Pastoral Letter V, Thursday, April 23rd, 2020
The 'Curiouser and Curiouser' Case of George Cardinal Pell and the Challenges It Throws Up

The purpose of these pastoral letters to you, is to keep us together, to maintain our togetherness, as we read the same stuff. Because there is a limit to what I can say about congregational activities, simply because these activities are currently minimal, I want to use these letters as a means to stir the mind, to encourage our thinking – and not just about COVID-19, although undoubtedly I shall include it in my thoughts as time progresses – but other things as well. Today, I want to think with you about the strange case of Cardinal Pell. We are currently witnessing a world in turmoil, but the turmoil of the Pell case is a local example of confusion and disorientation, where not even the Australian judicial system was able to provide a consistent and coherent response. In effect, the decisions of the judiciary, turned 180 degrees in the space of sixteen months, and the process has thrown up a series of significant questions regarding the legal system in a modern democracy. In what follows, I would like to examine three questions: first the peculiarity of the case; second the future of the jury system in our legal framework; and third, the secrecy of the legal process, where the public right to information, was simply not countenanced, but actually ignored.

The peculiarity of the case is clear in as much as the full bench of the High Court of Australia unanimously threw out the unanimous guilty verdict of a jury, that was further supported by a majority decision of the Victorian Court of Appeal. Rewinding the events, what is often missed in public appreciation of the High Court decision, is the question that was actually considered. The High Court bench did not ask whether Pell committed the offences. Rather, it asked whether the two majority judges in the Victorian Court of Appeal, had made an error about the nature of the correct legal principles or the application of those principles. Prior to the entry of the High Court into the picture, the Court of Appeal had been asked to consider the jury decision of December 11th, 2018, and did so on June 5th and 6th, , 2019 Looking back to that original jury decision, Pell was found guilty "beyond reasonable doubt" of five child sexual offences. Pell's subsequent appeal to the Victorian Court of Appeal, argued that the jury verdict was not safe, because it "could not be supported on the whole of the evidence". The question for the Court of Appeal, as with the High Court, was not whether they thought Pell was guilty, but whether in its opinion, after reviewing all the evidence, that it had been genuinely "open to the jury", to have decided otherwise: in other words, that in their deliberations, there had remained a reasonable doubt about Pell's guilt. As we know, the Court of Appeal, was not so disposed, and in a majority decision, found against Pell and dismissed the appeal. By the time the High Court gave Pell special leave to appeal, the legal arguments had moved a little. The arguments were threefold: first that the Victorian Court of Appeal majority judgment that it had been genuinely "open to the jury" to have decided otherwise, was wrong. Second, that it was so, because, Pell had been required to show that it was impossible for the offending to have occurred, meaning that the burden of proof had been reversed, falling upon the accused not the complainant, Witness J; and third there remained sufficient doubt that the offending had been possible at all, as Witness J's account had required them to have been alone in the sacristy for five to six minutes: an unlikely circumstance.

The High Court's decision as we know, delivered on April 7th, this year, stood contrary to that of the Victorian Court of Appeal. Based on their summary reasons, the High Court concluded that the Court of Appeal majority judgment, lacked sufficiently cogent reasoning when it assessed the evidence. In their full argument, released some hours later, the High Court, argued that an independent assessment by the Court of Appeal, should have concluded that there ought to have been sufficient doubt in the jury's minds, to have prevented the verdict arrived at. Finally, the High Court, found that the Court of Appeal, had failed to consider whether there was a reasonable possibility the offending had not taken place, such that there ought to have been a reasonable doubt as to Pell's guilt. In the second paragraph (119) of the conclusion, the High Court stated, *"Making full allowance for the advantages enjoyed by the jury, there is a significant possibility…that an innocent person has been convicted"*.

In the face of such a complex and conflicted process, the second inescapable issue, concerns the future place and weight of jury decisions. Legal opinion is divided on this. On the one hand, some hold that the High Court decision will not put the jury system at risk, but others are more cautious; uncomfortable, if not with the High Court decision as such, the manner in which the jury decision was overturned. In an article by Rick Sarre, Adjunct Professor of Law and Criminal Justice in the University of South Australia, it is pointed out that appeal judges have historically been most reluctant to overturn jury verdicts. The failed High Court appeal in 1984 by Michael and Lindy Chamberlain against the conviction of the murder of their daughter Azaria is a case in point. They were later exonerated by the Northern Territory Criminal Court of Appeal.[1] In 1997, the then Chief Justice of the High Court of Australia, put it this way:

the courts accept the jury as the possessor of both the skills and the advantages that are required to reach a proper verdict. In my respectful opinion, any contrary approach denies the importance of trial by jury and is inconsistent with the constitutional function which the jury performs. Nevertheless, there may be exceptional cases where it appears that, despite its skills and advantages and the due observance of all relevant rules of law and procedure, the jury must have fallen into error.

Only time will tell as to whether this particular High Court decision marks the watershed toward a change in the way jury's verdicts are considered by higher courts. In any case, the Pell story, appears perilously close to a retrial by the High Court.[2]

The third point concerns the question of the secrecy of the legal process itself. The problem, raised by more than one legal expert is that the Pell case was marked by a lack of accountability when it came to the issue of an informed public. The noted irony is that the courts exhibited a penchant for secrecy and insular decision-making that resembled the Catholic Church's own flawed and damaging response to sexual abuse.

From the very beginning of the case, the judiciary resisted the possibility of the criminal trial as a public event, for, it must be said, the lofty reason of ensuring the impartial rule of law, especially in the heated environment of child abuse in Australia. But it could be well argued that this desire for impartiality went too far. Early on there was a sweeping suppression order restricting what journalists could publish, barring even the most basic details. Moreover, journalists could not report on the case as it happened, meaning the original trial, which ended with a hung jury, largely disappeared from view. Even reporting about the suppression order, because it was a court document related to the proceedings, was considered breaking the law. Finally, when Cardinal Pell was convicted in December 2018, the verdict was not reported for two months, even though for those who read the world press online outside of Australia – nearly everyone one – it was old news. The court finally lifted its gag order, only after a second trial involving additional accusations was dropped. As Jason Bosland, a law professor at Melbourne University put it in speaking about the judicial system in Australia "We have this approach of 'Well, you just have to trust us.' It's a problem." [3] Perhaps, the pendulum in this democracy lies too far toward secrecy and unaccountability, even of the judiciary.

In the meantime, whatever you may think of the Pell decision, it is clear that there must be a final arbiter in the justice process. The cost however appears to be for some a loss of public confidence in the jury system, while at the other end of the spectrum, a loss of confidence in the justice system itself.[4] Not even Cardinal Pell wins entirely, since he will be subject to civil litigation for many years yet. The complainant Witness J, walks away believed by a jury, by a majority judgment of the Court of Appeal, and probably by a substantial body of public opinion. Nonetheless, all are walking-wounded, not least the judiciary.

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[1] Rick Sarre, "The jury may be out o the jury system after George Pell's successful appeal", *The Conversation,* April 7th, 2020

[2] Ben Matthews and Mark Nicholas Bernard Thomas, "How George Pell won in the High Court on a legal technicality", *The Conversation,* April 7th, 2020

[3] Damien Cave and Livia Albeck-Ripka, "Cardinal Pell's Acquittal was as Opaque as his Sexual Abuse Trial", *The New York Times,* April 7th, 2020

[4] Sarre, op.cit.