HIGH COURT OF AUSTRALIA

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Details of Filing

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IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

BETWEEN: **The King**
Appellant

and

Theodoros Tsalkos
Respondent

APPELLANT'S SUBMISSIONS

PART I: CERTIFICATION

1. These submissions are in a form suitable for publication on the internet.

PART II: ISSUES

2. Evidence of the complainant's previous representation to her mother of having been raped was adduced at trial under s 66 of the *Evidence Act 2008* (Vic) (the **EA**). The complainant's mother gave evidence of the distressed demeanour of the complainant when making that representation. The prosecution relied on the distress evidence as a piece of indirect evidence that supported the charges relating to that sexual offending.
3. The first issue is whether the distress evidence was irrelevant under s 55 of the EA because there was a competing innocent inference as to the cause of the complainant's distress, and relatedly, whether a test of 'intractable neutrality' as between competing hypotheses should be applied by a trial judge to determine whether the evidence is relevant?
4. The second issue is, if the distress evidence was rationally capable of being causally linked to the offending, was the trial judge required to assume the jury would find the causal connection between the alleged offending and the distress when considering the probative value of the distress evidence for the purpose of s 137 of

the EA, or was the trial judge required to undertake her own assessment as to the relative likelihood of the competing causes of the complainant's distress to determine its probative value?

5. The third issue is whether the existence of an innocent competing inference regarding the cause of the complainant's distress and/or the nature of the distress evidence gave rise to a danger of unfair prejudice within the meaning of s 137 of the EA?
6. The fourth issue is whether there was a risk of unfair prejudice because the use of the distress evidence was not limited by the trial judge?

PART III: SECTION 78B NOTICE

7. The appellant does not consider that notice under s 78B of the *Judiciary Act 1903* (Cth) is required.

PART IV: DECISIONS BELOW

8. The reasons for sentence of the County Court of Victoria (**Supplementary CAB**[1] **4–25**) are cited as: *Director of Public Prosecutions v Theodoros Tsalkos* [2023] VCC 367 (**reasons for sentence**).
9. The decision of the Court of Appeal of the Supreme Court of Victoria (**CAB 80–170**) has not been reported. The medium-neutral citation is *Tsalkos v The King* [2024] VSCA 324 (the **judgment below**).

PART V: MATERIAL FACTS

10. On 31 August 2022, a jury found the respondent guilty of two charges of kidnapping, two charges of rape with aggravating circumstances and four charges of gross indecency with a person under 16 (**CAB 49**).[2] He was sentenced on 7 March 2023 to a total effective sentence of 13 years and 6 months' imprisonment, with a non-parole period of 8 years and 2 months' imprisonment (**CAB 73**).

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[1] Core Appeal Book ('**CAB**').

[2] On 26 August 2022, the trial judge directed verdicts of not guilty on two charges of rape with aggravating circumstances (charges 6 and 8) and two charges of rape (in the alternative to charges 6 and 8).

11. The circumstances of the offending are summarised at paragraphs 15–24 in the reasons for sentence (**Supplementary CAB 8–10**) and at paragraphs 194–202 of the judgment below (**CAB 132–134**).
12. In short compass, the offences were committed on 7 May 1987 against the two female complainants, AB and JJ,[3] when they were 16 and 15 years of age respectively.
13. In the days leading up to the offending, AB and JJ had started soliciting for sex work and on the night of the offending had been doing so in St Kilda. It was alleged that the respondent collected them in his car at about 2:30 am, falsely told them he was a police officer and would 'bust them' for prostitution, before raping both girls and requiring them to perform sexual acts with each other over several hours at two different locations (**CAB 131 [189], 132–133 [194]–[200]**). During the offending the respondent threatened AB and JJ saying he could 'blow [their] heads off' and threatened to 'stick a knife' in JJ. While AB did not see any weapon, her evidence was that at the time she 'really thought [the respondent] could have a gun or a knife' (**AFM**[4] **4–5, 6–7**).[5]
14. The respondent dropped AB and JJ back in St Kilda shortly before 6:00 am. They attended a friend's boarding house where they reported the offending and police were called. Before the police arrived, AB and JJ agreed that they would say that they were hitchhiking and were picked up by the man who had raped them and that they would not tell anyone they had been engaged in sex work. In her evidence-in-chief, AB said that she and JJ had together 'concocted' the story that they were hitchhiking because they did not want to tell police they had been engaged in sex work (**CAB 89 [36], 133–134 [201]–[202]**).
15. No suspects were identified until 2019, when the respondent was identified as a person of interest based on a DNA match using forensic evidence taken from the complainants (**CAB 131 [190]**).

