

HIGH COURT OF AUSTRALIA

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

THE KING

APPELLANT

AND

THEODOROS TSALKOS

RESPONDENT

The King v Tsalkos
[2025] HCA 49
Date of Hearing: 17 October 2025
Date of Judgment: 3 December 2025
M64/2025

ORDER

1. *Appeal allowed.*
2. *Set aside orders 2, 3, 4 and 5 made by the Court of Appeal of the Supreme Court of Victoria on 19 December 2024 and, in lieu thereof, order that the respondent's appeal to that Court against conviction be dismissed.*
3. *Remit the respondent's application for leave to appeal against sentence to the Court of Appeal of the Supreme Court of Victoria for determination.*

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))

T Kassimatis KC with G F Connelly SC for the respondent (instructed by
Papa Hughes Lawyers)

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CATCHWORDS

The King v Tsalkos

Criminal practice – Directions to jury – Distress evidence – Where respondent found guilty of offences against two complainants – Where evidence of pre-trial distress when one complainant made complaint – Where trial judge gave directions in relation to evidence of complainant's distress – Whether trial judge's directions invited jury to use distress evidence as independent support for complainant's account – Whether directions occasioned substantial miscarriage of justice – Whether Court of Appeal's reasoning contrary to *R v Churchill (a pseudonym)* (2025) 99 ALJR 719; 422 ALR 265 – Whether evidence inadmissible under s 137 of *Evidence Act 2008* (Vic) – Whether miscarriage of justice because prosecutor described distress evidence as "independent evidence".

Words and phrases – "alleged offending", "capable of supporting", "causal connection", "circumstantial evidence", "corroboration", "credit", "direction", "distress evidence", "hearsay rule", "historical evidentiary rules", "independent evidence", "indirect evidence", "pre-trial distress evidence", "probative value", "sexual offence", "substantial and compelling reasons", "substantial miscarriage of justice", "unfair prejudice", "unreliable", "weight".

Evidence Act 2008 (Vic), ss 55, 56, 66, 137.

Jury Directions Act 2015 (Vic), ss 12, 15, 16, 31, 32.

1 GAGELER CJ, GORDON, EDELMAN, STEWARD, GLEESON, JAGOT AND BEECH-JONES JJ. After a trial in the County Court of Victoria, the respondent was found guilty by a jury of two charges of kidnapping¹ and two charges of rape with aggravating circumstances² of two female complainants, AB and JJ. The respondent was also found guilty of four charges of procuring or inciting the commission of an act of gross indecency with a person under the age of 16 years,³ each committed against JJ. AB and JJ were 16 years and 15 years of age respectively at the time of the offences. The respondent was sentenced to a substantial term of imprisonment.

2 The respondent applied for leave to appeal against his conviction⁴ and sentence.⁵ The Court of Appeal of the Supreme Court of Victoria relevantly granted the respondent leave to appeal against his conviction, allowed his appeal, set aside his convictions and ordered a new trial. A majority of the Court of Appeal (Emerton P, McLeish and Boyce JJA, and Priest JA; Niall JA dissenting) found that a substantial miscarriage of justice⁶ was occasioned because the trial judge's directions supposedly invited the jury to use evidence that AB was distressed at the time she complained about the alleged offences to her mother as "independent support" for AB's account in circumstances where, according to the majority, it was not open to the jury to find the requisite causal link between the distress and the events complained of.⁷

3 As will be explained, the reasoning of the majority of the Court of Appeal in upholding this ground was inconsistent with the subsequent decision of this

1 *Crimes Act 1958* (Vic), s 63A.

2 At the time of the offending, a common law offence. See also *Crimes Act*, s 45.

3 *Crimes Act*, s 50(1)(b).

4 *Criminal Procedure Act 2009* (Vic), s 274.

5 *Criminal Procedure Act*, s 278.

6 *Criminal Procedure Act*, s 276(1)(c).

7 *Tsalkos v The King* [2024] VSCA 324 at [65], [75].

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Court in *R v Churchill (a pseudonym)*.⁸ Contrary to the conclusion of the majority, AB's mother's evidence that AB was distressed at the time AB complained to her was capable of supporting the occurrence of the alleged offending. Further, contrary to the conclusion of the majority, the trial judge's directions did not invite the jury to treat the evidence as "independent support" for AB's evidence in the sense of being independent evidence corroborative of AB's testimony. Additional complaints raised by the respondent in this Court to the effect that a substantial miscarriage of justice was occasioned by either or both the failure of the trial judge to exclude the evidence of distress under s 137 of the *Evidence Act 2008* (Vic) or the failure of the trial judge to correct a submission made by the prosecutor in the prosecutor's closing address that the evidence of distress was "independent evidence" should also be rejected.

