Pell v The Queen [2020] 268 CLR 123

Gavin Silbert KC

George Pell was convicted of one charge of sexual penetration of a child under 16 years and four charges of committing an act of indecency with or in the presence of a child under the age of 16 years when serving as Catholic Archbishop of Melbourne. The first four charges were alleged to have occurred on either 15th or 22nd December 1990 and the fifth at least a month later all following Sunday solemn Mass at St. Patrick's Cathedral. The complainants were two cathedral choirboys "A" and "B". The prosecution case was wholly dependent upon the truthfulness and reliability of A's evidence, B having died. A had not made his first complaint until 2005 and B had denied being assaulted prior to his death. The convictions resulted from a second County Court trial the first jury having been unable to agree on its verdicts.

The applicant appealed to the Court of Appeal on the single ground that the verdicts were unreasonable and could not be supported by the evidence. The prosecution led evidence from a number of "opportunity" witnesses as to the applicant's movements following the conclusion of Sunday solemn Mass which was inconsistent with A's account. The majority, Ferguson CJ and Maxwell P, concluded that this evidence did not compel the jury to entertain a reasonable doubt as to the applicant's guilt; Weinberg JA, in dissent, concluded that it did. The critical question was the effect of the opportunity witnesses' evidence on the otherwise accepted evidence of witness A which was conceded to be credible and reliable. The determinative answer was that this evidence was led by the Crown as part of its ethical duty to lead all relevant evidence, favourable or unfavourable, and was unchallenged.

The applicant sought special leave on the grounds, first, that the majority erred in finding that the applicant had to establish that the offending was impossible to raise the necessary doubt and, second, that the majority erred in finding that the evidence of the opportunity witnesses failed to compel a reasonable doubt.

In a unanimous decision by a bench of seven the High Court granted special leave, heard and allowed the appeal instanter, quashed the convictions and entered verdicts of acquittal.

The judgment of the High Court proceeded on the entirely orthodox approach laid down in *M v The Queen* (1994) 181 CLR 487 and *Libke v The Queen* (2007) 230 CLR 559 and which had been misapplied by the majority of the Court of Appeal, namely whether the appellate 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". In other words, whether the appellate court considers "it was *open* to the jury to be satisfied of guilt beyond reasonable doubt, which is to say whether the jury *mus*t as distinct from *might* have entertained a doubt about the appellant's guilt."

The High Court emphasised that such a case always proceeds on the assumption that the complainant's evidence is credible and reliable and that the appellate court must examine the record to see whether, notwithstanding that assessment, the court is satisfied that the jury acting rationally ought nonetheless to have entertained a reasonable doubt. The Court of Appeal majority's decision was a solecism in the application of long-established principle.

The evidence of Monsignor Portelli as to the applicant's routine movements after the Mass, although buttressed by other evidence, was unchallenged, together with evidence that the applicant was never unaccompanied within the Cathedral, also unchallenged. This should have raised a question of reasonable doubt in the minds of the jury and been identified by the Court of Appeal majority. Additionally, the forensic disadvantage arising from a delay of 20 years was required by the *Jury Directions Act 2015* (Vic) to be used in favour of the applicant rather than to his disadvantage as applied by the majority.

There is little by way of general principle that can be taken from the High Court judgment. The compounding improbabilities identified by Weinberg JA in dissent arising from the unchallenged evidence of the opportunity witnesses should have led the jury to entertain a reasonable doubt as to the applicant's guilt. The failure of the Crown to challenge this evidence was fatal to its case.

The rule in *Browne v Dunn* (1893) 6 R 67 required the prosecution, before seeking to ask the jury to reject the evidence of the opportunity witnesses, to challenge them in the witness box; this was not done.

The established practice of the Court of Appeal to view the video recorded evidence of witnesses on such appeals was undesirable and unnecessary for an appellate court to make an independent assessment of the evidence. The High Court stated that an appeal court should only view such videos in exceptional circumstances and where there is a specific need. An appeal court should not seek to duplicate the function of the jury in its assessment of the credibility of witnesses where that assessment is dependent on the evaluation of the evidence of the witness in the witness box. Judges of appeal do not perform the same function in the same way as the jury or with the same advantages that the jury enjoys. All such appeals proceed on the premise that the complainant was assessed by the jury to be credible and reliable.

The case attracted wide media interest for obvious reasons. By the time of the trial the applicant had attained the rank of Cardinal and was Australia's most senior Catholic. He was the most senior Catholic cleric ever to have been convicted of such crimes here or elsewhere. The applicant enjoyed a controversial public reputation. The public attention assured wide public discussion and much public controversy amongst his proponents and opponents. Publications including books fuelled the public discord.

Certain sections of the media embarked on a sustained and unrelenting campaign proclaiming the applicant's innocence likening the trial to that of Alfred Dreyfus. The media coverage was entirely uninformed and written in the main by those who had not heard the evidence or examined the record and few of those writing had any legal training. There was extensive criticism of Victoria Police, the Director of Public Prosecutions, who had carriage of the matter once charges were laid and, of the complainant, witness A, whose identity was suppressed.

An examination of the critiques serves little purpose at this time. The allegation that Victoria Police conducted a biased investigation was based on the allegation that complaints against the applicant were intentionally solicited and that there is evidence that the open and unbiased character of a police investigation was lacking. The Director of Public Prosecutions was accused of failing to exercise proper prosecutorial discretion prior to indicting; the verdicts confirm that the reasonable prospects of conviction test was satisfied.

Perhaps the most egregious example of gutter journalism followed the High Court decision and continues to this day where certain commentators continue to refer to the complainant as a liar notwithstanding the statements of the High Court that the decision "…proceeds on the assumption that the evidence of the complainant was assessed by the jury to be credible and reliable" and that "… the Court of Appeal majority did not err in holding that A's evidence of the first incident did not contain discrepancies, or display inadequacies, of such a character as to require the jury to have entertained a doubt as to guilt." while finding it unnecessary to opine on the second incident . The complainant was a dignified witness and the media criticism is unfair and unjustified.

Finally, the trial throws into question the efficacy of the *Open Courts Act 2013* (Vic*)* and the situation in Victoria as the suppression capital of the common law world. The trial was subject to a suppression order to protect its integrity from the surrounding mountain of public commentary. Undoubtedly such an order was necessary. The verdicts came late one afternoon. An hour or so after verdict I received an email from the Philippines advising me of the verdicts and the world's press immediately reported the verdicts. The following day Australian media reported the verdicts. There are now prosecutions on foot against some thirty media organisations for contempt of court arising from breaching the suppression order which remained on foot. We shall have to await the outcome of these prosecutions; however, they certainly raise for discussion the absurd situation seeking to restrict the access of the Australian public to information available world wide and via the internet within Australia.

*****

Published in the Summer 2020 edition of the Bar News