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[3] AB and JJ are pseudonyms. They were referred to respectively by the pseudonyms 'Caroline Evans' and 'Rebecca Green' in the reasons for sentence, and as 'AB' and 'JJ' in the judgment below. JJ died prior to trial. The prosecution did not adduce evidence of her statements to police regarding the offending but instead relied on AB's evidence to prove the respondent's offending against JJ (**CAB 131 [190]**).

[4] Appellant's Book of Further Material ('**AFM**').

[5] Transcript of Proceedings, *DPP v Tsalkos* (County Court of Victoria, CR-21-00085, Judge Carlin, 23–31 August 2022) 73.22–74.6, 100.29–101.5 ('Trial transcript').

The complaint and distress evidence

16. AB and JJ were taken to hospital for a medical examination, arriving at around 10:25 am on the day of the offending. At trial, the prosecution adduced evidence from AB's mother 'FR' (without objection) that she attended at the hospital and saw her daughter on a bed in a cubicle. FR said that AB was 'very, very distressed' and told her that 'somewhere in the night before' she was with a friend, they had gotten into a car with a man, he had raped both of them, they were very frightened and he had threatened them with a knife. She described her daughter as 'very very upset' and 'very emotional' but not 'yelling or screaming or anything like that' (**CAB 134 [204]–[205]**). In cross-examination FR was asked if, when she had seen AB in hospital, AB had told her what she had been doing in St Kilda that night. FR could not remember.[6] There was no challenge to FR's observations of AB's distressed condition.[7]

17. In her evidence, AB recalled that her mother had attended at the hospital but did not recall whether she had had a conversation with her mother at the hospital (although accepted that she likely did). However, AB stated that she did not tell her mother that she had been working as a prostitute because '[a]t that stage, we weren't saying that' (**CAB 152 [292]**).

The respondent's evidence

18. The respondent gave evidence at trial that he had engaged in consensual sexual activity with AB and JJ on the night of the alleged offending. He stated that he did not have oral sex with the complainants, he did not tell them he was a police officer, he did not threaten them with a knife, and neither complainant said 'no' or indicated that they did not want to have sex with him (**CAB 134–135 [207]–[210]**).

19. His evidence was that after he had sex with both girls, AB and JJ stole his wallet and marijuana and tried to run away, that he had chased them and they threw back his belongings and that he threatened to report them to police (**CAB 134 [208]**).

The prosecutor's closing address

20. In his closing address, the prosecutor referred to the complaint evidence given by

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[6] Trial transcript 126.9–16 (**AFM 10**).
[7] Trial transcript 125.31–126.18 (**AFM 9–10**).

FR and said that the complaint and observations of distress is 'evidence that supports [AB] having been consistent about the core allegations'. He then added:

> But her mother's observation of the distress that [AB] was experiencing at the time is independent evidence. And that shows that provided you're satisfied that there was a causal connection between the way [AB] was upset in that hospital bed the morning after and the alleged offending, well, you can use your common experience that recounting a stressful experience is accompanied by outward signs of distress.
>
> [AB] told you about her naivete at age 16, about her fears for the relationship with her mother if she found out what she had been doing and how close in time it was to the alleged kidnapping and rape, just a matter of hours. You could be satisfied that [AB] was upset, as observed by her mother, because of what she'd experienced and that is independent evidence that supports her.[8]

The defence case regarding the distress evidence

21. The respondent did not apply to limit the use of the distress evidence from FR under s 136 of the EA. The defence case was that there were other reasons why AB was distressed, including that she had lied, or was going to lie to the police about not having been engaged in sex work (**CAB 151 [287]**).

The trial judge's directions

22. The trial judge directed the jury, without exception, in terms that reflected her earlier discussion with counsel (**CAB 135–136 [212], 136 [214]**). After summarising FR's evidence, the judge gave the following direction (**CAB 27.13–28.10, 136–137 [215]**):

> If you find that [AB] was distressed soon after the alleged offence – and [FR's] evidence was – about that was not disputed – the prosecution invites you to use this as indirect evidence; that is, circumstantial evidence that supports its case that [AB] did not consent to the sexual penetration with the accused. The defence of course dispute this and they say, well, there might be other reasons that she was upset. She might have been upset because she was lying about the fact that – or either lying – either was going to lie, or had already lied to the police about the fact she was not working as a prostitute and how she came to be in St Kilda, knowing that that was something she said on oath, or was

[8] Trial transcript 275.8–23 (**CAB 136 [213]; AFM 11**).

