

HIGH COURT OF AUSTRALIA

GAGELER CJ,
EDELMAN, STEWARD, GLEESON AND BEECH-JONES JJ

STEVEN MOORE (A PSEUDONYM)	APPELLANT
AND	
THE KING	RESPONDENT

Steven Moore (a pseudonym) v The King
[2024] HCA 30
Date of Hearing: 5 June 2024
Date of Judgment: 14 August 2024
M23/2024

ORDER

Appeal dismissed.

On appeal from the Supreme Court of Victoria

Representation

C T Carr SC and J R Murphy with P D Coleridge for the appellant (instructed by Angus Cameron Lawyers)

B F Kissane KC with J P O'Connor for the respondent (instructed by Office of Public Prosecutions (Vic))

Notice: This copy of the Court's Reasons for Judgment is subject to formal revision prior to publication in the Commonwealth Law Reports.

CATCHWORDS

Steven Moore (a pseudonym) v The King

Evidence – Interlocutory appeal – Admissibility – Hearsay evidence – Judicial discretion to exclude evidence – Standard of appellate review – Where s 65 of *Evidence Act* 2008 (Vic) applied in criminal proceeding if person who made previous representation was not available to give evidence about asserted fact – Where appellant due to stand trial for seven offences committed against one complainant – Where complainant passed away in unrelated circumstances – Where respondent notified appellant of intention to adduce evidence of previous representations made by complainant – Where trial judge ruled evidence satisfied s 65 and refused to exclude evidence of representations under s 137 of *Evidence Act* – Whether Court of Appeal required to apply principles in *House v The King* (1936) 55 CLR 499 or "correctness" standard in reviewing trial judge's decision under s 137 of *Evidence Act* – Whether Court of Appeal erred in assessing danger of unfair prejudice that would result from admission of evidence of representations.

Words and phrases – "appellate court", "correctness standard", "discretionary decision", "evidence", "hearsay", "hearsay rule", "interlocutory", "not available", "probative value", "representation", "standard of review", "unfair prejudice".

Criminal Procedure Act 2009 (Vic), ss 295, 296, 297, 300.

Evidence Act 2008 (Vic), ss 59, 65, 67, 137.

1 GAGELER CJ, EDELMAN, STEWARD, GLEESON AND BEECH-JONES JJ.
During pre-trial argument, the appellant unsuccessfully objected to the prosecution adducing evidence of "representations" made by the complainant in the immediate aftermath of her detention and assault allegedly committed by the appellant. The complainant has passed away since she was detained and assaulted.

2 The trial judge found that the evidence of the representations was admissible under the exception to the "hearsay rule"¹ provided for in s 65 of the *Evidence Act 2008* (Vic), and declined to exclude the evidence under s 137 of that Act. The appellant was granted leave to appeal from the trial judge's ruling to the Court of Appeal of the Supreme Court of Victoria, but the Court affirmed the trial judge's (interlocutory) decision that the evidence in question was not excluded under s 137.²

3 The principal issue arising in this appeal is whether, in hearing an interlocutory appeal concerning the trial judge's refusal to exclude evidence under s 137 of the *Evidence Act*, the Court of Appeal was required to apply the principles in *House v The King*³ applicable to the review of discretionary decisions or the "correctness" standard.⁴ For the reasons that follow, the Court of Appeal was obliged to apply the correctness standard.

4 The appellant accepted that the probative value of the evidence of the representations was high, but contended that its exclusion under s 137 was warranted because that probative value was outweighed by the danger of unfair prejudice resulting from the admission of that evidence, especially such danger of prejudice as would follow from the appellant's inability to cross-examine the complainant. For the reasons that follow, that contention should not be accepted. The trial judge correctly declined to exclude the evidence. The appeal should be dismissed.

1 *Evidence Act 2008* (Vic), s 59(1).

2 *Steven Moore (a pseudonym) v The King* [2023] VSCA 236.

3 (1936) 55 CLR 499.

4 *Minister for Immigration and Border Protection v SZVFW* (2018) 264 CLR 541 at 559-560 [41], 560-561 [43], 562-563 [46], 563 [48]-[49], citing *Warren v Coombes* (1979) 142 CLR 531 at 551-552.