- 4 Accordingly, the appeal must be allowed, the respondent's convictions restored and the respondent's application for leave to appeal against his sentence remitted to the Court of Appeal.

Churchill

- 5 Reasons in *Churchill* were published after the Court of Appeal's judgment the subject of this appeal. In *Churchill*, this Court upheld an appeal from a differently constituted Court of Appeal of the Supreme Court of Victoria, which had found that a substantial miscarriage of justice was occasioned by a trial judge's failure to direct a jury about the need to be satisfied that there was a rational causal link between the distress of the complainant and the alleged offending, and to warn the jury that distress evidence "generally carries little weight".⁹ This Court found that no such direction was required.¹⁰ The relevant evidence in *Churchill* was to the effect that the complainant in that case became distressed when telling her mother that she had previously been sexually assaulted.¹¹

- 6 *Churchill* is authority for three relevant propositions.

8 (2025) 99 ALJR 719; 422 ALR 265.

9 *R v Churchill (a pseudonym)* (2025) 99 ALJR 719 at 724 [20]; 422 ALR 265 at 270.

10 *Churchill* (2025) 99 ALJR 719 at 721 [1], 725 [27]; 422 ALR 265 at 266, 271-272.

11 *Churchill* (2025) 99 ALJR 719 at 722 [6]-[10]; 422 ALR 265 at 267-268.

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7 First, 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 under s 55 of the *Evidence Act* and consequently admissible under s 56 to prove that the offending occurred.¹² The evidence is relevant on either or both of two bases: namely, that if accepted the evidence could enhance the credit of the complainant if the jury were to find a causal connection between the distress and the making of the complaint, and that the evidence could support the occurrence of the alleged offending if the jury were to find a causal connection between the distress and the alleged offending.¹³ 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.¹⁴

8 Second, absent substantial and compelling reasons for doing so in a particular case,¹⁵ trial judges in Victoria are not required or permitted to give a direction to the effect that evidence that a complainant was distressed at the time of making a pre-trial complaint is unreliable or carries little weight.¹⁶ Such evidence is not "evidence of a kind that may be unreliable" within the meaning of s 31 of the *Jury Directions Act 2015* (Vic)¹⁷ and consequently the *Jury Directions Act* does not permit a prosecutor or defence counsel to request a direction to the effect that such evidence is unreliable.¹⁸ In the absence of such a request, a trial judge is not permitted to direct a jury to that effect unless the trial judge considers

12 *Churchill* (2025) 99 ALJR 719 at 721 [3], 725 [27]-[29]; 422 ALR 265 at 267, 271-272.

13 *Churchill* (2025) 99 ALJR 719 at 721 [3], 725 [27]-[29]; 422 ALR 265 at 267, 271-272.

14 *Churchill* (2025) 99 ALJR 719 at 721 [3], 725 [27]-[29]; 422 ALR 265 at 267, 271-272.

15 *Jury Directions Act 2015* (Vic), s 16(1).

16 *Churchill* (2025) 99 ALJR 719 at 721 [1], 721-722 [4], 726 [36]; 422 ALR 265 at 266, 267, 274.

17 *Churchill* (2025) 99 ALJR 719 at 721-722 [4], 725 [31]; 422 ALR 265 at 267, 272.

18 *Jury Directions Act*, ss 12, 32; *Churchill* (2025) 99 ALJR 719 at 721-722 [4], 726 [36]; 422 ALR 265 at 267, 274.

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there are "substantial and compelling reasons for doing so" in a particular case.¹⁹ The "generic circumstance" that the evidence is of a kind or within the class of pre-trial distress evidence on the part of a complainant "could not alone constitute substantial and compelling reasons".²⁰

9 Third, where evidence that a complainant was distressed at the time of making a pre-trial complaint is admitted as indirect (or circumstantial) evidence of the offending conduct, it is for the jury to determine whether to accept that evidence and the weight to be given to that evidence.²¹ In the absence of a particular direction that is warranted by the existence of "substantial and compelling reasons for doing so" in a particular case,²² 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.²³

10 In so deciding, *Churchill* concluded that the *Evidence Act* and the *Jury Directions Act*, either individually or in combination, abolished five "historical common law evidentiary rules of general application" in Victoria,²⁴ namely: the rule that a jury should be warned that it is dangerous to convict an accused on the uncorroborated testimony of a complainant unless satisfied of the truth and accuracy of that testimony after "careful scrutiny";²⁵ the rule that in a circumstantial case intermediate facts indispensable to a conclusion of guilty had

19 *Jury Directions Act*, ss 15, 16; *Churchill* (2025) 99 ALJR 719 at 721-722 [4], 725-726 [32]-[36]; 422 ALR 265 at 267, 272-274.

