be dangerous or unsafe to convict in such circumstances. Nor may the judge suggest that, by reason of delay, the victim's evidence should be scrutinised with great care.

1001 In the present case, the trial judge correctly gave the jury a forensic disadvantage direction. His Honour outlined a number of considerations that he told the jury they should take into account as affecting the applicant's ability to defend himself. He noted the lost opportunity that the applicant had to make enquiries at, or close to, the time of the alleged offending. This included the applicant's ability to explore the alleged circumstances of the offending in detail.

1002 In relation to the witnesses, his Honour noted that due to the delay between the alleged offending and the trial, most of them could only give evidence of general practice and routine, rather than of specific recollection. It was said that the memory of some of the witnesses had diminished in the time that had elapsed between the alleged offending and the trial. His Honour directed the jury that if they found that the lucidity of a witness had been affected by the 22 years that had passed between the alleged offending and the trial, then they must take this into account as a disadvantage to the defence.

1003 In relation to the evidence of the complainant, his Honour told the jury that:

> the effluxion of time has … also diminished the capacity for the defence to fully test [the complainant's] evidence … if this investigation and trial had been run … at a time proximate to 1996 then one might have expected [the complainant] to be in a better position to answer questions about some of the details [of the offending] …

1004 Finally, his Honour observed that the death of the other boy, who would have been a material witness had there not been such lengthy delay, was another forensic disadvantage that the jury ought to take into consideration in favour of the applicant.

1005 It must be understood that s 39 operates, in its terms, only in favour of the accused. It has no application at all in relation to the prosecution, or any of its witnesses.

1006 By reason of s 4A of the JDA, this Court's reasoning with respect to delay, in dealing with Ground 1, must be consistent with how a jury would be directed, in accordance with s 39.

1007 The fact that a number of important witnesses, including for example, Dean McCarthy, are no longer capable of giving evidence that might have supported the defence case, must be taken into account by this Court, though solely in favour of the applicant. Dean McCarthy was not alone. No one knows, for example, what Father Egan might have said had he been called to give evidence, as he certainly would have been had this trial taken place much closer to the date of the alleged offending.

1008 It is particularly significant that the only challenge mounted by the prosecution to these witnesses was as to the reliability of their memory. Potter is a clear example, but he was not alone. Portelli's memory, and therefore the reliability of his evidence, was attacked, as was McGlone. In a case which, from the applicant's point of view, depended so heavily upon matters of precise detail, the disadvantage brought about by the more than 20 years that had elapsed from the time of the alleged offending was not merely significant, but quite profound.

1009 That is not to say that the complainant's evidence was not also diminished by delay. His memory of what he claimed to have taken place could easily be shown to be unreliable in a number of key respects, as in fact occurred. However, s 39 does not permit delay to be taken into account in the complainant's favour. As foreshadowed earlier in these reasons, there are a host of other provisions, such as ss 52, 53 and 54 of the Act, which provide a counterbalance to s 39.

1010 In assessing the weight to be given to the prosecution case, and the evidence as a whole, it is necessary therefore to take into account that the primary attack made on the very many witnesses who supported the defence case would have been

entirely different, and almost certainly far less potent, had there not been a delay of anything like this order. Plainly, this was a case where s 39 had to be given very considerable weight at trial, and must be given similar weight by this Court.

Sections 52, 53 and 54 of the JDA

1011 If a trial judge considers that there is likely to be evidence in the trial that suggests that the complainant either delayed in making a complaint, or did complain at all, the judge must direct the jury in accordance with s 52(4).

1012 That subsection reads as follows:

> (4) In giving a direction under this section, the trial judge must inform the jury that experience shows that—
>
> (a) people may react differently to sexual offences and there is no typical, proper or normal response to a sexual offence; and
>
> (b) some people may complain immediately to the first person they see, while others may not complain for some time and others may never make a complaint; and
>
> (c) delay in making a complaint in respect of a sexual offence is a common occurrence.

1013 As previously highlighted, s 53 enables the prosecution to request the trial judge to direct the jury that there may be good reasons why a person may not complain, or may delay in complaining about a sexual offence.

1014 Section 54 abolishes several common law rules developed by the High Court, respectively attributed to *Kilby v The Queen*[252] and *Crofts v The Queen*.[253] Accordingly, a judge is no longer required, pursuant to the Act, to direct the jury that a complainant's delay in making a complaint, or indeed, failure to complain at all, may cast doubt on the reliability of that person's evidence.

1015 Section 52 has no application to the other boy in this case. He was in no sense 'the complainant' within the meaning of s 52(1). The section does, however, apply to

---

252 (1973) 129 CLR 460

253 (1996) 186 CLR 427.

the complainant. It provides at least a partial answer to the defence submission that had the first incident occurred as alleged, the complainant and the other boy would have discussed it at some stage.

The 'fluid' nature of the prosecution case

1016 As indicated, the indictment charged that the offences said to have occurred within the first incident were all committed between 1 July 1996 and 31 December 1996. The offence set out in charge 5 was said to have been committed between 1 July 1996 and 28 February 1997.

1017 Of course, pleading between dates, in that way, is common in cases involving historical sex offending. In many cases, there is no viable alternative to adopting that course.

1018 In this case, the written summary of the prosecution opening simply nominated 'the second half of 1996' as the period when the first incident took place. It nominated 'at least a month after this [first] incident' as being the date of the second incident.

1019 As previously mentioned, when Mr Gibson came to open the case to the jury, he was no more specific than that. He spoke of the first incident as having occurred on a Sunday morning, 'in the latter part of 1996.' He spoke of the second incident as having occurred 'over a month later.'

1020 It will be recalled that the Connor diary only came to light after the first trial had concluded. That diary, together with a wealth of other evidence, made it clear that the newly appointed Archbishop had only ever said Sunday solemn Mass at the Cathedral on two specific dates in 1996; 15 and 22 December.

1021 The prosecution were understandably reluctant, throughout both trials, to have the complainant's account pinned down to a specific date or dates. The greater such specificity, the more difficult it would be to regard as reliable the complainant's

account, upon which he continued to insist, as to when these two incidents took place.

1022 If, as Mr Richter noted, the first incident, assuming it occurred at all, had to have taken place in mid-to-late December 1996, the second incident could not have occurred before Christmas of that year, no matter how insistent the complainant was as to that sequence of events.

1023 So far as I can tell, Mr Walker was correct in submitting that there was no evidence at all specifically linking the second incident to February 1997, still less to the date ultimately nominated by the prosecution, 23 February of that year. All that could be said is that the applicant was present at the Cathedral on that date.

1024 Once it became clear that the two December 1996 dates were the only viable dates on which the first incident could conceivably have occurred, the prosecution faced a significant hurdle. As indicated, that was because the evidence made it clear that there had been choir rehearsals between 12.00 pm and 12.45 pm on both those dates. That timeframe was so tight that it was difficult to see how the complainant's account could be accommodated within it.

1025 Again, it was hardly surprising that Mr Gibson cross-examined some of the witnesses who were called (and particularly Portelli), with a view to suggesting that it was possible that the applicant had said Sunday solemn Mass at the Cathedral on 3 November 1996 (after he had earlier that same morning said Mass for the racing fraternity). The theory postulated was that there may have been sufficient time for the applicant travel from St Francis' Church in the city, to the Cathedral, to have enabled him to say Sunday Mass at 11.00 am.

1026 As previously mentioned, it eventually became tolerably clear that the 3 November 1996 theory was utterly implausible. To Mr Gibson's credit, he came to appreciate that this was so, and effectively conceded that the first incident could only have taken place on one of the two December dates. That, of course, meant abandoning the complainant's account of the two incidents having occurred in the

same choral year, before Christmas.

1027 It also meant that an alternative date had to be found, upon which the second incident might have occurred. The date that was nominated was 23 February 1997, which according to Connor's diary, was the next time that the applicant attended the Cathedral for Sunday solemn Mass. Of course, that was some two months or so after the first incident, rather than a month. Nonetheless, it was the best that the prosecution could do.

1028 There were several difficulties with that scenario. One was that the applicant did not celebrate Sunday solemn Mass on 23 February 1997. Rather, he presided over that Mass. That meant that he would have worn entirely different vestments, 'choir dress', and not the 'full robes' of an Archbishop saying Mass, which the complainant described him as having worn at the time of the second incident. Portelli's evidence as to the robes that would have been worn when the Archbishop presided, rather than celebrated, Mass was unchallenged. It was, in any event, supported by the evidence of Connor. There is no reason why that evidence should not have been accepted.