Background

5 The appellant is due to stand trial in the County Court of Victoria for six offences under the *Crimes Act 1958* (Vic), and one offence under the common law, alleged to have been committed against the complainant on 30 and 31 August 2021. The respondent alleges that the appellant entered the complainant's home without her permission at about 6.00 pm on 30 August 2021 and remained there until around 5.00 am on 31 August 2021. During that time, the appellant is alleged to have: intentionally or, in the alternative, recklessly caused injury to the complainant;⁵ made a threat to kill her or, in the alternative, to inflict serious injury;⁶ prevented her from leaving her unit;⁷ and recklessly engaged in conduct that placed her in danger of death or, in the alternative, danger of serious injury by smothering her with his hands on her neck, mouth and nose, causing her to lose consciousness.⁸ The appellant has also been charged with attempting to pervert the course of justice as a consequence of a letter he wrote to the complainant from custody on 18 July 2022 asking her to have the charges against him withdrawn and offering to pay her if she did what he asked.

6 The appellant has pleaded not guilty to all the charges other than the charge of attempting to pervert the course of justice. In relation to the contested charges, the appellant admits that he entered the complainant's home on the evening of 30 August 2021, but says he did so with her permission. He admits that once he was inside the complainant's home they had an argument but states that he then left. He denies he assaulted her or was otherwise responsible for her injuries.

7 The complainant passed away in January 2023 in circumstances unrelated to the alleged offending. After her death, the respondent served a notice under s 67 of the *Evidence Act* notifying its intention to adduce evidence at the appellant's trial of representations made by the complainant under the exception to the hearsay rule⁹ provided for in s 65 of the *Evidence Act*. Section 65 applies to criminal proceedings where the maker of a previous representation is not available to give evidence about an asserted fact. Of present relevance are several representations

5 *Crimes Act 1958* (Vic), s 18.

6 *Crimes Act*, ss 20, 21.

7 False imprisonment, contrary to common law.

8 *Crimes Act*, ss 22, 23.

9 *Evidence Act*, s 59(1).

3.

said to have been made on 31 August 2021 by the complainant: (i) in a telephone call to her mother sometime between 11.30 am and 12.20 pm; (ii) in a triple-0 call at 12.20 pm; (iii) to a police officer at 1.05 pm as recorded by a body worn camera; (iv) to the same police officer at 1.30 pm, also recorded by a body worn camera; and (v) in a written statement taken by a different police officer and signed by the complainant at around 5.28 pm.

8 The appellant objected to the admission of the evidence of these representations. The trial judge ruled that the evidence was admissible. His Honour held that s 65(2)(b) of the *Evidence Act* was satisfied in that each of the representations was made shortly after when the facts asserted by the representations occurred and in circumstances that made it unlikely that the representations were a fabrication. His Honour also held that s 65(2)(c) was satisfied in that each of the representations was made in circumstances that made it highly probable that the representations were reliable. Either finding was sufficient to satisfy s 65(2) of the *Evidence Act*. The trial judge declined to exclude the evidence under s 137 of the *Evidence Act*.

9 The trial judge certified that his interlocutory decision concerned the admissibility of evidence that, if ruled inadmissible, would eliminate or substantially weaken the prosecution case.¹⁰ This certification enabled the appellant to seek leave to appeal to the Court of Appeal.¹¹ The appellant sought leave to appeal and raised four proposed grounds of appeal, three of which concerned s 65 of the *Evidence Act* and one of which concerned the trial judge's refusal to exclude the evidence of the representations under s 137.

10 On 28 September 2023, the Court of Appeal: refused leave to appeal in respect of two of the grounds of appeal concerning s 65 of the *Evidence Act*; and granted leave to appeal in respect of the remaining two grounds of appeal but affirmed the trial judge's ruling. The Court of Appeal upheld the trial judge's finding that s 65(2)(b) of the *Evidence Act* was satisfied in relation to each representation¹² and found it unnecessary to address s 65(2)(c).¹³ The Court of Appeal also upheld the trial judge's refusal to exclude the evidence of the

10 *Criminal Procedure Act 2009* (Vic), s 295(3)(a).

11 *Criminal Procedure Act*, s 295(2).

12 *Moore* [2023] VSCA 236 at [97], [106], [119], [130], [150].

13 *Moore* [2023] VSCA 236 at [98], [107], [120], [131], [151].

representations under s 137. The Court observed that it was "well-established" that *House v The King* principles apply in relation to an *interlocutory appeal* from a trial judge's decision addressing whether to exclude evidence under s 137.¹⁴

11 On 7 March 2024, the appellant was granted special leave to appeal to this Court in respect of that part of the Court of Appeal's judgment that affirmed the trial judge's refusal to exclude the evidence of the representations under s 137 of the *Evidence Act*.

