HIGH COURT OF AUSTRALIA

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Details of Filing

File Number:	M94/2024
File Title:	The King v. Ryan Churchill (a pseudonym)
Registry:	Melbourne
Document filed:	Appellant's outline of oral argument
Filing party:	Appellant
Date filed:	14 Feb 2025

Important Information

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IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

BETWEEN: **The King**
Appellant

and

Ryan Churchill (a pseudonym)
Respondent

APPELLANT'S OUTLINE OF ORAL SUBMISSIONS

Part I: Internet publication certificate

1. It is certified that this outline is in a form suitable for publication on the internet.

Part II: Outline

2. The Court of Appeal found that it was open to the jury to use evidence of the complainant's distressed demeanour when making her complaint as indirect evidence supportive of the complainant's direct evidence that she had been raped by the respondent (**CAB 77–78 [51], [54]**). The trial judge was obliged to direct the jury how they were permitted to use the distress evidence as the prosecutor requested the direction: s 12 *Jury Directions Act 2015* (Vic) (**JDA**). The trial judge reached his formulation after discussion with counsel. There was no request for additional directions about the evidence. The direction given adequately conveyed to the jury the permitted use of the evidence. The Court of Appeal's reasoning that there were substantial and compelling reasons for the trial judge to give two additional directions not requested evinces four errors.

Error 1: The rationales underpinning the directions at common law have been abolished

3. The directions that the Court of Appeal held were required reflect common law principles that governed the use of distress evidence. Those principles operated at a time when corroboration of sexual offending was required, delay in complaint was considered to cast doubt on the reliability and credibility of the complainant, and complaint evidence was only admissible to

establish consistency of a complainant's account (and not as evidence of the offending).

4. However, with the introduction of the *Evidence Act 2008* (Vic) (**EA**) and the JDA in Victoria the rationales underpinning those common law principles and rules have been abolished. Further, s 51(1) of the JDA prohibits trial judges stating or suggesting in any way that complainants who delay in making, or do not make, a complaint, are, as a class, less credible or require more careful scrutiny than other complainants, or that the law regards complainants in sexual offence cases as an unreliable class of witness. The Court of Appeal's reliance on common law principles was therefore unsound.

Error 2: The judge was not permitted to direct the jury what weight they must give the evidence

5. A direction that distress evidence carries little weight infringes the fundamental principle that the jury is the trier of fact, and determination of weight is a quintessential matter for the jury. To give such a direction is therefore at odds with the jury's fact-finding role.
6. Even where a type of evidence requires a specific warning, for example unreliable evidence, that warning only directs the jury of the need for caution, after identifying the matters that may adversely affect the reliability of the evidence: JDA ss 31, 32.

Error 3: The direction requires the jury to consider the weight of distress evidence in isolation

7. The jury is entitled to weigh distress evidence in the context of all the evidence without a limiting direction applying to distress in isolation. Distress evidence is generally given alongside complaint evidence. Evidence of complaint and distress accompanying it can be used by the jury in proof of the charge. The EA does not require that evidence come from an independent source before it can be used as support for a complainant's account.
8. Distress exhibited in the context of a complaint is supportive evidence because distress when recounting a traumatic experience may be regarded as consistent with the trauma having occurred. This was reflected in the original model direction on distress in the context of complaint (**CAB 73 [39]**). In *Papakosmas* (1999) 196 CLR 297 at [20], [78], part of the rationale for complaint evidence being treated as evidence of the facts in issue was that it would be treated the same way as distress evidence (**JBA Vol 3 Tab 13**).
9. Distress evidence also gives complaint evidence its force. In this way it is not a 'weak' piece of evidence. This was recognized in *IMM* (2016) 257 CLR 300 at [73], (**JBA Vol 3 Tab 11**) where this Court considered that the evident distress of the complainant in making the complaint together with the content and the timing of the complaint meant the probative value

of the evidence was potentially significant. Likewise in *Bauer* (2018) 266 CLR 56 at [90], [98] the Court considered distress observed at the time of the complaint was relevant in assessing whether the evidence was 'fresh in the memory', and considered that the complaint evidence together with the evidence of distress had a compelling ring of truth about it (**JBA Vol 3 Tab 14**). The distress evidence was not treated as only providing 'context' to the complaint.

10. There was no suggestion in *Papakosmas*, *IMM* or *Bauer* that evidence of distress at the time of the making of the complaint was of limited weight. To give such a direction significantly diminishes the capacity of the jury to assess the evidence of complaint.

Error 4: No risk jury would fail to understand the permissible use of the distress evidence

11. Once it is recognised that distress is to be considered together with complaint evidence, there is no need to direct the jury that they must find a causal link. The link between distress and a complaint about a traumatic event is obvious and a matter of ordinary human experience.
12. The existence of other possible causes of distress did not make the evidence incapable of being used as indirect support of the charges. Further, there was no need to direct the jury that they were required to exclude all other reasonable explanations for the distress. Accordingly, the concept of intractable neutrality does not arise (cf **RS [66]**). Such an approach is tantamount to requiring the jury to be satisfied beyond reasonable doubt that the distress was caused by the offending. This is not necessary, is prohibited in Victoria by s 61 of the JDA, and is not in accordance with *Doney* (1990) 171 CLR 207 at 211 and *Shepherd* (1990) 170 CLR 573 at 578–579 (**JBA Vol 3 Tab 17**).
13. The complainant's mother gave evidence of the complainant being "very, very distressed" as she told her about the rape (**AFM 24**). That the distress was sometimes characterised as a "meltdown" did not change the nature of the evidence. The existence of other possible explanations for the complainant's distress was simply a matter for cross-examination or submissions.

Dated: 14 February 2025

BRENDAN F. KISSANE **STEPHANIE CLANCY**