1029 The 'fluid' nature of the prosecution case, at least when it came to dates, is a matter that must be taken into account when evaluating its strength. It is also a matter to be taken into account when considering s 39, and forensic disadvantage. An accused is entitled to have the case against him properly particularised. In a case that, from a defence perspective, depended so very heavily upon matters of quite intricate detail, nominating a date, such as 23 February 1997, without any sufficient justification for having done so must be a matter of concern.

The M v The Queen test — the second limb

1030 As previously indicated, the complainant's evidence in the first trial was given from a remote location.[254] That accords with the practice now adopted in this

[254] Section 360 of the CPA provides for 'alternative arrangements' to be made for the giving of evidence by a witness in the course of a criminal proceeding that relates to a charge for a

State in most trials involving sexual offending. The evidence was also recorded, and could therefore be used in the second trial. It thus avoided the need for the complainant to be cross-examined a second time.

1031 Also as indicated,[255] both trials were entirely video recorded. This meant that a number of witnesses who gave evidence at the first trial were not required to give their evidence again. The jury were simply shown the recordings of their original evidence.[256]

1032 The fact that the second trial was fully recorded means that this Court has had available to it a complete visual record of the evidence given by every witness, in both trials.

1033 The members of this Court have viewed the evidence given by those witnesses who were nominated by each side as being of particular significance. In addition, we have, of course, had available to us the entire transcript of the second trial, as well as relevant parts of the transcript of the first trial.

1034 As I have now said on a number of occasions, the High Court in *M* stipulated that an intermediate appellate court, in dealing with a ground of appeal that contends that the jury's verdict was unreasonable, or cannot be supported having regard to the evidence, must make an 'independent assessment' of the whole of the evidence led at trial. Each member of the Court must consider whether he or she entertains 'a doubt' as to the guilt of the accused. If that question is answered affirmatively, the Court must then move to the second stage of the *M* test.

1035 The High Court in *M* established that, ordinarily, a doubt entertained by an appellate court will be a doubt that the jury ought also to have entertained. That is

---

sexual offence. Section 360(a) permits such evidence to be given from a remote location. Section 360(d) allows only persons specified by the court to be present while the witness is giving evidence. It was on that basis that his evidence was given in camera, and has not been made available to the general public.

255 See [415] of my reasons for judgment.

256 For example: John May, who gave evidence as to the bottling of sacramental wine used at the Cathedral in 1996, simply had the recording of that evidence played to the jury at the second trial.

so, unless the members of that court consider that, by reason of the jury having seen and heard the witnesses give their evidence, their advantage over the appellate court should be regarded as allaying any such doubt.

1036 As I have said, each member of this Court has had the opportunity to see and hear all of the witnesses give evidence. It is a fact that this was only by way of recording, and there is obviously a difference between being present in court and seeing a witness live, and merely watching that witness give evidence on a television or computer screen. As regards the complainant, however, the members of this Court have seen exactly what the jury in the second trial saw. Clearly, those jurors had no advantage over this Court, at least in that respect.

1037 Whether an intermediate appellate court should, as a matter of course, view a recording of, at least parts of, the evidence given at trial, was a question canvassed, to some degree, by the High Court in *SKA*, to which I have previously referred on the issue of the application of the *M* test.

1038 In *SKA*, one question that arose was whether the New South Wales Court of Criminal Appeal had erred in failing to view the recorded evidence of the complainant. Her evidence at trial was given, in part, by way of a recorded interview and, in part, by way of viva voce testimony.

1039 The appellant, and a number of essentially unchallenged defence witnesses, provided an alibi for each of the three days upon which the alleged offending could conceivably have occurred. As previously discussed, the appellant challenged his convictions on the basis that the verdicts were unreasonable, or could not be supported, having regard to the evidence.

1040 Importantly for present purposes, the High Court held that the members of the Court of Criminal Appeal had not erred in declining to view for themselves the video recording of the complainant's interview. The appellant had not identified

any forensic purpose which could have been served by viewing that recording.[257]

1041 The majority in *SKA* stated that ordinarily, the account given, and the language used by witnesses, available to the intermediate appellate court from the transcript, will be sufficient to enable a proper review of the evidence at trial to be made. It was to be expected that if there were anything that could be discerned only visually, or by sound, which might affect the Court's view of the evidence, it would be identified. For a court to be obliged to go further, and view an actual recording of evidence, something in the circumstances of the case would have to necessitate the adoption of that course.

1042 Relevantly, the majority in *SKA* expressed concern as to the potential for there to be an undue focus upon one aspect of the totality of the evidence, if the recording of the complainant's evidence alone were to be viewed. That could well constitute a failure, on the part of the Court, to consider the evidence as a whole, which was the task required to be performed.

1043 Returning to the present case, the complainant gave his evidence over more than two days. He was cross-examined at length, and vigorously, as was to be expected. Mr Richter challenged both his credibility, and the reliability of his account.

1044 When the parties were informed in writing of this Court's desire to view the recording of the complainant's evidence, as well as the recordings of several other key witnesses, the applicant initially objected to that course. He submitted that if the members of this Court were minded to see for themselves how the complainant had conducted himself in giving evidence at trial, they should also view the recorded evidence of a number of other witnesses. The names of those witnesses who were considered to be of particular relevance, in that regard, were specifically nominated.

1045 In accordance with the applicant's request, the members of this Court, before

---

257 See generally on this point, *Pate* [70]–[77] (Priest JA).

the oral hearing of this application, viewed the recorded evidence of not just the complainant, but also of a number of other witnesses. In my case, I watched the recordings of the evidence given by Portelli, Potter, McGlone, Connor, Finnigan, Cox, Mallinson, Rodney Dearing, David Dearing, Parissi, and Bonomy. That process took a number of days, but in the end, proved to be of considerable value.

1046 I should say that before viewing the recordings of these witnesses, I had read the entire transcript of the trial, as well as a substantial body of other documentation. That included the transcript of the applicant's record of interview, as well as the agreed statement of facts.

1047 The recordings were uniformly of high quality. It was relatively simple to follow the evidence given by each witness, while aligning what was actually said with what appeared in the transcript. To the extent that demeanour is a relevant factor to take into account when assessing issues of credibility and reliability, the recordings seemed to me to provide a solid basis upon which to form a view about those matters.

1048 I accept that the jury in the present case had a number of advantages over the members of this Court in assessing the weight of the evidence led at trial. For one thing, they were present in the courtroom throughout the whole of that evidence. They observed it as it was given sequentially. They saw many, though not all, of the witnesses in person, whereas I saw nothing more than recordings of their evidence. The jury were therefore imbued with the 'atmosphere of the trial', in a way that no member of an appellate court could hope to replicate.

1049 Moreover, the jurors were also able to see and hear the opening and closing addresses of counsel, whereas the members of this Court could only read what they had said. The jurors were also able to see and hear the trial judge deliver what was plainly a thorough and well-constructed charge. Once again, the members of this Court could only rely upon a transcript of what his Honour had said.

1050 Perhaps most importantly, the members of the jury had the benefit of each

other's views during their deliberations. They could bring to bear, to the task before them, their experience of life, and their common sense. The fact that the jury reached a unanimous verdict of guilty, in this trial, is most definitely not something to be taken lightly. It establishes just how high a bar the applicant must overcome in order to succeed upon this ground of appeal. Nonetheless, I consider the advantage that the jury had in seeing and hearing the evidence given in this trial to have been somewhat less than would ordinarily be the case.

Conclusion regarding Ground 1

1051 Having had regard to the whole of the evidence led at trial, and having deliberated long and hard over this matter, I find myself in the position of having a genuine doubt as to the applicant's guilt.

1052 In accordance with the principles laid down by the High Court in *M*, my doubt is a doubt which the jury ought also to have had. That is not because I am necessarily to be regarded as being better able to evaluate factual issues of the kind raised in this trial. It is rather because the High Court has said definitively that ordinarily, my doubt is a doubt that the jury ought to have had.

1053 Turning to the second limb of the *M* test, I have considered all of the various advantages that the jury had in assessing the weight to be given to the evidence. I have compared those advantages, such as they are in this case, to my own position. I have concluded that those advantages do not allay my doubt.

1054 Objectively speaking, this was always going to be a problematic case. The complainant's allegations against the applicant were, to one degree or another, implausible. In the case of the second incident, even that is an understatement.

1055 That is not so by reason of the complainant having alleged that he had been sexually abused, in the past, by a senior Catholic cleric. Sadly, as we have come to appreciate, there is nothing wholly improbable about allegations of that kind being true. It is, rather, by reason of the detailed circumstances that were said to have

surrounded those allegations of abuse, circumstances as to time, place and manner.