20 *Churchill* (2025) 99 ALJR 719 at 726 [36]; 422 ALR 265 at 274.

21 *Churchill* (2025) 99 ALJR 719 at 721-722 [4]; 422 ALR 265 at 267.

22 *Jury Directions Act*, s 16(1).

23 *Churchill* (2025) 99 ALJR 719 at 721-722 [4], 726-727 [37]; 422 ALR 265 at 267, 274.

24 *Churchill* (2025) 99 ALJR 719 at 727 [42]; 422 ALR 265 at 275.

25 *Churchill* (2025) 99 ALJR 719 at 727-728 [43], 728-729 [49]; 422 ALR 265 at 275, 276-277, quoting *Hargan v The King* (1919) 27 CLR 13 at 20.

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to be proved beyond reasonable doubt and a jury directed accordingly;²⁶ the hearsay rule by which evidence of a pre-trial representation was not permitted to be relied on as evidence of the existence of any fact asserted or implied by the representation;²⁷ the rule which, subject to exceptions, excluded evidence of a prior consistent statement to bolster the credit of a witness;²⁸ and the general common law rule obliging trial judges to draw to the jury's attention various features of evidence that "judicial experience" had shown to give rise to the significant possibility that the evidence is unreliable for reasons which may not be evident to the jury, to explain how those features affect the reliability of the evidence and to warn the jury of the need for caution in deciding whether to accept the evidence and the weight to be given to it.²⁹

Background

11 The events the subject of the charges against the respondent occurred in 1987. AB and JJ were soliciting for sex work on a street in St Kilda. It was alleged that at around 2.30am on 7 May 1987 the respondent invited AB and JJ into his car and then falsely told them that he was a policeman who would "bust" them for prostitution. He drove them to two different locations where he committed the sexual assaults and acts of gross indecency. He returned them to St Kilda just before 6:00am. AB and JJ went to their friend's house and told him they had been raped. The police were called but before they arrived AB and JJ agreed to tell the police that they had been hitchhiking before they were picked up and raped. In her evidence AB said that she was scared about how her mother would react if her mother learned that AB was soliciting for sex work.

12 Later that morning, AB and JJ were taken to the hospital for a medical examination. AB's mother attended the hospital. AB accepted that it was likely that

26 *Churchill* (2025) 99 ALJR 719 at 728 [45], 729 [50]; 422 ALR 265 at 276, 277. See also *Director of Public Prosecutions v Benjamin Roder (a pseudonym)* (2024) 281 CLR 18 at 29-30 [16]-[17]

27 *Churchill* (2025) 99 ALJR 719 at 728 [46], 729 [51]; 422 ALR 265 at 276, 277.

28 *Churchill* (2025) 99 ALJR 719 at 729 [52]; 422 ALR 265 at 277-278. See also *Papakosmas v The Queen* (1999) 196 CLR 297.

29 *Churchill* (2025) 99 ALJR 719 at 728 [47], 729-730 [53]; 422 ALR 265 at 276, 278.

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she spoke with her mother but could not recall doing so. Without objection, AB's mother gave evidence that she walked into the cubicle at the hospital and saw AB on the bed "very very distressed". AB's mother was asked if she had any conversation with AB "at that time". AB's mother said that she did and that AB "told me that she'd been raped, she was with a friend and they had got into a car with a man and he had raped both of them and that they were very frightened and because he threatened them and he had a knife". AB's mother told the jury that AB "was just very very upset and very emotional ... but she wasn't yelling or screaming or anything like that ... I knew she was very very upset".

13 The respondent gave evidence at trial that he engaged in consensual sexual activity with AB and JJ. His case was that there were other reasons as to why AB might have been distressed, including that she was concealing from her mother that she had been engaging in sex work, or that she had lied or was going to lie to the police about not having been engaged in sex work.

