

# HIGH COURT OF AUSTRALIA

GAGELER CJ,  
GORDON, GLEESON, JAGOT AND BEECH-JONES JJ

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THE KING

APPELLANT

AND

RYAN CHURCHILL (A PSEUDONYM)

RESPONDENT

*The King v Ryan Churchill (a pseudonym)*

[2025] HCA 11

*Date of Hearing: 14 February 2025*

*Date of Judgment: 2 April 2025*

M94/2024

## ORDER

- 1. Appeal allowed.*
- 2. Set aside the orders made by the Court of Appeal of the Supreme Court of Victoria on 28 June 2024 and, in their place, order that the respondent's appeal to the Court of Appeal be dismissed.*

On appeal from the Supreme Court of Victoria

### Representation

B F Kissane KC with S C Clancy for the appellant (instructed by Office of Public Prosecutions (Vic))

B W Walker SC with R B Shann SC and H L Canham for the respondent (instructed by Doogue + George Defence Lawyers)

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



## **CATCHWORDS**

### **The King v Ryan Churchill (a pseudonym)**

Criminal practice – Directions to jury – Distress evidence – Where respondent found guilty of two sexual offences against complainant – Where evidence of pre-trial distress of complainant when making complaint – Where trial judge gave circumstantial evidence direction in relation to evidence of complainant's distress – Whether trial judge's directions in relation to use jury could make of pre-trial distress evidence gave rise to substantial miscarriage of justice – Whether substantial and compelling reasons for trial judge to warn jury of necessity of finding causal link between distress and offending – Whether substantial and compelling reasons for trial judge to warn jury that distress evidence generally carries little weight.

Words and phrases – "causal connection", "circumstantial evidence", "complainant", "corroboration", "credibility", "direction", "distress", "distress accompanying complaint", "hearsay", "historical common law evidentiary rules", "indirect evidence", "jury", "miscarriage of justice", "pre-trial distress", "relevance", "sexual offence", "substantial and compelling reasons", "substantial miscarriage of justice", "unreliable", "weight".

*Evidence Act 2008* (Vic), ss 55, 56, 59, 66, 135, 136, 137, 164.

*Jury Directions Act 2015* (Vic), ss 16, 31, 34, 54K, 61, 62.



1 GAGELER CJ, GORDON, GLEESON, JAGOT AND BEECH-JONES JJ. The issue of principle raised by this appeal from a decision of the Court of Appeal of the Supreme Court of Victoria (Beach, Taylor and Orr JJA)<sup>1</sup> is whether, in a trial of a sexual offence governed by the *Evidence Act 2008* (Vic) and the *Jury Directions Act 2015* (Vic), where evidence that the complainant was distressed at the time of making a pre-trial complaint was relied upon by the prosecution to support the complainant's version of events, there are "substantial and compelling reasons"<sup>2</sup> for the trial judge to warn the jury that: (1) before the evidence of distress could be used for that purpose the jury had to be satisfied that there was a causal link between the distress and the alleged offending; and (2) such evidence generally carries little weight. As will be explained, there are no such reasons and a trial judge is not required to give such directions.

2 The Court of Appeal was wrong to hold that such directions were required to be given by the trial judge to the jury in the trial of the respondent in the County Court of Victoria in which he was found guilty of two offences of incest contrary to s 44(2) of the *Crimes Act 1958* (Vic) and, accordingly, was wrong to hold that the absence of such directions occasioned a substantial miscarriage of justice warranting the setting aside of his convictions for those offences under s 276 of the *Criminal Procedure Act 2009* (Vic).

3 In a trial of a sexual offence in Victoria, evidence that a complainant was distressed at the time of making a pre-trial complaint is ordinarily relevant and admissible. It is relevant within the meaning of s 55 of the *Evidence Act* on either or both of two bases: as evidence that, if accepted, could, first, enhance the *credit* of the complainant if the jury were to find a causal connection between the distress and the making of the complaint<sup>3</sup> and, second, 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.

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1 *Ryan Churchill (a pseudonym) v The King* [2024] VSCA 151.

2 See s 16 of the *Jury Directions Act*.

3 Section 55(2)(a) of the *Evidence Act* provides that evidence is not taken to be irrelevant only because it relates only to the credibility of a witness.