1056 I am quite unconvinced by Mr Boyce's submission that the complainant's evidence was so compelling, either when viewed as a whole, or when regard is had to his distressed response to Mr Richter's vigorous cross-examination, that I should put aside all of the factors that point to his account as being unreliable. While I cannot conclude that the complainant invented these allegations, at least in respect of the first incident, and do not do so, that is not the determinant of whether Ground 1 succeeds.

1057 In *Palmer*, the High Court made it clear that in a case such as the present, the defence is not required to point to any motive on the part of the complainant to have fabricated his or her story. Nor is it incumbent upon the defence to proffer an explanation as to how, or why, the complainant came to make his or her allegations. The short answer to these questions is that as a matter of law, they are irrelevant. They have nothing to do with the proper conduct of a criminal trial. As *Palmer* made clear, they have a tendency to reverse the onus of proof, and should never therefore be asked.[258]

1058 In the present case, there was a significant body of cogent evidence casting serious doubt upon the complainant's account, both as to credibility and reliability.

1059 I will not, at this point, again go over Mr Richter's 17 separate 'solid obstacles' to conviction, nor Mr Walker's reduced list of 13. I would not characterise them all, individually, as 'solid', though some seem to me to have been cogent.

1060 I will, however, say something further about the notion of 'compounding improbabilities', which both Mr Richter, at trial, and Mr Walker, before this Court, put at the centre of their submissions.

---

[258] The position is compounded somewhat by the fact that there are legislative limitations upon the extent to which matters that may be relevant to this issue can be explored. See for example, s 32C of the *Evidence (Miscellaneous Provisions) Act 1958* which, as I have said, was invoked in this case. I make no criticism of that fact. This is a matter for the Parliament, and for no one else.

1061 In relation to the first incident, Mr Richter submitted that each and every one of a number of independently 'impossible' things would had to have occurred within the very same limited time period (he suggested 10 minutes or so), if the complainant's account were to be accepted.

1062 Of course, these days, arguments as to 'compounding improbabilities' are often made by prosecutors,[259] and usually, entirely legitimately, to good effect.[260]

1063 Mr Walker's point, in oral argument before this Court, was really an application of what statisticians call 'the product rule' of probability theory. That rule postulates that the probability of the joint occurrence of mutually independent events equals the product of the individual probabilities of each of the events.[261]

1064 In order for the complainant's account to be capable of being accepted, a number of the 'things' set out by Mr Richter at [840]–[842] of my reasons,[262] had to have taken place within the space of just a few minutes. In that event, the odds against the complainant'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 form of 'probabilistic analysis', if properly applied, suggests strongly to me that the jury, acting reasonably, on the whole of the evidence in this case, ought to have had a reasonable doubt as to the applicant's guilt.

---

259 Most clearly, pursuant to s 98 of the *Evidence Act*, dealing with coincidence evidence.

260 See, for example, the seminal article by Professor Lawrence Tribe 'Trial by Mathematics: Precision and Ritual in the Legal Process' (1971) 84 *Harvard Law Review* 1329. The author addresses the propriety of allowing statistical or overtly probabilistic arguments to be advanced in relation to the process of fact-finding. He cautions against misuse of such arguments, and cites not only the infamous 1899 trial of Alfred Dreyfus, but what is still the leading case on this subject in the United States, *People v Collins* 68 Cal 2d 319, 320 (Cal, 1968) ('*People v Collins*').

261 Eggleston (n 209).

262 This is assuming that those 'things' were, in fact, genuinely independent of each other, an assumption that could not be made in respect of all of them. For example, there would inevitably be some overlap in the attack upon the reliability of Portelli's evidence as to the applicant having remained on the front steps, and his evidence as to the applicant never having been left alone when robed. To ignore that overlap might be to fall into the mathematical error identified by the Supreme Court of California in reversing the conviction based largely upon evidence of mathematical probability in *People v Collins*.

1065 Of course, the defence case went much further than mere reliance upon this mode of reasoning. As I have said, the complainant's account could not possibly stand if the evidence given by Portelli, or Potter, were to be accepted. More importantly perhaps, it could not stand even if their evidence were assessed as being 'reasonably possible.'

1066 The prosecution's written case submitted that none of the 22 witnesses called at trial, who gave evidence supposedly supportive of the defence could say anything beyond what the 'normal procedure' had been in 1996, and in the early part of 1997, both as regards their own movements and the movements of others. With respect, that is not so, at least as regards Portelli and Potter, and to some degree, McGlone.

1067 Mr Boyce submitted that it was significant that none of the witnesses called at trial had been in a position to say that the alleged offending 'did not happen.'[263] Rather, the evidence of these witnesses merely suggested that certain scenarios, such as the Archbishop having been left alone, in the Cathedral, while robed were 'unlikely' to have occurred. The concession, on the part of any of those witnesses, that this scenario might possibly have occurred was said to overcome the defence case of 'impossibility.' By implication, it was submitted that this provided a complete answer to the applicant's ground of appeal.

1068 Mr Boyce went so far as to submit that, taken at its highest, the evidence for the defence merely established that there were possible 'hindrances' to the complainant's account being accepted, but no more than that. He submitted that the prosecution had addressed each of the 'solid obstacles' at trial, and that the jury had been entitled to find that they were not 'solid' at all. They were, therefore, entitled to act upon the evidence of the complainant, unsupported though it may have been.

1069 According to Mr Boyce, Portelli was the only witness who specifically claimed to have been in constant company with the applicant at Sunday solemn Mass at all

---

263 With respect, that is not quite accurate. If Portelli's account were accepted, he was in exactly that position.

relevant times.

1070 In that regard, Mr Boyce submitted that Portelli's evidence had been qualified in several important respects. For example, he agreed that there may have been an occasion when he did not actually accompany the applicant back to his sacristy immediately after Sunday solemn Mass. Portelli said that he could not recall any such instance, but he accepted that it could have occurred if, for some reason, he had to de-vest first.

1071 Mr Boyce also noted that Portelli had conceded that there may have been an occasion when, despite having accompanied the applicant to the sacristy door, he left him alone for a short period, around two minutes or so. Portelli said that this might have happened if there were another function in the Cathedral that afternoon, and he needed to go back to the sanctuary to make sure that everything was in place for that event.[264] Precisely how a one or two minute absence of that kind could possibly strengthen the prosecution case, or provide support for the complainant's account, is not apparent to me.

1072 Mr Boyce observed that Portelli insisted that he had accompanied the applicant back to the Priests' Sacristy after both Sunday solemn Masses in December 1996. Portelli claimed that he had an actual and specific recollection of having done so, and that this was not a reconstruction, on his part, based upon what his normal practice at the time would have been. He insisted that he was not aware of the applicant ever having been alone in the Priests' Sacristy.

1073 Mr Boyce submitted that the jury were entitled to reject Portelli's evidence on these matters in its entirety. When asked whether he had been with the applicant on every occasion that he said Mass in both 1996 and 1997, Portelli had readily agreed. However, when asked whether the first time that the applicant had said Sunday solemn Mass at the Cathedral would have been 15 December 1996, his reply had

---

[264] As highlighted earlier, there was no other event listed for the Cathedral that afternoon on any of 15 or 22 December 1996, or for that matter, 23 February 1997.

been no more emphatic than that 'would seem correct.' It was submitted that this was hardly a confident, or unequivocal, answer to the question. In a similar vein, when Portelli was asked whether the applicant had said Mass on 22 December 1996, he could only answer 'that would be correct.' An answer expressed in these terms was also said to cast doubt upon the reliability of Portelli's evidence.

1074 Mr Boyce contrasted that postulated uncertainty with Portelli's repeated and emphatic insistence that he had been in constant attendance upon the applicant on both 15 and 22 December 1996, and on 23 February 1997.

1075 A further attack mounted by Mr Boyce against Portelli noted that, despite insisting that he had a clear recollection of events going back as far as 1996 (including December of that year), his ability to recall other dates and other occasions without having had to be prompted was less impressive. So, for example, Portelli's recollection of the events of November 1996 was said to be nowhere near as precise as his recall of the two dates in December.

1076 In his reply, Mr Walker submitted that Mr Boyce had done Portelli a serious injustice by the manner in which he had attacked his evidence. Certainly, Mr Walker acknowledged, Portelli's memory had been prompted, at various times, by counsel on both sides below.

1077 Mr Walker submitted that there was nothing sinister about such prompting. Cross-examination often served that entirely legitimate purpose. It was hardly surprising that Portelli needed to be reminded of some of the detail about events that had, after all, taken place more than 20 years previously. None of those events would have had anything like the significance to Portelli of the Archbishop's having said his first Sunday solemn Mass after his appointment.

