HIGH COURT OF AUSTRALIA

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IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

BETWEEN: **The King**
Appellant

and

Ryan Churchill (a pseudonym)
Respondent

APPELLANT'S REPLY

PART I: CERTIFICATION

1. These submissions are in a form suitable for publication on the internet.

PART II: REPLY

A. Distress evidence under the *Evidence Act 2008* (Vic) ('the EA')

2. The respondent contends that, as a matter of principle, the relevance of distress evidence accompanying complaint admitted under s 66 of the EA differs from distress evidence which can be used as indirect evidence tending to prove that an offence has occurred. He argues that distress evidence accompanying a complaint is relevant for the 'attenuated' purpose of providing context to that complaint (**RS [27]**). That contention is wrong.
3. Context evidence bolsters a complainant's credibility only in a limited way — namely by putting the evidence of the alleged offending in its proper context. Context evidence does not make the complainant's account more reliable and does not make it more likely that an accused committed any of the charged offences.[1]
4. In *R v Bauer (a pseudonym)*,[2] this Court reasoned that the circumstances of the complaint, including the complainant's distress, was evidence from which the jury was entitled to draw the inference that the events being complained of were vivid in the complainant's memory.[3] Accordingly it was held that the evidence of the complaint witness, which included the complainant's representations *and* evidence of the circumstances in which they were made (including distress), significantly supported the reliability and credibility of the complainant's testimony of the charged offences (**AS [61]–[62]**).[4] Clearly then, this Court did not consider the circumstances surrounding the complaint as being relevant for the limited purpose of providing context to it.
5. Similarly, the majority of this Court in *IMM v The Queen*[5] considered the complainant's distress in making the complaint was capable of adding weight to the complaint (**AS [59]**). The distress evidence did not merely place the complaint in its proper context.
6. To the extent the respondent relies on *Tsalkos v The King*[6] as supporting the proposition that distress accompanying complaint is ordinarily relevant only as context evidence, the appellant submits that case was wrongly decided.[7]

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[1] *Qualtieri v The Queen* (2006) 171 A Crim R 463, 494 [119] (Howie J).
[2] (2018) 266 CLR 56 ('*Bauer*').
[3] Ibid 102 [92] (Kiefel CJ, Bell, Gageler, Keane, Nettle, Gordon and Edelman JJ).
[4] Ibid 104 [98].
[5] (2016) 257 CLR 300 ('*IMM*').
[6] [2024] VSCA 324.
[7] The appellant has filed an application for special leave to appeal that judgment in this Court.

B. Risk of misuse of distress evidence

7. The respondent contends that distress evidence is a kind of evidence inherently likely to be misused by a jury: firstly, because the evidence is open to misinterpretation (**RS [32]**, **[34]**) and secondly, because the evidence is likely to provoke an emotional reaction in the jury, who may then overvalue the weight of the evidence because of feelings of sympathy for the complainant (**RS [39]**).

8. The *Jury Directions Act 2015* (the **JDA**) does not treat distress evidence as being of a kind that may be unreliable, and it is not one of the five categories of evidence included in the non-exhaustive definition of evidence of that kind: JDA, s 31. Nor is it a kind of evidence which attracts mandatory directions under the JDA to avoid an inherent risk of misuse by the jury, in contrast to evidence of incriminating conduct: JDA, s 21.

9. The respondent relies on statements from cases relating to incriminating conduct, and to the assessment of reliability and truthfulness based on the appearance of witnesses as they give their testimony, to support the contention that drawing inferences based on a person's demeanour is by its nature an imprecise, variable and difficult task (**RS [32]**). Those cases do not support such a broad contention.[8]

10. In asserting that the jury was likely to misuse the evidence because of feelings of sympathy, the respondent has ignored the fact the jury was directed during the trial judge's charge to decide the case solely on the evidence and (**CAB 12.16–23**):

> ignore all other considerations such as any feelings of sympathy or prejudice you may have for anyone involved in this case. … as judges of the facts, in relation to all of the issues in this case you must act like judges. You must dispassionately weigh the evidence logically with an open mind; not according to passion, not according to your feelings.

