Cardinal Pell's appeal to the High Court of Australia: challenging the limits of a defendant's right to appeal the facts of a criminal conviction

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Legislation cited
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E.H.R.L.R. 317 **Abstract**
*The acquittal of Cardinal Pell by the High Court of Australia (*HCA*) has been a topic of much controversy, fomenting robust debate, and attracting both criticism and praise. This contribution seeks to examine the approach of the* HCA *in discharging its role in this case and the reasons why its approach ought to be adopted more broadly. It begins by considering the* HCA*'s understanding of its duty as a criminal appellate court, and contrasts this with the Court of Appeal of England and Wales (Criminal Division), and the minimal protection offered to defendants by protection of the right to appeal in international human rights law (the* European Convention on Human Rights *and the International Covenant on Civil and Political Rights). Arguments for the right to a criminal appeal to be strengthened will then be considered: examining other aspects of the principles underlying the right to fair trial; and broader normative arguments about the functioning of the criminal justice system.*

Introduction: Cardinal Pell's appeal[1]

On 7 April 2020, the High Court of Australia (HCA) ruled in favour of the appeal of Cardinal George Pell, clearing him of allegations of historic sexual assault on two choristers.[2] This appellate court's ruling considered, in-depth, the evidence that was put before the jury. The jury's conclusions about the credibility of the witnesses were not questioned, but the HCA defined the issue before them as: "whether the compounding improbabilities […] nonetheless required the jury, acting rationally, to have entertained a doubt as to the applicant's guilt".[3] They concluded that the other evidence in the case was not consistent with the complainant's account and thus, "there is a significant possibility that an innocent person has been convicted".[4]

The HCA's approach to a criminal appeal may seem unusual to criminal lawyers of some other jurisdictions. It can be contrasted with a recent case of the England and Wales Court of Appeal (Criminal ***E.H.R.L.R. 318*** Division) (CACD), *R v SJ & MM*.[5] This case also concerned historic child sexual offences, and the appeal related to a witness, P, whose subjective opinion was agreed to be expert evidence notwithstanding that it should have been ruled inadmissible, as her evidence should have gone only to factual circumstance. The CACD held that the wrongful evidence did not undermine the safety of the conviction, as: "the critical issue was whether or not the jury were sure that [the complainants] were telling the truth".[6]

In the CACD's approach, we see that the jury's belief in the credibility of the complainant is determinative. P's evidence was held to be peripheral. Although passages of it were "inadmissible and couched in over-emotive language",[7] the CACD was satisfied that "in the context of the evidence against the defendants as a whole, and the clear directions to the jury in the summing-up"[8] the convictions were nonetheless safe. The CACD's view on its role is clear: they may assess the classification and admissibility of evidence, and the directions given by the judge. But its decision shows a limit of its role: the "sacred cow" of the jury is not to be disturbed. It is their assessment of the complainant's credibility that is determinative, and it is not the place of the criminal appeals system to examine if other evidence might mean they might be mistaken. A decision by the jury that the complainant is credible is not a finding that should be disturbed.[9]

The HCA, by comparison, is explicit about its role:

"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." [10]

This proclamation of the appellate court's duty is startling in its candour, and it was the performance of this duty that led the HCA to its unanimous judgment that Cardinal Pell's conviction was unsafe. The court's statutory mandate informed the approach, that it must allow appeals where "the verdict of the jury is unreasonable or cannot be supported having regard to the evidence".[11] The standard to which the finding was held was also informed by the common law: the HCA held that the relevant standard was that there was "a significant possibility that an innocent person has been convicted because the evidence did not establish guilt to the requisite standard of proof".[12]

The equivalent act governing the CACD, the Criminal Appeals Act 1968, was amended in 1995. This amendment removed the previous grounds under which an appeal must be granted,[13] and now requires only that the CACD must allow appeals where the conviction is "unsafe".[14] The standard of "unsafe" is different, yet, is arguably broader than an "unreasonable" verdict. In *R v SJ & MM*, a narrow approach to "unsafe" is clearly demonstrated however: even in a case where the inadmissible evidence "purport[ed] ***E.H.R.L.R. 319*** to tell the jury that [the complainant] is reliable", the safety of the convictions was reliant on the jury's finding of credibility.[15]

The Criminal Appeals Act 1995 also set up the Criminal Cases Review Commission (CCRC), and mandated it as an independent organisation to investigate suspected miscarriages of justice from first-instance criminal trials. It plays a central role as a gatekeeper to the review of criminal convictions, and can send a case back to the CACD where there is new evidence or a novel legal argument that was not put before the jury. It has attracted much criticism from practitioners for its conservative approach. The CCRC is required to only send back cases where they have a "real possibility" of being overturned.[16] Some say that this creates an unequal relationship between the CACD and the CCRC, with the latter being steered and even subservient to the former.[17] The CCRC's cautious, even supine approach would not refer a case based on the factual evaluation of the evidence at trial, in sharp distinction with the HCA's powers when it assayed and rejected the jury's approach.

The CACD's philosophy of appeal is very much driven by the primacy of the jury's verdict. This doctrine is best described by Lord Bingham in *R v Pendleton*:[18]

"Trial by jury does not mean trial by jury in the first instance and trial by the judges of the [CACD] in the second. The [CACD] is entrusted with a power of review to guard against the possibility of injustice but it is a power to be exercised with caution, mindful that the [CACD] is not privy to the jury's deliberations and must not intrude into territory which properly belongs to the jury." [19]

Even where new evidence is adduced, the CACD is passive and unwilling to interfere with the jury's findings.[20] The CACD's approach is particularly concerning in cases dependent on the credibility of witnesses, with scant other evidence, such as *R v SJ & MM*. In consequence, the prospects of success would be very different for a convicted person appealing in either of these jurisdictions. While Cardinal Pell's conviction was held to be unsafe by the HCA, the scrutiny of the evidential matrix demonstrated in this appeal would not have been conducted in the CACD.

