IN THE HIGH COURT OF AUSTRALIA No M112 of 2019
MELBOURNE OFFICE

Between **GEORGE PELL**

Applicant

And

THE QUEEN

Respondent

APPLICANT'S FURTHER SUBMISSIONS

1 By correspondence dated 5th February 2020, the Court requested further written submissions on two questions: (1) Whether the test in *M v The Queen* (1994) 181 CLR 487, 493-495, to which reference is made in the current written submissions, restricts an intermediate appellate court to written transcripts of the evidence or extends to permit or require it to undertake a review of the video recordings of evidence of witnesses, scenes and to view other matter which was before the jury. (2) If the court is permitted or required to do so what, if any, effect does viewing the recording (or other thing) have on the application of the test in the present case.

2 For the reasons that follow, the questions should be answered: (1) The *M* test permits an intermediate appellate court to view video recordings and other material where there is something contained in that material which is identified as necessary for the court to view in order to determine the appeal. (2) In the present case, the fact that the court viewed material (despite there having been no identified need to do so) could not have affected the proper application of the *M* test in any way determinative of the issues on the appeal (or the special leave application).

Question 1

3 In *SKA v The Queen* (2011) 243 CLR 400, the Court considered and applied the test in *M*. The Court determined that there was no requirement for the intermediate appellate court to have watched the recorded evidence of the complainant for two reasons. First, because the applicant had failed to identify any purpose which would have been served by the court viewing the recording as necessary to the applicant's appeal or being in the interests of justice {410-412 [30]-

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[35] per French CJ, Gummow and Kiefel JJ and 433 [116] per Crennan J (Heydon J agreeing)}. Second, because to watch only part of the evidence from the trial would have risked creating an 'imbalance' or 'undue focus' {410-411 [28]-[30] per French CJ, Gummow and Kiefel JJ}.

4 The plurality in *SKA* confirmed that proper application of the test in *M* requires the intermediate appellate court to undertake its own independent assessment of the evidence in order to carry out its task: to determine whether the verdicts of guilty could be supported {409 [22]}. Performance of this function does not ordinarily require the appellate court to go beyond transcript {411 [31]}.

5 There is no reason to doubt the correctness of *SKA* regarding the requirement to identify a forensic purpose for viewing – even where there is no risk of imbalance (for example, where all of a trial is recorded and available to an intermediate appellate court). For courts to be required to view recorded evidence in the absence of an identified reason necessitating that course would not only magnify the workload of the appellate courts but would also imperil the critical distinction between the jury's primary function and the appellate court's statutory appellate control of the jury's exercise of its primary function.

6 In principle, the reasons identified in *SKA* against a requirement to watch are also reasons against a decision to watch. Unless something in the circumstances of the case necessitates viewing material additional to the written record (and there is no risk of imbalance), an intermediate appellate court should not do so.

7 The two steps set out in *M* as the method by which an intermediate appellate court answers the ultimate question ensures the reasonableness of a jury verdict (which is not accompanied by any reasons) can be independently reviewed by an intermediate appellate court without substituting trial by appellate court for trial by jury. The orthodox operation of the two steps leaves questions of 'belief' to the jury who saw and heard the witnesses, experienced the atmosphere of the trial and benefitted from collective decision-making. This accords with the constitutional role of the jury. Unless there is some circumstance of the case which necessitates the viewing of material by the intermediate appellate court, assessments about the manner in which witnesses gave their evidence (beyond that contained in the written record) are properly left as part of the second step.

Question 2

8 In the present case, prior to the appeal hearing, the intermediate appellate court indicated in writing to the parties an intention to watch video recordings of the trial evidence of four

witnesses (the complainant, Portelli, Potter and McGlone) and attend a view of the Cathedral. The court invited the parties to provide submissions on these matters.

9 In submissions dated 9th April 2019, the applicant submitted that, in accordance with *SKA,* there was no necessity to watch any video recordings because the complaint of the applicant on appeal did not depend on the manner in which any witness gave evidence. In particular, it was submitted that no matter how favourable a view was taken of the manner that the complainant gave evidence, it was not open to the jury, acting rationally, to conclude that the prosecution had eliminated all reasonable doubt due to the combined effect of the unchallenged evidence of other witnesses {Applicant's Additional Submissions (**AAS**) [8]-[10][1]}. The applicant also submitted that if the court, contrary to the applicant's primary submission that no evidence should be watched, were to watch some evidence, then in order to ameliorate (if not eliminate) the question of imbalance, the court should also watch the recordings of the evidence of a number of additional named witnesses {AAS {[3](a), [13]}. The applicant agreed that the court should have the benefit of a view of the Cathedral {(AAS [3](b)}.