14 Prior to the closing addresses and in the absence of the jury, the trial judge advised the prosecutor and trial counsel for the respondent that her Honour would direct the jury that the prosecution invited them to use the evidence of AB's mother about AB's distress as "indirect evidence or circumstantial evidence that supports its case that [AB] did not consent to ... sexual penetration". Her Honour also indicated that she would direct the jury that it was for the jury to decide whether AB's "distress was because she had been raped or for some other reason". Counsel for the respondent did not oppose that direction but advised that he would suggest to the jury other reasons for AB's distress. The trial judge agreed to incorporate counsel's submission into the direction.

15 In his closing address, the prosecutor described AB's mother's observations of distress as "independent evidence" that supported AB's account of the offending as follows:

"Now, it's going to be pointed out to you that this complaint, despite me suggesting it stands against any sort of recent invention, a lie told, because it's consistent over time doesn't include saying that she was a prostitute. ... All you're really getting is the evidence of a conversation where [AB] said something to her mother. *It's consistent but it's not independent evidence.*

But her mother's observation of the *distress* that [AB] was experiencing at the time *is independent evidence*. And that shows that provided you're satisfied that there was a causal connection between the way [AB] was upset

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in that hospital bed the morning after and the alleged offending, well, you can use your common experience that recounting a stressful experience is accompanied by outward signs of distress.

[AB] told you about her naivete at age 16, about her fears for the relationship with her mother if she found out what she had been doing and how close in time it was to the alleged kidnapping and rape, just a matter of hours. You could be satisfied that [AB] was upset, as observed by her mother, because of what she'd experienced *and that is independent evidence that supports her.*" (emphasis added)

16 Consistent with what was foreshadowed, and after summarising the evidence of AB's mother about AB's distress, the trial judge directed the jury as follows:

"If you find that [AB] was distressed soon after the alleged offence – and [her mother's] evidence was – about that was not disputed – the prosecution invites you to use this as indirect evidence; that is, circumstantial evidence that supports its case that [AB] did not consent to the sexual penetration with the accused. The defence of course dispute this and they say, well, there might be other reasons that she was upset. She might have been upset because she was lying about the fact that – or either lying – either was going to lie, or had already lied to the police about the fact she was not working as a prostitute and how she came to be in St Kilda, knowing that that was something she said on oath, or was under penalty of perjury. So she might have been upset about that or that her mother, generally, might have found out that she was working as a prostitute.

So that is what the defence say, so it is for you to assess those arguments. It is up to you to decide whether [AB's] distress was because she had been raped, or for some other reason, and what you make of the arguments of counsel. Obviously, you cannot use it as indirect evidence supporting the charges unless you are satisfied that she was distressed because of the alleged sexual offending, and not for some other reason. If you do find that causal connection it is for you to evaluate the weight of the evidence; that is, the extent to which it helps you decide the issues in this case, and in doing this you will use your common sense."

17 Trial counsel for the respondent did not raise any objection to the prosecutor's closing address or the trial judge's summing up.

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The Court of Appeal's judgment

18 The respondent sought leave to appeal against his convictions and sentence to the Court of Appeal. The respondent raised two grounds of appeal against his conviction. Ground 1 of the proposed appeal against conviction alleged that a substantial miscarriage of justice occurred because: (a) "the jury was invited to use [evidence of AB's] distress on 7 May 1987 as independent support for her account" ("ground 1(a)"); and (b) "the jury was not warned that evidence of distress is a species of [evidence] that carries little weight" ("ground 1(b)").³⁰ Emerton P, McLeish and Boyce JJA upheld ground 1(a), considered it unnecessary to address ground 1(b) and rejected the other ground.³¹ Priest JA upheld both aspects of ground 1 and upheld the other ground.³² Niall JA rejected both grounds and addressed the application for leave to appeal against sentence.³³

19 In upholding ground 1(a), Emerton P, McLeish and Boyce JJA treated the terms "independent", "indirect" and "circumstantial" evidence interchangeably,³⁴ and distinguished between evidence of distress adduced as a circumstance in which a complaint is made³⁵ on the one hand and evidence of distress adduced as "independent (or circumstantial) evidence of the offending alleged" on the other.³⁶ Their Honours found that, for the latter to be admissible as independent, indirect or circumstantial evidence of the offending, "the connection between the distress and the events alleged must be direct, that is, unmediated by (or independent of) the representations constituting the complaint".³⁷ That test was said not to be satisfied because, having regard to the possibility that AB's distress was "caused

30 *Tsalkos* [2024] VSCA 324 at [5].

