

THE CONVERSATION

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The High Court has referred George Pell's application for special leave to the court's full bench. Erik Anderson/AAP

What did the High Court decide in the Pell case? And what happens now?

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Two judges in the High Court of Australia this morning referred Cardinal George Pell's application for special leave to appeal his convictions to a full bench of the High Court.

While not a full grant of special leave, this is favourable to Pell, as dismissing the application would have finalised the case and his convictions.

When the High Court hears the case in coming months, it can reject or grant the special leave application. If granted, it can then allow or dismiss the appeal.

The case is exceptionally complex and the final outcome is difficult to predict. Allowing leave to appeal does not guarantee the appeal will succeed. Here is what might happen next.

What happened with the convictions?

In December 2018, a jury unanimously found Pell guilty of five sexual offences against two 13-year-old choirboys, committed when he was Archbishop of Melbourne from 1996-97. The offences were one count of sexual penetration of a child aged under 16 through forced oral sex, and four counts of an

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indecent act with or in the presence of a child aged under 16. He was sentenced to six years' prison with a non-parole period of three years and eight months.

What happened with the failed appeal?

In August 2019, Victoria's Court of Appeal dismissed Pell's appeal against these convictions by a 2:1 majority decision. The background is summarised elsewhere. The key issue was whether the verdicts were "unreasonable" or could not be supported on the evidence. The question was whether, given the evidence, it was "open to the jury" to be satisfied beyond reasonable doubt the accused was guilty.

It is not enough to overturn a guilty verdict if the court merely finds a jury "might have" had a reasonable doubt. Rather, the court must find that, on its assessment of the evidence, it was not open to the jury to have been satisfied of guilt beyond reasonable doubt. So the evidence must have "obliged" the jury to reach a not guilty verdict. Because of the jury's role as tribunal of fact, setting aside a guilty verdict is "a serious step" (see the case *M v R*).

The majority judges, Chief Justice Anne Ferguson and Justice Chris Maxwell, concluded the guilty verdicts were open to the jury. They did not have a doubt about the complainant's truthfulness or the cardinal's guilt. They made crucial findings after careful and cogent reasoning, considering each aspect of the defence case.

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First, the complainant was credible and reliable. His account was consistent and detailed. His recalled detail of the sacristy layout enhanced his credibility and independently confirmed his account, as it was not normally used by the archbishop.

Second, the majority judges evaluated each defence claim individually and collectively. They rejected the claim that the "opportunity" testimony (defence witnesses' statements about where they, Pell and the choirboys would likely have been at relevant times) made the guilty verdicts unreasonable. Essentially, this testimony was not deemed sufficiently strong to make the verdict unreasonable or "not open". Its effect was "of uncertainty and imprecision". There was evidence showing "a realistic opportunity" for the offending.

The dissenting judge, Justice Mark Weinberg, gave extensive reasons. On his interpretation of the "opportunity" testimony – including statements by two witnesses about customarily being with Pell at relevant times – there was a "reasonable possibility" of an effective alibi for the first four offences. Weinberg himself had "a genuine doubt" about Pell's guilt, thought there was a "significant possibility" the offences had not been committed, and inferred the jury ought to have had this doubt.

The application for special leave to appeal to the High Court

The High Court does not lightly give leave to appeal. It can only grant leave if:

- the proceedings involve a question of legal principle; or
- the interests of the administration of justice (generally, or here) require consideration of the earlier judgment.

Pell's team made two arguments, relying on the dissenting judgment. First, they argued the majority's approach to the "open to the jury" test was wrong, effectively requiring the applicant to exclude any possibility of the offending to have occurred, which reversed the onus and standard of proof. They also argued the majority's belief in the complainant was not enough to overcome doubts raised by the opportunity testimony, and the alibi evidence had not been eliminated.

Second, they argued there was sufficient doubt about whether the offending was possible. This, they said, made the verdicts unreasonable, given the complainant's account required them to be alone in the sacristy for five to six minutes. They argued that after mass and five to six minutes of "private prayer time" there was a "hive of activity" near the sacristy, and the majority incorrectly found it was reasonably open to the jury to find the offending happened during this period.

The director of public prosecutions argued there simply was no such error by the majority in applying the test, and the verdicts were not unreasonable.

In large part, the special leave application turned on the different approaches to whether the "opportunity evidence" was sufficiently strong to create enough doubt that it was "not open to the jury" to find Pell guilty beyond reasonable doubt.

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What did the High Court say?

The transcript had not been released at the time of writing, but the two judges referred the application for special leave to hearing by a full bench (five or seven members) for argument as on an appeal. There, the full High Court can reject or grant the special leave application.

On one view, this is surprising. Applications arguing an unreasonable verdict in child sexual offence cases are typically dismissed (for example, O'Brien; in contrast GAX).

The High Court generally does not grant leave simply due to an alternative interpretation of the facts. The majority judgment in the appeal accurately stated the test. It applied the test by carefully analysing all the arguments and testimony individually and collectively, applying cogent reasoning in independently assessing the sufficiency and quality of the evidence. It weighed the evidence and expressed an independent conclusion about whether on all the evidence it was open to the jury to be satisfied of guilt beyond reasonable doubt.

On the other hand, the two High Court judges may reasonably feel there are important issues of legal principle and justice to consider, and that such a significant case warrants full consideration at all levels by the entire court.

What happens now?

The full hearing of the special leave application will occur in 2020. If leave is then granted, the appeal will proceed. If the appeal succeeds, the court can grant a new trial, or reverse or modify the prior judgment.

However, if special leave is refused at the full hearing, or granted but the appeal fails, the convictions stand and no further appeal is possible.

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For the complainant and many survivors, especially of clergy abuse, this decision will be confronting. They will hopefully be able to draw on reserves of resilience, hope, and any support services if necessary, while awaiting the High Court's final decision.

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