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Consequently, it is admissible in a trial of a sexual offence under s 56 of the *Evidence Act*.<sup>4</sup>

- 4 Evidence that a complainant was distressed at the time of making a pre-trial complaint is not evidence "of a kind that may be unreliable" under the *Jury Directions Act*.<sup>5</sup> Therefore, the *Jury Directions Act* does not permit a prosecutor or defence counsel to request the trial judge to direct the jury that such evidence is "of a kind that may be unreliable".<sup>6</sup> Any rule of the common law to the contrary is abolished.<sup>7</sup> Where that evidence is admitted as indirect or circumstantial evidence of the offending conduct, it is for the jury to determine whether to accept the evidence and the weight to be given to that evidence. The use of such evidence as indirect or circumstantial evidence can be addressed by appropriate general directions as to the drawing of conclusions and the distinction between direct and circumstantial evidence. Where there is no request for such a direction, then the trial judge is only obliged to so direct a jury if the trial judge considers there are substantial and compelling reasons for doing so in the particular case.<sup>8</sup>

### **The trial**

- 5 Both offences with which the respondent was charged and of which the respondent was found guilty related to a single complainant. The complainant was the respondent's stepdaughter, the respondent having commenced a de facto relationship with the complainant's mother in 2003.
- 6 The prosecution case at the trial in the County Court, which occurred in September 2022, was that the offences were committed on two occasions in 2005 when the complainant was 13 or 14 years old. The prosecution evidence included a recording of testimony of the complainant given in a special hearing in 2021 in which the complainant adopted the contents of video and audio evidence recorded

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4 Subject to the potential for exclusion or limitation in the circumstances of a particular case under s 66, 135, 136 or 137 of the *Evidence Act*.

5 Section 31 of the *Jury Directions Act*.

6 Section 34(1) of the *Jury Directions Act*, read with ss 32, 12 and 14.

7 Section 34(2) of the *Jury Directions Act*.

8 Section 16 of the *Jury Directions Act*.

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in 2018. The prosecution evidence also included testimony of the complainant's mother given at the trial.

7 Both the testimony of the complainant and the testimony of her mother included evidence of pre-trial distress on the part of the complainant when she first complained about the offences to her mother which was admitted without objection. The evidence of pre-trial distress arose in the context of the behaviour and demeanour of the complainant when attending a hearing in the Children's Court of Victoria in 2006 or 2007.

8 In her evidence in chief, the complainant explained that she had run away from home and had stayed at a friend's house drinking quite heavily and smoking marijuana before being found by police and taken to the Children's Court, where she met her mother. She said that she "was only young" and had "a lot of crap in [her] system" and so did not remember much about it, but that her mother had told her that when they were at the Children's Court she had screamed and told her mother that she had been raped by the respondent. She said that she "only ever told people" about being raped by the respondent "in the midst of meltdowns".

9 In cross-examination, the complainant said that she blamed her behaviour in running away from home on her mother for bringing the respondent into their lives and that, at the time she told her mother at the Children's Court that the respondent had raped her, she was "having a meltdown". Asked what she meant by the word "meltdown", she explained:

"Well a meltdown – I will explain at the time that I was not – again I was not diagnosed with autism at the time so I did not understand at the time what exactly it was. We called them psychotic episodes back then but now we understand them to be meltdowns – if you want to add the autistic meltdowns then you can. It usually happens when somebody is extremely overwhelmed and there's too much stimulus – stimuli whatever – and it all happens and explodes. That was the case – I was having meltdowns because I was dealing with a lot in my head and I didn't want to be at home because I didn't want to be around people that were making me remember it so I was having these meltdowns really bad."

10 The evidence of the complainant's mother was to similar effect. In her evidence in chief, the complainant's mother said that the complainant told her at the Children's Court that the complainant had been raped by the respondent and that the complainant said that it was her fault for bringing the respondent into their lives. She said that, at the time, the complainant was "very upset, very, very distressed" and was "yelling". In cross-examination, she agreed with the

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description of the complainant as "having ... a meltdown" and described the behaviour of the complainant as erratic, "violent" and "crazy".

11 After the close of the evidence, the prosecutor requested the trial judge to give a direction to the jury on the subject-matter of the complainant's "distress" as described by the complainant's mother. The prosecutor did not articulate the precise form of the direction he was then requesting. However, the ensuing discussion between the prosecutor and defence counsel and the trial judge appears to have proceeded by reference to the model direction on "pre-trial distress" set out in the *Victorian Criminal Charge Book* published by the Judicial College of Victoria.