11. That direction amply ameliorated any risk the jury would reason towards guilt based on feelings of sympathy on hearing viva voce evidence that the complainant had been very distressed when making her complaint.

12. The respondent's reliance on s 54K(5) of the JDA is misplaced. Section 54K(5) does not support the contention that a jury is likely to misuse evidence of distress (cf **RS [37]–[38]**). Section 54K was introduced by the *Justice Legislation Amendment (Sexual*

[8] The passage in *Fox v Percy* (2003) 214 CLR 118, 128–129 [30]–[31] (Gleeson CJ, Gummow and Kirby JJ) relates to the need to exercise caution against 'too readily drawing conclusions about truthfulness and reliability solely or mainly from the appearance of witnesses' as they give their testimony. *R v Favata* [2006] VSCA 44 was a case relating to the inability of a jury to use as incriminating conduct an accused's agitated response and profuse perspiration in a police interview in response to being shown recording of his discussion with an undercover police operative.

Offences and Other Matters) Bill 2022. The purpose of the directions can be gleaned from the Second Reading Speech:

> The directions will address a range of misconceptions, including about a complainant's behaviour or appearance. For example, the Bill will make clear that an accused cannot rely on an assumption that a person who dresses provocatively or drinks alcohol with someone is consenting to sex. *It will also, in appropriate cases, require the judge to direct that both truthful and untruthful accounts of a sexual offence may be given with or without obvious signs of emotion or distress, to address the misconception that a genuine victim survivor would always appear distressed when giving evidence and that the absence of such emotion indicates they are not being truthful.*[9]

13. It is clear that the introduction of the requirement to inform the jury of the matters in s 54K was intended to dispel misconceptions in order to address possible unfairness to a complainant of a sexual offence who *does not* appear distressed when giving evidence. It cannot in converse be used to suggest that there exists a risk that juries might misuse distress evidence when present.

C. Respondent's amended notice of contention

'Intractably neutral'

14. The respondent contends that before a jury can infer a complainant's distress is caused by the alleged offending, they must first exclude all other reasonable possible causes of the distress, otherwise the evidence is 'intractably neutral' and therefore irrelevant (**RS [52], [60]**). That contention should not be accepted.

15. The existence of competing inferences does not render evidence irrelevant.[10] All that is required to meet the test of relevance under s 55 is that the evidence has the capacity to rationally affect the assessment of the *probability* of the existence of a fact in issue.[11] If it is rational for a jury to reason that it is likely, although not inevitable, that a complainant's distress was caused by the alleged offending, they will be entitled to use it as evidence tending to confirm or support the complainant's testimony in relation to the charges, subject to the operation of ss 136 and 137 of the EA.[12]

16. Further, a direction that a jury may only draw an inference in relation to an intermediate fact if they first exclude all other reasonable inferences is tantamount to requiring the jury to be satisfied of an intermediate fact to the standard of beyond reasonable doubt. Such a direction is expressly prohibited by s 61 of the JDA.[13]

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[9] Victoria, *Parliamentary Debates*, Legislative Assembly, 4 August 2022, 2908 (Sonya Kilkenny, Minister for Corrections, Youth Justice, Victim Support and Fishing and Boating) (emphasis added). See also Explanatory Memorandum, Justice Legislation Amendment (Sexual Offences and Other Matters) Bill 2022 (Vic) 53–55.
[10] *Bauer* 91 [69].
[11] *IMM* 313 [45] (French CJ, Kiefel, Bell and Keane JJ).
[12] *Doney v The Queen* (1990) 171 CLR 207, 211 (Deane, Dawson, Toohey, Gaudron and McHugh JJ).
[13] *DPP v Roder (a pseudonym)* 98 ALJR 644, 649 [19].

'Self-corroboration'

17. The respondent also contends, relying in part on *R v Meyer*,[14] that a jury is not permitted to have regard to the content of a complaint in determining whether to infer that a complainant's distress is likely a consequence of the alleged offending because it amounts to 'self-corroboration' (**RS [73]–[74]**). That should not be accepted. Unless an independent witness is an eyewitness to the actual offending, evidence of a complainant's distress in the aftermath can only ever be linked to the alleged offending by having regard to the content of the complainant's account. Considered in isolation from that account, the distress evidence would be irrelevant. The relevance of distress evidence has never been required to be established without reference to the complainant's account.

