HIGH COURT OF AUSTRALIA

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File Number:	M64/2025
File Title:	The King v. Tsalkos
Registry:	Melbourne
Document filed:	Form 27E - Reply
Filing party:	Appellant
Date filed:	25 Sep 2025

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IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

BETWEEN: **The King**
Appellant

and

Theodoros Tsalkos
Respondent

APPELLANT'S REPLY

PART I: CERTIFICATION

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

PART II: REPLY

A. The concept of 'independent evidence'

2. The respondent contends that the prosecutor's description of the distress evidence as 'independent evidence' in his closing address was an invitation for the jury to treat the evidence as 'corroboration' (**RS**[1] **[12]**). He argues that it was this submission that necessitated the Court below to consider whether that evidence had been admissible as 'independent evidence/corroboration', (**RS [7]**) and that the majority was correct to conclude that the evidence of distress was 'not admissible as independent evidence' (**RS [15]**).
3. These contentions, at least implicitly, reflect a reversion to the common law concept of independent corroboration rather than engaging with the requisite statutory framework governing the admissibility and permissible use of the distress evidence in the

[1] Respondent's Submissions (**RS**).

respondent's trial. As was made plain by this Court in *The King v Churchill (a pseudonym)*,[2] that approach is erroneous.[3]

4. While the characterisation of evidence as 'independent' was essential to the determination of the admissibility of evidence as 'corroboration' at common law,[4] the *Evidence Act 2008* (Vic) (the **EA**) contains no reference to 'independent evidence' and there are no provisions which contemplate the admission of evidence on that basis. Accordingly, there is no statutory foundation for a trial judge or an appellate court to determine the admissibility of evidence by reference to its status as 'independent'. Such an inquiry distorts the analysis required under the EA for assessing both the admissibility and permissible use of the evidence.
5. The fact that the prosecutor described FR's observation of the complainant's distress as 'independent evidence' that supported the complainant's account in his closing address did not require or permit the Court below to revert to concepts of independent corroboration in considering the admissibility or permissible use of that evidence.[5]
6. It is difficult to see how any submission made by counsel in a closing address could bear upon the question of admissibility. The admissibility of evidence is a matter for determination of the trial judge and will, by necessity, have been resolved prior to the making of such submissions.[6]
7. Whether a submission made by a prosecutor during their closing address about a piece of evidence constitutes an error occasioning a substantial miscarriage of justice[7] raises different considerations.
8. In any event, there was nothing improper about the prosecutor's closing submission in the respondent's trial. Properly understood, the reference to FR's observation of the complainant's distress as 'independent' was merely to indicate that the evidence came from a source other than the complainant – a fact that would have been apparent to the jury. Nothing this Court said in *Churchill* supports the respondent's contention that a prosecutor is prohibited from characterising evidence of a witness' observations of a complainant's distress as being independent in a closing address (**cf RS [9]**).

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[2] (2025) 99 ALJR 719, 727 [38] (Gageler CJ, Gordon, Gleeson, Jagot and Beech-Jones JJ) ('*Churchill*').
[3] *Churchill* 729 [53].
[4] *Churchill* 727–728 [43]–[44].
[5] *Churchill* 729 [53].
[6] *IMM v The Queen* (2016) 257 CLR 300, 315 [51] (French CJ, Kiefel, Bell and Keane JJ) ('*IMM*').
[7] Within the meaning of s 276 of the *Criminal Procedure Act 2009* (Vic).

B. Intermediate fact finding

9. The respondent contends that the distress evidence was irrelevant because there was no rational basis for the jury to exclude as a reasonable possibility that the distress was wholly caused by things other than the occurrence of the offences (**RS [21]**). That contention is wrong. There is no requirement for a jury to exclude all other reasonable possible causes of the complainant's distress as a pre-condition to its use as indirect evidence of the occurrence of the offences. Such an approach is an implicit reversion to the historical common law rules relating to intermediate fact-finding, which have been expressly abolished by s 61 of the *Jury Directions Act 2015* (Vic).[8]
10. As was observed in *Churchill*, the circumstances in which evidence of distress on the part of a complainant when making a complaint about the charged offence is not relevant, must be rare.[9]
11. None of the matters raised by the respondent either individually or collectively prevented the jury from finding a causal link between the complainant's distress and the offending, or the distress and the making of the complaint concerning the offending.
    a) Firstly, there was no requirement for the complainant to give direct evidence about the cause of her distress at the time of making her complaint, particularly where there was a body of other evidence from which the relevant inference could be properly drawn (**AS [55]**, **cf RS [20.1]**).
    b) Secondly, the fact that FR came upon the complainant in a state of distress when she walked into the cubicle did not prevent the jury inferring a causal link between the distress and the complaint. Neither logic nor ordinary human experience mandate that a causal connection between a complainant's distress and the making of the complaint may only be inferred if the complaint occurs first in time (**cf RS [20.2]**).
    c) Thirdly, the mere existence of potential alternative causes for the complainant's distress did not render the evidence irrelevant. The question of whether the distress observed by FR was more likely attributable to those alternative causes was a matter for the jury's determination (**cf RS [20.3]–[20.5]**).
12. Finally, the respondent's contentions regarding the assessment of the probative value of the evidence should also be rejected. The requirement to take the evidence at its highest for the purpose of assessing its probative value was not confined to merely accepting the

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[8] *Churchill* 728 [45], [50].
[9] *Churchill* 724 [26].

fact that the complainant was distressed; it also required the acceptance of any rational inferences the jury could draw from that evidence (**cf RS [23]–[25]**).

13. As the majority of this Court explained in *IMM*:

> The assessment of "the extent to which the evidence could rationally affect the assessment of the probability of the existence of a fact in issue" requires that the possible use to which the evidence might be put, which is to say how it might be used, be taken at its highest.[10]

14. Contrary to the respondent's contention, the Victorian Court of Appeal in *Di Natale (a pseudonym) v The Queen*[11] and the New South Wales Court of Criminal Appeal in *Franklin v The Queen*[12] applied the above test in *IMM* to the assessment of the probative value of circumstantial evidence consistently.

Dated: 25 September 2025

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BRENDAN F. KISSANE
Director of Public Prosecutions (Vic)
T: (03) 9603 7666
E: director@opp.vic.gov.au

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STEPHANIE CLANCY
T: (03) 9225 7333
E: stephanieclancy@vicbar.com.au

[10] *IMM* 313 [44] (French CJ, Kiefel, Bell and Keane JJ).
[11] [2022] VSCA 99, [27].
[12] [2021] NSWCCA 260, [63]–[65].