> under penalty of perjury. So she might have been upset about that or that her mother, generally, might have found out that she was working as a prostitute.
>
> So that is what the defence say, so it is for you to assess those arguments. It is up to you to decide whether [AB's] distress was because she had been raped, or for some other reason, and what you make of the arguments of counsel. Obviously, you cannot use it as indirect evidence supporting the charges unless you are satisfied that she was distressed because of the alleged sexual offending, and not for some other reason. If you do find that causal connection it is for you to evaluate the weight of the evidence; that is, the extent to which it helps you decide the issues in this case, and in doing this you will use your common sense.

Proceeding in the Court below

23. The respondent sought leave to appeal against his convictions and sentence to the Court below. Ground 1 of the conviction application alleged that a substantial miscarriage of justice occurred because (a) the jury was invited to use the complainant's distress on 7 May 1987 as independent support for her account; and (b) the jury was not warned that evidence of distress is a species of [evidence] that carries little weight (**CAB 74**).
24. The Court below, sitting as a bench of five, by a majority (Emerton P, Priest, McLeish, Boyce JJA; Niall JA dissenting) allowed the respondent's appeal on ground 1(a), set aside his convictions and ordered a re-trial.
25. Of the majority, Emerton P, McLeish and Boyce JJA (the **primary judgment**) held that:
    a. The distress evidence was admissible as context for the complaint evidence, but it was not capable of being used by the jury as independent, indirect, or circumstantial evidence of the events alleged by AB (**CAB 82–83 [8(a)], 83 [10]**).
    b. In order for distress to be used in the latter way, 'the connection between the distress and the events alleged must be direct, that is, unmediated by (or independent of) the representations constituting the complaint' (**CAB 84 [15]**).
    c. The factors relevant to whether distress can be used by a jury as independent circumstantial evidence are the same as those required for distress to be used as

corroboration at common law, as set out in *R v Flannery*[9] (**CAB 85–86 [21], 86 [24]**).

d. In order to be admissible as 'independent supportive evidence' the evidence of AB's distress, when examined in the context of all the evidence to be adduced at trial, had to be rationally capable of being characterised as attributable to the sexual offending AB alleged, as distinct from being caused by her fear or shame that her mother would find out that she and JJ had been out on the streets of Melbourne for a number of days working as prostitutes. The evidence did not have that capacity, but even if it did, if both factors were 'in play' in causing the distress, the probative value of AB's evidence would be slight and would be outweighed by the danger of unfair prejudice, engaging s 137 of the EA (**CAB 87–88 [30]**).

e. Because there were other significant possible causes for AB's distress, and the fact that AB and JJ were preparing to commit themselves to a false and perjured account of their activities, it was not possible for the jury to find the requisite causal connection between the alleged offending and AB's distress at the hospital and the evidence was 'intractably neutral' (**CAB 92 [50]**).

f. A substantial miscarriage of justice had occurred because the jury was invited to use AB's distress as independent support for her account (**CAB 96 [65]**).

26. It was therefore unnecessary to determine the respondent's complaint that the jury had not been warned that the distress evidence 'carried little weight' (**CAB 96 [64]**), although the primary judgment considered such evidence is 'susceptible to being given more weight than it deserves' (**CAB 94 [56]**).

27. Priest JA held that the distress evidence was irrelevant because the four and a half hours elapsed between the cessation of the offending and observation of the distress was 'too great' to establish the necessary causal link and that there were too many alternative explanations for AB's distress to permit the jury to conclude that 'the only rational explanation for the distress was the alleged offending' (**CAB 128 [178]**).

28. Niall JA in dissent held that when the charge is read as a whole, the trial judge did not invite the jury to treat the distress evidence as independent corroboration of the complainant's account and, alternatively, that while there were other possible causes

[9] [1969] VR 586 ('*Flannery*').

for AB's distress, it was open to the jury to use AB's distress as evidence that she had been sexually assaulted (**CAB 150–151 [281]–[285]**). Further, the trial judge had not been required to direct the jury that the distress evidence 'carried little weight' (**CAB 151 [288]–[289]**).