12 By his notice of appeal, the appellant contends that the Court of Appeal erred in reviewing the trial judge's refusal to exclude the evidence of the representations under s 137 by reference to *House v The King* principles as opposed to applying the correctness standard. The appellant also contends that the Court of Appeal erred in its assessment of the danger of unfair prejudice that would result from the admission of the evidence of the representations.

The correctness standard applies to interlocutory appeals from rulings under s 137

13 The parties were at issue as to the appropriate standard of review to be applied on an interlocutory appeal from a ruling of a trial judge in relation to whether to exclude evidence under s 137 of the *Evidence Act*.

14 Two standards of appellate review of first instance judicial determinations are of present relevance, namely what has come to be referred to as the correctness standard¹⁵ and a "*House v The King*" standard involving judicial restraint affording latitude to a trial judge.¹⁶ Under the correctness standard, the appellate court determines for itself the correct outcome while making due allowance for such "advantages" as may have been enjoyed by the judge who conducted the trial or hearing.¹⁷ With *House v The King*, appellate intervention is limited to circumstances where the trial judge: acted upon a wrong principle, or allowed extraneous or irrelevant matters to affect the decision; mistook the facts; failed to

14 *Moore* [2023] VSCA 236 at [178].

15 *SZVFW* (2018) 264 CLR 541 at 559-560 [41], 560-561 [43], 562-563 [46], 563 [48]-[49].

16 See *SZVFW* (2018) 264 CLR 541 at 591-592 [150]-[151].

17 *Warren v Coombes* (1979) 142 CLR 531 at 552; see also *Fox v Percy* (2003) 214 CLR 118 at 125-126 [23].

5.

take into account some material consideration; or made a decision that was unreasonable or plainly unjust.¹⁸ These grounds for intervention contemplate the appellate court accepting that intervention is not warranted even though the members of the appellate court may have decided the matter differently to the judge at first instance,¹⁹ a circumstance that is reflected in the language adopted by the Court of Appeal in this case when it described the trial judge's conclusion as "open" to his Honour.²⁰

15 The basis for intervention identified in *House v The King* was expressed to be dependent upon the subject matter of the appeal, being the exercise of a judicial "discretion".²¹ *House v The King* was an appeal against the imposition of a sentence of three months imprisonment for an offence under the *Bankruptcy Act 1924* (Cth). While what constitutes a "discretionary decision" in this context can be ambiguous, in essence it refers to the circumstance where the decision maker is allowed "some latitude as to the choice of the decision to be made".²² A determination of which standard of review is applicable does not depend on whether the reasoning to be applied is evaluative or in respect of which reasonable minds may differ. Instead, the determination turns on whether the legal criterion to be applied "demands a unique outcome, in which case the correctness standard applies, or tolerates a range of outcomes, in which case the *House v The King* standard applies".²³

16 Consistent with this approach, in *R v Dennis Bauer (a pseudonym)*²⁴ this Court observed that an assessment of whether tendency evidence has "significant probative value" for the purposes of s 97(1)(b) of the *Evidence Act* is "one to which

18 *House v The King* (1936) 55 CLR 499 at 505.

19 *Lovell v Lovell* (1950) 81 CLR 513 at 519.

20 *Moore* [2023] VSCA 236 at [187].

21 *House v The King* (1936) 55 CLR 499 at 504.

22 *Coal and Allied Operations Pty Ltd v Australian Industrial Relations Commission* (2000) 203 CLR 194 at 205 [19]; see also *SZVFW* (2018) 264 CLR 541 at 589-590 [146]-[148].

23 *SZVFW* (2018) 264 CLR 541 at 563 [49]; see also *GLJ v Trustees of the Roman Catholic Church for the Diocese of Lismore* (2023) 97 ALJR 857 at 865 [15]; 414 ALR 635 at 641-642.

24 (2018) 266 CLR 56.

Gageler CJ
Edelman J
Steward J
Gleeson J
Beech-Jones J

6.

there can only ever be one correct answer", although "reasonable minds may sometimes differ" about that answer.²⁵ Thus it is for the appellate court to determine whether the evidence meets that threshold, rather than deciding whether it was "open to the trial judge" to reach that conclusion.²⁶

17 In *Aytugrul v The Queen*,²⁷ four members of this Court (implicitly) applied the correctness standard in determining an appeal against conviction by determining for themselves whether certain evidence should have been excluded under the New South Wales equivalent of s 137.²⁸ However, their Honours did not expressly determine whether that standard or some other standard should be applied.