12 The model direction on pre-trial distress at that time commenced "[i]f you find that [the complainant] was distressed soon after the alleged offence, the prosecution invites you to use this as indirect evidence that supports its case". The model direction at that time continued: "[i]n other words, the prosecution says that the distress supports a conclusion that [the complainant] suffered a traumatic event" and "[g]iven the timing of the distress, the prosecution say[s] that the traumatic event was the alleged" offence.

13 Defence counsel opposed any such direction, arguing that the "causal connection between the distress and the allegations" was "too remote" and "too tenuous". The trial judge decided to "short circuit" the discussion at that point and to revisit the prosecutor's request after hearing what the prosecutor and defence counsel each said on the topic of pre-trial distress in their closing addresses.

14 In his closing address to the jury, the prosecutor said of the circumstance in which the complainant told her mother at the Children's Court that she had been raped by the respondent that she had "somewhat of a meltdown" and that there was "a level of distress in that recollection". The prosecutor continued that the jury "might think that given the evidence of her mother about the way that complaint came out at the Children's Court, that that distress is something that is entirely consistent with her complaint". In her closing address to the jury, defence counsel urged the jury not to draw a causal connection between the complainant's distress at the Children's Court and the respondent's alleged offending more than a year before, but to treat her distress as the result of a range of other circumstances then affecting her.

15 Having heard the closing addresses, the trial judge said that he thought that a circumstantial evidence direction would be appropriate. The trial judge proposed to use the competing ways in which the prosecutor and counsel for the defence had suggested to the jury that the complainant's distress at the Children's Court should



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be used as "a concrete example as to the manner in which indirect evidence should be approached". Neither the prosecutor nor defence counsel demurred.

16 In the result, the trial judge gave a standard direction to the jury to the effect that evidence can be "direct or indirect" and that "[w]hat matters is how strong or weak the particular evidence is, not whether it is direct or indirect". The trial judge continued:

"Now, to use one example that arises from the arguments presented to you today, you will recall that [the prosecutor] argued to you that [the complainant's] distress at the time that she had, as she described it, her meltdown at the Children's Court when she first claimed that [the respondent] had, to use her word, raped her, his argument was to the effect that that was indicative of the trauma of having been sexually penetrated by the accused.

Now, [defence counsel] in response to that argument suggested that you could not draw that inference, you could not draw that conclusion at all and that is because [the complainant's] meltdown was no doubt the product of a whole host of difficulties she was experiencing at that time a year or so after the alleged events ... So that is one example where you are being invited to draw an inference to act upon indirect evidence."

17 The trial judge went on:

"Now, you must take care when drawing conclusions from indirect evidence of that kind. You should consider all of the evidence in the case and only draw reasonable conclusions based on the evidence that you accept. ... You may only convict an accused if you are satisfied that his guilt is the only reasonable conclusion to be drawn from the whole of the evidence both direct and indirect."

18 Turning, later in his directions to the jury, to the complainant's mother's evidence of the complainant's complaint that she had been raped by the respondent, the trial judge instructed the jury that this evidence of complaint could be used in two ways: first as evidence of the fact that the conduct complained of had occurred; second as evidence relevant to the credibility of the complainant. The trial judge nevertheless emphasised that it would be "a mistake" for the jury to treat the complainant's mother's evidence of the complainant's statement that she had been raped by the respondent as "independent of the complainant". The trial judge separately warned the jury of the need for "caution" when considering the evidence of the complainant.

## The decision of the Court of Appeal

19 The Court of Appeal granted the respondent leave to appeal and allowed the appeal on a single ground, to the effect that the trial judge's directions in relation to the use the jury could make of the evidence of the distress of the complainant at the Children's Court when making the complaint to her mother gave rise to a substantial miscarriage of justice. In consequence, it quashed the convictions and ordered a retrial.

20 In so doing, the Court of Appeal drew on its decision in *Paull v The Queen*,<sup>9</sup> delivered before the trial, together with its decisions in *Seccull v The King*<sup>10</sup> and *Nimely (a pseudonym) v The King*,<sup>11</sup> delivered after the trial, to observe that "[o]n any view, the causal link between the [respondent's] alleged offending and the distress exhibited by the complainant at the Children's Court was a weak one". The Court of Appeal formulated and applied to the case before it the following general proposition:<sup>12</sup>

"if a distress direction of the kind given by the [trial] judge was to be given ... [i]t required the trial judge to direct the jury specifically about the need for the jury to be satisfied that there was a rational causal link between the distress and the alleged offending; and also to warn the jury of the fact that distress evidence generally carries little weight".