1078 Mr Walker submitted that the fact that Portelli may have had no detailed recollection as to some of the events that took place in November 1996 was again hardly surprising. Those matters would have been of little moment to him, particularly having regard to the fact that, over the years, he took part in more than

100 Masses with the applicant.

1079 It was reasonable to think that Portelli would have recalled standing on the steps of the Cathedral after Mass with the Archbishop at his first Sunday solemn Mass. Accompanying the Archbishop to his 'meet and greet' was a central part of Portelli's role. So too was never leaving him alone, in the Cathedral, while robed.

1080 Mr Walker submitted that Portelli's use of the common idiom, 'it would have been', or 'I believe so', particularly when it came to outlining matters of practice, showed him to be an entirely credible and reliable witness. There was nothing to suggest that he had either consciously or subconsciously sought to assist the applicant in his defence. Indeed, as previously detailed, the prosecution had been specifically prevented by the trial judge from putting any such submission to him. Portelli had answered those questions put to him regarding matters of ritual and practice in terms that were appropriate to the form in which they were asked.

1081 Mr Walker submitted that Portelli's 'concession' to Mr Gibson that it was 'possible' that, at some time, the applicant may have been in the Priests' Sacristy, without Portelli having been there with him, was simply an indication of the fact that he was a thoroughly credible witness, doing his best to give truthful evidence. The 'possibility' of which Portelli spoke in answer to the question posed by Mr Gibson was itself heavily qualified. It was scarcely, in any event, the kind of 'possibility' that could, in any reasonable way, have accommodated the complainant's account of events.

1082 Put simply, Mr Walker submitted that there was every reason for the Archbishop's first two Sunday Masses, and the first Mass over which he presided in February 1997, to have been truly significant events in Portelli's life. They were likely to have imprinted themselves in his memory.

1083 Mr Walker summarised the defence position regarding Portelli as follows:

> But the critical thing for our purposes are not things which is really possible either at the trial or here for the Crown to say these can be, to use my friend's expression, 'put to one side', removed, they can't and they really mustn't be

> and it would be unreasonable for the jury not to have treated him as a witness, not suggested to be lying, not suggested to have no recollection; he was invited to do what it would be expected all of us would have as the maximum of our capacity about routine matters being asked about 22 years ago.
>
> …
>
> And Monsignor Portelli deserved better, with respect, than the way his evidence was criticised and belittled in terms of its importance for your Honours' independent assessment of the material for the first question under *M*.

1084 Mr Walker reminded this Court that Portelli had not been challenged, directly or indirectly, as to his recollection that, on the two dates in December 1996, he had stood side-by-side with the applicant, for an extended period, at the front steps of the Cathedral.

1085 Mr Boyce also levelled a series of criticisms at the evidence given by McGlone. He submitted that even if McGlone were to be found by this Court to be a credible witness, his claim to now recall the first occasion on which the applicant had said Sunday solemn Mass (based largely upon his mother's presence, and embarrassing behaviour that day), would still only have provided the applicant with an alibi for that day. It would not have covered both dates.[265]

1086 As regards Potter, Mr Boyce submitted that, by agreement, both sides had treated him gently. By reason of his age, the trial judge had absolved the prosecution from having to comply with any particular *Browne v Dunn* obligation in relation to him. Mr Boyce submitted that, in these circumstances, the jury were perfectly entitled to form whatever view they considered appropriate with regard to Potter. That is, of course, true. So too, however, is the proposition that the members of this Court are entitled to form their own view of Potter. Mr Boyce invited us to put his evidence entirely to one side, just as he did in relation to Portelli. I reject that submission.

---

[265] Of course, McGlone's evidence had another important aspect. If accepted as to the meeting between his mother and the applicant, it would effectively explode the prosecution's theory that the practice of meeting parishioners on the steps did not develop until sometime later, in 1997.

1087 In my view, Portelli was a credible and reliable witness. He appeared, to me, to be doing his very best to recall the events of many years ago, and he seemed, to me, to be making a very good fist of doing so. His evidence alone may well have been sufficient to have created a reasonable doubt as to the applicant's guilt because, if it were even 'reasonably possible' to be both truthful and accurate, the complainant's account had to be 'impossible', even in the fullest sense of that word.

1088 Making due allowance for Potter's age, and several obvious lapses of memory, I regarded him too as an honest witness who was doing his best to be candid with the court below. I also regarded him as a witness whose evidence could generally be accepted as reliable when it came to matters of liturgical practice, and his own decades-long role as Sacristan. As with Portelli, Potter would have had good reason to recall the first time that the applicant celebrated Sunday solemn Mass at the Cathedral.

1089 I found McGlone's evidence to be credible as regards the meeting that he described between his mother and the Archbishop. His evidence concerning his mother's behaviour on that occasion had a very strong 'ring of truth' about it.

1090 Finnigan's evidence, as regards the applicant's having stood at the steps of the Cathedral after Sunday solemn Mass, was particularly significant. It will be recalled that he left his position as choir marshal at Christmas 1996. If, by then, the applicant had already developed a practice of standing at the front steps, the prosecution theory that the 'meet and greet' practice may not have developed until 1997 was convincingly shown to be untenable.

1091 If I may turn, for a moment, to the applicant's record of interview, I should say that I considered his denials to have been made in a forceful and persuasive manner. Making the same due allowance of which I have spoken with regard to the dangers of giving too much weight to matters of demeanour, the applicant seemed to me to be genuinely shocked and angered by the nature of the allegations being put to him, as I understand it, for the first time in detail.

1092 I also take into account, to a limited degree, the other boy's denial to his mother that he had ever been sexually abused while a member of the choir. Making due allowance for the understandable unwillingness of many victims of sexual abuse to complain to others, the other boy's denial of ever having been so abused might be thought to have gone one step further than the mere absence of any complaint. That denial is a matter to be considered, in conjunction with the rest of the evidence as a whole, when deciding whether it was reasonably open to the jury to be satisfied beyond reasonable doubt.

1093 Dealing next with the 'madman' theory, it is clear that some sexual offenders commit their crimes in a manner that can properly be described as almost 'breathtaking in its brazenness.' Teachers have been known to molest their pupils in the classroom, and even while in the presence of other students.

1094 It is by no means uncommon, in the experience of this Court, for the submission to be made that a conviction should be set aside as unreasonable because the conduct alleged was so laden with risk as to be highly improbable. An argument couched solely in those terms, and without more, seldom succeeds.

1095 Even so, the complainant's account of the second incident seems to me to take brazenness to new heights, the like of which, I have not seen. The use of the term 'madness' may have been a rhetorical flourish. It may have been insensitive and inappropriate, though the criminal court is no place for shrinking violets.

1096 Nonetheless, I would have thought that any prosecutor would be wary of bringing a charge of this gravity against anyone, based upon the implausible notion that a sexual assault of this kind would take place in public, and in the presence of numerous potential witnesses. Had the incident occurred in the way that the complainant alleged, it seems to me highly unlikely that none of those many persons present would have seen what was happening, or reported it in some way.

1097 If, as I think, it was not open to the jury to be satisfied, beyond reasonable doubt, of the guilt of the applicant regarding the second incident, that is a factor that

would, ordinarily, be expected to impact significantly upon the complainant's credibility overall.[266] In other words, a doubt about that matter would ordinarily cast real doubt upon the complainant's credibility and reliability in relation to the first incident as well.

1098 Nonetheless, I recognise that ss 44F and 44G of the JDA (which abolished the rule laid down in New South Wales in *R v Markuleski*[267]) must be borne in mind in assessing how this Court, in accordance with s 4A of that Act, is to reason with regard to that issue. Accordingly, I am required to avoid treating the improbability of the complainant's account regarding the second incident as meaning that the same doubt that I have with regard to that matter must necessarily be also applied to his account of the first incident. That may be counterintuitive in some respects, but it is what the law seems to me to require, and is consistent with the direction that the charges arising out of the first incident were not cross-admissible with the charge arising out of the second incident.

1099 To be clear, as I have previously indicated, I see nothing inherently improbable in the allegation that a senior cleric, of whatever denomination, would sexually abuse a child. The findings of the Royal Commission into Institutional Responses to Child Sexual Abuse represented a shocking indictment of clerical abuse in this country.

1100 It must be remembered, however, that the complainant's allegations in this case cannot, and must not, be viewed in isolation from his detailed depiction of the circumstances in which such offending is said to have occurred. It cannot legitimately be said that no matter how improbable the complainant's account might be, at least in relation to matters of detail, and no matter how cogent the body of exculpatory evidence led at trial might appear, the complainant's demeanour in the face of sustained cross-examination must invariably trump factors of that kind.

---

266 The High Court in *Jones v The Queen* (1997) 191 CLR 439, 453 specifically said that this was a legitimate and proper mode of reasoning.