18 Section 137 of the *Evidence Act* provides that "[i]n a criminal proceeding, the court must refuse to admit evidence adduced by the prosecutor if its probative value is outweighed by the danger of unfair prejudice to the accused". The application of s 137 requires the making of three evaluative assessments, namely the weight of the probative value of the evidence, the extent of any danger of unfair prejudice, and then a comparison of one with the other.²⁹ The first two assessments are no different in substance to the assessment of "significant probative value" referred to in *Bauer*, and neither is the comparison between the two. There can only be one correct answer resulting from this process. It follows that the relevant standard to be applied by an appellate court in considering an appeal from a ruling as to whether or not evidence should be excluded under s 137 is the correctness standard.

19 In this case, the Court of Appeal followed its previous decisions, including *McCartney v The Queen*,³⁰ in concluding that the standard which it described as based on "*House v The King* principles" applies to an interlocutory appeal in

25 *R v Dennis Bauer (a pseudonym)* (2018) 266 CLR 56 at 88-89 [61].

26 *Bauer* (2018) 266 CLR 56 at 89 [61].

27 (2012) 247 CLR 170.

28 *Aytugrul v The Queen* (2012) 247 CLR 170 at 184-187 [23]-[34].

29 *IMM v The Queen* (2016) 257 CLR 300 at 329 [109].

30 (2012) 38 VR 1.

7.

relation to a trial judge's decision as to whether to exclude evidence under s 137.³¹ Those previous decisions distinguish between an interlocutory appeal and an appeal following conviction where the trial judge declined to exclude evidence under s 137, in which case the correctness standard is applied to determine whether the admission of the evidence was productive of a miscarriage of justice.³² In *McCartney*, it was accepted that "the legal character of a decision under s 137 remains the same whether the decision falls to be examined at the interlocutory appeal stage or after the trial is concluded", but it was held that the application of different standards of review was justified "by the different functions, and perspectives, of the appeal court at those different stages of the proceeding",³³ including the assertion of a clear intention of the *Criminal Procedure Act 2009* (Vic) that interlocutory appeals on questions of evidence "should be strictly confined".³⁴

20 The previous decisions of the Court of Appeal that invoked this distinction relied in part on a decision of a five-judge bench of the New South Wales Court of Criminal Appeal in *DAO v The Queen*.³⁵ *DAO* was an application for leave to appeal from a refusal to order separate trials, which in turn followed from an evidentiary ruling in relation to tendency evidence. Four members of that Court held that some standard other than the correctness standard applied to appellate review of assessments of "significant probative value" under s 97 of the *Evidence*

31 *Moore* [2023] VSCA 236 at [178], citing *Gilbert Lewis (a pseudonym) v The Queen* [2018] VSCA 40 at [50], in turn referring to *McCartney v The Queen* (2012) 38 VR 1, *KJM v The Queen [No 2]* (2011) 33 VR 11 and *Bray (A Pseudonym) v The Queen* (2014) 46 VR 623.

32 *KJM [No 2]* (2011) 33 VR 11 at 13 [12]-[14]; *McCartney* (2012) 38 VR 1 at 10-12 [45]-[51]; *Bray* (2014) 46 VR 623 at 631 [34], 638 [62]; *Lewis* [2018] VSCA 40 at [50].

33 *McCartney* (2012) 38 VR 1 at 12 [51].

34 *McCartney* (2012) 38 VR 1 at 12 [51], citing *KJM [No 2]* (2011) 33 VR 11 at 13 [13].

35 (2011) 81 NSWLR 568; see *KJM [No 2]* (2011) 33 VR 11 at 12-13 [10]-[14].

Act 1995 (NSW).³⁶ That conclusion was inconsistent with this Court's subsequent decision in *Bauer*.

21 In this Court, the respondent sought to maintain the distinction between the standard of review of decisions under s 137 applicable to interlocutory appeals and the standard applicable to conviction appeals. That distinction should not be accepted.

22 Appeals from interlocutory decisions made by trial judges in the County Court of Victoria and in the Trial Division of the Supreme Court of Victoria are governed by Div 4 of Pt 6.3 of the *Criminal Procedure Act*. A party to such a proceeding may appeal to the Court of Appeal against an interlocutory decision with the leave of the Court.³⁷ However, a party may not seek leave to appeal without certification from the trial judge who made the interlocutory decision.³⁸ If the interlocutory decision concerns the admissibility of evidence, the trial judge must certify that, if the evidence was ruled inadmissible, it would eliminate or substantially weaken the prosecution case.³⁹ If the interlocutory decision does not concern the admissibility of evidence, the trial judge must certify that the decision is otherwise of sufficient importance to the trial to justify it being determined on an interlocutory appeal.⁴⁰ In either case, if the decision is made after the trial commences, the trial judge must certify either that the issue the subject of the proposed appeal was not reasonably able to be identified before the trial or that the appealing party was not at fault in failing to identify that issue.⁴¹ The refusal of a trial judge to provide such certification may be the subject of application for review by the Court of Appeal.⁴²

36 *DAO v The Queen* (2011) 81 NSWLR 568 at 589-590 [100]-[101], 599 [157], 607-608 [211], 608 [212].