## The appeal to this Court

21 Having been granted special leave to appeal from the decision of the Court of Appeal, the prosecution argued pursuant to its notice of appeal in this Court that the directions given by the trial judge were lawful and regular, and occasioned no miscarriage of justice.

22 Pursuant to his amended notice of contention in this Court, and consistently with *Paull*, *Seccull* and *Nimely*, the respondent argued that the decision of the Court of Appeal should be affirmed on the ground that the trial judge was obliged to instruct the jury that it needed to be satisfied that the complainant's distress was

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9 [2021] VSCA 339.

10 (2022) 69 VR 454.

11 [2023] VSCA 20.

12 [2024] VSCA 151 at [52].

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caused by the respondent's offending, and not by some other cause, in order to use evidence of the complainant's distress when making the complaint to her mother as indirect evidence of the respondent's offending. Consideration of that argument is bound up with consideration of the argument on the ground of appeal and need not be separately addressed.

23 Another argument advanced by the respondent, pursuant to his amended notice of contention in this Court, can be disposed of immediately. The argument was to the effect that the trial judge was obliged to instruct the jury that the jury needed to be satisfied that the complainant's distress was caused by the respondent's offending and not by some other cause by reason of the prosecutor having requested such a direction. The argument fails at the threshold of fact: as has been recounted, the prosecutor did not articulate the direction requested on the subject-matter of the complainant's distress. The prosecutor did not persist in the request for such a direction but rather acquiesced with defence counsel to the directions which were proposed and given by the trial judge with the benefit of having heard the closing addresses.

**The correct analysis**

24 The requisite statutory analysis is uncomplicated.

25 In *Papakosmas v The Queen*, McHugh J said:<sup>13</sup>

"Evidence of distress on the part of a complainant is always relevant, within the meaning of [s 55 of the *Evidence Act*], to a charge of sexual assault. A complainant who has been sexually assaulted may, but will not necessarily, display outward signs of distress after the assault. Evidence of distress tends to prove that the complainant had been sexually assaulted."

26 Though it is conceivable that circumstances might exist in which evidence of distress on the part of a complainant when making a complaint about the charged offence is not relevant, those circumstances must be rare. As was emphasised by four members of the Court in *IMM v The Queen*,<sup>14</sup> in which evidence of pre-trial complaints and of the complainant's distress at the time of making them was held to be properly admitted for the purpose of proving the occurrence of sexual offences, a question as to relevance arises "at the point when a piece of evidence

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13 (1999) 196 CLR 297 at 321 [78].

14 (2016) 257 CLR 300.

is tendered, which is normally before all of the evidence is admitted and the witnesses examined, and therefore before the full picture has emerged".<sup>15</sup> Their Honours further emphasised that a question of relevance "does not invite consideration of its veracity or the weight which might be accorded to it when findings come to be made by the ultimate finder of fact"<sup>16</sup> whereas "determination of the weight to be given to the evidence, such as by reference to its credibility or reliability, will depend not only on its place in the evidence as a whole, but on an assessment of witnesses after examination and cross-examination and after weighing the account of each witness against each other".<sup>17</sup>

27 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.

28 Neither of those potential bases of relevance is in tension with the requirement of s 54K of the *Jury Directions Act*, inserted shortly after the trial in the present case,<sup>18</sup> that, if the 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"<sup>19</sup> and that "both truthful and untruthful accounts of a sexual offence may be given with or without obvious signs of

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15 (2016) 257 CLR 300 at 311 [36].

16 (2016) 257 CLR 300 at 312 [38].

17 (2016) 257 CLR 300 at 315 [51].

18 *Justice Legislation Amendment (Sexual Offences and Other Matters) Act 2022* (Vic).

19 Section 54K(5)(a) of the *Jury Directions Act*.

emotion or distress".<sup>20</sup> 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.

29 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*.

30 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.<sup>21</sup>

31 Evidence of pre-trial distress does not, as a class of evidence, fall within the definition of "evidence of a kind that may be unreliable" in s 31 of the *Jury Directions Act*. Perpetuation of the notion that a trial judge has an obligation to caution a jury on the basis that evidence of a complainant's pre-trial distress is, or is generally, unreliable is inconsistent with Pt 3 of the *Jury Directions Act* in its intersection with Div 3 of Pt 4 of the *Jury Directions Act*.

32 The scheme of Pt 3 of the *Jury Directions Act*, which was examined in *Director of Public Prosecutions v Roder (a pseudonym)*,<sup>22</sup> is that directions concerning matters relating to the conduct of trials generally, including the drawing of conclusions and the distinction between direct and circumstantial (or indirect) evidence, are treated as "general directions".<sup>23</sup> Other than general

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20 Section 54K(5)(b) of the *Jury Directions Act*.

