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

RESPONDENT'S SUBMISSIONS

PART I: FORM OF SUBMISSIONS

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

PART II: STATEMENT OF ISSUES

2. This appeal presents the following issues:

   2.1 Was it open to the jury rationally to infer that the observed distress of the complainant while having a "meltdown" at the Children's Court in late 2006 or early 2007 was indirect or circumstantial evidence indicative of the trauma of having been sexually penetrated by the accused (the **use issue**)?

   2.2 If so, was the trial judge required to: a) warn the jury that evidence of distress generally carries limited weight; and b) direct the jury specifically about the need to be satisfied that the distress was caused by the alleged offending, as distinct from another cause (the **directions issues**)?

3. While logically anterior to the directions issues, the use issue is raised by the respondent's notice of contention (**NOC**),[1] and addressed in Part VI below.

PART III: NOTICE UNDER S 78B OF THE JUDICIARY ACT 1903 (CTH)

4. Notice under s 78B of the *Judiciary Act 1903* (Cth) is not required.

[1] CAB 95. And see Proposed Amended Notice of Contention, 9 January 2025 (**Amended NOC**).

PART IV: FACTUAL BACKGROUND

5. The complainant first made an allegation that the respondent had "raped" her during what was described as a "meltdown" at the Children's Court in late 2006 or early 2007.[2] Ms Russo described the complainant's behaviour as "just crazy … out there".[3] She said that the complainant was yelling and "very upset, very very distressed".[4]

6. At the respondent's trial, the jury was invited by the prosecutor and the trial judge to use the complainant's meltdown at the Children's Court as indirect or circumstantial evidence of "distress" that was "indicative of the trauma of having been sexually penetrated by the accused".[5]

7. On the morning of the Children's Court hearing, the complainant had been picked up by police and brought to Court.[6] Ms Russo had earlier called the then Department of Health and Human Services (**DHHS**) because the complainant had run away from home for a number of days.[7] The complainant's evidence was that she had been drinking alcohol and smoking marijuana the night before.[8] Her evidence was that the hearing resulted in her being placed in foster care.[9]

8. After the close of evidence, the prosecutor under s 12 of the *Jury Directions Act 2015* (Vic) (**JDA**) asked the trial judge to give the "distress [direction]".[10] His Honour "reserve[ed]" the request for the direction,[11] but told the prosecutor, "[y]ou can put the argument, there's no problem with that".[12] Counsel for the respondent objected to the direction, saying that the causal connection between the alleged offending and the "distress" at the Children's Court was "too remote … and too tenuous".[13] Her submissions were cut short by the trial judge indicating that his Honour would reserve the application for the direction and hear the arguments put by counsel to the jury.[14]

9. After closing addresses, the trial judge advised counsel that he intended to use the prosecutor's reliance on "distress" as an example of indirect evidence in his Honour's

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2 AFM 27, lines 4-6.
3 AFM 27, line 10.
4 AFM 24, line 5.
5 CAB 14, lines 4-5; AFM 37, lines 6-19.
6 AFM 15 (Q362).
7 AFM 23, lines 11-14. The complainant was living with her mother and sisters at that time, her mother having by then separated from the respondent.
8 AFM 15 (Q363-365).
9 AFM 18, lines 18-20; RFM 5, lines 14-17.
10 AFM 30, line 5; AFM 32, line 30.
11 AFM 34, line 3 - AFM 35, line 14.
12 AFM 34, lines 20-21.
13 RFM 6, lines 19-23.
14 RFM 7, lines 4-14.

charge.[15] The respondent's counsel, having unsuccessfully objected to the line of reasoning that the prosecutor had been permitted to leave to the jury, did not then further object to the argument being summarised by the trial judge.

10. On the first day of his Honour's charge, the trial judge directed the jury on distress.[16] The following day, the trial judge gave a separate direction in relation to the use of complaint evidence.[17]

PART V: ARGUMENT IN ANSWER TO ARGUMENT OF THE APPELLANT

A. Summary of argument

11. The Court of Appeal was correct to conclude that the directions of the trial judge were defective (**VSCA [52]; CAB 77-78**). In particular, if the trial judge was right to leave a line of reasoning open to the jury that the complainant's "distress" at the Children's Court was indirect evidence indicative of the trauma of having been sexually penetrated by the accused (which is disputed in the NOC addressed in Part VI below), then the Court of Appeal was correct to conclude that his Honour ought to have: directed the jury specifically about the need to be satisfied of a causal link between the distress and alleged offending; and cautioned the jury to the effect that distress evidence generally carries little weight (**VSCA [52]; CAB 77-78**).

12. On the causation issue, the Court of Appeal ought to have held that the judge was required to direct the jury that they could not use evidence of the complainant's "distress" at the Children's Court as indirect or circumstantial evidence in support of her account unless they were first satisfied that she was distressed because of the alleged offending, and not for some other reason.[18]

13. Both the causation direction and the warning as to the limitations of distress evidence are supported by longstanding authority and are sound in principle. Moreover, the particular facts of the respondent's case underscore the need for adequate directions to assist the jury to avoid impermissible reasoning and over-valuing of a species of evidence which is inherently imprecise, open to interpretation and susceptible to being given more weight than it deserves.

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15 AFM 41, line 8-18.