PART VI: ARGUMENT

A. Summary

29. The primary judgment was wrong to conclude that the distress evidence was incapable of providing indirect support of the occurrence of the alleged sexual offences against AB. In summary, that is for the following reasons.

30. Firstly, the conclusion stemmed from the erroneous finding that the common law limitation on the use of distress evidence as corroboration, as summarised in *Flannery*, remains 'good law and represents a clear expression of the sorts of considerations that might bear upon the decision to admit evidence of distress as independent circumstantial evidence' (**CAB 85–86 [21]**). The primary judgment assimilated the common law rules of corroboration into the requirements of ss 55 and 137 of the EA and made the same essential error identified by this Court in *The King v Churchill (a pseudonym)*:[10] see **section B** below.

31. Secondly, the primary judgment was in error to hold that a trial judge must exclude from their consideration the content of the complaint when determining whether it is open for the jury to find a causal connection between distress observed at the time of the complaint and the offending (**CAB 84 [15]**). The content of a complaint of sexual offending is clearly relevant to assessing whether a complainant's distress when making that complaint is causally linked to the alleged offending: see **section C** below.

32. Thirdly, the primary judgment erred in applying a test of 'intractable neutrality' to determine whether the evidence of distress had been properly admitted at trial, and whether an error occurred because the jury had been invited to use evidence of the complainant's distress as independent support for her account (**CAB 87 [28], 92 [50]–[51]**). The concept of 'intractable neutrality' in determining the relevance of circumstantial evidence under s 55 of the EA or its probative value under s 137 of

[10] [2025] HCA 11, [38] (Gageler CJ, Gordon, Gleeson, Jagot and Beech-Jones JJ) ('*Churchill*').

the EA is unhelpful and likely to mislead the trial judge in their task: see **section D** below.

33. The jury was entitled to use the distress evidence as support for the occurrence of the respondent's sexual offending. Accordingly, there was no error in the respondent's trial by the admission of the evidence, or because the trial judge did not limit the use the jury could make of the evidence: see **section E** below.

B. The primary judgment made the same essential error identified in *Churchill*

34. The primary judgment held that the evidence of AB's distress was not capable of being used by the jury as 'independent', 'indirect' or 'circumstantial' evidence of the events alleged by AB, and a substantial miscarriage of justice had been occasioned in the respondent's trial because the jury had been invited by the prosecutor to do so and the trial judge had left it to the jury to decide whether it was open for it to do so (**CAB 83 [10], 96 [65]**).

35. The primary judgment considered that distress evidence could only be used as indirect, independent or circumstantial evidence supporting the complainant's testimony of the alleged offences if it met the requirements of corroboration at common law as set out in *Flannery* (**CAB 85–86 [21]–[24]**). It considered that each of the terms 'indirect', 'independent' and 'circumstantial' were interchangeable and meant the same as 'corroborative' (**CAB 83 [9]**).

36. The primary judgment reasoned that in order to be relevant within the meaning of s 55 of the EA and admissible as 'independent supportive evidence', the evidence of AB's distress, when examined in the context of all the evidence to be adduced at trial, had to be rationally capable of being characterised as attributable to the alleged sexual offending, as distinct from having been caused by AB's fear or shame that her mother would find out that she and JJ had been out on the streets of Melbourne for a number of days working as prostitutes (**CAB 87–88 [30]**).

37. In so reasoning, the primary judgment assimilated the requirements of admissibility under the EA with the requirements of the use of distress evidence as corroboration under the common law, making the same essential error as this Court identified in *Churchill*.[11]

[11] The same error infected the reasoning in Priest JA's judgment.

38. As this Court explained in *Churchill*, the approach taken at common law in the past to the permissible use by a jury of evidence of pre-trial distress on the part of a complainant in the trial of a sexual offence as set out in *Flannery* was the product of common law evidentiary rules.[12] There have, however, been significant changes to the law of evidence in Victoria since *Flannery* was decided, namely that:
    a. the whole notion of corroboration of the testimony of a complainant has been swept away by s 164 of the EA;[13]
    b. the related notion that a trial judge might need to direct a jury that evidence of a complainant's distress should only be treated as corroborative evidence if there was no other reasonable explanation consistent with innocence has been abolished by ss 61 and 62 of the *Jury Directions Act 2015* (Vic) (the **JDA**);[14]
    c. complaint evidence can now be used as evidence of the facts asserted and is no longer confined to assessment of the complainant's credibility;[15] and
    d. the law now recognises that sexual abuse can remain fresh in the memory for many years, and consequently complaints made even many years after the alleged offending may be admissible under s 66 of the EA.[16]
39. Given those significant changes, the common law principles governing the use of distress evidence as corroboration had no application to the determination of the respondent's complaint that his trial had miscarried because the jury was invited to use evidence of the complainant's distress to infer that she had not consented to sexual penetration by the respondent, and the primary judgment was wrong to have concluded otherwise.