Having explored the lacuna in approach of these two courts, we seek to explore whether this could be seen as an issue of the rights of defendants. Does a defendant have a right to a substantive appeal from jury findings in a criminal trial, in the law of the European Convention on Human Rights (ECHR) and the International Covenant on Civil and Political Rights (ICCPR)? The right to appeal is found in both documents, but its interpretation leaves it with limited scope. The European Court of Human Rights (European Court) has left it with minimal substantive requirements, only requiring appeal on legal points. While the ICCPR might offer more requirements for a substantive appeal of facts and law, it will be argued here that the Human Rights Committee (HRC) has not yet gone far enough in considering the implications of this, for example by refusing to examine how evidence is weighted, and the sanctity given to jury findings of fact.

We will then explore other human rights arguments for extending a right to appeal, based on other principles of the right to fair trial, and particularly how these exist in the context of the relevant processes. First, trust in juries is important: determining whether a person is telling the truth when they give evidence is central to adversarial fact-finding, and yet this process is not

trusted by the judiciary. Whilst judges are scrupulous in recognising these dangers when trying cases in civil litigation, they see no difficulty in passing the responsibility onto juries in the criminal jurisdiction, without directing them on the dangers they freely acknowledge when they act as "fact finders". In contrast, the HCA expressly acknowledged ***E.H.R.L.R. 320*** that the complainant in *Pell* was a credible and reliable witness,[21] but that that was not enough — hence their searching analysis of the contradictory evidence. In spite of this, juries are very much trusted by the public. The role played by juries in the criminal justice system and society may be relevant: public trust in juries may mean that interfering with their decision-making in appeals could pose problems.

A second point, the nature of *Pell* and *R v SJ & MM* as historic child sexual offences cases, will be considered. In an area of criminal justice which is already rife with accusations of anti-complainant bias, the suggestion that convictions should be more easily overturned is undoubtedly controversial. While this paper is not able to resolve these problems, it will be argued that they do not affect the internal coherence of our argument.

International human rights law and the right to appeal in criminal matters

The ECHR 's protection of the right to fair trial for criminal defendants, found in art.6, does not grant a right to appeal in criminal matters.[22] The right to appeal is granted separately, in art.2 of Protocol No.7 (A2P7), which reads:

1. "Everyone convicted of a criminal offence by a tribunal shall have the right to have his conviction or sentence reviewed by a higher tribunal. The exercise of this right, including the grounds on which it may be exercised, shall be governed by law.
2. This right may be subject to exceptions in regard to offences of minor character, as prescribed by law, or in cases in which the person concerned was tried in the first instance by the highest tribunal or convicted following an appeal against acquittal." [23]

In one of the leading cases, *Krombach v France*,[24] the European Court confirmed that states have a wide margin of appreciation in determining how A2P7 is realised: "the review by a higher court of a conviction or sentence may concern both points of fact and points of law or be confined solely to points of law".[25] The result is that there is no duty recognised in European human rights law to provide any appeal on factual findings in criminal matters. In *Pesti and Frodl v Austria*, the European Court found that an appeal limited to procedural aspects was acceptable, and a claim that this was a violation of A2P7 was manifestly ill-founded.[26] The European Court understands its duty is to regulate "institutional matters, such as accessibility of the court of appeal or scope of review in appellate proceedings",[27] however, by granting a wide margin of appreciation with respect to the scope, the European Court shows little propensity for regulation in this area in its case law.

It has been made clear that an art.6 right to fair trial also applies to appeal proceedings, "since these proceedings form part of the whole proceedings which determine the criminal charge at issue".[28] However, in practice the explicit and implicit guarantees of art.6 do not need to be realised in an appeal which examines errors of law, providing they have been met in other procedures. For example, in *Meftah and others v France*, the European Court held that the appellant does not need to be able to make oral representations.[29] Justifying this by highlighting the appeal's limits to points of law, and the particularities ***E.H.R.L.R. 321*** of the Court of Cassation's procedure, the implication is that the European Court denies appellants the right to the same level of participation in appellate proceedings accorded to them at first instance.[30]

Article 14(5) of the ICCPR provides express protection of the right to a criminal appeal:

"Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law."

The HRC has provided a more detailed explanation of the standards required by this provision in its General Comment No. 32:

"The right to have one's conviction and sentence reviewed by a higher tribunal established under article 14, paragraph 5, imposes on the State party a duty to review substantively, both on the basis of sufficiency of the evidence and of the law, the conviction and sentence, such that the procedure allows for due consideration of the nature of the case. A review that is limited to the formal or legal aspects of the conviction without any consideration whatsoever of the facts is not sufficient under the Covenant." [31]

It is immediately apparent that the ICCPR places greater obligations on states bound by it to provide a substantive review of the criminal conviction. The explicit reference to "sufficiency of evidence" goes further than the European Court's interpretation of A2P7. The HRC lays down a duty on states to provide for recourse to appeal for those convicted of a criminal offence at first instance which addresses the factual dimensions of the case. The HRC also states in the General Comment that this need not be a full retrial of all evidence, but can be satisfied where "a higher court looks at the allegations against a convicted person in great detail, considers the evidence submitted at trial […] and finds that there was sufficient incriminating evidence to justify a finding of guilt in the specific case".[32]

This interpretation by the HRC places a clear emphasis on the importance of substantive review for a right to fair trial, the General Comment is not specific about how this review of the facts must work. To return to *R v SJ & MM*, and consider it in light of art.14(5), it could be argued that this does involve review of the factual circumstances. Even though the CACD in that case showed a great fidelity to the jury's finding of fact, it could be argued they should enter into some factual review of the case, as opposed to unequivocal acknowledgement of the facts as presented by the prosecution. The CACD assessed the evidential problems but decided: "the [inadmissible evidence] could fairly be described as peripheral".[33] This shows some engagement with the factual dimensions of the case, although as discussed above, the CACD did not consider that the safety of the factual finding was enough to question the jury's finding of credibility. For the ICCPR to require this greater level of scrutiny the HRC would need to scrutinise in detail the factual review in appellate proceedings in its jurisprudence.