267 (2001) 52 NSWLR 82. It seems that this rule has never really been followed in Victoria.

1101 In the present case, as with so many others involving historical sexual offending, the devil is in the detail. It would be wrong to say that although the complainant may have been mistaken about a number of matters surrounding the commission of these alleged offences (as he unquestionably was), the jury, acting reasonably, might simply put all of that to one side, and dismiss his mistakes as nothing more than matters at the periphery. Sometimes an approach of that kind may be justified. It does not, however, absolve this Court from its duty of carrying out a full and proper assessment of the whole of the evidence, including matters of detail. It is, after all, often only the details of an alleged offence that can be the subject of productive cross-examination. A verdict of guilty in circumstances where these matters cannot be properly probed, or explored, would and should be a matter of concern.

1102 Cases such as *Palmer* (and to a lesser degree, perhaps, *SKA*), make it clear that as part of the overall 'independent assessment' that must be undertaken by an intermediate appellate court, the probative value of the evidence given by a complainant must be balanced against the cogency of any evidence supporting the defence case, or at least casting doubt on the prosecution case.

1103 It is important to note that in both *Palmer* and *SKA*, the complainant's evidence was described as 'credible.' Indeed, it was actually supported by independent evidence (or to use the old terminology, it was corroborated). Nonetheless, when faced with exculpatory evidence that 'seemed cogent', despite the fact that it was not, of itself, dispositive, the credibility of the complainant's account was insufficient to sustain the verdict in *Palmer*, and may ultimately have proved so, as well, in *SKA*.

1104 The same is true of this case, though I would certainly not characterise the complainant's evidence as being anything like as compelling with regard to the complainants in *Palmer* and *SKA*. Unlike the complainants' evidence in those cases, the evidence of the complainant in this case was neither corroborated (to use the old terminology), nor even independently supported. Moreover, the prosecution in this

case faced a much stronger defence case than it did in either of those two High Court decisions.

1105 The prosecution had to prove the applicant's guilt beyond reasonable doubt. The defence had to prove nothing at all. It did, however, point to a substantial body of evidence that, it submitted, left open at least the 'reasonable possibility' that the complainant's allegations fell short of the standard of proof required for conviction.[268] In my view, Mr Walker's submission that the defence had succeeded in making good that proposition should be accepted.

1106 In *Chamberlain (No 2)*,[269] Deane J, who dissented (but who, it might be noted, was ultimately, though for other reasons, proved correct) would have allowed the appeal. His Honour observed that the 'cause of the continued acceptance of trial by jury' was not likely to be served by treating a jury's verdict of guilty as unchallengeable or unexaminable. To do so could 'sap and undermine the institution of trial by jury', and be liable to be seen as 'a potential instrument of entrenched injustice.' As his Honour said, if the evidence led against an accused fails to establish guilt beyond reasonable doubt, there is a miscarriage of justice if that person is adjudged as guilty on that evidence.

1107 Justice Deane added that this was not the same thing as saying that the person who succeeds on this ground has been found guilty when he is, in fact, innocent. It is to say no more than that the person has not been proved to be guilty according to the standard demanded by a fundamental principle of the administration of criminal justice.

1108 His Honour continued by noting that when the trial is by jury, and there is

---

268 In a classic sense, the defence bore what Lord Denning described as a 'provisional' or 'tactical' burden of proof insofar as it sought to raise a reasonable doubt as to guilt through an argument based upon 'alibi' in the loosest sense of that term, thereby negating opportunity. See Lord Denning, 'Presumptions and Burdens' (1945) 61 *Law Quarterly Report* 379, 380. Professor Cross referred to the 'shifting' burden of proof in relation to matters of this kind as 'tactical', essentially suggesting that evidence intended to meet a 'provisional burden' would be led as a tactical, rather than legal matter. The analysis is akin to an evidential burden of proof.

269 (1984) 153 CLR 521.

evidence reasonably capable of being seen as establishing guilt beyond reasonable doubt, the question whether it does so is always question for the jury. However, the question to be considered by an appellate court is whether, even where there is such evidence, a finding of guilt by the jury must stand notwithstanding that the appellate court is persuaded that, on its assessment of the evidence before the jury, and notwithstanding the jury's verdict of guilty, there remains a real doubt about the guilt of the accused.

1109 Justice Deane said that he had found the question whether the evidence failed to establish beyond reasonable doubt that Mrs Chamberlain had murdered her daughter a difficult one. He acknowledged that the circumstantial evidence against her appeared strong. He said that there was much about the defence story about the dingo that struck him as being 'far-fetched.'

1110 At the same time, his Honour said that the prosecution case against Mrs Chamberlain was neither comprehensive nor, in itself, impregnable. Much of the evidence led at trial had been that of conflicting experts, and of inferences to be drawn from established facts. He concluded that, doing the best he could, he had finally come to a firm view that notwithstanding the jury's verdict of guilty, the evidence did not establish, beyond reasonable doubt, Mrs Chamberlain's guilt.

1111 I find myself in a position quite similar to that which confronted Deane J. To borrow his Honour's language, there is, to my mind, a 'significant possibility' that the applicant in this case may not have committed these offences. That means that, in my respectful opinion, these convictions cannot be permitted to stand. The only order that can properly be made is that the applicant be acquitted on each charge.

1112 Mine is, of course, a minority view in relation to Ground 1. I am troubled by the fact that I find myself constrained to differ from two of my colleagues whose opinions I always respect greatly. That has caused me to reflect even more carefully upon the proper outcome of this application. Having done so, however, I cannot, in good conscience, do other than to maintain my dissent.

1113 That raises the question of what, if anything, should be done with Grounds 2 and 3. In *Jones v The Queen*,[270] the High Court made it clear that it is the duty of a court of criminal appeal fully to exercise its jurisdiction when that jurisdiction is invoked. As such, the court must hear and determine each ground of appeal that is raised, unless that particular ground is clearly untenable, or the party raising it succeeds on another ground.

1114 In this case, the applicant having succeeded before me on Ground 1, it might not be strictly necessary to deal with Grounds 2 and 3. Nonetheless, the other members of this Court having rejected Ground 1, are obliged to deal with those other grounds in order to dispose of this application. I consider it appropriate, in these circumstances, that I offer my views about them.[271]

Ground 2 — The moving visual representation

1115 As indicated earlier, the applicant has also sought leave to appeal on the following ground:

> The trial judge erred by preventing the defence from using a moving visual representation of its impossibility argument during the closing address.

1116 At some point during the course of the second trial, the defence had prepared a visual representation, in the form of a 19 minute animation, to play to the jury at the conclusion of Mr Richter's closing address. The members of this Court have had the opportunity to view this visual representation.

1117 The animation depicts a blueprint of the Cathedral complex, including the body of the Cathedral, the sacristies, and the Knox Centre. Throughout its duration, a series of coloured dots and lines are shown moving through the complex. Each coloured dot or line is attributed to a particular person or group (for example, the applicant, the complainant, or the choir as a whole, when processing).

---

270 (1989) 166 CLR 409.

271 See also, *R v Chai* (2002) 76 ALJR 628, where the High Court emphasised the necessity of a court of appeal to deal with all grounds which may affect any retrial.

1118 It is implicit that the movement of each of the dots and lines is a real-time representation of the movements of each of these persons through the Cathedral, after the conclusion of Sunday solemn Mass.

1119 On the right-hand side of the screen, a window of text is featured. At the top of the window, quotes taken from the transcript of evidence of witnesses favourable to the defence case fade in and out throughout the course of the animation. These quotes are said to accord with the movements of the various dots and lines depicted. At the bottom of the window, quotes taken from the transcript of the complainant's evidence fade in and out, ostensibly to accord with the movement of the dots representing himself and the other boy.

1120 After Mr Gibson took objection to the use of this animation, the trial judge ruled against its being played to the jury. His Honour noted that the movements depicted were based on evidence of events that had allegedly occurred more than 20 years ago. The evidence sometimes took the form of purported actual recollection. At other times, the evidence took the form of what was said to be regular, or invariable practice. There was also a mixture of the two.

1121 As such, his Honour noted that:

> … the quality of the evidence overall could not possibly account for the actual movement of each protagonist [in the moving representation], let alone the movement of each protagonist vis–à–vis each other, over the course of this some 20 minute period in question.

1122 The trial judge held that the moving representation could not accurately, or fairly, depict the state of the evidence, overall, as to what occurred. It certainly could not do so on a moment-by-moment basis regarding the events immediately after Sunday solemn Mass on 15 or 22 December 1996.

