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REFLECTIONS ON *PELL V THE QUEEN* [2020] HCA 12

WHAT THE COURT OF APPEAL CRIMINAL DIVISION CAN LEARN FROM THE HIGH COURT OF AUSTRALIA

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On 7th April Cardinal Pell was cleared by the High Court of Australia of wrongful allegations of historic sexual assault on a chorister. In its judgment, the HCA found that for all five charges, there were many improbabilities that had not been fully considered by the jury, amounting to "a significant possibility," the judges wrote, "that an innocent person has been convicted." Edward Henry QC considers that cases involving historic allegations of sexual abuse can present a real danger of injustice, which the CACD too often seems to ignore. The approach of the HCA is one the CACD should adopt in making an assessment of whether a conviction is 'unsafe.'

The case of ***R. v SJR. v MM*** *[2020] 1 Cr. App. R. 7* (in which I appeared for the appellants) represented a personal nadir in my professional life. A sense of injustice still haunts me. A weak case, replete with inconsistencies and serious anomalies, including the admission of patently inadmissible evidence, as was submitted to the Court, was rationalised by the Court of Appeal [Criminal Division] with the same old-saw: "the critical issue was whether or not the jury were sure that [the complainants] were telling them the truth." Appeals dismissed, and in so doing both Appellants (to whom another constitution of the Court had granted leave to appeal less than six weeks before) were condemned to rot inside, one in such poor health that it is unlikely he will ever be released.

How different is the approach of the High Court of Australia ["HCA"] the equivalent, since 1986, of the UKSC. Not for them the "Sacred Cow" that a jury is always right, or that the complainant's credibility is necessarily determinative. That may be the ruthlessly expedient default option for

other appellate courts, but it was not the route the HCA took: a road less travelled for many Court of Appeal judges. But it would be wrong to assume that the HCA decided the case simply by finding that Pell's accuser was a liar.

Pell v The Queen [2020] HCA 12 is striking because the HCA proceeded on the basis that the complainant **was** credible. The foundation stone upon which the HCA constructed its unanimous judgment was set down with startling candour as to its own unflinching duty:

> *The function of the court of criminal appeal in determining a ground that contends that the verdict of the jury is unreasonable or cannot be supported having regard to the evidence, in a case such as the present, proceeds upon the assumption that the evidence of the complainant was assessed by the jury to be credible and reliable. The court examines the record to see whether, notwithstanding that assessment – either by reason of inconsistencies, discrepancies, or other inadequacy; or in light of other evidence – the court is satisfied that the jury, acting rationally, ought nonetheless to have entertained a reasonable doubt as to proof of guilt.*

In the course of its judgment, the HCA passed reflection on the majority judgment of the Supreme Court of Victoria, which upheld the convictions, on the basis of its *"subjective assessment, that [the complainant] was a compellingly truthful witness."* This was in spite of the magisterial dissenting judgment of Weinberg JA. The HCA, tellingly, made this observation, which provides the key to how they evaluated the testimony of Pell's accuser in the context of all of the evidence:

> *Weinberg JA did not assess A to be such a compelling, credible and reliable witness as to necessarily accept his account beyond reasonable doubt.* ***The division in the Court of Appeal in the assessment of A's credibility may be thought to underscore the highly subjective nature of demeanour-based judgments. [Emphasis added]***

It is refreshing to note this frank recognition that demeanour-based judgments are highly subjective, and thus credibility, alone, can be an unreliable yardstick for determining guilt. Mr Justice Weinberg's analysis prevailed before the HCA in the light of his profound sifting of the evidence, citing a number of 'compounding improbabilities', which combined to render the alleged episodes distinctly unlikely. Australian jurisprudence has been steeped in such probabilistic reasoning, owing perhaps to the influence of the late Sir Richard Eggleston QC, the widely

respected law professor, appellate judge, and author of "Evidence, Proof, and Probability." Eggleston was esteemed by no less than Lord Bingham[1], who distilled his method of appraising a witness's account under five headings:

(1) Analysing the consistency of the witness's evidence with what is agreed, or clearly shown by other evidence to have occurred;
(2) The internal consistency of the witness's evidence;
(3) Consistency with what the witness has said or deposed on other occasions;
(4) The credit of the witness in relation to matters not germane to the litigation; and finally, and last and least of all,
(5) The demeanour of the witness.