The General Comment draws on the jurisprudence of the HRC, where it is clear that the requirement of a substantive review of the evidence involved goes to its "sufficiency".[34] In practice, the Committee has found violations where the review on appeal went only to "formal or legal aspects of the conviction",[35] or where there was a judicial review which did not allow for "full evaluation of the evidence and the conduct of the trial".[36] However, the Human Rights Committee has not yet gone far enough in its review ***E.H.R.L.R. 322*** of appellate proceedings in two ways. First, the case law of the HRC suggests an unwillingness to review the weighting of evidence in the case. Secondly, the particular nature of jury findings of fact, and the fallibility of this, are also not considered.

On the first point, the HRC has not dealt specifically with the weighing of evidence, and how this goes to fairness of the appeal for the defendant. In a communication to the HRC, *Quliyev v Azerbaijan*,[37] the author of the communication argued that their art.14(5) right had been violated by the failure of a higher court to take into account new circumstances (an alibi). The HRC found that the fact of a procedure which had reviewed the author's crime and sentence made the complaint inadmissible.[38] Although there is a clear obligation to review the factual circumstances, the HRC is more concerned with the formal requirement to review this than the particulars of that review, and the extent to which it engages with the safety of the conviction.

On the second point, the Committee has shown that they are more concerned with looking at the fact of an appeal process than scrutinising the safety of jury decision-making. *TLN v Norway* [39] concerned an appellate court with a jury. The author argued that the jury's decision was not able to be effectively appealed to the Supreme Court, as the jury did not provide reasons for their decision, and the direction that they were given was not recorded.[40] The Committee acknowledged that the only access to appeal from that decision was on procedural grounds, but that this was sufficient given that this jury trial was procedurally an appeal from a lower court.[41] The Committee's interpretation, whilst proclaiming the need for a substantive appeal which examines the sufficiency of the evidence, then appears to stop short of considering exactly how those appeals can ensure the safety of convictions in circumstances where this requires disturbing jury findings of fact.

The strength of the HCA's approach in Pell: protecting the defendant's right to conviction based on truth

The HCA's judgment in the *Pell* case is significant, because if that court had adopted anything less than a far-reaching duty to ensure the factual dimensions of the conviction were sound, then the appeal may have been dismissed. The result would have been that the unsafe nature of the defendant's conviction would not have been recognised. There is no support for this approach from international human rights law, however, as interpretation of the right to appeal does not provide enough supervision over appeal proceedings to bring this issue within the standards expected by the right to fair trial in either the ECHR or the ICCPR.

We make two arguments for this protection to be extended: First that a fair trial process, which gives proper recognition to the presumption of innocence and the right to confront the evidence, should require appellate courts to examine the factual basis of convictions. Secondly that the defendant's right to fair trial ought to include some right to truth emerging from process. From this right, an appeals process which is capable of challenging jury fact-finding is essential, given the known fallibility of that process.

1. Principles of fair trial

The objective of a criminal trial, as correctly expressed in Rule 1 of the Criminal Procedure Rules of England and Wales, is to "acquit … the innocent and convict … the guilty". The same rules make explicit reference to safeguarding the rights of defendants under art.6 of the ECHR. In its approach to appeals and ***E.H.R.L.R. 323*** the requirements of A2P7, the European Court does not follow the spirit of principles of the right to a fair trial, specifically, the presumption of innocence and the right to confront evidence.

1.1 Presumption of innocence and appeals

Recognition of the presumption of innocence is a critical requirement of a fair trial, yet is not properly upheld by a right to appeal which does not require a full review of the facts leading to a conviction. Roberts has stated that the presumption of innocence means that the accused must be granted the right to accuracy in fact-finding for two reasons: first, the presumption of innocence is based on the principle that the innocent must be prevented from being wrongly convicted; and secondly, that a standard of certainty of guilt must be demonstrated by the process in order to promote the rule of law.[42] Both of these reasons justify measures which ensure safe findings of truth in first instance trials, but a strong level of scrutiny of appeals must also be secured.

If a convicted person has no recourse to appeal the factual findings of a first-instance court, then the potential for discrepancies in the factual circumstances of the case makes convictions unsafe. As Blackstone's adage goes, the non-punishment of a guilty person is far preferable to the punishment of an innocent person.[43] The presumption of innocence is the principle that informs other measures which seek to minimise the probability of this grave error occurring, chiefly the burden and standard of proof, as well as evidentiary mechanisms which intend to exclude potentially prejudicial evidence, such as bad character.[44] The same principles strongly support a recourse to appeal the factual dimensions of criminal convictions, and a full review of the evidence involved would lead to safer convictions. As will be explored in more detail below, particularly where the conviction is based on the jury finding of credibility, the risk of wrongful conviction remains high, and it should be the duty of an appellate court to explore the weighting given to this finding, and ensure that the remainder of the evidence supports that finding. In this sense, the approach of the HCA in *Pell* is exemplar, and some understanding of the presumption of innocence of the defendant grounds their robust review.