1123 None of the witnesses gave evidence to anything like the degree of specificity portrayed in the animation. Neither were they shown, or presented with the representation, in order to comment upon its specificity for themselves. His Honour characterised the animation as 'reconstructed evidence', though, in context, it is plain

that he was using that expression in a non-technical sense. He plainly understood that its proposed use was not as 'evidence.' He found that a jury presented with what purported to be a moment-by-moment depiction of events in the Cathedral would be invited to 'fill the gaps' in the depiction by way of speculation.

1124 Before this Court, the applicant submitted that his Honour had erred in ruling that the jury could not be shown the animation. Ms Shann, who argued this ground, submitted that the animation constituted argument, and not, as she submitted, his Honour had appeared to suggest, 'evidence.' It was intended merely to contrast the complainant's account of the first incident with what was said to be the unchallenged evidence of a number of witnesses regarding their movements around the Cathedral after Sunday solemn Mass.

1125 Additionally, Ms Shann submitted that the animation was 'very well-grounded' in the evidence. She pointed to various excerpts from the trial transcript that were contained within the window of text adjoining the particular representation.

1126 Ms Shann further submitted that it had never been intended to play the animation through from start to finish. She said that the idea was that a portion of it be played, and then stopped. Mr Richter would then have used a laser pointer to demonstrate to the jury where the complainant's account differed from that of the other witnesses. It was submitted that, without the jury being able to view the animation, it was possible that they might not understand the full force, cumulatively, of the defence argument in relation to opportunity.

1127 Mr Boyce, in reply, submitted that the trial judge had been correct in refusing to allow the jury to view the moving representation. He submitted that the animation was neither a fair, nor accurate depiction of the state of the evidence, overall. He also submitted that it had a seductive quality, which could have led the jury into misconceived speculation.

1128 In my view, Mr Boyce's submission should be accepted. The animation bore

little resemblance to the actual state of the evidence but rather presented a distorted picture of that evidence, no doubt, as the applicant would like the jury to have believed. It was tendentious in the extreme. For example, it showed the Priests' Sacristy, with the complainant and the other boy in the room, in company with a large number of concelebrant priests. Self-evidently, there was no evidence of any kind that this particular scenario had occurred. It was plainly intended to implant in the minds of the jury that the complainant's account must have been impossible because the evidence showed that there were concelebrant priests in the room at the time of the alleged offending.

1129 The same is true of the animation showing both the applicant and Portelli remaining on the front steps of the Cathedral throughout the entire period that the alleged offending was said to have occurred. Whereas there was evidence from Portelli to that effect, the visual depiction of that evidence need hardly have been presented to the jury to make it clear that, if his account were accepted, or might reasonably be true, the applicant would inevitably have to be acquitted. That was conceded by Mr Gibson throughout the trial. In addition, the jury were so directed in the clearest of terms. The animation added nothing of any consequence, or substance, to the evidence given in the trial regarding that issue.

1130 Of course, there was a good deal of evidence to suggest that the area in and around the Priests' Sacristy was always crowded shortly after Sunday solemn Mass had concluded. The jury could hardly have failed to understand the significance of that evidence. To have portrayed it in a visual representation, ostensibly based on the state of the evidence led at the trial, had the potential, correctly recognised by the trial judge, of misleading, or at least confusing, the jury.

1131 If it had been sought to tender the animation as evidence, perhaps equivalent to a chart or other extrinsic material, ostensibly to assist the jury in comprehending the issues before them, his Honour would have been well entitled to exclude it on the basis of s 135(b) of the *Evidence Act*. That would be on the basis that its probative value would be substantially outweighed by the danger that it might be misleading

or confusing. Indeed, it is hardly conceivable that the trial judge would not have exercised that power.

1132 The fact that Ms Shann maintained that Mr Richter proposed to rely upon the animation as nothing more than an aid to his argument, in the course of a closing address, does not mean that his Honour was powerless to prevent the jury from being presented with material in this highly questionable form.

1133 A judge is not required to stand back and do nothing if he or she considers that arguments that are being presented to a jury by way of closing address misstate the evidence, or are otherwise misleading. Counsel can be called upon to correct such arguments. Alternatively, the trial judge can properly do so in the course of his or her charge.

1134 The High Court's recent decision in *McKell v The Queen*,[272] which restricts the scope for judicial comment upon the facts, in the course of a charge to the jury, would not preclude a trial judge from doing so. At the very least, there must be an inherent or implied power, vested in a trial judge, to ensure that the jury are not misled.[273]

1135 In my view, the trial judge correctly ruled that the animation should not be used in the way contemplated by the defence. I would refuse leave to appeal on this ground.

Ground 3 — the arraignment before the jury panel

1136 Ground 3 complains of a 'fundamental irregularity in the trial process.'[274] This is said to be on the basis that the applicant was not arraigned 'in the presence of

---

272 [2019] HCA 5.

273 See generally, Rosemary Pattenden, *Judicial Discretion and Criminal Litigation* (Clarendon Press, 2nd ed, 1990) 136–8, where the learned author posits that in interests of fairness, a trial judge is entitled to restrain counsel from, inter alia, the adoption of 'questionable trial tactics.'

274 In *Jago v District Court of New South Wales* (1989) 168 CLR 23, Mason CJ spoke of a 'fundamental defect' which goes to the 'root of the trial.' That is essentially the same notion as that for which the applicant contends under Ground 3.

the jury panel', as required by ss 210 and 217 of the CPA.

1137 Those sections relevantly provide as follows:

> **210 When trial commences**
>
> (1) A trial commences when the accused pleads not guilty on arraignment in the presence of the jury panel in accordance with section 217.
>
> (2) If a jury panel is split into 2 or more parts under section 30(5) of the *Juries Act 2000*, the trial commences when the accused pleads not guilty on arraignment in the presence of the first part of the jury panel that is present in court.
>
> …
>
> **217 Arraignment in presence of jury panel**
>
> If an accused has not pleaded guilty to all of the charges on an indictment—
>
> (a) the accused must be arraigned in the presence of the jury panel or, if a jury panel is split into 2 or more parts under section 30(5) of the *Juries Act 2000*, the first part of the jury panel that is present in court; and
>
> (b) a jury for the trial must be empanelled from that jury panel.
>
> …

1138 Section 215 of the Act provides that an accused is arraigned when the court asks the accused whether he or she is the person named on the indictment, reads out each charge, and asks whether the accused pleads guilty or not guilty to the charge.

1139 The *Juries Act 2000* sets out the process for empanelling a jury. It makes provision in Part 5 for summoning of jurors in criminal trials,[275] and in Part 6 for creation of jury pools,[276] selection of panels,[277] and the calling of panels, or parts of split panels.[278]

1140 Because of the extraordinary size of the jury panel required for this trial, the empanelment process was conducted in a somewhat unusual manner. All of the

---

275 Section 22.

276 Section 29.

277 Section 30.

278 Section 31.

members of the jury panel remained in the jury panel room until excuses had been ruled upon. This aspect of the procedure was adopted with the full consent of both sides.

1141 A video-link was set up between the courtroom and the jury panel room. The applicant and all counsel remained, at all times, in the courtroom. The trial judge moved between the courtroom and the jury panel room. He was in the courtroom when the applicant was arraigned. The instructing solicitors were in the jury panel room.

1142 The applicant was arraigned only once. The arraignment took place when no jury panel members were physically present in the courtroom. However, the entire jury panel viewed the arraignment directly via a video-link. Once again, this was done with the consent of both sides.

1143 The applicant's written case noted that ss 210 and 217 of the CPA require arraignment to take place 'in the presence of the jury panel.' Mr Walker submitted that the failure to have arraigned the applicant in the 'physical presence' of the entire jury panel constituted a fundamental irregularity in the trial process, which rendered the trial a 'nullity' and required these verdicts to be set aside. That argument was said to rest on three propositions.

1144 First, ss 210 and 217 were said to restrict the authority to empanel a jury to hear a criminal trial. These provisions required the jury to be empanelled from a particular jury panel, namely, the panel in whose 'presence' the accused had been arraigned. They operate to mark the point of that arraignment as the time at which a criminal trial commences.

1145 Secondly, Mr Walker submitted that there was no justification for giving the word 'presence', in these provisions, other than its ordinary meaning. He submitted that 'presence', in this context, meant 'physical presence' and nothing less.

1146 Thirdly, because these provisions went to the constitution and authority of the

jury, their breach constituted a fundamental defect, in respect of which, no question of waiver could arise. Nor was it necessary, in these circumstances, to establish any actual prejudice.

1147 Mr Walker supported this interpretation of these provisions by reference to s 30(5) of the *Juries Act*. That subsection provides that the proper officer may split the panel into two or more parts if it is considered that it is not practical for the whole panel to be present in the court at the one time, or alternatively, that it is expedient to do so for any other reason. In other words, it provides a mechanism whereby the arraignment can be conducted in the presence of the jury panel, albeit not all at one time.