C. No requirement for causal link between offending and distress without regard to complaint evidence

40. The primary judgment held that in order for the evidence of distress to be used as circumstantial evidence of the offending, the connection between the distress and

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[12] *Churchill* [42].
[13] Ibid [49].
[14] Ibid [50].
[15] Ibid [51]–[52]; *Papakosmas v The Queen* (1999) 196 CLR 297, 309–311 [33]–[43] (Gleeson CJ and Hayne J), 311–312 [45]–[47] (Gaudron and Kirby JJ), 324 [89] (McHugh J) ('*Papakosmas*').
[16] *Churchill* [51]; *R v Bauer (a pseudonym)* (2018) 266 CLR 56, 99 [89] (Kiefel CJ, Bell, Gageler, Keane, Nettle, Gordon and Edelman JJ) ('*Bauer*').

the events alleged must be 'direct, that is, unmediated by (or independent of) the representations constituting the complaint' (**CAB 84 [15]**).

41. As the primary judgment acknowledged, this required the jury 'to negotiate the difficult analytical path of separating the distress from its immediate context' (the complaint) and is an exercise 'fraught with difficulty' (**CAB 85 [18]**).

42. At common law, the jury was prohibited from using complaint evidence as evidence of the asserted facts and could only use the evidence in assessing the complainant's credibility. However, as Gleeson CJ and Hayne J observed in *Papakosmas v The Queen*:

> The reason why, at common law, the evidence could only be used for a purpose relating to the credibility of the complainant was the hearsay rule. It was not that such evidence could not rationally affect the probability that there was no consent to the intercourse. It was that to use the evidence as evidence of the truth of what the complainant was alleging would be to use it for a hearsay purpose …
>
> The Act has changed that. Such evidence, if relevant, may now be used for a hearsay purpose if it falls within an exception to the exclusionary rule (subject to other provisions of the Act such as ss 135, 136 and 137).[17]

43. It is apparent, then, that the rationale at common law for requiring a causal link to be established between distress and the alleged offending, without recourse to the content of the complaint, was the operation of the hearsay rule. That rationale no longer applies to complaint evidence admitted under s 66 of the EA. Further, requiring a jury to disentangle the distress from the complaint evidence re-introduces unnecessary complexity into the fact-finding process which had been abolished by this Court's judgment in *Papakosmas*.[18]

44. The content of the complaint is plainly a relevant factor in assessing whether there is a causal link between a complainant's observed distress and the alleged offending the subject of the complaint. It is a common human experience that recalling a stressful or traumatic event may be accompanied by outward signs of distress. If the complaint evidence is admitted under s 66 of the EA and can be used as evidence of the facts asserted, that evidence should be taken into account by the trial judge in

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[17] *Papakosmas* 309 [32]–[33].

[18] See *Papakosmas* 305–306 (Gleeson CJ and Hayne J). Albeit now in the reverse, whereby complaint evidence is capable of supporting the prosecution case, but evidence of distress is not. At common law the jury was permitted to use the evidence of distress as support for the charges, but not the complaint.

assessing the admissibility of the distress evidence and by the jury in determining whether there is a causal link between the distress and the alleged offending.

D. 'Intractable neutrality'

45. The primary judgment considered that evidence of distress, 'as independent circumstantial evidence', may be admitted for this purpose so long as it is not 'intractably neutral' as to its causal connection with the alleged offending (**CAB 87 [28]**). In allowing the respondent's appeal, the primary judgment found that the distress evidence was 'intractably neutral' as to its causal connection with the alleged offending and, as a result, was not capable of providing independent support for AB's allegations and should not have been left to the jury on that basis (**CAB 92 [50]–[51]**).
46. The term 'intractably neutral' is not found in the EA. It is a term most commonly used in assessing whether post offence conduct or lies can be relied on as implied admissions of the charged offence as opposed to a lesser charge.[19] However the reasoning processes that a jury is required to undertake in relation to incriminating conduct is different to other pieces of circumstantial evidence making the use of the term in this context inapposite.
47. Section 21(1)(a) of the JDA creates a statutory precondition to the use of evidence as an implied admission of guilt. A trial judge must direct a jury that it can only use evidence that an accused engaged in post offence incriminating conduct because he or she believed they committed the offence if the only reasonable explanation of the conduct is that the accused held that belief.
48. There is no such statutory precondition that applies to circumstantial evidence generally. Further, as was held in *Churchill*, the notion that a trial judge might have been required to direct a jury that evidence of a complainant's distress should only be treated as corroborative evidence if there was no other reasonable explanation consistent with innocence has been swept away by ss 61 and 62 of the JDA.[20]