21 Section 3 (definition of "general directions") of the *Jury Directions Act*.

22 (2024) 98 ALJR 644 at 648 [12]-[13]; 418 ALR 190 at 193-194.

23 Section 3 of the *Jury Directions Act*.

directions and directions that the trial judge is required to give under a provision of that or another Act, a trial judge is prohibited by s 15 from giving any directions in respect of the matters in issue or evidence in the trial relevant to those matters other than particular directions requested by the prosecution or defence counsel under s 12. Conversely, a trial judge is required by s 14 to give such particular directions as are requested by the prosecution or defence counsel under s 12 "unless there are good reasons for not doing so". The prohibition in s 15 is subject to s 16, by force of which "[t]he trial judge must give the jury a direction if the trial judge considers that there are substantial and compelling reasons for doing so even though the direction has not been requested under section 12".<sup>24</sup>

33 Division 3 of Pt 4 of the *Jury Directions Act* intersects with the scheme of Pt 3 in that it provides, in s 32, that the prosecution or defence counsel may request under s 12 that the trial judge direct the jury "on evidence of a kind that may be unreliable".<sup>25</sup> This in turn requires the trial judge, in giving such a direction as required by s 14, to do the following: to warn the jury that the evidence may be unreliable;<sup>26</sup> if the evidence is not that of a child witness (noting the separate rule in such circumstances<sup>27</sup>), to inform the jury of the significant matters that the trial judge considers may cause the evidence to be unreliable;<sup>28</sup> and to warn the jury of the "need for caution in determining whether to accept the evidence and the weight to be given to it".<sup>29</sup> Section 31 contains an inclusive definition of "evidence of a kind that may be unreliable" in a list which relevantly includes hearsay evidence admitted under s 66 of the *Evidence Act*.<sup>30</sup>

34 The inclusive nature of the definition, in theory, leaves open the potential for a court to determine that some other kind or class of evidence is "evidence of a kind that may be unreliable". But the statutory scheme and its legislative history are against a court deciding that another kind or class of evidence fits that

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24 Section 16(1) of the *Jury Directions Act*.

25 Section 32(1) of the *Jury Directions Act*.

26 Section 32(3)(a) of the *Jury Directions Act*.

27 Section 32(3)(b)(ii) of the *Jury Directions Act*.

28 Section 32(3)(b)(i) of the *Jury Directions Act*.

29 Section 32(3)(c) of the *Jury Directions Act*.

30 Section 31(a) of the *Jury Directions Act*.

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description merely because evidence of that class had been treated as warranting a caution at common law. Section 34 makes plain that a trial judge is not required to direct the jury regarding evidence of a kind that may be unreliable, except as relevantly provided for in s 32 as required by s 14 pursuant to a request under s 12,<sup>31</sup> and that any rule of common law to the contrary is abolished.<sup>32</sup>

35 The requirement of s 16 that the trial judge more generally "give the jury a direction if the trial judge considers that there are substantial and compelling reasons for doing so" in the absence of a request under s 12 is to be understood in the context of the specific substantive and procedural conditions imposed by Div 3 of Pt 4 of the *Jury Directions Act* on a trial judge directing a jury "on evidence of a kind that may be unreliable". Understood in this context it is apparent that s 16 can have no application to evidence merely because the evidence is of a kind or class which the trial judge considers may be unreliable.<sup>33</sup> The considerations relevant to the requirement of s 16 are considerations specific to the evidence in the particular case.

36 Because it does not, as a kind or class of evidence, fall within the definition of "evidence of a kind that may be unreliable" in s 31 of the *Jury Directions Act*, the evidence of pre-trial distress which has been admitted cannot be the subject of a request for a particular direction under s 12 of the *Jury Directions Act* by reason only of it being evidence of the kind or within the class of pre-trial distress. For the evidence to become the subject of a particular direction under s 16 of the *Jury Directions Act*, the trial judge would need to consider there to be substantial and compelling reasons for making the direction in the circumstances of the particular trial. The generic circumstance of the evidence being evidence of the kind or within the class of pre-trial distress on the part of a complainant could not alone constitute substantial and compelling reasons.

37 The general direction that the trial judge gave to the jury in the present case as to the drawing of conclusions and the distinction between direct and circumstantial evidence sufficed to explain the permissible use by the jury of the evidence by the complainant and her mother of the complainant's distress at the time of complaining to her mother that the respondent had raped her. Indeed, the

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31 Section 34(1) of the *Jury Directions Act*.