1148 Mr Walker referred to several authorities dealing with the consequences of non-compliance with provisions governing the empanelment of the jury.

1149 In *Maher v The Queen*,[279] the accused had pleaded not guilty to 19 counts, originally contained in the indictment, and two further counts that were added after the jury had been sworn. The trial judge had the accused re-arraigned on the new counts, dismissing his objection that the court had no jurisdiction to entertain them. The two further counts were allowed, pursuant to a provision of the *Queensland Criminal Code* which made provision for joinder of counts in an indictment.

1150 The High Court held that the jury could only have been sworn and empanelled to try the issues raised by the pleas to the original 19 counts at the time the jury were sworn. There was no provision authorising an amendment to the indictment by adding counts. As the jury had not been sworn to try the issues on the further counts, merely re-arraigning the appellant in front of the jury did not alter the issues that the jury were sworn to try. Accordingly, the convictions could not stand.

1151 In *Katsuno v The Queen*,[280] the challenge to the appellant's conviction was

---

279 (1987) 163 CLR 221.

280 (1999) 199 CLR 40.

based upon non-compliance with several provisions of the *Juries Act*. It had been a longstanding practice in Victoria for the Chief Commissioner of Police, having been provided in confidence by the sheriff with a copy of the list of names on the panel from which the jury was to be struck, to provide the Director of Public Prosecutions with details of any convictions or any information of names concerning persons on the panel. That information was then made available to prosecutors.

1152 The convictions of those on the panel were not such as to disqualify them under Schedule 2 of the *Juries Act*. The information was provided in order to assist the prosecutor in exercising the then right of peremptory challenge. Before the jury were empanelled, objection was taken to the use by the prosecutor of any such information which had been supplied by the Chief Commissioner. Alternatively, it was submitted that the information in question should be furnished to the defence.

1153 There was a peremptory challenge by the prosecution to one potential juror on the basis of the information supplied. It was common ground that the potential juror had been challenged solely because of the information in question.

1154 The High Court held that the Chief Commissioner's practice was unlawful, being impliedly prohibited by several provisions of the Act. Nonetheless, by majority,[281] it was held that the prosecution had been entitled to exercise a right of peremptory challenge, irrespective of whether there was sound reason, or other basis, for its exercise. Accordingly, there had been no failure to observe the requirements of the criminal process in a fundamental respect. The appeal was dismissed.

1155 Mr Boyce, in his reply regarding Ground 3, relied upon the prosecution's written case. He chose not to elaborate upon that ground in oral argument. In his written case, he submitted that ss 210 and 217 concerned only the marking of a moment in time when a trial is deemed to have commenced. These provisions were not to be read as stipulating, in a manner from which there could be no departure,

---

[281] (Gleeson CJ, Gaudron, Gummow and Callinan JJ, McHugh J dissenting, Kirby J dissenting).

that the method of arraignment had to be by putting the charges to the accused, and having him plead to them in the physical presence of the jury panel. They were not to be read as precluding the process of arraignment from being carried out, for example, by video-link, as was done in this case.

1156 Mr Boyce referred to the Explanatory Memorandum concerning the introduction of clauses 210 and 217 in the *Criminal Procedure Bill*, which he submitted, made it perfectly clear that these provision were not intended to preclude the course adopted by the trial judge in this matter.

> Clause 210 defines the commencement of trial as when the accused pleads not guilty on arraignment in the presence of the jury panel in accordance with clause 217. The clause also provides for the situation where a jury panel is split into parts under section 30(5) of the *Juries Act 2000*, in which case the trial commences when the accused pleads not guilty on arraignment before the first of those parts.
>
> This definition is new and resolves uncertainty surrounding when a trial formally commences arising from the difference between the approach at common law (see *R v Talia* [1996] 1 VR 462) and section 2 of the *Crimes (Criminal Trials) Act 1999*. The new definition ensures that empanelling of the jury forms part of the trial. It also allows particularity as to the timing of pre-trial obligations (e.g. in clauses 182 and 183 which now run backwards from the day on which the trial is 'listed to commence').[282]

1157 Mr Boyce submitted that clause 217 simply provided a 'link' to clause 210.[283]

1158 The history associated with the introduction of ss 210 and 217 sheds light upon the proper interpretation of these provisions. Prior to the CPA, the expression 'commencement of trial' could mean two different things. At common law, the formal commencement of trial was when the accused was arraigned, and not before.[284] Regrettably, and inconsistently, s 3 of the *Crimes (Criminal Trials) Act 1999* had defined the commencement of the trial as being 'the day on which the accused is

---

282 Explanatory Memorandum, Criminal Procedure Bill 2008, 78.

283 I note that some support for Mr Boyce's interpretation of ss 210 and 217 may be found in the *Legislative Guide to the Criminal Procedure Act 2009*, which was produced by the Department of Justice. That is a document to which regard can be had, pursuant to the *Interpretation of Legislation Act 1984*, when engaged in an interpretive task. That Guide specifically refers to s 210 as having been enacted to define the moment at which a trial commences.

284 *R v Talia* [1996] 1 VR 462.

due to be put in the charge of the jury.' An earlier version of the *Crimes (Criminal Trials) Act 1999*, namely, the *Crimes (Criminal Trials) Act 1993* (later repealed) had required the accused be 'arraigned' at the beginning of the first directions hearing, obviously long before any jury were empanelled.

1159 Mr Boyce submitted that ss 210 and 217 were intended to ensure that this wholly unsatisfactory state of affairs was brought to an end. Those provisions were not intended to lay down prescriptively, and in a manner from which there could not be even the slightest modification or departure, a requirement that the accused be in the courtroom, physically in the presence of the panel (or at least a part thereof), failing which, the trial could not be said to have commenced.

1160 In effect, Mr Boyce's submission regarding this matter amounted to this. Even if, contrary to his primary contention, the arraignment process adopted below was not conducted in absolute accordance with the procedures laid down in ss 210 and 217, it would not follow that the trial was a 'nullity.' That would depend, in accordance with the reasoning in *Project Blue Sky v Australian Broadcasting Authority*,[285] whether it was a purpose of these provisions wholly to invalidate any trial in which the arraignment was carried out in a manner that did not strictly accord with the terms of the statute, albeit in a manner that was agreed to by both sides, and could not conceivably have caused even the slightest prejudice to the applicant.

1161 It would depend upon whether the course adopted failed in some substantive way to have achieved the purpose for which the statutory requirement was imposed. I simply cannot conceive of how that could be said with regard to what took place in this case.

1162 The history of these provisions is important. However, as the High Court has said repeatedly, the task of interpretation both begins and ends with the language of the text.

---

[285] (1998) 194 CLR 355.

1163 The assumption built into Mr Walker's submission, that the expression 'in the presence of' can have one meaning only, namely, physical presence, seems to me to be misplaced. To assert that the 'ordinary meaning' of the word 'presence' invariably connotes nothing less than physical presence is unconvincing.[286] It ignores the requirement that legislation be read purposively. Moreover, it can be argued that rather than merely construing the word 'presence', it requires an additional word, 'physical', to be read into the statute.

1164 The interpretative task is facilitated by having regard to both history and context. As indicated, the history of the provisions under consideration makes it clear that they were not intended to perform the role for which Mr Walker contended. The textual analysis suggests that when the legislature has omitted, or not included, a particular word from a composite expression, a court will not ordinarily re-write the provision so the word or words are 'read in.'[287] Certainly, it will not do so without good reason. In the present case, no such reason suggests itself.

1165 Mr Boyce submitted that the point must surely be that the jury panel in this case were able to see and hear the applicant, quite clearly, as he pleaded not guilty to each of the charges. The use of a video-link, in circumstances such as those which prevailed in the present case, did not constitute even the slightest impediment to the process of arraignment. It did not in any way impinge upon the jury panel's capacity to witness that process.

1166 I should add that the use of a video-link is now commonplace in criminal

---

[286] In some aspects of the law, where 'presence' is required, what is sometimes described as 'constructive presence' has been held to meet this requirement. See, for example, the discussion of 'presence' in the context of criminal complicity in Peter Gillies, *The Law of Criminal Complicity* (Lawbook, 1980), 46. The author refers to *R v Manners* (1837) 173 ER 349, 349, as a source of the doctrine of 'constructive presence' in English law.