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[19] Although it was used in the context of the admissibility of distress evidence in *Flora v The Queen* (2013) 233 A Crim R 320.

[20] *Churchill* [50]; *DPP v Roder (a pseudonym)* (2024) 98 ALJR 644, 649 [17] (Gageler CJ, Gordon, Edelman, Steward, Gleeson, Jagot and Beech-Jones JJ).

49. The existence of competing inferences can render evidence irrelevant.[21] All that is required to meet the test of relevance under s 55 is that the evidence has the capacity to rationally affect the assessment of the *probability* of the existence of a fact in issue.[22] If it is rational for a jury to reason that it is likely, although not inevitable, that a complainant's distress was caused by the alleged offending, they will be entitled to use it as evidence tending to confirm or support the complainant's testimony in relation to the charges, subject to the operation of ss 136 and 137 of the EA.[23]

50. The assessment of the probative value of the distress evidence must be made taking the use of the evidence at its highest. The only sense in which competing inferences are of significance in the assessment of the probative value of evidence is in the determination of whether the evidence could rationally affect the assessment of the probability of the existence of a fact in issue.[24]

51. Questions of admissibility usually arise at the point the evidence is sought to be tendered, not at the conclusion of the evidence. It must be doubted that the EA contemplates a trial judge would revisit the admissibility of pieces of circumstantial evidence already adduced in a trial at the conclusion of the evidence and determine whether the evidence is 'intractably neutral' and should thus be withdrawn from the jury's consideration.

52. The trial judge was not required to undertake an assessment to determine whether the distress evidence was 'intractably neutral'. That exercise involves weighing the likelihood of the possible explanations, after assessing the credibility and reliability of the evidence, which is the role of the jury.

E. The jury was entitled to use distress evidence in support of the sexual offences concerning AB

53. The correct analysis regarding the admissibility of the distress evidence was set out by this Court in *Churchill*:[25]

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[21] *Bauer* 91–92 [69].
[22] *IMM v The Queen* (2016) 257 CLR 300, 313–314 [45] (French CJ, Kiefel, Bell and Keane JJ) ('*IMM*').
[23] *Doney v The Queen* (1990) 171 CLR 207, 211 (Deane, Dawson, Toohey, Gaudron and McHugh JJ).
[24] *Bauer* 91–92 [69].
[25] *Churchill* [27], [29]–[30] (citation omitted).

> Ordinarily, like evidence of the complaint itself, evidence of distress on the part of a complainant at the time of making a complaint is evidence that is relevant in the trial within the meaning of s 55 of the *Evidence Act* on either or both of two bases: first, as evidence that, if accepted, could support the credit of the complainant if the jury were to find a causal connection between the distress and the making of the complaint, and second, as evidence that, if accepted, could support the occurrence of the offending if the jury were to find a causal connection between the distress and the offending. On either basis, the evidence could rationally indirectly affect the assessment of the probability of the existence of a fact in issue – namely, whether the offending occurred – and is therefore relevant within the meaning of s 55.
>
> …
>
> If, as here, such evidence is not excluded by the hearsay rule or excluded or limited under s 135, 136 or 137, it is admissible under s 56 of the *Evidence Act*.
>
> The evidence, having been admitted as indirect or circumstantial evidence of the offending conduct, is then left to the jury to consider with other evidence in the exercise of its collective wisdom informed by the ordinary knowledge and experience of its members. It is for the jury to determine whether to accept the evidence and the weight to be given to the evidence if accepted in the context of the jury's overall consideration of the totality of the direct and indirect evidence in the trial in the performance of its function of determining whether the offence charged has been proved beyond reasonable doubt. In appropriate cases the jury may be given a general direction about the drawing of conclusions and the distinction between direct and circumstantial evidence.