The HCA, in quashing the convictions, concentrated exclusively on the first issue: there was no opportunity for the offences to have occurred (consistent with the burden and criminal standard of proof) based upon an exacting review of the 'solid obstacles to conviction,' all derived from credible prosecution witnesses, noting the impact such evidence had upon the prosecution case. This was a highly nuanced and fact-centric approach, assaying the case in detail, as opposed to the 'broad brush' psychologically primitive slant of, on occasions, the Court of Appeal. The HCA's inquiry into the whole facts, in the circumstances of this case, fully justified the convictions being overturned, as scrutiny of the seven judge unanimous decision reveals.[2]

In contrast, in this jurisdiction appellate courts are notoriously reluctant to disturb first-instance findings of fact which turn on questions of credibility, or reliability. Should our senior judiciary absolve themselves by chanting the mantra 'we must not usurp the jury?' The demise of the *Cooper* "lurking doubt" ground of appeal is consistent with this attitude. That ground is now rare and successful appeals, pursuant to it still rarer. I would contend that Widgery's LJ thesis in *Cooper* should be reframed, not as a general feeling of unease, dependent on the Court's "feel" for the case, but upon a rigorous assessment of the entire matrix of evidence, whether it might contradict or undermine the complainant, i.e. is it reasonably possible that the complainant's account was not correct, such that there is a reasonable doubt as to the applicant's guilt?

[1] Chapter 1, The Business of Judging, The Judge as Juror
[2] http://eresources.hcourt.gov.au/downloadPdf/2020/HCA/12

There needs to be honest acceptance that accounts of historic abuse, however convincing, and apparently credible, can be unreliable. Especially, as was found in Pell, where such allegations cannot be reconciled with, or are flatly contradicted by, other credible evidence.

The HCA's approach, echoes something we all know, and which Shakespeare expressed succinctly, thus:

"There's no art / to find the mind's construction in the face."

In spite of this collective wisdom, from Literature, common experience, and psychology, the Court of Appeal (in its Criminal Constitution) has shut its eyes to this troubling and self-evident truth – that demeanour is a profoundly unreliable way to resolve cases. This has been known to the Civil & Family Divisions for many years. In his Neill lecture to the Oxford Law Faculty on 10th February, 2017, Lord Neuberger stated that he was:

> *"very sceptical about judges relying on their impression of a witness, or even on how the witness deals with questions. Honest people, especially in the unfamiliar and artificial setting of a trial, will often be uncomfortable, evasive, inaccurate, combative, or, maybe even worse, compliant. And our assessments of people are inevitably based on our particular experiences and subconscious biases. Sometimes it might appear that factual disputes are being resolved by reference to who calls the best-performing witness, not who calls the more honest witnesses."*

In saying this, he was following in the footsteps of Lord Devlin, and more recently, Lord Bingham. For Lord Devlin, judicial confidence in reading the witness, thereby discerning truth or falsehood, was overstated:

> *"The great virtue of the English trial is usually said to be the opportunity it gives to the judge to tell from the demeanour of the witness whether or not he is telling the truth. I think*

that this is overrated. It is the tableau that constitutes the big advantage, the text with illustrations, rather than the demeanour of the particular witness."

Leggatt LJ, who joined the UKSC on 21st April, 2020, made the following declaration in a commercial case, which he tried as a puisne Judge in 2013,that memory is not to be trusted, an opinion that surely accords with the objective experience of most criminal practitioners:

"While everyone knows that memory is fallible, I do not believe that the legal system has sufficiently absorbed the lessons of a century of psychological research into the nature of memory and the unreliability of eyewitness testimony."

This quotation from *Gestmin v Credit Suisse [2013] EWHC 3560 (Comm)* potently describes the 'elephant in the room,' which has been worse than ignored in criminal trials. Whilst generic directions on 'stereotypes' are deployed in the Crown Court, often to the defendant's disadvantage, the accused is not afforded even the most rudimentary précis of that 'century of psychological research' which calls the reliability of memory into question.

Gestmin has been widely approved and cited elsewhere, as one might expect, since Leggatt's J analysis was a cogent exposition as to why the nature of historic oral evidence is an evolving creation, as opposed to a 'flashbulb' image. Having sign-posted a number of issues as to why memory is fallible and subject to certain biases created by the trial process (which could arguably apply to pre-trial criminal procedure) he came to this conclusion:

"Above all, it is important to avoid the fallacy of supposing that, because a witness has confidence in his or her recollection and is honest, evidence based on that recollection provides any reliable guide to the truth."

This takes on more ominous importance where a witness may have convinced themselves of something entirely fallacious in a criminal court. Given that Lord Leggatt's tenure at the UKSC has just begun, it is to be hoped that before it ends an appropriate challenge can be brought before the UKSC in an historic case predominantly based on the credibility of a complainant, as

Pell did in the HCA. Until then, innocent defendants will remain at the mercy of their accuser's memory, which Oliver Goldsmith once described as "thou fond deceiver, still importunate and vain!"

This article was produced by Edward Henry QC. It should not be taken as constituting formal legal advice. To obtain expert legal advice on any particular situation arising from the issues discussed in this note, please contact our clerking team at barristers@qebhw.co.uk. For more information on the expertise of our specialist barristers in criminal and regulatory law please see our website at https://www.qebholliswhiteman.co.uk/.

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