31 *Tsalkos* [2024] VSCA 324 at [3], [51], [64].

32 *Tsalkos* [2024] VSCA 324 at [178]-[179], [186].

33 *Tsalkos* [2024] VSCA 324 at [281]-[282], [289], [320], [323]-[379].

34 *Tsalkos* [2024] VSCA 324 at [9].

35 *Tsalkos* [2024] VSCA 324 at [14].

36 *Tsalkos* [2024] VSCA 324 at [15].

37 *Tsalkos* [2024] VSCA 324 at [15].

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by her fear or shame that her mother would find out that she and JJ had been out on the streets ... for a number of days working as prostitutes", ³⁸ the evidence was "intractably neutral as to its causal connection with the alleged offending".³⁹

20 Emerton P, McLeish and Boyce JJA concluded that a substantial miscarriage of justice occurred "because the jury was invited to use AB's distress as independent support for her account in circumstances where it was simply not open to the jury to find the requisite causal link between the distress and the events complained of".⁴⁰ Priest JA's reasoning on this issue was not relevantly different from that of Emerton P, McLeish and Boyce JJA.⁴¹

21 In dissent, Niall JA held that, when the trial judge's directions were read as a whole, the jury was not invited to treat the distress evidence as independent corroboration of AB's account.⁴² His Honour also considered that, in any event, while there were other possible causes for AB's distress, it was open to the jury to use AB's distress as evidence of the alleged offending.⁴³

Court of Appeal's reasoning contrary to *Churchill*

22 The notice of appeal to this Court raises one ground of appeal: that the Court of Appeal erred in finding that the trial judge erred in directing the jury that it could use evidence of AB's distress when making a complaint of being raped as indirect evidence that supported the prosecution case that AB did not consent to sexual penetration with the respondent. As framed, this ground addresses ground 1(a) as it was understood and upheld by the majority of the Court of Appeal. As noted,

38 *Tsalkos* [2024] VSCA 324 at [30].

39 *Tsalkos* [2024] VSCA 324 at [50].

40 *Tsalkos* [2024] VSCA 324 at [65].

41 *Tsalkos* [2024] VSCA 324 at [66]-[68], [143]-[146].

42 *Tsalkos* [2024] VSCA 324 at [281].

43 *Tsalkos* [2024] VSCA 324 at [282]-[285].

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ground 1(b) was not addressed by a majority of the Court of Appeal and, in any event, it is self-evidently inconsistent with *Churchill*.⁴⁴

23 So far as the reasoning of the majority of the Court of Appeal concerned ground 1(a), four related errors in that reasoning follow from *Churchill*.

24 First, it was erroneous to separate AB's distress from the content of her complaint in assessing the admissibility and use of the evidence given by AB's mother of what transpired at the hospital. Just as the jury must consider all the evidence,⁴⁵ an assessment of the relevance of evidence and its possible uses must involve a consideration of that evidence's effect when taken with other evidence.⁴⁶ AB's distress was an aspect of her complaint in telling her mother what happened to her.⁴⁷ Thus the evidence of AB's distress was admissible for the purposes identified in *Churchill*: namely, not only as evidence relevant to credit but also as (indirect) proof that the offending occurred.⁴⁸ In this Court, the respondent submitted that the reasoning in *Churchill* was not engaged because the evidence of AB's distress given by her mother involved an observation of distress prior to the making of the complaint. This submission must be rejected. As the above description makes clear, AB's mother described AB's distress "at the time" AB complained about being raped.⁴⁹

25 Second, the focus of the majority of the Court of Appeal upon whether the evidence of AB's distress at the time she was recounting the alleged offending to

44 *Churchill* (2025) 99 ALJR 719 at 728 [47], 729-730 [53]; 422 ALR 265 at 276, 278.

45 *Shepherd v The Queen* (1990) 170 CLR 573 at 580, quoting *Chamberlain v The Queen* [No 2] (1984) 153 CLR 521 at 535-536.

46 *Festa v The Queen* (2001) 208 CLR 593 at 599 [14]; *Evans v The Queen* (2007) 235 CLR 521 at 568 [177].

47 *Evidence Act 2008* (Vic), s 66(1), (2)(a), (2)(b)(i), (2)(b)(ii). See also *Churchill* (2025) 99 ALJR 719 at 729 [52]; 422 ALR 265 at 277-278.

