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The trial and acquittal of Cardinal George Pell

Date: Tuesday May 12, 2020

After two trials, an appeal, and more than 400 days in prison, Australia's highest-ranking Catholic clergyman, Cardinal George Pell, was acquitted of his alleged crimes by the High Court of Australia. This article will look at the factors that led to this final decision in Australia's highest court.

The outcome is unlikely to leave anyone satisfied. To many, the acquittal after a jury conviction will be seen as a setback in the quest for the greater belief of victims.

To others, the fact that Cardinal Pell served more than 400 days in prison based on a conviction that was ultimately found to be unsafe, will suggest that the criminal justice system is too easily held hostage to public sentiment and politics.

The issue at trial

The prosecution case against Cardinal Pell relied almost entirely on the evidence given by complainant "A". The other evidence led by the prosecution largely concerned clergy and choir practices at St Patrick's Cathedral at the relevant time. This other evidence came to be referred to as the "opportunity evidence".

The critical issue at trial, and subsequently on appeal, was whether the opportunity evidence created a reasonable doubt that the offending alleged by A could have occurred.

The tension between the complaint and the opportunity evidence

The complainant alleged that the first of two incidents occurred in the priests' sacristy (the robing room connected to the Cathedral) immediately after Sunday Mass in late 1996.

From an evidentiary perspective though, the difficulty with this allegation was that the opportunity evidence given by witnesses:

1. placed Pell at the front steps of the Cathedral at the time the incident was alleged to have occurred;
2. placed Pell in the company of the Cathedral's Master of Ceremonies, Monsignor Portelli, when he returned to the priests' sacristy to remove his vestments; and
3. described continuous activity around the priests' sacristy area for 10 to 15 minutes in the period after Mass.

A second incident was alleged to have occurred about a month after the first incident and faced similar challenges regarding the opportunity for it to have occurred.

Ultimately, the High Court found that these "compounding improbabilities" required the jury, even assuming they found A's evidence to be credible and reliable, to entertain a reasonable doubt about Cardinal Pell's guilt.

What factors led to the High Court's decision to overturn the conviction?

It is important to observe at the outset that it is not unusual for judges, on appeal, to make different findings and reach different conclusions.

The High Court identified several errors made by the Victorian Court of Appeal majority in its decision to dismiss Cardinal Pell's appeal and uphold the conviction.

1. Viewing recorded evidence and making 'demeanour-based' judgments about the complainant

The Court of Appeal took the unusual step (for a criminal appeal court) of viewing video recordings of the evidence of A and several witnesses nominated by Cardinal Pell's legal team in order to put itself "*in the closest possible position to that of the jury*".

Appeal courts ordinarily confine themselves to reading transcripts of the evidence. This led the majority judges in the Court of Appeal to find that A was not merely credible and reliable based on the content of his evidence, but that he was *compellingly* credible and reliable, based on the way he presented.

The High Court criticised the Court of Appeal's viewing of the evidence and its making of 'demeanour-based judgments', commenting that the persuasive effect of A's demeanour was subjective. This subjectiveness was demonstrated by the fact that the lone dissenting judge in the Court of Appeal was clearly not so compelled by A's evidence.

2. Rejecting unchallenged evidence and using the effect of delay against the accused

The majority judges in the Victorian Court of Appeal questioned the reliability of critical opportunity evidence, particularly the evidence given by Monsignor Portelli, due to the effect that delay must have had on the witnesses' memory.

For example, Portelli gave evidence that he could actually recall standing outside the Cathedral with Cardinal Pell and returning to the sacristy with him on the crucial dates in late 1996. The Court of Appeal majority said that the jury was entitled to have doubts about Portelli's ability to remember these otherwise unremarkable events more than 20 years later.

The High Court said the Court of Appeal should have regarded this evidence as unchallenged because the prosecutor did not question Portelli about whether his memory could be mistaken.

The Court of Appeal was also wrong to use the delay and its effect on witnesses' memories to the disadvantage of Cardinal Pell. Any doubt about the memories of witnesses who may have been able to provide an alibi for Cardinal Pell had to operate in his favour. Otherwise, an accused person may have their defence prejudiced by the effect of delay.

3. A reversal of the onus of proof

The majority judges in the Court of Appeal were so convinced by A's evidence that they approached the opportunity evidence on the basis that, if it left a *possibility* for the offending to have occurred, A's evidence could be relied upon to be satisfied of Cardinal Pell's guilt beyond reasonable doubt.

Cardinal Pell's legal team later argued in the High Court that this reversed the burden of proof, effectively placing the onus on Cardinal Pell to prove that the accusations made against him were impossible.

The High Court did not, in the end, need to decide whether the Court of Appeal's approach amounted to a reversal of the onus of proof. It was satisfied that the opportunity evidence allowed for a reasonable possibility that Cardinal Pell was innocent.

This, in the High Court's view, must have created a reasonable doubt about his guilt.

What about believing the victim?

It is important to observe that the High Court did not criticise the evidence of the complainant and in fact reached its decision assuming that the complainant's evidence was credible and reliable.

The reasonable doubt about Cardinal Pell's guilt was created by the opportunity evidence.

There was no need for the court to choose between accepting the opportunity evidence and accepting the complainant's evidence. The fact that the opportunity evidence showed there was a real possibility that the offending did not occur was enough to produce what should have been a reasonable doubt in the jury's mind.

How will the decision affect future cases?

The Cardinal Pell case continues a line of High Court decisions upholding a robust concept of proof beyond reasonable doubt.

It confirms that the standard of proof needed to establish guilt is not to be lowered in order to compensate for the difficulty that police and prosecutors might face in proving events where there is significant delay in a complaint being made.

An important practical aspect of the decision is that it discourages appeal courts from viewing audio-visual recordings of witness evidence and making demeanour-based judgments about the witnesses. Such demeanour-based judgments (based solely on the witness's manner and presentation) are criticised as being generally too subjective to draw rational inferences on an appeal.

The fact Cardinal Pell spent more than 400 days in prison before being acquitted could also spark renewed debates about the soundness and reliability of jury decision-making, especially in cases where the defendant is well known.

Victoria has since introduced temporary laws (due to COVID-19 restrictions prohibiting juries from gathering) allowing defendants to apply for a judge-alone trial. The laws will need to be reviewed by Parliament once they lapse. Similar laws are already permanently in force in Queensland.

Another safeguard to jury trials that might be considered is the extent of a judge's ability to direct a verdict of 'not guilty' where the evidence is unsafe to support a verdict. As the law presently stands, a trial judge can only direct a verdict of not guilty (i.e. decide that there is no case to be answered) if there is *no* evidence to establish the facts necessary to prove the prosecution case.

Where there is *some* evidence (albeit unreliable or inconsistent with other evidence, for example), the trial judge must leave it to the jury to decide the defendant's guilt, and to an appellate court to overturn the conviction (if appealed).

It is difficult to know whether giving the trial judge a broader discretion to direct the jury to return a not guilty verdict would have helped Cardinal Pell given that two of the three Court of Appeal judges dismissed his appeal. Having said that, many defendants are refused special leave to take their case to the High Court, so for them, one further safeguard might make all the difference.

Final thoughts

Public opinion about the High Court's decision and Cardinal Pell's legacy in the church more broadly is unlikely to reach anything like the unanimity of the seven High Court judges. Viewed in this context, perhaps the most important feature of the case is its demonstration of the importance of courts that are independent and apolitical.

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