32 Section 34(2) of the *Jury Directions Act*.

33 See *Anthony Hordern & Sons Ltd v Amalgamated Clothing and Allied Trades Union of Australia* (1932) 47 CLR 1 at 7.

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general direction would have sufficed even if the trial judge had not used that evidence of complaint as an example of indirect evidence. No further direction was required.

### Common law and statute

38 The essential error of the Court of Appeal in the decision under appeal, carried over from the reasoning in *Paull*, *Seccull* and *Nimely*, was to assimilate the requirements of the *Evidence Act* and the *Jury Directions Act* with the requirements of the common law. The same error informs the remaining argument of the respondent pursuant to his amended notice of contention.

39 Referred to in, and centrally informing, the reasoning in each of *Paull*,<sup>34</sup> *Seccull*<sup>35</sup> and *Nimely*<sup>36</sup> was the frequently cited explanation of 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 given by the Full Court of the Supreme Court of Victoria in *R v Flannery*.<sup>37</sup> Delivering the judgment of the Full Court, with reference to the then relatively recent decisions of the English Court of Criminal Appeal in *Redpath*<sup>38</sup> and *R v Knight*,<sup>39</sup> Winneke CJ said in *R v Flannery*:<sup>40</sup>

"In our opinion, evidence of the distressed condition of a prosecutrix may or may not be capable of amounting to corroboration according to the particular facts of each case. In determining whether it is so capable, regard must be had to such factors as the age of the prosecutrix, the time interval between the alleged assault and when she was observed in distress, her conduct and appearance in the interim, and the circumstances existing when she is observed in the distressed condition. Without attempting to

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34 [2021] VSCA 339 at [40]-[49].

35 (2022) 69 VR 454 at 463-469 [29]-[44].

36 [2023] VSCA 20 at [25]-[28].

37 [1969] VR 586.

38 (1962) 46 Cr App R 319.

39 [1966] 1 WLR 230; [1966] 1 All ER 647.

40 [1969] VR 586 at 590-591.



enumerate exhaustively the circumstances in which such evidence may amount to corroboration, we are of opinion that if, regard being had to factors of the kind we have mentioned, the reasonable inference from the evidence is that there was a causal connexion between the alleged assault and the distressed condition, evidence of the latter is capable of constituting corroboration. If such inference is not open, the evidence is not, in our opinion, capable of amounting to corroboration. We should add that except in special circumstances ... evidence of distressed condition will carry little weight and juries should be so warned by the trial judge in the course of his charge."

40 In *R v Flannery*, like in this case, the complaint that implicated the offender was accompanied by distress.<sup>41</sup> Consistent with the historical common law evidentiary rules described below, the evidence of the complaint could not be treated as "additional evidence" of the facts complained of and it could not be corroborative of her evidence.<sup>42</sup>

41 The last three sentences of Winneke CJ's explanation of the approach then taken at common law contain the seeds not only of the two directions held to be required by the Court of Appeal in the decision under appeal but also of the variation of the first of those directions contended for by the respondent in his remaining argument pursuant to his amended notice of contention in this Court.

42 As the language in which the explanation in *R v Flannery* was couched makes apparent, however, this approach to a jury's use of evidence of a complainant's pre-trial distress was the product of historical common law evidentiary rules of general application.

43 The first of those historical evidentiary rules of general application was that a jury should be warned that it was "dangerous" to convict an accused of a sexual offence on the testimony of a complainant in the absence of evidence in corroboration of that testimony, unless satisfied of the truth and accuracy of that testimony after "careful scrutiny".<sup>43</sup> To constitute evidence in corroboration of the

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41 [1969] VR 586 at 587.

42 *R v Flannery* [1969] VR 586 at 590.

43 *Hargan v The King* (1919) 27 CLR 13 at 19-20; *Kelleher v The Queen* (1974) 131 CLR 534 at 553; *Longman v The Queen* (1989) 168 CLR 79 at 84-85.