It could be argued that this would stretch the definition of the presumption of innocence. The limit of presumed innocence is, famously, until proven guilty. However, this total rejection would mean that the spirit of the presumption should also run through appeal proceedings. There are instances where the implications of the presumption of innocence are continued after conviction. The European Court has ensured this quite creatively. Article 6(2) of the ECHR protects explicitly the presumption of innocence "until proved guilty". The European Court therefore has held that art.6(2) does not apply to sentencing procedures, which occur after conviction.[45] However, the practical implications of the presumption of innocence: "requir[ing] the prosecution to bear the onus of proving the allegations against [the subject of proceedings]",[46] have been held to apply to procedures after conviction including sentencing.[47] The European Court claims that this "forms part of the general notion of a fair hearing under Article 6(1)"[48] which is of more general application: "appl[ying] throughout the entirety of proceedings for 'the determination of … any criminal charge'".[49]

That the presumption of innocence should be applied to appellate proceedings can be argued for similar reasons. The fairness of proceedings as a whole would be best achieved by retaining at least some remnants ***E.H.R.L.R. 324*** of the presumption in appellate proceedings. Analogous to *habeas corpus*, it should be a requirement that a trial court's conviction is based on sound evidence, as the alternative is an affront to the principle that the innocent should be protected from wrongful conviction, and at a deeper level, liberal democracy, that should be unacceptable to human rights law. Moreover, in a case where there is patently prejudicial and inadmissible evidence going to the issue of whether the complainant had been abused by the defendant (as in *R v SJ & MM*) it is perilous to assume that such evidence did not influence the jury to convict — especially given the inscrutability of the verdict.[50]

1.2 The right to confront evidence in appeals

The right to confront and challenge evidence is another essential principle of a right to fair trial. The opportunity for the defendant to have knowledge of and comment on the evidence for their conviction embodies key principles of procedural

fairness, including equality of arms, and the right to adversarial proceedings.[51] These principles are generally inferred from general requirements of fairness, and the specific guarantee found in the ECHR and ICCPR to examine or have examined witnesses for the prosecution and defence. It is argued that this right would also support the application of these principles to appeal proceedings as a necessary means of securing fairness.

The European Court has for some time guaranteed a process which must be defined as adversarial in some sense: "all the evidence must in principle be produced in the presence of the accused at a public hearing with a view to adversarial argument".[52] This is inferred from general requirements of fairness, and a right to examine witnesses. Article 6(3)(d) of the ECHR and art.14(3)(e) of the ICCPR contain identical protection of the right to "examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf". When this right applies is not explicit: art.6(3) ECHR provides for this guarantee for "everyone charged with a criminal offence"; art.14(3) ICCPR applies "in the determination of any criminal charge against [the rightholder]".

The ECHR has held that art.6(3) will generally be violated where testimony by witnesses not in attendance or examined at trial is the "sole"[53] or "decisive"[54] basis for conviction, however, the Court will make exception where there has been an opportunity for the defence or the judge to assess the truthfulness and reliability of the witness accounts at some other point in the proceedings.[55] While not all fair trial guarantees are to safeguard against wrongful convictions, this interpretation suggests that the right to examine witnesses guarantees the testing of evidence: an epistemological exercise which ensures that the defendant is able to challenge the factual case against them, and protect against the risk of wrongful conviction.[56]

The application of these rights cannot be unlimited, as requiring multiple attendances could place an unrealistic and unfair burden on witnesses, so the human rights systems have come up with minimum requirements as to when the defendant must have the opportunity to "examine" witnesses. The European Court has interpreted this provision such that there ought to be "adequate and proper opportunity" to examine witnesses.[57] This may be at trial,[58] but could also be satisfied by pre-trial stages.[59] The Human Rights Committee has similarly said in its General Comment No. 32: "[Article 14(3)(e)] does not […] provide an unlimited right to obtain the attendance of [witnesses], but only a right to […] be given a proper opportunity to question and challenge witnesses against them *at some stage of the proceedings*".[60]

The right to challenge evidence under both the ECHR and ICCPR is therefore satisfied by having had some opportunity to test evidence. This makes the application of this principle to appeals difficult, as once this requirement has been satisfied at an earlier stage in the proceedings, the protection of this provision is formally achieved. However, it could be argued that the application of these same principles to the appeals process is essential in guaranteeing the fairness of those proceedings. Ensuring the security of the conviction ought to allow some remnants of the right to challenge the factual evidence against them even after the conviction is made. This does not need to be so far as conducting examination of witnesses "live" in both first-instance and appellate proceedings, but maintaining the opportunity for the defence to scrutinise evidence in the case against them, through an appeals process which has the capacity for this.

2. A right to a truthful process?

Beyond realising other aspects of international human rights law's protection of the defendant's right to fair trial, there is a question as to whether a robust appeal would realise some other moral duty owed to the defendant by the state. The defendant is entitled to an appropriate standard of truth emerging from the process, and an effective system of appeals should ensure that other factors, such as unsafe conclusions by the jury, are upheld during that process. Whilst not all aspects of fair trial rights go towards truth-seeking,[61] the importance of truth should not be discounted as an integral part of the right to fair trial throughout the common law world.[62]

Roberts argues that the uncontroversial foundation of all criminal trials is that the innocent have a right not to be convicted and punished, and as such, the trial procedure must provide reasonable means to secure a truthful outcome.[63] However, truth emerging from the process is not the only consideration which the state makes in determining the limits of the criminal fact-finding process. Dworkin suggests that this right is inevitably qualified by the cost which it imposes: more accurate procedures are more expensive and time-consuming, and to obtain the most accurate procedures across the criminal justice system would redirect state resources which could better address injustice elsewhere.[64] Then, the question is what standard ought we expect of the state. Stein suggests that the state is justified in convicting a defendant "only if it *did its best* in protecting that person

from the risk of erroneous conviction and if it does not provide better protection to other individuals".[65] This is an imprecise moral duty, however, if we accept that the state must do its best to prevent false convictions, then a robust appeals process which examines the "truth" relied upon for conviction is essential.

Support for this argument is found in the broader context of knowledge about trials, and specifically juries. Findings of credibility are a crude tool on which to base convictions: they are known and ***E.H.R.L.R. 326*** acknowledged to be fallible by the judiciary; and this is supported by psychological studies performed on juries. This feeds into a broader discussion however, about the role of juries in the contemporary justice system. Although credibility findings are known to be fallible, the broader context of jury trials is significant. The trust placed in them by the public may serve a broader function for the criminal justice system. To empower appeals courts more readily to overturn their decisions may decrease public faith in the system.