37 *Criminal Procedure Act*, s 295(2).

38 *Criminal Procedure Act*, s 295(3).

39 *Criminal Procedure Act*, s 295(3)(a); cf *Criminal Appeal Act 1912* (NSW), s 5F(3A).

40 *Criminal Procedure Act*, s 295(3)(b).

41 *Criminal Procedure Act*, s 295(3)(c).

42 *Criminal Procedure Act*, s 296.

23 The Court of Appeal may only grant leave to appeal against an interlocutory decision if it is satisfied that it is in the interests of justice to do so, having regard to various factors, including the extent of any disruption or delay to the trial process that may arise and whether the determination of the appeal may: render the trial unnecessary; substantially reduce the time required for the trial; resolve any issue of law, evidence or procedure that is necessary for the proper conduct of the trial; or "reduce the likelihood of a successful appeal against conviction in the event that the accused is convicted at trial".⁴³ The Court is precluded from granting leave to appeal after a trial has commenced "unless the reasons for doing so clearly outweigh any disruption to the trial".⁴⁴ The refusal of a grant of leave does not preclude any other appeal, such as a conviction appeal, concerning the issue that was the subject of the proposed appeal.⁴⁵

24 If leave to appeal is granted, the appeal is determined by reference to the evidence given before the trial judge, unless the Court of Appeal grants leave to adduce additional evidence.⁴⁶ The Court of Appeal "may affirm or set aside the interlocutory decision" and, if the decision is set aside, the Court "may make any other decision that [it] considers ought to have been made" or may remit the matter to the court which made the interlocutory decision for determination.⁴⁷ These statutory provisions confirm that the Court of Appeal undertakes an appeal by way of rehearing.⁴⁸

25 As the secondary materials relating to the introduction of the *Criminal Procedure Act* confirm,⁴⁹ the statutory provisions requiring certification by the trial judge before a party may seek leave to appeal, and specifying the matters to which the Court of Appeal may have regard in determining whether to grant leave to

43 *Criminal Procedure Act*, s 297(1).

44 *Criminal Procedure Act*, s 297(2).

45 *Criminal Procedure Act*, s 297(3).

46 *Criminal Procedure Act*, s 300(1).

47 *Criminal Procedure Act*, s 300(2).

48 See, eg, *Allesch v Maunz* (2000) 203 CLR 172 at 179-181 [20]-[23].

49 Victoria, Legislative Assembly, *Criminal Procedure Bill 2008*, Explanatory Memorandum at 108-109; Victoria, Legislative Assembly, *Parliamentary Debates* (Hansard), 4 December 2008 at 4986-4987.

appeal, seek to balance the desirability of allowing interlocutory appeals that are genuinely likely to reduce delay against the consequences of fragmenting the process of a criminal trial. Nevertheless, nothing in these statutory provisions provides any support for applying a different standard to the review undertaken by the Court of Appeal of a decision under s 137 of the *Evidence Act* once leave to appeal has been granted to that which follows from the nature of the decision itself. It may be that, in determining whether to grant leave to appeal from such a decision, the Court of Appeal will consider whether the trial judge's decision reveals some error of principle which, along with the various other factors, may weigh in the determination of whether the Court is satisfied that the interests of justice warrant a grant of leave to appeal. However, if leave to appeal is granted, then, in determining whether to affirm or set aside the interlocutory decision,⁵⁰ the Court of Appeal is required to apply the standard of review dictated by the nature of the decision the subject of the appeal. For the reasons already explained, where the decision the subject of the appeal concerns whether evidence should be excluded under s 137 of the *Evidence Act*, that standard is the correctness standard.

