



HIGH COURT OF AUSTRALIA

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Details of Filing

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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 OUTLINE OF ORAL SUBMISSIONS

PART I: INTERNET PUBLICATION

1. This outline of submissions is in a form suitable for publication on the internet.

PART II: PROPOSITIONS TO BE ADVANCED IN ORAL ARGUMENT

INTRODUCTION

2. A prosecutor may not invite the jury to treat evidence of a complainant's distress as evidence that independently supports the complainant's evidence.
3. The Court below did not err by holding that evidence of AB's distress was not admissible as evidence that independently supported her evidence. It did not err by holding that a substantial miscarriage of justice occurred because the jury was invited to treat the evidence as independent support or corroboration.
4. "Taking evidence at its highest" for the purpose of assessing its probative value does not permit or require a Court in its role as "gatekeeper" to assume that all inferences advanced by the prosecution will be drawn by the jury.

CONTESTED MATERIAL FACT

5. The Appellant has submitted for the first time that there was no evidence in the trial that 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]**).
6. That submission was not advanced by the prosecutor at trial (**RFM 4**), nor was it advanced in the Court below.
7. The Court of Appeal did not err (**CAB 91 [43]**). 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]; RFM 4**).

DISTRESS IN THE RESPONDENT’S TRIAL

8. At trial the prosecutor invited the jury in his closing address to treat AB’s distress as independent support for her claim (**CAB 100 [83] 136 [213]; AFM 11**). The trial judge did not use the word “independent” in her directions. But she endorsed the prosecutor’s invitation to use the evidence and described its potential use as “indirect” and “circumstantial” (**CAB 26-28; 101-102 [85]**). Her Honour did not define “indirect evidence” or distinguish it from “independent evidence”.
9. The issue on appeal was whether the distress evidence was admissible for the specific purpose advanced by the prosecutor in his closing address. Four of the five judges on the Court below concluded that it was not admissible or that the evidence ought to have been excluded.
10. In *The King v Churchill*,¹ this Court concluded that evidence of a complainant’s distress which accompanies a complaint should not be analysed by reference to its capacity to provide independent support of corroboration.
11. Nonetheless, the Court below had to deal with the consequences for the Respondent’s trial of the prosecutor’s invitation to treat the evidence as corroboration. Emerton P, McLeish and Boyce JJA did so by reference to the provisions of the *Evidence Act 2008* (**87 -88 [29] – [33]**).²
12. The Court below was correct to conclude that the evidence of distress was not admissible as independent evidence and that the real risk that it was used as such gave rise to a substantial miscarriage of justice.

RELEVANCE AND ADMISSIBILITY

13. Although the majority in the Court below decided the relevance and admissibility of the complainant’s distress by reference to its use at trial, and its capacity to corroborate the complainant’s accusations, their Honours adopted an orthodox approach to assessing relevance and exclusion (**CAB 87 – 88 [28] – [30], 92 [50]**).

¹ (2025) 99 ALJR 719.

² Their Honours rejected the need for a warning about weight, correctly observing that that was a matter governed by the *Jury Directions Act 2015* (**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]**).

14. The distress evidence was correctly held to have been inadmissible or subject to exclusion. Even by reference *inter alia* to AB's assertion that she had been raped and threatened, the distress evidence lacked the logical capacity to render more probable the charged acts. 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.
15. In any event, its probative value was outweighed by the danger of its unfair prejudice. That its assessment necessitated that it be taken at its highest,³ did not require the Court to accept, or to assume the rational validity, of the use or uses to which the prosecution sought to make of the evidence of distress.
16. 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. A judge as gatekeeper is not required or permitted when assessing its probative value to assume that an inference which a party may want drawn by its admission will be drawn. The Appellant's submission that the probative value of the distress evidence should be assessed on the assumption that the jury *would* infer that it was caused by the offending is wrong (AS [64]).
17. There was no dispute that AB was distressed. The evidence of her distress was taken at its highest. The Court below correctly concluded that its probative value was at best slight because of the competing explanations for its cause, and was outweighed by the danger of unfair prejudice.

Dated 16th October 2025



Theo Kassimatis KC



Georgina Connelly

³ *IMM v The Queen* (2016) 257 CLR 300, 313 [44] and 314 [47] (French CJ, Kiefel, Bell and Keane JJ).