48 *Churchill* (2025) 99 ALJR 719 at 721 [3]; 422 ALR 265 at 267.

49 See above at [2], [3], [12].

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her mother provided "independent support" for AB's account was misplaced.⁵⁰ That approach reflects one of the historical evidentiary rules identified in *Churchill* as having been abolished: namely, that to be evidence in corroboration of the testimony of the complainant in the context of a sexual offence the evidence must be "independent" of the testimony of the complainant.⁵¹ Under that superseded evidentiary rule, evidence of distress could only be considered to be "independent" and thus corroborative if there was a causal connection rationally open to be drawn by the jury between the alleged offence and the complainant's distress and that connection could not be established if the evidence was "of an equivocal nature".⁵²

26 Third, the majority's description of the distress evidence as "intractably neutral" does not reflect a proper application of s 55 of the *Evidence Act*. Instead, it reflects the application of the superseded historical evidentiary rule just noted. Section 55(1) merely provides that evidence is relevant where the evidence, if accepted, "could rationally affect (directly or indirectly) the assessment of the probability of the existence of a fact in issue in the proceeding". The circumstance that there could be another explanation for the distress evidence does not mean that the test of relevance in s 55 is not satisfied. Instead, consideration must be given to whether there is a process of reasoning by which the evidence could rationally affect the assessment of the probabilities.⁵³ In circumstances where the complaint of rape was accompanied by evidence of distress and the probative effect of the distress evidence was to be considered having regard to the content of the complaint,⁵⁴ the test of relevance in s 55 was satisfied.

27 Fourth, as Niall JA found, the trial judge's directions did not invite "the jury to treat the distress evidence as independent corroboration" of AB's account.⁵⁵ Once any requirement for corroboration is put aside, it is potentially misleading to

50 *Tsalkos* [2024] VSCA 324 at [33], [51].

51 *Churchill* (2025) 99 ALJR 719 at 727-728 [43]; 422 ALR 265 at 275.

52 *Churchill* (2025) 99 ALJR 719 at 728 [44]; 422 ALR 265 at 275-276, quoting *R v Flannery* [1969] VR 586 at 592.

53 *Washer v Western Australia* (2007) 234 CLR 492 at 497-498 [5].

54 *HML v The Queen* (2008) 235 CLR 334 at 352 [6].

55 *Tsalkos* [2024] VSCA 324 at [281].

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treat indirect or circumstantial evidence as synonymous with "independent" evidence. Two pieces of evidence can be "independent" in the sense that each emanates from a different *and unrelated* source, such as two separate eyewitnesses to an offence. Evidence such as that given by AB's mother can also be characterised as "independent" if it is adduced from a separate source to the testimony of the witness who was distressed, even though, as Niall JA observed, "[d]istress evidence always [ultimately] emanates from the complainant".⁵⁶ In light of *Churchill* it suffices to note that whether or not distress evidence is "independent" in either sense is generally irrelevant to an assessment of the evidence's admissibility and use.

28 In the end result, the trial judge's directions to the jury were consistent with *Churchill*. Those directions did not occasion a substantial miscarriage of justice. It follows that the sole ground of appeal must be upheld.

Section 137 of the *Evidence Act*

29 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".

30 In this Court, the respondent sought to maintain the orders setting aside his conviction and ordering a new trial on the basis of the following statement by Priest JA to the effect that the use of the distress evidence as evidence of the offending engaged s 137:⁵⁷

"If, in a case like the present, the state of the evidence is such that the jury, acting rationally, could not exclude the reasonable possibility that the complainant's distress may have been caused by factors other than the alleged offending, then the distress evidence cannot go in proof of a fact in issue, and thus cannot be said to be relevant. To permit the evidence to go to the jury would be to permit the jury potentially to apply speculative 'reasoning' in proof of guilt. Moreover, on any view, the probative value of the evidence would be slight, and would be outweighed by the risk of unfair

56 *Tsalkos* [2024] VSCA 324 at [264].

57 *Tsalkos* [2024] VSCA 324 at [164]; see also at [178].

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prejudice — that is, the risk that the jury would misuse the evidence — thereby engaging s 137 of the [Evidence] Act."