26 The outcome of an interlocutory appeal under these provisions will still be an interlocutory decision which, like all such decisions, may be altered or reversed at trial, at least if circumstances change.⁵¹ Even so, the application of the same standard of review at an interlocutory stage if leave is granted and on appeal after conviction will minimise the potential for inconsistent rulings. It will enhance that part of the statutory scheme for interlocutory appeals that supports the grant of leave to appeal in circumstances where the hearing of an interlocutory appeal will reduce the likelihood of a successful appeal against conviction in the event that the accused is convicted at trial.⁵²

27 In this case, the Court of Appeal granted leave to appeal and thus was required to determine for itself whether the evidence of the representations should be excluded under s 137. The appellant contended that the Court of Appeal did not do so because it referred to *House v The King* and concluded that "it was well open" to the trial judge to find that the probative value of the evidence of the

50 *Criminal Procedure Act*, s 300(2).

51 *Saunders* (1994) 72 A Crim R 347 at 353; see also *Cornelius v The King* (1936) 55 CLR 235 at 249; *Sinclair v The King* (1946) 73 CLR 316 at 324.

52 *Criminal Procedure Act*, s 297(1)(b)(iv).

11.

representations was "high"⁵³ and that it was "open to the trial judge to conclude that the danger of any unfair prejudice would not outweigh the probative value of the evidence".⁵⁴ However, the respondent noted that the Court of Appeal also found that "[f]or completeness, we also observe that in our view the trial judge was correct not to exclude the evidence pursuant to s 137".⁵⁵ The respondent contended that this amounted to a contingent finding that, if the correctness standard was applicable, then the Court of Appeal applied that standard. The appellant contended that this finding was no more than a bare assertion and not a separate basis for the Court of Appeal upholding the trial judge's conclusion in relation to the application of s 137. It is not necessary to consider this further because, for the reasons that follow, the decision of the trial judge to refuse to exclude the evidence under s 137 was correct.

Danger of unfair prejudice

28 The five occasions on 31 August 2021 when the complainant made representations the subject of this appeal have been noted.⁵⁶ The representations made to the complainant's mother in a telephone call sometime between 11.30 am and 12.20 pm on that day alleged that the appellant: held the complainant hostage overnight at her unit; made the complainant lie down on the floor and poured water over her all night; smashed a porcelain bowl over the complainant and slashed her with it; stabbed the complainant's wrist; and told the complainant she would bleed out in the bath. The complainant's mother provided a statement that supported the making of representations to that effect by the complainant. As the evidence of these representations identified the appellant, it was objected to in its entirety.⁵⁷

29 The evidence of the other four sets of representations was recorded. The representations said to have been made in the triple-0 call were to a similar effect to those made to the complainant's mother, except they did not identify the appellant as the perpetrator.⁵⁸ However, one of the representations was to the effect

53 *Moore* [2023] VSCA 236 at [179].

54 *Moore* [2023] VSCA 236 at [187].

55 *Moore* [2023] VSCA 236 at [188].

56 See above at [7].

57 *Moore* [2023] VSCA 236 at [89].

58 *Moore* [2023] VSCA 236 at [99]-[100].

that the complainant was "bashed during the night"⁵⁹ and was thus capable of referring to the appellant given he admitted to entering the complainant's home. Only the evidence of that representation was objected to.⁶⁰ The representations made to a police officer at around 1.30 pm on 31 August 2021 identified the appellant, referred to him possessing the knife and plate identified in the body worn camera footage and alleged that the appellant prevented the complainant from leaving the premises.⁶¹ The representations made to a police officer at around 1.05 pm and in the written statement signed by the complainant at around 5.28 pm specifically identified the appellant as the perpetrator and provided far more detail of the complainant's alleged mistreatment and detention at the hands of the appellant.⁶² To the extent that the evidence of these three sets of representations was capable of identifying the appellant as the perpetrator, it was also objected to.⁶³

30 In this Court, the appellant accepted that the probative value of the evidence of the representations was "high". The possible use of the evidence extends to the proof of the matters asserted by the representations. As the Court of Appeal found, assuming the evidence of the representations was credible and reliable, it was "strongly supportive of the allegation that it was the [appellant] who assaulted" the complainant.⁶⁴ The fact that the evidence has high probative value makes the appellant's task of demonstrating a danger of prejudice that outweighs that value much harder.

31 Nevertheless, the appellant contended that, in addressing the danger of unfair prejudice arising from the admission of the evidence of the representations, the Court of Appeal erred in: failing to recognise that the "existence of plausible lines of cross-examination" of the complainant that could not be pursued in her absence increased the danger of unfair prejudice; failing to recognise the effect of the "sheer volume, and repetitive nature" of the representations; and wrongly

59 *Moore* [2023] VSCA 236 at [99].

60 *Moore* [2023] VSCA 236 at [99]-[100].

61 *Moore* [2023] VSCA 236 at [121].

62 *Moore* [2023] VSCA 236 at [108], [132].