Distress evidence was relevant within the meaning of s 55 of the EA

54. Here, there was a both a temporal and circumstantial connection between the observed distress and the offending, such that it was reasonably open to infer a causal connection between AB's distressed condition and the offending.

55. The distress was observed hours after the offending — which had itself taken place over a protracted period — had concluded. AB, then a child, had been transported to the hospital to undergo an examination related to the offending. FR had been contacted and told to come to the hospital regarding her daughter. When she arrived, FR was taken to a cubicle where she saw AB on the bed and observed that AB was 'very, very distressed'. AB told her mother that she had been raped. She said that she was with a friend, and they had got into a car with a man and he had raped both

of them and that they were frightened because he threatened them and he had a knife. There was no evidence that AB raised any other concern with FR at the time she was distressed. The clear inference from the evidence was that AB was 'very very distressed' because she had been subjected to a violent sexual assault, which she was then disclosing to her mother.

56. The existence of a possible alternative cause of AB's distress identified by the primary judgment, namely shame or fear her mother would find out she had been engaged in sex work, did not deprive the evidence of its capacity to rationally affect the probability of a fact in issue, namely that AB had not consented to any of the sexual acts the subject of the charges.
57. That possible alternative was not so likely that it would have been irrational for the jury to infer the distress was linked to the offending.
58. It was open to the jury to reason that AB's significant distress was more likely linked to the traumatic events of the previous evening as opposed to any stress or shame AB may have felt at the prospect of her mother finding out she had been engaging in sex work for a number of reasons.
59. Firstly, the level of distress observed by FR was significant, which a jury could properly reasons was more consistent with a serious sexual assault rather than fear or shame of her mother finding out about her sex work.
60. Secondly, upon seeing her mother for the first time since the assault, AB told her she had been raped. She did not tell her mother about any other matter that was upsetting her at that time.
61. Thirdly, at the time of AB's complaint to her mother, she understood the purpose of her mother attending at the hospital was as a 'support' for her (**CAB 89 [38]**).
62. Although AB reported being concerned about her mother's reaction to the fact she had engaged in sex work, and contrary to the finding of the primary judgment (**CAB 91 [43]**), there was no evidence that she 'lied' to her mother at the relevant time — AB's evidence was that she did not tell her mother why she was in St Kilda, and FR's evidence was that she could not remember if she was told by AB that she had been in St Kilda. On AB's evidence, there was no reason for her to believe that it was likely her mother would find out she had been engaging in sex work, given '[a]t that stage, we weren't saying that'.

No basis to limit use of the evidence under 136 of the EA or exclude the distress evidence under s 137 of the EA

63. The primary judgment considered that even if AB's distress could be attributed to the alleged sexual offending as distinct from the fear or shame of her mother finding out she had been engaged in sex work so as to meet the threshold of relevance under s 55, it should have been excluded under s 137 of the EA because the probative value of the evidence was slight, since both factors 'were in play' and would be outweighed by the danger of unfair prejudice (**CAB 87–88 [30]**). Later in their reasons, the primary judgment identified the danger of unfair prejudice of distress evidence being 'because distress involves the expression of strong feelings, and is likely to enliven strong feelings in others, evidence of distress is susceptible to being given more weight than it deserves, especially where there is very limited evidence other than the complaint itself and the case is essentially one of word against word' (**CAB 94 [56]**). The primary judgment further considered that the introduction of s 54K into the JDA 'tells us something more generally about the weight to be given to evidence of a complainant's response to having been offended against sexually. Just as an absence of distress may not indicate that a rape or assault did not occur, so too the presence of distress may not indicate that it did' (**CAB 96 [62]**).
64. The assessment of the probative value of the evidence was to be undertaken taking the evidence at its highest, which in this case meant assuming the jury would draw the inference the distress was casually linked to the respondent's sexual offending. The primary judgment was wrong to find that the probative value of the evidence was slight, because of the existence of an alternative inference.
65. The primary judgment was also wrong to conclude that distress evidence accompanying a complaint is susceptible to being given more weight than it deserves or that s 54K of the JDA is relevant in assessing the probative value of distress evidence accompanying complaint evidence in a trial for a sexual offence.
66. Section 54K of the JDA provides that if a complainant is to give evidence and in the absence of 'good reasons for not doing so', the trial judge must inform the jury that experience shows that 'because trauma affects people differently, some people may show obvious signs of emotion or distress when giving evidence about a sexual offence, while others may not' and that 'both truthful and untruthful accounts of a sexual offence may be given with or without obvious signs of emotion or distress'.