Reflecting on the nature of the jury's finding

The HCA in *Pell* overturned the majority judgment of the previous appellate court, the Supreme Court of Victoria (SCV).[66] The HCA commented that this court's "subjective assessment that [the complainant] was a compellingly truthful witness […] drove their analysis of the consistency and cogency of their evidence".[67] However, this was not unanimous in the SCV, and Weinberg JA dissented, as he had disagreed with the assessment that the complainant was credible and reliable. The HCA observes: "The division in the Court of Appeal in the assessment of [the complainant's] credibility may be thought to underscore the highly subjective nature of demeanour-based judgments."[68] This admission supports an appeal which is willing to look past jury findings of credibility, accepting that upholding any decision as a "sacred cow" based on demeanour when assessing credibility, rests on a fallacy that demeanour-based judgments are reliable.

The approach of the CACD, in prefacing the jury's determination of whether the complainants were truthful, shuts its eyes to this uncomfortable truth. This goes against conventional wisdom, as well as psychological study of the jury process.[69] It is also internally inconsistent with other constitutions of the Court of Appeal of England and Wales, and the judiciary of the UK more generally. Leggatt J (now Lord Leggatt after joining the UK Supreme Court in April 2020) said in *Gestmin v Credit Suisse*:

"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." [70]

Knowledge of this truth is shown by judges who perform a fact-finding role. Lord Neuberger (at that time President of the UK Supreme Court) said in 2017 he was "very sceptical about judges relying on their impression of a witness, or even on how the witness deals with questions. […] 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."[71] Not simply that a decision-maker may not be able to tell whether a witness is telling the truth from their demeanour, but that the memory of the witness may leave them believing they are telling the truth while their evidence is unsafe. ***E.H.R.L.R. 327*** [72]

If this truth about demeanour-based determinations of credibility is known by judges, then it should follow that this should be addressed in criminal appeals. The reluctance of the CACD to interfere with jury assessments of credibility, while acknowledging the fallibility of those very assessments might suggest a somewhat reckless disregard for the right of appellants to be protected from unjust convictions.[73] This would not fulfil a moral duty of the state to do "all it can" to prevent wrongful convictions. Realising a defendant's right to have truth emerge from the process would necessarily involve looking at the factual findings on which their conviction is based, and ensuring that this is a safe foundation.

It is possible, then, that the judiciary believes that not overturning the jury's finding in the criminal appeals process serves some other (presumably greater) purpose than protecting against wrongful convictions. It is true that the jury's role is historically underpinned with the values of a democratic criminal justice system in common law jurisdictions.[74] For all that they are fallible, public confidence in juries is very high,[75] and to overrule these decisions may be met with derision from the public, or, as Sarre commented after the *Pell* case, cause the public to lose confidence in the jury.[76] Furthermore, juries are notably an aspect of the criminal justice system which tends not be racially biased, which cannot be said of other decision-makers, such as magistrates and judges.[77]

It is not a novel discussion to question whether jury determinations are reliable, and this debate has been stoked in the wake of the *Pell* decision.[78] The submission here is that while there may be reasons for protecting juries, refusing to disturb their decision-making as a matter of policy poses a barrier to protecting fairness for the defendant, and preventing wrongful convictions.

Reflecting on the particular nature of historic sexual offences

Although this discussion has focused on the rights-based response to unsafe convictions, it is important to reflect a little on the context in which the *Pell* case and *R v SJ & MM* were decided. Both cases concern historic child sexual offences, which by their very nature pose particular evidentiary problems, as well as practical barriers to obtaining convictions in an area renowned for a low number of accusations making it to trial.[79] The nature of historic sexual offences means that little evidence is available, and as such the credibility of the complainant is normally the central and often the only issue. It could be questioned whether a robust appeal would serve the fairness of proceedings as a whole, or if this would complicate an already complex area of criminal justice.

This has implications for the scope of appeals that we have been considering. The argument that has been constructed here is that an appeals process should be less reluctant to overturn the jury's finding of the complainant's credibility, where this is incompatible with other evidence or there are any other factors which make the factual finding on which the conviction is based unsafe. It could be reasonably argued ***E.H.R.L.R. 328*** that increased appeal scrutiny may make the bar too high, as a lack of available evidence and the unreliability of human memory for fine details may be exacerbated over the long period between the date of the offence and the testing of evidence in court. In the UK in 2019, only 3% of rape cases recorded by the police resulted in conviction.[80] To increase uncertainty in those decisions by broadening the scope of appeal might exacerbate a criminal justice response which is perceived by some to be weighted against complainants.

In this sense it could be argued that enhanced scrutiny of the factual basis for convictions upon appeal could interfere with the rights of the victim to have justice. A large-scale 2005 Home Office study concerning alleged sexual offences concluded that high attrition rates could be improved by establishing a complainant or victim-centric ethos, thereby creating "a culture of belief and support".[81] Interested parties representing complainants would argue that enhancing the rights of defendants in the appeals process might exacerbate structural barriers for victims, and result in fewer complainants coming forward.[82]

However, the importance of safe convictions from jury findings of fact should not be placed in opposition to addressing bias in sexual offences trials, but seen as part of it. Allowing an appellate court to look at the broader scheme of evidence before the case rather than relying on jury findings of credibility would have an impact on the treatment of the jury's finding in the justice system. Rather than treating this as a "sacred cow", not to be disturbed, a forensic appeals process could deal explicitly with the reasons for the jury's finding. While this may serve to protect defendants from unsafe convictions, it may also force us to confront the underlying factors which affect jury findings. Willmott argues that this is largely down to juror characteristics, having observed while conducting empirical research on mock juries: "[o]ne [rape] trial observed by ten different mock juries, produced five guilty verdicts and five not guilty verdicts, based upon observing the exact same case evidence".[83] Allowing the appeals process to check the evidence basis for conviction may add further obstacle to securing convictions, however, to argue that this safety measure should not be taken to protect conviction rates distracts from a broader problem of the role of juries in sexual offences trials, which should not be addressed by sacrificing the safety of convictions.