63 *Moore* [2023] VSCA 236 at [112], [123], [133].

64 *Moore* [2023] VSCA 236 at [180].

assuming that the jury would follow any and all directions that might be given by the trial judge to protect against unfair prejudice.

32 The contention that there is a danger of unfair prejudice arising from the inability to cross-examine the maker of a representation where evidence of that representation is admitted under an exception to the hearsay rule and the maker of the representation is not available to give evidence⁶⁵ warrants consideration. Without more, the inability to cross-examine could not justify the exclusion of such evidence, as otherwise the power of exclusion would swallow the exception.

33 The hearsay provisions of the *Evidence Act* have their origins in the interim and final reports of the Australian Law Reform Commission ("ALRC")⁶⁶ that led to the introduction of the *Evidence Act 1995* (Cth) and the *Evidence Act 1995* (NSW). What became s 137 was characterised as a statutory retention of a common law discretionary power.⁶⁷ The interim report described "prejudice" as "danger that the fact-finder may over-estimate the probative value of the evidence" or may decide the matter on an improper basis, "ie on a basis logically unconnected with the issues in the case".⁶⁸ Neither the interim report nor the final report identified the absence of an ability to cross-examine the maker of a representation as a form of potential prejudice that might warrant the exclusion of the evidence of the representation. Having regard to the discussion of prejudice in the interim report, in *Papakosmas v The Queen*⁶⁹ McHugh J doubted whether unfair prejudice extended to "procedural disadvantages", such as the inability to cross-examine the maker of the representation.⁷⁰

34 The 2005 joint review of the *Evidence Act 1995* (Cth) and the *Evidence Act 1995* (NSW) conducted by the ALRC, the New South Wales Law Reform

65 *Evidence Act*, ss 63, 65.

66 Australian Law Reform Commission, *Evidence*, Report No 26 (Interim) (1985) ("ALRC 26"), vol 1, ch 13; Australian Law Reform Commission, *Evidence*, Report No 38 (1987), ch 10.

67 ALRC 26, vol 1 at 529 [957]; see also proposed s 114 in the Draft Evidence Bill: ALRC 26, vol 2 at 57.

68 ALRC 26, vol 2 at 290 [259]; see also ALRC 26, vol 1 at 351-352 [644], 529 [957].

69 (1999) 196 CLR 297.

70 *Papakosmas v The Queen* (1999) 196 CLR 297 at 325-326 [93].

Commission and the Victorian Law Reform Commission ("ALRC 102") acknowledged a debate in the authorities about this aspect of prejudice, but accepted that an inability to test evidence by cross-examination "may constitute a legitimate ground for its exclusion where this will affect the ability of the fact-finder to assess rationally the weight of the evidence".⁷¹ ALRC 102 stated that this assessment would depend on a number of factors, including "the basis on which the hearsay rule did not apply; the possible significance of cross-examination; and whether there are other means of assessing the reliability of the evidence".⁷²

35 ALRC 102 preceded the enactment of the *Evidence Act 2008* (Vic) and can be considered in its construction.⁷³ The report's analysis of the interrelationship between the inability to cross-examine the maker of a representation and unfair prejudice should be accepted. It reconciles the procedural disadvantage arising from the inability to cross-examine with the understanding of prejudice described in the interim report.

36 The basis for the admission of the evidence of the representations in this case is that the complainant is not available to give evidence and the uncontested findings by the Court of Appeal that each representation was made shortly after the asserted fact happened and in circumstances that made it unlikely that the representation was a fabrication.

37 The appellant contended that the denial of the ability to cross-examine the complainant on various matters affecting the honesty of her identification of the appellant as the perpetrator warranted the rejection of the evidence of the representations. The "plausible lines of cross-examination", which the appellant contended he was denied, included various statements made by the complainant about the identity of her assailant that were arguably inconsistent, such as her referring to him in the triple-0 call as her "ex-partner", which was said to be inaccurate. The other lines of cross-examination the appellant referred to were: the approximately six and a half hour period between the end of the alleged ordeal and the first recorded complaint; the complainant's alleged excessive drinking and use of medication; the complainant's apparently calm demeanour as depicted in the

71 Australian Law Reform Commission, New South Wales Law Reform Commission, Victorian Law Reform Commission, *Uniform Evidence Law*, ALRC Report No 102 (2005) ("ALRC 102") at 564 [16.45].