67. The primary judgment's concern that distress evidence is susceptible to be given more weight than it deserves does not accord with decisions of this Court which make clear that distress evidence accompanying a complaint of a sexual offence is well within the province of the jury to assess. In *IMM v The Queen* the majority considered there was little risk the jury would misunderstand the use to which the complaint evidence, which was accompanied by distress, was put,[26] and in *R v Bauer (a pseudonym)* the Court considered there was little if any risk the jury would reason improperly from the complainant's representations, also accompanied by distress, to a conclusion of guilt.[27]

68. FR's evidence of her observations of AB's distress was not of a kind that was likely to evoke a particularly strong emotional reaction for the jury. Evidence of pre-trial distress is not a class of evidence that is generally unreliable within the meaning of s 31 of the JDA.[28] The jury was given the general direction that it must decide the issues on the basis of admissible evidence only,[29] which included a specific warning that feelings of sympathy or prejudice for either party had no part to play in the jury's decision and must be ignored.[30]

69. In *Churchill*, this Court rejected a submission that the use of distress evidence as indirect support that the offending occurred, or as supporting the credit of the complainant were in tension with s 54K of the JDA, stating:[31]

> Neither of those potential bases of relevance is in tension with the requirement of s 54K of the *Jury Directions Act* … That is because whether, and if so how, evidence of such pre-trial distress on the part of a particular complainant at the time of making a particular complaint might ultimately be related to trauma induced by the particular offending alleged is quintessentially a matter for the jury to consider as part of its overall determination of whether the elements of the sexual offence have been proved beyond reasonable doubt in the particular case.

70. That is what occurred here. The jury was directed that it was entitled to evaluate, applying common sense, the weight to be given to the distress evidence, albeit in

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[26] *IMM* 320 [74] (French CJ, Kiefel, Bell and Keane JJ).
[27] *Bauer* 104 [100].
[28] *Churchill* [31].
[29] JDA s 3(d) (definition of 'general directions').
[30] CAB 14.2–16.
[31] *Churchill* [28] (citations omitted).

terms that were overly favourable to the respondent (**CAB 136–137 [215]**). The respondent was also protected from the jury using indirect evidence to speculate by the general directions regarding the difference between direct and indirect evidence and the process of drawing inferences.[32] There was no danger of unfair prejudice that required the evidence to be excluded under s 137 of the EA.

71. For the same reasons, there was no basis for the trial judge to limit the use of the evidence under s 136 of the EA as there was no relevant unfairness to the respondent by allowing the jury to use the distress evidence as indirect evidence of the sexual offending.

PART VII: ORDERS SOUGHT

72. The orders sought by the appellant are:

a. Appeal allowed.

b. Set aside the order of the Court below made on 19 December 2024 allowing the appeal to that Court and quashing the respondent's convictions and, in its place, order that the respondent's appeal to the Court below against conviction be dismissed.

c. Remit the respondent's appeal against sentence to the Court below for rehearing.

PART VIII: ESTIMATE OF TIME

73. It is estimated that the appellant will require up to 1.5 hours for oral submissions.

Dated: 4 September 2025

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[32] CAB 13.24–14.1, 16.2–17.29.

ANNEXURE TO APPELLANT'S SUBMISSIONS

No	Description	Version *eg: Version 26 (1 July 2020 to 24 March 2024)*	Provision(s)	Reason for providing this version *eg:* • *Act in force on the date of the offence;* • *date of judgment in Court of Appeal;* • *for illustrative purposes only*	Applicable date or dates (to what event(s), if any, does this version apply) *eg: 21 April 2018: date of Minister's decision*
1.	*Evidence Act 2008* (Vic)	Version 26 (1 July 2020 – 24 March 2024)	55, 66, 135, 136, 137, 164	Act in force at the time of the respondent's trial	23 August 2022 – 31 August 2022: Respondent's trial
2.	*Jury Directions Act 2015* (Vic)	Version 11 (29 October 2018 – 31 December 2022)	3(d), 21, 31, 61, 62	Act in force at the time of the respondent's trial	23 August 2022 – 31 August 2022: Respondent's trial
3.	*Jury Directions Act 2015* (Vic)	Version 15 (Current)	54K	For illustrative purposes only	