HIGH COURT OF AUSTRALIA

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Details of Filing

File Number:	M64/2025
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Filing party:	Respondent
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Important Information

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IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

BETWEEN: THE KING
Appellant

and

THEODOROS TSALKOS
Respondent

RESPONDENT'S SUBMISSIONS

PART I: FORM OF SUBMISSIONS

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

PART II: STATEMENT OF ISSUES

2. This appeal presents the following issues:
   2.1. May a prosecutor invite the jury to treat evidence of a complainant's distress as evidence that independently supports the complainant's evidence?
   2.2. Did the Court below err in finding that the evidence of the complainant's distress was not admissible as evidence that independently supported the complainant's evidence?
   2.3. Does "taking the evidence at its highest" for the purpose of assessing its probative value permit or require the Court to assume all inferences advanced by the prosecution will be drawn by the jury?
   2.4. Did the Court below err in finding a substantial miscarriage of justice had been occasioned by the risk the jury used the evidence of the complainant's distress as evidence that independently supported the complainant's evidence?

PART III: NOTICE UNDER S 78B OF THE JUDICIARY ACT 1903 (CTH)

3. Notice under s 78B of the *Judiciary Act 1903* (Cth) is not required.

PART IV: STATEMENT OF CONTESTED MATERIAL FACTS

4. The Respondent contests the Appellant's submission that there was no evidence AB lied to FR about the circumstances in which AB came to be in the Respondent's car and that the Court below erred in so finding (**AS [62]**).
5. There was no error. AB was asked:

   > What happened when your mum came to the hospital? ---Um, we were still sticking to the story that we were hitch-hiking…(**CAB 89 [38]**).

6. The Appellant's submission requires that "still sticking to the story" be interpreted as still "sticking to" but not saying the story, even though the answer given by AB was in response to a question about what "happened." Such an interpretation is not to be preferred to that adopted.by the Court below (**CAB) 91 [43]**). Nor was it adopted by the prosecutor at trial who, in closing to the jury, seems to have accepted that AB lied to her mother (**RFM 4**):

PART V: ARGUMENT IN ANSWER TO ARGUMENT OF THE APPELLANT

Overview

7. Central to this appeal is the particular use the jury was invited and permitted to make of the evidence of AB's distress. The issue on appeal to the Court below was whether the distress evidence was admissible or permitted to be used for the specific purpose advanced by the prosecutor in his closing address, namely as independent evidence (corroboration). The finding, in the primary judgement and that of Priest JA, was that the distress evidence was not admissible for that purpose or that such use must be excluded.
8. The decision of the Court below was peculiar to the manner in which the prosecution put its case at trial. The prosecutor invited the jury to use the evidence of distress as corroboration; the Court below (by majority) found it was not admissible for that purpose and a substantial miscarriage of justice arose from the risk the jury used it for that purpose.

Relevance of distress as evidence independent of the complainant

9. In *The King v Churchill* (*Churchill*),[1] this Court concluded that relevance and permissible use should not be analysed by reference to the concept of independent

[1] (2025) 99 ALJR 719.

corroboration, observing that to do so is a recipe for confusion. It follows that trials conducted following *Churchill* should not feature invitations to treat evidence of a complainant's distress as independent evidence. After all, the relevance of circumstantial evidence falls to be considered by reference to the evidence as a whole – to evaluate its value independently of some evidence is antithetical to its status as circumstantial evidence.

10. The Court below also observed that the treatment of evidence of a complainant's distress as independent evidence was fraught and unnecessary (**CAB 84 [17]; 85 [18]; 147 [264]**). Nonetheless, the Court below had to deal with the consequences for the Respondent's trial of the prosecution invitation to treat the evidence as independent evidence that supported AB's account. The primary judgement was reached by reference to the provisions of the *Evidence Act* 2008 (**87 -88 [29] – [33]**). It rejected the need for a warning about weight, correctly observing that that was a matter governed by the *Jury Directions Act 2015*[2] (**CAB 93 -94 [52] – [55]; 96 [65]**) and rejected the common law requirement that, before distress evidence could be used as circumstantial evidence in proof of a crime, the jury needed to find that the crime was its only reasonable cause (**CAB 87 [28]**).
11. That the majority of the Court below (and counsel for the now Respondent) might have been wrong to treat "independent" as the same as indirect or circumstantial evidence does not mean that the conclusion of error and substantial miscarriage of justice in this case were wrong.
12. There is no doubt the prosecutor invited the jury to treat AB's distress as corroboration.[3] He described it as "independent evidence that supports" her account, contrasting it with the evidence of complainant which, while consistent, was not independent (**CAB 100 [83] 136 [213]**).
13. The trial judge determined to give the (then) model distress direction, without request from either counsel (although Her Honour did circulate to counsel her draft direction before their addresses).
14. The trial judge did not use the word "independent" when charging the jury. However, she did endorse the prosecutor's invitation to use the evidence. The trial judge described that use as indirect evidence: that is circumstantial evidence

[2] *Jury Directions Act 2015* (Vic) ss 14, 15 and 16.
[3] *Hicks v The King* (1920) 28 CLR 36, 49 (Issacs and Rich JJ).

that supports its case. (**CAB 101-102 [85]**). The trial judge did not contradict the prosecutor's wrong submission that the evidence was independent of the complainant. Her directions preserved the risk the jury would regard themselves as required or allowed to treat the evidence of distress as independent confirmatory evidence, namely corroboration. Contrary to the opinion of Niall JA, the trial judge did not actually or contextually direct the jury to assess the evidence of distress in the light of AB's evidence (**CAB 150 [280]**).