[287] A more flexible approach to reading into a provision words that are not there is said to be reflected in *Bermingham v Corrective Services Commission of New South Wales* (1988) 15 NSWLR 292 (McHugh JA). On the other hand, a somewhat more restricted view appears to have been taken in *R v Young* (1999) 46 NSWLR 681, [11]–[16] (Spigelman CJ), *DPP v Chan* (2001) 52 NSWLR 56, and perhaps, in this State in *Victorian Work Cover Authority v Wilson* (2004) 10 VR 298, [25]–[28] (Callaway JA). See generally, Dennis C Pearce and Robert S Geddes, *Statutory Interpretation in Australia* (LexisNexis Butterworths, 8th ed, 2014), 76.

trials throughout this country. It could hardly be suggested that the right of an accused to confront his or her accuser has somehow been diminished by the fact that technology enables that process effectively and justly to be undertaken.

1167 I accept that there are older authorities which suggest that the term 'present', in a statutory context, should ordinarily be interpreted as 'physically present.'[288] In the light of modern technology, such a narrow and restrictive interpretation of that term seems, to me, not to be warranted. Many meetings are routinely conducted using video-conferencing facilities. It is plain that, depending upon the form of any legal requirement stipulating 'presence', the use of such facilities is readily accepted, and 'presence' can thereby be achieved, as it was here.

1168 This conclusion is not at odds with the requirements set out in s 30(5) of the *Juries Act*. That sub-section clearly has operation when a jury panel is split in two and there are no video conferencing facilities used.

1169 There is some recent authority which might be thought to bear upon Ground 3. In *Amagwula v The Queen* ('*Amagwula*'),[289] the New South Wales Court of Criminal Appeal dealt with an appeal against conviction based, in large part, upon the fact that a trial judge, confronted with a self-represented accused, had not required him to move back from the bar table, and stand in the dock so that he could plead to the individual charges in the presence of the jury panel. Rather, the judge said that, in arraigning the accused, he would not ask him personally to enter a plea. Instead, he would direct that pleas of not guilty be entered in relation to each charge, after the accused had been arraigned.

1170 It was submitted on appeal that, there having been no valid arraignment, the trial had been a 'nullity.' That submission was rejected. It was held that any irregularity did not 'go to the root of the trial.' Moreover, the course adopted by the trial judge had not, in any way, resulted in prejudice to the appellant.

---

288 *Harris (M) Ltd, Petitioners* 1956 SLT 367, 368–9 (Lord Sorn).

289 [2019] NSWCCA 156 ('*Amagwula*').

1171 Justice Basten, who delivered the lead judgment of the Court, observed that the term 'arraignment' was not defined in the *Criminal Procedure Act 1986* (NSW). Although Archbold had described the process of arraignment as involving a reading of the indictment to him, and asking whether he is guilty or not, with a requirement that he plead personally, and not through counsel or another person, the process followed in the particular case before the Court did not give rise to a nullity.

1172 First, it was clear that the process of arraignment was governed by statute, and that the consequence of the precise procedure for arraignment not having been followed would necessarily depend on the proper construction of the relevant provisions. That, in turn, would depend upon the apparent purpose of arraignment, in the context of a criminal trial.[290]

1173 Of course, the legislative background to the arraignment process in New South Wales differs from that which applies in this State. By enacting s 130(3) of the *Criminal Procedure Act 1986*, the New South Wales legislature had clearly intended to change the manner of conducted of an arraignment under the general law. Although it was, and remains common practice to require the accused to plead personally to each count in an indictment, under the general law, a failure in that regard did not vitiate the ensuing trial. All that was necessary was that the accused knew the contents of the indictment and, in fact, intended to plead not guilty.

1174 *Amagwula* is obviously not directly in point in relation to Ground 3. Nonetheless, aspects of the reasoning underlying that decision might be thought to support the prosecution contention with respect to this ground. Given the absence of any prejudice to the accused in the procedure in fact adopted in that case, and absent any statutory implication that a different procedure was required to ensure

---

[290] His Honour referred to *R v Williams* [1978] QB 373, 379F ('*Williams*'), where the Court of Appeal held that the accused had the right to waive the right to be arraigned. In that case, the accused heard the indictment being read out, and also heard a statement by the clerk to the effect that he had pleaded not guilty to it. That statement was factually incorrect, but the accused did not demur to it. The Court observed that 'insistence on an express plea of not guilty by the defendant himself is no longer a necessary safeguard of justice where that is the intended plea, and where the ensuing proceedings are precisely what they would have been if the accused had himself made the plea in plain terms.'

the validity of the trial, it was held that there had been no miscarriage of justice.

1175 Both parties' attention was drawn to *Amagwula* by the Court. Mr Walker, on behalf of the applicant, submitted that none of the reasoning in that case assists the respondent in the present case. No question of prejudice or waiver could arise. Moreover, the Victorian provisions require a specific procedure to be followed, and that had not been done.

1176 In addition, Mr Walker referred to the judgment of Button J in *Amagwula*. His Honour concluded that there had been an irregularity, but not one that required the trial to be treated as a nullity. Nonetheless, and despite the movement away from procedural formalism in criminal law, a procedural failing of the kind said to have occurred in the present case required that the applicant's convictions be set aside, the trial having been a 'nullity.' Mr Walker submitted that the Victorian legislature had empowered only those members of the jury panel, in whose physical presence the applicant had been arraigned, to sit as jurors in the trial. He submitted that the jurors who convicted the applicant were not authorised by law to try the applicant.

1177 Mr Gibson, who replied to this Court's invitation to comment upon *Amagwula* on behalf of the respondent, submitted that the New South Wales Court's reliance upon the decision of the English Court of Appeal in *Williams* gave added force to the general submission that there had been no fundamental defect or irregularity in the arraignment process. In the present case, there had been a formal arraignment. The jury panel were left in no doubt as to the nature of the charges, nor as to the plea entered in response to them. The jury panel heard and saw the applicant enter his pleas in relation to all charges, and did so in real time. This was not a case of the applicant having remained silent, in the face of arraignment, as had occurred in *Amagwula*.

1178 In this case, the applicant was arraigned in the presence of the jury. It was a properly constituted jury with full authority. The process adopted below did not give rise to a 'fundamental irregularity' 'going to the root of the trial.' It did not

render the trial a nullity. The applicant did not, by reason of the use of video-link, suffer a miscarriage of justice. I would refuse leave to appeal on this ground.

Orders

1179 I would grant leave to appeal against conviction on Ground 1. I would order that the appeal be treated as having been heard instanter, and that it be allowed. I would set aside each of the convictions sustained below, and the sentences passed thereon. I would further order that there be entered judgment and verdicts of acquittal on each charge.

1180 I would refuse leave to appeal on both Grounds 2 and 3.

ANNEXURE A

This annexure sets out in alphabetical order the witnesses specifically referred to in this Court's reasons. It excludes the complainant and other witnesses who gave evidence at trial but who were not specifically referred to in this Court's reasons.

	Surname	Given names	Role and age in 1996
1.	Bonomy	Robert Anthony	Chorister 1990–1998, 15 years old in December 1996
2.	Connor	Jeffrey Ian	Altar server 1994–November 1997, 40 years old in December 1996
3.	Cox	Geoffrey Arnold	Assistant organist and choirmaster 1995–1999, director of music 1999–2014
4.	Dearing	David Michael	Chorister between 1993–2000, 14 years old in December 1996
5.	Dearing	Rodney David	Chorister June 1993–2002 and father of David Dearing, 44 years old in December 1996
6.	Derrij	Farris	Chorister from 1994 (grade 5) until the end of year 12, 12 years old in 1996
7.	Doyle	Christopher Leigh	Chorister 1994– 1999, 14 years old in December 1996
8.	Finnigan	Peter Michael	Choir member from 1990 – 1996, Choir Marshal from 1993/1994 – 1996
9.	Ford	Stuart Michael	Chorister 1994 – 2000, turned 14 years old in December 1996
10.	La Greca	Andrew	Chorister 1993–2000, 13 years old in December 1996
11.	Mallinson	John Whalley	Organist 1976–1999, choirmaster 1987 – 1999, 62 years old in December 1996
12.	May	John Lawrence	Sacramental wine maker
13.	Mayes	David Nicholas Andrew	Chorister 1994–2000, 13 years old in December 1996
14.	McGlone	Daniel Newman	Altar server from 1987 until 1997, 27 years old in December 1996
15.	Nathan	Anthony Lord	Chorister 1993–2000, 13 years old in December 1996
16.	Parissi	Luciano	Chorister 1991–2001, 16 years old in December 1996
17.	Portelli	Charles	Assistant priest January 1993–June 1996, Master of Ceremonies to Archbishop Pell September 1996–2000
18.	Potter	Maxwell Francis	Sacristan 1963–2001, 62 years old in December 1996
19.	Reed	Christopher Ashley	Informant
20.	Thomas	Aaron Roger	Chorister 1993–2001, 13 years old in December 1996