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testimony of the complainant, evidence was required to be "independent" of the testimony of the complainant.<sup>44</sup>

44 The requirement for evidence in corroboration of the testimony of the complainant to be "independent" meant that evidence of pre-trial distress on the part of a complainant could constitute evidence in corroboration of the testimony of the complainant only if a causal connection was open to be drawn by the jury between the alleged offence and the complainant's distress. If the connection between the distress and the alleged offence was so "tenuous or remote" as to be not open to be drawn by the jury, the rule required that the evidence of the pre-trial distress not be left to the jury as evidence capable of constituting corroboration of the testimony of the complainant.<sup>45</sup> *R v Flannery* was one of several authorities to hold that the requisite causal connection with the alleged offence was not open to be drawn by the jury from evidence of the complainant's distress which was "of an equivocal nature" in the sense that the evidence was "at least as consistent with being induced by the complaint she was making as by the alleged assault".<sup>46</sup>

45 The second historical common law evidentiary rule of general application was the rule concerning circumstantial evidence. The common law rule, attributed to *Shepherd v The Queen*,<sup>47</sup> was that, although individual items of circumstantial evidence did not ordinarily need to be proved beyond reasonable doubt, intermediate facts indispensable to a conclusion of guilt did need to be proved beyond reasonable doubt, and a jury was to be directed accordingly. There were intermediate appellate court decisions after *Shepherd* which appeared to endorse the notion that pre-trial distress corroborative of the testimony of a complainant was or could be an intermediate fact of that nature such as to require a trial judge to instruct that "the jury had to consider whether the evidence of a distressed

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44 *Hicks v The King* (1920) 28 CLR 36 at 40, 49, referring to *R v Baskerville* [1916] 2 KB 658 at 667.

45 *R v Roissetter* [1984] 1 Qd R 477 at 482.

46 [1969] VR 586 at 592. See also *R v Sailor* [1994] 2 Qd R 342 at 345-346, referring to *R v Poa* [1979] 2 NZLR 378 at 381-383.

47 (1990) 170 CLR 573.

condition should only be treated as corroborative evidence if there [was] no other reasonable explanation consistent with innocence".<sup>48</sup>

46 Next there was the historical common law evidentiary rule against hearsay, according to which a pre-trial representation, whether by words or conduct, was not permitted to be relied on to prove the existence of a fact asserted or implied in the representation.<sup>49</sup> The evidence of complaint in *R v Flannery* was caught by this rule. Faced with evidence of a pre-trial representation constituted by words or conduct on the part of a complainant conveying or implying that the complainant had been raped, therefore, "at common law a jury would have been directed that they could consider such evidence, not as evidence of the truth of what [the complainant] was asserting, but as evidence which had a bearing upon [the complainant's] credibility, and in particular, upon the consistency of [the complainant's] behaviour and ... allegations".<sup>50</sup> For that purpose, evidence of the complainant being in distress at the time of making the pre-trial representation might be treated as conduct constituting a non-verbal aspect of that pre-trial representation: "part and parcel of the complaint".<sup>51</sup>

47 Then there was the general common law rule which requires the judge, where evidence has a feature shown by judicial experience to give rise to a significant possibility that the evidence is unreliable for reasons which may not be evident to a lay jury,<sup>52</sup> "to draw [the feature] to the jury's attention, explain how it may affect the reliability of the evidence and warn the jury of the need for caution in deciding whether to accept it and the weight to be given to it".

48 Each of those evidentiary rules has been superseded in Victoria by statute.

49 The whole notion of corroboration of the testimony of a complainant has been swept away by s 164 of the *Evidence Act*, which: declares that "[i]t is not

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48 *Azarian v Western Australia* (2007) 178 A Crim R 19 at 32 [50]; *Flora v The Queen* (2013) 233 A Crim R 320 at 333-334 [70]. See also *R v Rogers* [2008] VSCA 125 at [20].

49 *Walton v The Queen* (1989) 166 CLR 283 at 288, 292-293.

50 *Papakosmas v The Queen* (1999) 196 CLR 297 at 306 [20].

51 *Redpath* (1962) 46 Cr App R 319 at 322; *R v Sailor* [1994] 2 Qd R 342 at 345.

52 *Bromley v The Queen* (1986) 161 CLR 315; *Longman v The Queen* (1989) 168 CLR 79; *R v GW* (2016) 258 CLR 108 at 130-131 [50].

necessary that evidence on which a party relies be corroborated";<sup>53</sup> specifically prohibits a judge in a criminal proceeding from warning the jury "that it is dangerous to act on uncorroborated evidence or give a warning to the same or similar effect" and from directing the jury "regarding the absence of corroboration";<sup>54</sup> and adds for good measure that "[t]he principles and rules of the common law that relate to jury directions or warnings on corroboration of evidence, or the absence of corroboration of evidence, in criminal trials to the contrary of this section are abolished".<sup>55</sup>

50       The foundation for 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 swept away by ss 61 and 62 of the *Jury Directions Act*. As recently expressed by this Court in *Roder*,<sup>56</sup> those sections "could not be more emphatic in stipulating that it is only the elements of an offence (and disproof of any relevant defence), not some particular piece of evidence or intermediate fact, that must be proved beyond reasonable doubt".