15. The Court below was correct to conclude that the evidence of distress was not admissible as independent evidence and (by majority) that the risk the jury used it as independent evidence gave rise to a substantial miscarriage of justice.

Relevance and competing hypotheses

16. The primary judgement in the Court below approached the determination of relevance without regard to the facts asserted in the complaint accompanying distress (**CAB 84 [15]**). It did so because it was assessing admissibility as independent evidence. It otherwise adopted an orthodox approach to assessing relevance by reference to the cumulation of circumstantial evidence and according to its capacity rationally to affect the probability of the occurrence of the offending (**CAB 87 – 88 [28] – [30]**).

17. It is in that context that the primary judgement concluded that the evidence of distress was not rationally capable of being attributed to the sexual offending because of competing hypotheses as to its cause (**CAB 87 -88 [30]**). The primary judgement concluded that a finding as to cause was not open (**CAB 92 [50]**). As a conclusion about the admissibility of as independent evidence, the conclusion is correct.

18. The primary judgement did not import into the *Evidence Act* a test regarding intractable neutrality. That term was simply a convenient expression for the limiting effect of competing hypotheses as to the cause of the distress on the ability to draw a reasonable inference as to cause.

19. Even including AB's assertion that she had been raped and threatened in the pool of evidence in which the potential relevance of this distress evidence fell to be assessed, the distress evidence could not achieve relevance as circumstantial evidence. This is not a question of whether the distress evidence was to be accepted or of the weight to be accorded to it. It is a question of the logical

capacity of the evidence of distress, together with all other evidence in the trial, to make more probable the happening of the charged acts.

20. The following are relevant to that assessment.

    20.1. AB did not give evidence of distress at the time of making her complaint to FR. She was not asked anything related to her demeanour or how she was feeling or why. The only thing AB said about her state of mind at the time of the complaint was that she was scared of telling her mother. The thing she had previously explained she was scared of telling her mother about was that she had been working on the streets.

    20.2. AB was distressed at the time FR walked into the cubicle. Her distress preceded her representations to FR. It is not open to infer a causal connection between the distress and the complaint.

    20.3. This was not a case where the occurrence of the offending was the only potentially distressing circumstance revealed by the evidence.

    20.4. This was not a case where the assertions of rape and threats were the only potentially distressing aspect of the representations made to FR. AB was "sticking to the story" when speaking to FR.

    20.5. AB's distress followed a period of time where AB had concocted and then presented a false version of events to police. She had or knew she was about to commit perjury.

21. In all the circumstances, there was no rational basis on which it was open to the jury reasonably to infer that the distress observed by FR was causally connected to the charged acts. 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.

Probative value and exclusion under s137 *Evidence Act*

22. The determination of the probative value of the evidence is, in the first instance, a question of law.[4] It is an assessment of the extent to which the evidence being assessed could rationally affect the assessment of the probability of a fact in issue. In this case, it involved an assessment of the capacity of the evidence of distress to bear on the occurrence of the offending.[5]

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[4] *IMM v The Queen* (2016) 257 CLR 300, 313 [45] (French CJ, Kiefel, Bell and Keane JJ).
[5] Ibid 314 [49].

23. The probative value of evidence is to be taken at its highest.[6] But "taken at its highest" does not mean accepting the use the prosecution seeks to make of the evidence or accepting the prosecution case at its highest. It does not mean assuming all inferences the prosecution says can be drawn will be drawn.[7]
24. At its highest, the probative value of a piece of circumstantial evidence is that it may, in conjunction with other evidence, support the drawing of an inference. The judge is not required or permitted when assessing the probative value of a piece of circumstantial evidence to assume the inference it is adduced to support will be drawn or, indeed, that any particular inference contended for by the parties will be drawn. The appellant's submission that the probative value of the distress evidence is to be assessed on the assumption the jury would infer that it was causally related to the offending should not be accepted (**AS [64]**).
25. There was no dispute the complainant was distressed. The evidence of her distress was taken at its highest. The Court below was correct to conclude that the probative value of the evidence of distress as a piece of circumstantial evidence was, at its highest, weak because of the inability to draw a reasonable inference as to its cause or the inability to exclude alternative explanations of its cause and was outweighed by the danger of unfair prejudice.
26. The danger of unfair prejudice lay in the risk the jury would misuse the evidence to reason backwards to the offending from the fact of distress rather than using the distress as a piece of circumstantial evidence and would overestimate its ability to infer the cause of the distress or reject alternative possible inferences as its cause.

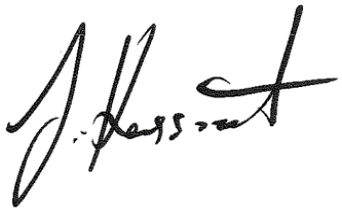
PART VI: THERE IS NO NOTICE OF CONTENTION

PART VII: ESTIMATE OF TIME REQUIRED FOR ORAL ARGUMENT

27. The Respondent estimates 1 hour is required for his oral argument.

Dated 18 September 2025

[6] Ibid 313 [44] and 314 [47].
[7] Intermediate courts have reached differing conclusions on this point, for example: *Di Natale v The Queen* [2022] VSCA 99 [27] and *Franklin v The Queen* [2021] NSWCCA 260 [63] – [65].



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ANNEXURE TO RESPONDENT'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 to 24 March 2024)	55, 137	Act in force at time of the Respondent's trial	23 August 2022 – 31 August 2022: dates of Respondents trial
2	*Jury Directions Act 2015* (Vic)	Version 11 (29 October 2018 – 31 December 2022)	14, 15 and 16	Act in force at time of the Respondent's trial	29 October 2018 – 1 January 2023