Conclusion

The *Pell* case shows an approach to criminal appeals which places the safety of convictions as the highest priority. The contrast shown with the CACD in *R v SJ & MM* exposes a weakness in the latter's approach with respect to performing its own duty of ensuring safety in cases particularly when new evidence is not invoked. On a review on the law of the ECHR and the ICCPR, there is no legal duty to provide a more probing appeal, however it has been argued here that the greater scrutiny done by the HCA should be required by international human rights law. This can be justified in accordance with other principles of human rights law, but also by extension of a right to prevent the innocent from being convicted.

The particular nature of prosecuting sexual offences, particularly historic as in the *Pell* and *R v SJ & MM* cases, brings forth other very complex issues and discussions. This paper cannot delve sufficiently ***E.H.R.L.R. 329*** into these complexities, and policy arguments may dictate whether the scope of appellate processes can or should be broadened exponentially. The impacts of unlimited appeal could be pernicious, for example, eroding *res judicata* protection for defendants with the possibility of the prosecution reviewing an acquittal. That said, it is significant that an unsafe conviction was ultimately found in the

Pell case only due to a rigorously forensic approach to the evidence heard at trial and the HCA's willingness to overrule the jury's specious verdict, which was founded exclusively upon the credibility of the complainant, in spite of ample cogent and compelling evidence to the contrary.

This is an unusual situation to find in an appellate court. A human rights approach which centres the fairness of the proceedings upon the defendant must recognise that appeal proceedings are a key part of ensuring that convictions obtained from juries, particularly where based on findings of credibility, are as safe and fair as possible. International human rights law can and must reflect this; the HCA's approach to, and understanding of its role should therefore become the standard for others.

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Footnotes

1 This article is developed from the ideas in the following blog post: *Edward Henry QC, "Reflections on the case of Cardinal Pell" (23 April 2020), The Secret Barrister Blog*, https://thesecretbarrister.com/2020/04/23/guest-post-by-edward-henry-qc-reflections-on-the-case-of-cardinal-pell/ [Accessed 30 June 2020]. Edward gratefully acknowledges the major contribution Christopher made to this paper.

2 *Pell v The Queen [2020] HCA 12 (HCA)*.

3 *Pell v The Queen [2020] HCA 12* at [118].

4 *Pell v The Queen [2020] HCA 12* at [127].

5 *R v SJ & MM [2019] EWCA Crim 1570; [2020] 1 Cr. App. R. 7*.

6 *R v SJ & MM [2019] EWCA Crim 1570; [2020] 1 Cr. App. R. 7* at [76].

7 *R v SJ & MM [2019] EWCA Crim 1570; [2020] 1 Cr. App. R. 7* at [81].

8 *R v SJ & MM [2019] EWCA Crim 1570; [2020] 1 Cr. App. R. 7* at [4].

9 For an unusual example of the CACD being prepared to reappraise the evidence at trial, see *R v Slade & Others [2015] EWCA Crim 71*, at [92]–[96].

10 *Pell v The Queen [2020] HCA 12* at [39].

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

12 *Pell v The Queen [2020] HCA 12* at [9], citing *Chidiac v The Queen (1991) 171 C.L.R. 432* at 444 per Mason CJ, citing *Chamberlain v The Queen [No 2] (1984) 153 C.L.R. 521* at 618–619 per Deane J; see also *M v The Queen (1994) 181 C.L.R. 487* at 494 per Mason CJ, Deane, Dawson and Toohey JJ.

13 Criminal Appeals Act 1968 (England and Wales) s.2. Even before the 1995 amendment, the CACD rarely referred on these explicit grounds. See D. Schiff and R. Nobles, "Criminal Appeal Act 1995: The Semantics of Jurisdiction" (1996) 59(4) Modern Law Review 573, 577, citing *K. Malleson, Review of the Appeal Process, RCCJ Research Study No 19 (HMSO, 1993) 14*.

14 Criminal Appeals Act 1995 (England and Wales) s.2(1).

15 *R v SJ & MM [2019] EWCA Crim 1570, [2020] 1 Cr. App. R. 7* at [34].

16 Criminal Appeals Act 1995 (England and Wales) s.13.

17 *House of Commons. Justice Committee, Criminal Cases Review Commission, HC Paper No.850 (Session 2014–15) paras 11–14*.

18 *R v Pendleton [2001] UKHL 66*.

19 *R v Pendleton [2001] UKHL 66* at [17].

20 *HoC Justice Committee, Criminal Cases Review Commission, HC Paper No.850, paras 22–23*.

21 *Pell v the Queen [2020] HCA 12* at [39].

22 *Dorado Bauldé v Spain (App. No.23486/12), judgment of 1 September 2015* at [18].

23 Notably, Protocol No.7 of the ECHR is not signed or ratified by the UK.

24 *Krombach v France (App. No.29731/96), judgment of 13 February 2001*.

25 *Krombach v France (App. No.29731/96)* at [96].

26 *Pesti and Frodl v Austria (App. Nos 27618/95 and 27619/95), judgment of 18 January 2000*.

27 *Ruslan Yakovenko v Ukraine (App. No.5425/11), judgment of 4 June 2015* at [77].

28 *Ross v United Kingdom (App. No.11396/85), judgment of 11 December 1986* at [3].

29 *Meftah and others v France (App. Nos.32911/96, 35237/97 and 34595/97), judgment of 26 July 2002* at [46]–[48].

30 For more on the principle of participation as a guiding principle of the European Court's case law on art.6, see John D. Jackson, "The Effect of Human Rights on Criminal Evidentiary Processes: Towards Convergence, Divergence or Realignment" (2005) 68(5) Modern Law Review 737.

31 *UN Human Rights Committee, General Comment No. 32, Article 14, Right to equality before courts and tribunals and to fair trial, 23 August 2007, UN Doc CCPR/C/GC/32, para.48*.

32 *General Comment No. 32 para.48*.