10 In submissions also dated 9th April 2019, the respondent submitted that the court should view the evidence of the four witnesses identified and there was no objection to the further witnesses named by the applicant also being watched, nor any objection to a view {Respondent's Additional Submissions (**RAS**) [1][2]}. The Respondent submitted that watching the evidence of witnesses was 'desirable given the existence of the relevant recordings' {RAS [1]}.

11 Prior to the appeal hearing, the court attended a view and watched recordings of twelve witnesses (as per the applicant's secondary position). The court did not identify a reason why it was necessary for them to go beyond the written transcript in order to determine the appeal. There was no written ruling provided regarding the decision to view this material.[3]

12 While the applicant maintains that it was unnecessary for the court to have watched any recordings, the fact that the court did so could not have affected the application of the *M* test in any way determinative of the issues on the appeal (or the special leave application). This is because the issue for the court's consideration remained whether it was sufficient for belief in the complainant to eliminate doubt otherwise raised and left by unchallenged exculpatory evidence unanswered by the evidence of the complainant.

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[1] These submissions are located within Tab 1 of the lower court's books filed with the High Court Registry on 26th November 2019, in accordance with the directions of the High Court Registry of 13th November 2019.
[2] These submissions are located within Tab 2 of the books referred to in footnote 1 of these submissions.
[3] Each judgment referred to the fact of the applicant's objection without providing reasons for not acceding to it {CA [32] CAB 189, [1044]-[1045] CAB 468-469}.

13 This is not to say, however, that the court's decision in the present case to view additional material did not alter the application of the component parts of the *M* test. Both the majority {CA [25]-[41] CAB 187-192} and Weinberg JA {CA [661]-[663] CAB 370-371, [1030]-[1053] 465-470} accepted that the *M* test required two steps. The usual premise of such an appeal is that the jury, who were best placed to have evaluated the manner in which evidence was given, believed the complainant (and, where relevant, disbelieved the applicant). In the present case, rather than this being a presumed part of the second step in *M*, each member of the court evaluated the manner in which evidence was given (at least insofar as the complainant and applicant were concerned) for themselves as part of the first step. Nevertheless, each member of the court found that the second step retained relevant content: the jury still had an advantage albeit one that was less than would be if the court had not viewed the recordings of the evidence {CA [35]-[38] CAB 190-191, [1048]-[1050] 469-470}. The majority did not 'experience a doubt' and hence did not consider it necessary to take the second step {CA [39] CAB 191-192}. Weinberg JA did experience a doubt and took the second step {CA [1051]-[1053] CAB 470}.

14 Pursuant to the first step, the majority considered that the manner in which the complainant gave his evidence in the recordings was 'very compelling' {CA [90]-[94] CAB 207-208}. Although the majority stated that they 'bore in mind' the caution sounded in *Fox v Percy* (2003) 214 CLR 118, 129 [30] per Gleeson CJ, Gummow and Kirby JJ regarding the dangers of too readily drawing conclusions about truthfulness and reliability solely or mainly from the appearance of witnesses {CA [57] CAB 197}, the majority's conclusion {CA [90] CAB 207} appears to have been substantially based on the favourable view the majority took of the manner in which the complainant gave his evidence {CA [73] CAB 201, [87] 206, [90]-[94] 207-208, [201]-[202] 242, [208] 243-244}. Many of the other matters considered by the majority to affect the complainant's credibility were either viewed by the majority as not detracting from the favourable perception they had of his demeanour or are interpreted through the lens of having concluded he is credible and reliable because of his demeanour: see {CA [71] CAB 201, [73]-[74] 201-202, [77]-[80] 203-204, [86] 205-206, [113] 214, [216] 248, [219]-[220] 249, [225] 250, [234]-[237] 254-255}. This accorded with the approach urged on the court by Senior Counsel for the prosecution at the appeal hearing {CA [925]-[926] CAB 441-442}.