31 Emerton P, McLeish and Boyce JJA agreed with Priest JA, stating that, if the distress evidence were to be admitted where there were competing explanations for the cause of the distress "in play", then the "probative value of AB's distress as independent evidence would be slight, and would be outweighed by the danger of unfair prejudice, thereby engaging s 137 of the *Evidence Act*".⁵⁸

32 No application was made to the trial judge under s 137 of the *Evidence Act* to exclude the evidence of AB's mother to the extent that it related to AB's distress while AB told her mother she was raped. If such an application had been made, then it would have to have been rejected. In applying s 137, the reasoning of the majority of the Court of Appeal attributes little probative value to the distress evidence by disassociating that evidence from AB's complaint and then applying the superseded historical evidentiary rule that required that juries be directed to give such evidence little weight. However, in applying s 137, the evidence is to be taken at its highest and in the context of the accompanying statements made to AB's mother.⁵⁹ In light of *Churchill*, that evidence had substantial probative value for the purposes of applying s 137. Similarly, the prejudice identified by Priest JA, being the potential misuse of the evidence,⁶⁰ proceeds from the misconception rejected in *Churchill* that it could not be used as evidence of the offending. Otherwise, any potential misuse of the evidence was guarded against by the trial judge's directions concerning indirect and circumstantial evidence.⁶¹

The prosecutor's closing address

33 In this Court, the respondent further submitted that a substantial miscarriage of justice was occasioned by the fact that, in the prosecutor's closing address to the jury, the prosecutor described the distress evidence as "independent evidence". It

58 *Tsalkos* [2024] VSCA 324 at [30].

59 *R v Dennis Bauer (a pseudonym)* (2018) 266 CLR 56 at 91-92 [69].

60 See *Steven Moore (a pseudonym) v The King* (2024) 98 ALJR 1119 at 1128 [33]; 419 ALR 169 at 179.

61 *Moore* (2024) 98 ALJR 1119 at 1129 [39]; 419 ALR 169 at 180-181.

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was contended that the prosecutor invited the jury to treat the evidence of AB's mother about AB's distress as independent corroboration of AB's account and the failure of the trial judge to correct that invitation in the prosecutor's closing address occasioned a substantial miscarriage of justice. The respondent argued that this contention was captured by ground 1(a) as raised in the Court of Appeal; ie, that ground should be read as stating that the "jury was invited [by the prosecutor] to use the complainant's distress on 7 May 1987 as independent support for her account".⁶² The respondent submitted that the Court of Appeal addressed ground 1(a) on that basis. However, it is clear that the Court of Appeal addressed ground 1(a) on the basis that it was the trial judge's directions (not the prosecutor's closing address) that invited the jury to use the distress evidence in that way.

34 In any event, the submission should be rejected. To describe evidence as "independent" in this context can be ambiguous. The better reading of the prosecutor's address is that the prosecutor's description of the evidence given by AB's mother of AB's distress as "independent" was a reference to that evidence being adduced through AB's mother, not through AB. Nonetheless, whatever the prosecutor intended to convey by referring to the observations of AB's mother as "independent" evidence, it cannot be accepted that a jury, unburdened by any knowledge of the superseded historical evidentiary rule as to corroboration identified in *Churchill*, would somehow take that description as a reference to independent corroboration of AB's account akin to that which might have been given by an eyewitness to the offending. Nothing in the trial judge's directions conveyed any such suggestion or conveyed that the prosecutor made any submission to that effect. The fact that, throughout the discussions between the trial judge and counsel prior to addresses, after the addresses and after the trial judge's summing up, no concern was raised about this aspect of the prosecutor's address supports the conclusion that the prosecutor's closing address did not convey an invitation to the jury to treat that evidence as having an evidentiary character that it did not possess.

35 The respondent's further submission must be rejected.

Conclusion

36 The appeal must be allowed. The orders of the Court of Appeal must be set aside and the respondent's appeal to that Court against his conviction must be

62 *Tsalkos* [2024] VSCA 324 at [5].

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

15.

dismissed. The proceedings are to be remitted to the Court of Appeal for the determination of the respondent's application for leave to appeal against his sentence.

37 Accordingly, the orders of the Court are:

1. Appeal allowed.
2. Set aside orders 2, 3, 4 and 5 made by the Court of Appeal of the Supreme Court of Victoria on 19 December 2024 and, in lieu thereof, order that the respondent's appeal to that Court against conviction be dismissed.
3. Remit the respondent's application for leave to appeal against sentence to the Court of Appeal of the Supreme Court of Victoria for determination.