33 *R v SJ & MM [2019] EWCA Crim 1570, [2020] 1 Cr. App. R. 7* at [72]. An extraordinary pronouncement given that the inadmissible evidence was treated by the prosecution as unchallenged expert evidence going directly to the ultimate issue, and rehearsed in the trial judge's directions.

34 UNHRC, Communication No. 1100/2002 *Bandajevsky v Belarus (2006) U.N. Doc CCPR/C/86/D/1100/2002*, para.10.13. See also UNHRC, Communication No. 985/2001 *Aliboev v Tajikistan (2005) U.N. Doc CCPR/C/85/D/985/2001*, para.6.5.
35 UNHCR, Communication No. 701/1996 *Gómez Vázquez v Spain (2000) U.N. Doc CCPR/C/69/D/701/1996*, para.11.1.
36 UNHCR, Communication No. 623-627/1995 *Domukovsky et al. v Georgia (1998) U.N. Doc CCPR/C/62/D/623-627/1995*, para.18.11
37 UNHCR, Communication No. 1972/2010 *Ali Djanhangir oglu Quliyev (2014) U.N. Doc CCPR/C/112/D/1972/2010*.
38 *Ali Djanhangir oglu Quliyev (2014)*, para.8.4.
39 UNHCR, Communication No. 1942/2010 *T.L.N v Norway (2014) U.N. Doc CCPR/C/111/D/1942/2010*.
40 *T.L.N v Norway (2014)*, paras 3.5–3.6.
41 *T.L.N. v Norway (2014)*, para.9.3.
42 *A. Roberts, "The Frailties of Human Memory: the accused's right to accurate procedures" (3 July 2019) U of Melbourne Legal Studies Research Paper No. 825*, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3414084 [Accessed 30 June 2020], 4–5.
43 *W. Blackstone, Commentaries on the Laws of England (Boston: Beacon Press, 1962), p.420*.
44 *J. Jackson and S. Summers, The Internationalisation of Criminal Evidence: Beyond the Common Law and Civil Law Traditions (Cambridge: Cambridge University Press, 2012), p.203*.
45 *Bikas v Germany (App. No.76607/13), judgment of 25 January 2018* at [33] and [57].
46 *Grayson and Barnham v United Kingdom (2009) 48 E.H.R.R. 30* at [39].
47 *Grayson and Barnham v United Kingdom (2009) 48 E.H.R.R. 30* at [39].
48 *Grayson and Barnham v United Kingdom (2009) 48 E.H.R.R. 30* at [39].
49 *Grayson and Barnham v United Kingdom (2009) 48 E.H.R.R. 30* at [37].
50 See an apposite judgment concerning this to be found in *R v D [2007] EWCA Crim 2485* at [30]:"It is trite to observe that the fairness of the trial can only be assessed in the factual context of the particular case. But it is not idle to recall that the purpose of the trial process is to give the prosecution a fair opportunity to establish guilt and a fair opportunity for the defendant to advance his defence. The means by which that is achieved is by ensuring that the jury has a reasonable opportunity to retain and assess the evidence laid before it and by the judge directing the jury, fairly, as to the issues which it must determine. *Since juries are not required to give reasons for their verdict, the only objective assurance that the process by which the jury has reached its conclusion is rational, lies in the fair conduct of a trial. A rational conclusion demands a fair process.* A trial must be managed to enable those objectives to be achieved (see introduction to the Lord Chief Justice's Protocol)." [Emphasis added]
51 *Brandstetter v Austria (1991) 15 E.H.R.R. 378* at [67]; UNHRC, General Comment No. 32, para.39.
52 *Barbera, Messegua, and Jabardo v Spain (1988) 11 E.H.R.R. 360* at [78].
53 *Saidi v France (1994) 17 E.H.R.R. 251* at [44].
54 *Kostovski v The Netherlands (1989) 12 E.H.R.R. 434* at [44].
55 See, e.g. *Van Mechelen and others v the Netherlands (1997) 25 E.H.R.R. 647* at [62]; *Seton v United Kingdom (App. No.55287/10), judgment of 31 March 2016* at [58].
56 *A. Roberts, "The Frailties of Human Memory: the accused's right to accurate procedures" (3 July 2019) U of Melbourne Legal Studies Research Paper No. 825, 5*.
57 *Kostovski v The Netherlands (1989) 12 E.H.R.R. 434* at [41].
58 See, e.g. *Barbera, Messegua, and Jabardo v Spain (1988) 11 E.H.R.R. 360*.
59 See, e.g. *Kostovski v The Netherlands (1989) 12 E.H.R.R. 434*.
60 UNHRC, General Comment No. 32, para.39 (emphasis added).
61 For example, the privilege against self-incrimination is more commonly justified by placing the symbolic burden of proving the case onto the state. See M. Redmayne, "Rethinking the Privilege Against Self-Incrimination" (2007) 27(2) Oxford Journal of Legal Studies 209.
62 See, for more on the "'mixing" or convergence of the traditional models of adversarialism and inquisitorialism in contemporary criminal justice systems: *B.S. Markesinis (ed), The Gradual Convergence (Oxford: Clarendon Press, 1994)*. See, for more on the role of truth in an adversarial model of trial: T.L. Steffen, "Truth as Second Fiddle: Reevaluating the Place of Truth in the Adversarial Trial Ensemble" [1988] 4 Utah Law Review 799, 801.
63 *A. Roberts, "The Frailties of Human Memory: the accused's right to accurate procedures" (3 July 2019) U of Melbourne Legal Studies Research Paper No. 825, 2*.
64 *R. Dworkin, A Matter of Principle (Oxford: Clarendon Press, 1985), Ch.3*.
65 *A. Stein, Foundations of Evidence Law (Oxford: Oxford University Press, 2005), p.175*.
66 *[2019] VSCA 186*.
67 *Pell v the Queen [2020] HCA 12* at [46].
68 *Pell v the Queen [2020] HCA 12* at [49].
69 For a review of some studies in this area, see, e.g.: B.H. Bornstein and E. Greene, "Jury Decision Making: Implications For and From Psychology" (2011) 20(1) Current Direction in Psychological Science 63; *C. Thomas, Are juries fair?, Ministry of Justice Research Series 1/10 (February 2010)*.
70 *Gestmin v Credit Suisse [2013] EWHC 3560 (Comm)* at [16].
71 Lord Neuberger, "Twenty Years a Judge: Reflections and Refractions", Neill Lecture 2017, Oxford Law Faculty (10 February 2017).
72 A famous passage concerning this issue by Mr Justice MacKenna (and subsequently endorsed by Lord Devlin and Lord Bingham) stated: "He speaks hesitantly. Is that the mark of a cautious man, whose statements are for that reason to be respected, or is he taking time to fabricate? Is the emphatic witness putting on an act to deceive me, or is he speaking from the fullness of his heart, knowing that he is right? Is he likely to be more truthful if he looks me straight in the face than if he casts his eyes on the ground perhaps from shyness or natural timidity? Instead, I start with the undisputed facts which both sides accept and I add to them such other facts as seem very likely to be true, as for example those recorded in contemporary documents or spoken to by independent witnesses like the policeman giving evidence in a running down case [road accident] about marks on the road … I judge a witness as unreliable if his evidence is, in any serious respect, inconsistent with these undisputed or indisputable facts, or of course if he contradicts himself on important points … When I have done my best to separate the true facts from the false by these more or less objective tests, I say which story seems to me the more probable, the Claimant's or the Defendant's." See B. MacKenna, "Discretion" (1974) 9(1) Irish Jurist 1, 10, cited by *T. Bingham, "The Judge as Juror" in The Business of Judging: Selected Essays and Speeches 1985-1999 (Oxford: Oxford University Press, 2000), pp.3, 9*.
73 Some judges are cynical as to the gullibility of juries particularly with respect to perverse acquittals rather than wrongful convictions. For a recent example, see letter to *The Times, dated 23 June 2020* by His Honour Michael Heath, viz: "Sir, You report that criminal trials are facing delays of up to five years. The situation gets worse by the day. For some time I and others more distinguished have been advocating, purely as