18. The issue in *Meyer* was that the complainant herself gave evidence that she had been distressed after the alleged offending, and the trial judge had directed the jury that they could use the complainant's own testimony of being distressed as independent evidence that supported her account.[15] Nothing said in *Meyer* establishes a general proposition that distress evidence given by an independent observer must be assessed in isolation from the complainant's account in order to be relevant as indirect support of the alleged offending.

19. Further, it is well-established that under the EA, evidence can logically provide support for the prosecution case without meeting the requirements of corroboration at common law. Both complaint evidence and single complainant tendency evidence are examples of evidence that is not from an independent source but can nevertheless be used by a jury to support the complainant's testimony of the charges.

20. Thus, it is not accurate to assert, as the respondent does, that to use the content of the complaint evidence to draw the inference the complainant's distress was caused by the offending is to engage in 'bootstraps' or circular reasoning (**RS [75]**).

Section 16 of the JDA

21. The Court below was correct to find that the respondent needed to demonstrate that the trial judge had been obliged to give the additional directions under s 16 of the JDA. The prosecutor sought a 'particular direction' under s 12 of the JDA in relation to the distress evidence, namely that the judge direct the jury as to its permissible use. If the

[14] [2007] VSCA 115 ('*Meyer*').
[15] *Meyer* [8]–[9] (Nettle JA). Similar errors were identified in *Paull v The Queen* [2021] VSCA 339, [44]–[46] (Priest, Kaye and Niall JJA) and *Seccull v The King* (2022) 69 VR 454, 481 [96] (Niall JA and Kidd AJA).

respondent's trial counsel considered additional 'particular directions' ought to be given to the jury about the distress, they were obliged to request those directions under s 12.

The distress evidence in the respondent's trial

22. The respondent's attempt to characterise the complainant's display of emotion as observed by her mother (**RR**) as being of a different nature to distress should be rejected. It does not accord with the evidence,[16] nor the manner in which the respondent's trial counsel closed to the jury.[17] While there were other upsetting circumstances about the complainant's attendance at the Children's Court, the only matter the complainant raised with her mother (and of which RR gave evidence) was that the respondent had 'raped' her. There was no ambiguity in relation to the timing of the complainant's distress (cf **RS [68]**). Given the nature of the offending, and the complainant's evidence that in the lead up to the Children's Court hearing she had run away from home because her family reminded her of the offending, it was open to conclude that the offending was fresh in her memory notwithstanding it had occurred about 12 months earlier (**AFM 10**). There was simply no evidence the complainant's distress was a manifestation of a 'mental health issue'.[18] Finally, despite the passage of time, RR's evidence about the complainant's distress was unequivocal and unchallenged.

Costs

23. The respondent seeks an order as to costs in the event the appeal is unsuccessful. The appellant resists the making of such an order on the basis of lack of exceptionality.

Dated: 16 January 2025

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[16] In her evidence in chief, RR described the complainant's demeanour when making her complaint as 'very upset, very very distressed' (**CAB 68; AFM 24**). In cross-examination, the respondent's counsel put to RR 'You've described an incident at the Children's Court and you've described her having what you called a meltdown, do you remember saying that?' to which RR answered 'Yes' (**AFM 27**). Otherwise, RR did not adopt the term 'meltdown' to describe the complainant's emotional state when making her complaint. The respondent also conflates RR's evidence of the complainant's behavioural deterioration which she had previously described as 'psychotic' but clarified to be 'just crazy…out there' with the complainant's emotional state at the Children's Court (**AFM 27**).

[17] In closing address, the respondent's trial counsel used the terms 'meltdown' and 'distress' interchangeably (**AFM 39–40**).

[18] Evidence of the complainant's mental health diagnoses, as distinct from her autism, were as at the time of the VARE (**RFM 4**) and the respondent's trial (**AFM 24–25**) not the Children's Court hearing. By the time of trial the borderline personality disorder diagnosis had been 'dismissed'.