51       The historical common law rule against hearsay has been replaced by the hearsay rule in s 59 of the *Evidence Act* that "[e]vidence of a previous representation made by a person is not admissible to prove the existence of a fact that it can reasonably be supposed that the person intended to assert by the representation", to which s 66 of the *Evidence Act* creates an exception in a criminal proceeding if the person who made the previous representation is available to give evidence about the asserted fact.<sup>57</sup> The exception applies to evidence of the representation given by the person who made it or by a person "who saw, heard or otherwise perceived" it if the person who made it has been or is to be called to give evidence<sup>58</sup> and one or other of two conditions (both of which are met in the circumstances of the present case) are met: the first that, when the

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53   Section 164(1) of the *Evidence Act*.

54   Section 164(4) of the *Evidence Act*.

55   Section 164(6) of the *Evidence Act*.

56   (2024) 98 ALJR 644 at 649 [17]; 418 ALR 190 at 195. See earlier *R v Bauer (a pseudonym)* (2018) 266 CLR 56 at 96 [80], 98 [86].

57   Section 66(1) of the *Evidence Act*.

58   Section 66(2)(a) of the *Evidence Act*.

representation was made, the occurrence of the asserted fact was "fresh in the memory" of the person who made it;<sup>59</sup> the second that the person who made it is a victim of an offence to which the proceeding relates and was under the age of 18 years when the representation was made.<sup>60</sup> In respect of the first of those conditions, this Court observed in *R v Bauer (a pseudonym)*<sup>61</sup> that it has "rightly come to be accepted ... that the nature of sexual abuse is such that it may remain fresh in the memory of a victim for many years".

52 The separate and overlapping historical common law rules which excluded evidence of a prior consistent statement to bolster the credibility of a witness but which recognised a pre-trial complaint in the trial of a sexual offence as a common law exception to that rule was held by this Court in *Papakosmas*<sup>62</sup> to be inconsistent with the central scheme of ss 55 and 56 of the *Evidence Act*, according to which: "[t]he evidence that is relevant in a proceeding is evidence that, if it were accepted, could rationally affect (directly or indirectly) the assessment of the probability of the existence of a fact in issue in the proceeding";<sup>63</sup> and "evidence that is relevant in a proceeding is admissible in the proceeding"<sup>64</sup> except as otherwise provided by the *Evidence Act*. Accordingly, subject to the potential for exclusion or limitation in the circumstances of a particular case under s 135, 136 or 137, evidence of a pre-trial representation of a complainant that is admissible in a trial of a sexual offence under the exception to the hearsay rule created by s 66 is admissible as evidence of the credibility of the complainant and of the occurrence of the events the subject of the complaint.

53 Finally, as discussed above, perpetuation of the notion that a trial judge has an obligation to caution a jury on the basis that evidence of a complainant's pre-trial distress is, or is generally, unreliable is inconsistent with Pt 3 of the *Jury Directions Act* in its intersection with Div 3 of Pt 4 of the *Jury Directions Act*. The prior common law rules which informed the reasoning in *Paull*, *Seccull* and *Nimely* have been interred by statute. Their ghosts ought to be banished from judicial

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59 Sections 66(2)(b)(i) and 66(2A) of the *Evidence Act*.

60 Section 66(2)(b)(ii) of the *Evidence Act*.

61 (2018) 266 CLR 56 at 99 [89].

62 (1999) 196 CLR 297.

63 Section 55(1) of the *Evidence Act*.

64 Section 56(1) of the *Evidence Act*.

*Gageler* CJ  
*Gordon* J  
*Gleeson* J  
*Jagot* J  
*Beech-Jones* J

18.

reasoning. To revert, even implicitly, to the concepts of independent corroboration or intermediate fact considerations in analysing the relevance or 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 or to characterise such evidence as inherently weak or having a significant possibility of being unreliable is a recipe for confusion and can only distort the requisite statutory analysis.

### **Conclusion and orders**

54           The appeal is to be allowed. The orders of the Court of Appeal allowing the respondent's appeal and quashing his convictions are to be set aside. In place of those orders, the respondent's appeal to the Court of Appeal is to be dismissed.