a temporary measure, trial in the crown court by judge alone. Barrister friends have asked me whether I would be content to be tried without a jury. If I were innocent I would welcome it. If guilty I would want to try to persuade a jury to acquit me. One benefit of trial by judge alone is the likelihood of timely guilty pleas by those who would otherwise seek to run spurious defences in the hope of pulling the wool over the eyes of a jury. They would realise that defences without merit would not succeed before a judge sitting alone."

74 Although the truth is more complicated, Coke and Blackstone attribute the right to trial by jury to the Magna Carta. See W. Clark, "Magna Carta and Trial by Jury" (1923) 2(1) North Carolina Law Review 1, 1.

75 *BBC News, "Jury trial support 'rock solid'" (30 January 2002), BBC News*, http://news.bbc.co.uk/1/hi/uk/1791180.stm [Accessed 30 June 2020].

76 *R. Sarre, "The jury may be out on the jury system after George Pell's successful appeal" (7 April 2020), The Conversation*, https://theconversation.com/the-jury-may-be-out-on-the-jury-system-after-george-pells-successful-appeal-135814 [Accessed 30 June 2020].

77 *D. Lammy, The Lammy Review: An Independent Review into the Treatment of, and Outcomes for, Black, Asian and Minority Ethnic Individuals in the Criminal Justice System (London: Lammy Review, 8 September 2017), p.31.*

78 See, e.g. *R. Sarre, "The jury may be out on the jury system after George Pell's successful appeal" (7 April 2020), The Conversation*; *J. Horan, "All about juries: why do we actually need them and can they get it 'wrong'?" (6 March 2019), The Conversation*, https://theconversation.com/all-about-juries-why-do-we-actually-need-them-and-can-they-get-it-wrong-112703 [Accessed 30 June 2020].

79 See, on attrition rates: J.V. Roberts, "Sexual Assaults in Canada: Recent statistical trends" (1996) 21 Queens Law Journal 395; S. Lea, U. Lanvers and S. Shaw, "Attrition in Rape Cases: Developing a profile and identifying relevant factors" (2003) 43(3) British Journal of Criminology 583.

80 *C. Barr, "Why are rape prosecutions at a 10-year low?" (12 September 2019), The Guardian*, https://www.theguardian.com/society/2019/sep/12/why-are-rape-prosecutions-at-a-10-year-low-england-wales [Accessed 30 June 2020].

81 *L. Kelly, J. Lovett and L. Regan, A gap or a chasm? Attrition in reported rape cases, Home Office Research Study 293, (February 2005)*, https://webarchive.nationalarchives.gov.uk/20100408125722/http://www.homeoffice.gov.uk/rds/pdfs05/hors293.pdf [Accessed 30 June 2020]. This approach, however, has attracted much criticism in the UK and Australia (see the Henriques report, written by the retired High Court Judge Sir Richard Henriques when assessing Operation Midland, https://www.met.police.uk/henriques). For a succinct précis of the mischief and dangers posed by a victim-centric approach see *Pell v The Queen [2019] VSCA 186* at [932]–[936] where Weinberg J.A., in a magisterial dissent, lays bare the dangers of failing to make a searching inquiry in historic cases. His dissenting judgment was unanimously preferred by the HCA.

82 In a statement after Cardinal Pell's acquittal, a complainant in that case expressed concern about this: "I would hate to think that one outcome of this case is that people are discouraged from reporting to the police." See also, *"Witness J, former choirboy who accused George Pell, says case 'does not define me'", (8 April 2020), ABC News*, https://www.abc.net.au/news/2020-04-08/george-pell-accuser-witness-j-reacts-to-high-court-judgment/12130684 [Accessed 30 June 2020].

83 *D. Willmott, "Is jury bias preventing justice for rape victims?" (9 June 2016), The Conversation*, https://theconversation.com/is-jury-bias-preventing-justice-for-rape-victims-60090 [Accessed 30 June 2020].