15 The majority viewed the applicant's record of interview and found the denials to be emphatic but otherwise do not appear to have made an assessment of the manner in which they were given {CA [185] CAB 235}. Similarly, although the majority viewed the video evidence of Portelli, Potter, McGlone and others, they do not appear to have made any determination of their

demeanour. None of these witnesses was found by the majority to lack credibility, the majority noting, for example, in relation to Portelli, that his honesty was not in issue either at trial or on the appeal {CA [251]-[252] CAB 265}. Rather, the majority considered that the jury were entitled to have reservations about Portelli's and Potter's reliability {CA [253] CAB 265, [267] 271}. It does not appear that this conclusion was influenced by the majority having watched the recordings of their evidence.

16 Weinberg JA stated that watching the evidence was 'of considerable value' {CA [1045] CAB 468-469} and 'to the extent that demeanour is a relevant factor to take into account when assessing issues of credibility and reliability', the recordings seemed to him to provide a solid basis upon which to form a view about those matters {CA [1047] CAB 469}. Having watched the complainant, Weinberg JA did not find the manner in which he gave evidence so compelling. Weinberg JA found that the complainant did embellish at times {CA [928] CAB 442} and that if the complainant's evidence stood alone (with each of the 17 'solid obstacles' put to one side), Weinberg JA would not be prepared to say that the complainant was so compelling that Weinberg JA would necessarily accept his account beyond reasonable doubt {CA [929] CAB 443}. But this assessment was not determinative for Weinberg JA {CA [1056] 471, [1100]-[1105] CAB 480-482}. Indeed, Weinberg JA noted the risks of giving too much credence to matters such as demeanour when evaluating the evidence of a witness {[917]-[924] CAB 439-441}. Weinberg JA stated that while demeanour must be 'weighed in the scale', it was to be considered in the light of the evidence as a whole {CA [927] CAB 442}. Similarly, while Weinberg JA assessed the applicant's demeanour in the record of interview and found the manner of the denials to have been 'forceful' and 'persuasive', he noted that he made the same due allowance regarding the dangers of giving too much weight to matters of demeanour {CA [1091] CAB 478}.

17 In relation to Portelli and Potter, though Weinberg JA himself considered that they were 'truthful' witnesses, he would have proceeded on that basis regardless of any subjective assessment of them because the prosecution had never suggested that either had lied {CA [952] CAB 448} and also [937] 445, [997] 459}. This accorded with the approach taken by the parties and the majority to their credibility. Weinberg JA found these witnesses (along with others) to gave cogent evidence {CA [1087]-[1089] CAB 478} but this conclusion was grounded, not in conclusions drawn from way in which their evidence was given, but rather because: (a) they were of good character and had not been suggested to have been lying {CA [937] CAB 445}; (b) their evidence was unchallenged {CA [997] CAB 459}; (c) the assessment of their evidence had to be undertaken by reference to the significant forensic disadvantage direction {CA [1010] CAB 461-

462}; (d) all that was required to raise and leave doubt was that their evidence was 'reasonably possible' {CA [1065] CAB 473}; (e) the role of the appellate court was not to consider whether the complainant should be preferred over the other witnesses {CA [969] CAB 452}. It is of note that neither the respondent (nor the applicant) ever suggested that the cogency of these witnesses' evidence could be assessed by reference to the video recordings of their evidence (see, for example, summary of the appeal arguments regarding Portelli {CA [1065]-[1086] CAB 473-477}).

18 There is no basis to conclude that the doubt that Weinberg JA experienced as to the applicant's guilt occurred due to his assessment of the manner in which witnesses gave their evidence. After a lengthy summary of the evidence and arguments at trial and on appeal, Weinberg JA set out in considerable detail the matters influential to his reasoning process { CA [896]-[1029] CAB 435-465} before giving his conclusion {CA [1051]-[1112] CAB 470-483}. That conclusion, reached after 'long and hard' deliberation {CA [1051] CAB 470} and 'careful reflection' {CA [1112] CAB 483}, emphasised the significant number of features which combined to produce doubt, including, for example, the 'compounding improbabilities' argument {CA [1064] CAB 472}.

19 The applicant's argument on this application does not 'rely' on Weinberg JA's conclusions regarding how compelling or credible any witness was or was not {cf Respondent's Submissions [28]}. Rather, the applicant notes the adoption of the correct judicial method employed by Weinberg JA {AS [54]} as a means of contrasting the erroneous approach of the majority {AS [44]-[53]}. As with the majority, then, the decision of Weinberg JA to view additional material is not determinative of any issue on this application.

19 February 2020

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