72 ALRC 102 at 564-565 [16.46] (footnotes omitted).

73 *Interpretation of Legislation Act 1984* (Vic), s 35(b)(iv).

footage taken from the body worn camera in contrast to the abuse she allegedly had been subjected to; and the complainant's subsequent resumption of affectionate relations with the appellant. The appellant also contended that the complainant's failure to attend court for limited preparatory cross-examination on oath pursuant to s 198B of the *Criminal Procedure Act* was indicative of her lack of credibility.

38 These matters do not advance the case for exclusion very far. The appellant did not point to any matter affecting the honesty of the complainant that cross-examination was especially suited to address. The evidentiary basis for each of the points sought to be raised can be established and then made the subject of submissions to the jury bearing in mind, as the Court of Appeal found, that it can be expected that the jury will receive "appropriate and strong directions regarding the dangers of giving too much weight to untested statements".⁷⁴ This may include a direction under s 32 of the *Jury Directions Act 2015* (Vic) that the evidence of the representations may be unreliable.

39 Beyond matters of credit, which can be the subject of evidence and submissions, there is no basis for concluding that the inability to test evidence by cross-examination will substantially affect the ability of the trier of fact to rationally assess the weight to be attached to the evidence of the representations. There is no scope for uncertainty about the source of the complainant's knowledge of the subject matter of the representations. The complainant was plainly purporting to recount matters she directly (and recently) observed, and she was very familiar with the appellant. To the extent that there is a danger of unfair prejudice arising from the inability to cross-examine the complainant, it is not substantial when regard is had to the capacity of the appellant to address her credibility by way of evidence and submissions, and the ability of the trial judge to give appropriate directions to the jury.

40 As noted, the appellant also contended that the Court of Appeal failed to recognise the effect of the "sheer volume, and repetitive nature" of the representations. This contention sits uneasily with the appellant's contention that the inability to cross-examine the complainant about inconsistencies between the evidence of the representations warranted its exclusion. In any event, the appellant's concern is that the jury might place undue weight on repeated representations by the complainant identifying the appellant as the offender.

74 *Moore* [2023] VSCA 236 at [183], citing *Lewis* [2018] VSCA 40 at [59].

41 As the Court of Appeal recognised,⁷⁵ it will be open to the trier of fact to regard the consistency of the evidence of the representations made by the complainant to different witnesses as a matter affecting the assessment of the probability that the appellant was the offender.⁷⁶ The adoption of such reasoning would not entail "unfair prejudice". At most, the potential danger to be guarded against is the jury treating "*mere repetition* as adding weight to the complainant's allegations" (emphasis added).⁷⁷ While a trial judge is not obliged to give a direction guarding against such reasoning,⁷⁸ they are not precluded from doing so.⁷⁹

42 Lastly, the appellant contended that the Court of Appeal erred in considering the effect of any directions to ameliorate the danger of unfair prejudice by observing that "[i]t must be assumed that the jury will follow such judicial directions".⁸⁰ It is correct that it is only an "assumption, that, as a general rule, juries understand, and follow, the directions they are given by trial judges".⁸¹ That assumption is not immutable. The possibility that unfair prejudice in the form of the jury misusing evidence might not be alleviated in some circumstances by directions can be accepted. That danger is protected against by the exercise of the exclusionary powers conferred by ss 135 and 137 of the *Evidence Act*.⁸² However, considered in context, the Court of Appeal did not state to the contrary. Instead, the Court's observation was directed to the circumstances of this case.⁸³ In this case, the assumption that a jury would follow the suggested directions to alleviate

75 *Moore* [2023] VSCA 236 at [186].

76 *Papakosmas* (1999) 196 CLR 297 at 309 [31].

77 *Papakosmas* (1999) 196 CLR 297 at 311 [42].

78 *Jury Directions Act 2015* (Vic), s 44B.

79 See, eg, *Glen Jacobs (a pseudonym) v The Queen* [2019] VSCA 285 at [90] in the context of s 44C(2) of the *Jury Directions Act*.

80 *Moore* [2023] VSCA 236 at [187].

81 *Gilbert v The Queen* (2000) 201 CLR 414 at 420 [13], see also at 426 [32].

82 See *HML v The Queen* (2008) 235 CLR 334 at 385 [116].

83 See *R v Georgiou* [1999] NSWCCA 125 at [7].

17.

the relatively modest danger of prejudice that was accepted as having arisen from the admission of the evidence of the representations was soundly based.

Conclusion

43 The danger of prejudice to the appellant from the admission of the evidence of the representations does not outweigh the probative value of that evidence. The trial judge's decision not to exclude the evidence of the representations made by the complainant under s 137 of the *Evidence Act* was correct.

44 The appeal should be dismissed.