16 CAB 13, line 13 - CAB 14, line 17.

17 See CAB 27, line 15 - CAB 28, line 23.

18 Amended NOC, [3]. See ***Nimely** v The King* [2023] VSCA 20, [27] (The Court); ***Tsalkos** v The King* [2024] VSCA 324, [30] (Emerton P, McLeish and Boyce JJA). See also *R v **Gulliford*** (2004) 148 A Crim R 558, [151] (Wood CJ at CL; Spigelman CJ and Howie J agreeing); *R v **Dhir*** (2019) 133 SASR 452, [64], [68]-[69] (Kourakis CJ; Stanley and Doyle JJ agreeing), citing with approval *R v Schlaefer* (1984) 37 SASR 207, 216-217 (King CJ).

B. Background

i. The statutory scheme – s 16 of the JDA

14. The JDA provides the relevant framework in which to analyse the directions required to be given to juries hearing criminal trials in Victoria. Its purposes include reducing the complexity of jury directions, simplifying and clarifying the issues that juries must determine and simplifying and clarifying the duties of the trial judge in giving directions.[19] The guiding principles of the JDA are those set out at s 5 and include, among others, the recognition by Parliament that "it is the responsibility of the trial judge to determine … the directions that the trial judge should give to the jury; and … the content of those directions."[20]

15. After the matters in issue have been identified in accordance with s 11 of the JDA, s 12 requires that "particular directions in respect of … the matters in issue; and … the evidence in the trial relevant to the matters in issue" be requested by counsel.[21] If requested, the directions must be given unless the trial judge considers that there are good reasons for not doing so.[22] Subject to the residual obligation of the trial judge preserved under s 16, the judge generally must not give the jury a direction that has not been requested under section 12.[23]

16. Section 16(1) of the JDA requires the trial judge to give a direction "regardless of parties' views … if the trial judge considers that there are substantial and compelling reasons for doing so even though the direction has not been requested".

17. Part 4, Div 3 of the JDA relates to directions about "evidence of a kind that may be unreliable".[24] If requested under s 12, or if substantial and compelling reasons exist for giving the direction under s 16, a trial judge is required under s 32(3) of the JDA to: "warn the jury that the evidence may be unreliable"; caution the jury about "the significant matters that the trial judge considers may cause the evidence to be unreliable"; and "warn the jury of the need for caution in determining whether to accept the evidence and the weight to be given to it."

18. In the present case, a request was made by the prosecutor, under s 12 of the JDA, for "[t]he distress [direction]".[25] For that reason, the substantial and compelling reasons

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[19] JDA, s 1.
[20] JDA, s 5(2)(b)-(c).
[21] JDA, s 12.
[22] JDA, s 14(1).
[23] JDA, s 15.
[24] See JDA, s 32(1).
[25] AFM 30, lines 4-5. See also AFM 32, line 30.

threshold of s 16 was not engaged.[26] The prosecutor's request drew upon and engaged a body of case law which speaks to the content of the direction sought, including the requirements ultimately relied upon by the Court of Appeal. Notwithstanding that it is the duty of counsel to assist, under the scheme of the Act the content of the distress direction, having been expressly requested, was a matter for the trial judge.[27] In this case, the trial judge gave the distress direction requested by the prosecutor, but failed to do so completely or in accordance with prevailing authority.

19. Alternatively, even if s 12 of the JDA required particular components of a distress direction to be requested by counsel, s 16 preserves and reflects the central role of the trial judge as the arbiter of fairness of process in a criminal trial and of the integrity of jury reasoning.[28] While it sets a deliberately stringent test,[29] it must be given work to do. Section 16 of the JDA operates as a "safeguard" to "protect the rights of the accused".[30] Where, as here, the failure to give a particular direction resulted in a substantial miscarriage of justice – that is the loss of a chance of acquittal fairly open – there are substantial and compelling reasons for the giving of that direction in the absence of a request (**VSCA [53]; CAB 78**). The Court of Appeal was correct to conclude that that standard was met in the present case.

ii. Distress evidence under the *Evidence Act 2008* (Vic)

20. In certain circumstances, observations of distress exhibited by a complainant after an alleged sexual offence may be indirect or circumstantial evidence that supports a complainant's account.[31] Evidence of observed distress, "[l]ike bruising, bleeding, and torn clothing", is "an aspect of the appearance or visible condition of the complainant that of itself is capable of providing independent confirmation of the complainant's account of what happened to her."[32] In this way, so called "distress evidence" may be capable of being viewed as "an artefact of the assault".[33]

21. Historically, evidence of the distressed condition of a complainant was capable of corroborating a complaint of alleged sexual offending if, having regard to factors such as the circumstances existing when the distress was observed and the time interval

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[26] Amended NOC, [4].
[27] JDA, s 5(2)(c), read together with s 5(3). See also s 9(a)(iii).
[28] See JDA, s 5(2).
[29] See *Dunn (a Pseudonym) v The Queen* [2017] VSCA 95, [22] (Tate JA).
[30] Explanatory Memorandum, *Jury Directions Bill 2015* (Vic) 11.
[31] See *R v **Flannery*** [1969] VR 586, 591 (Winneke CJ, Pape and Starke JJ).
[32] *R v **Sailor*** [1994] 2 Qd R 342, 346 (McPherson JA). See also *Dhir*, [61] (Kourakis CJ): "Evidence of distress, like evidence of torn or damaged clothing or a generally dishevelled appearance, is circumstantial evidence of involvement in a physical altercation."
[33] ***Seccull** v The King* (2022) 69 VR 454, [90] (Niall JA and Kidd AJA).

between the alleged offending and the distress, the reasonable inference was open that there was a causal connection between the two.[34]

22. Under ss 55 and 56 of the *Evidence Act 2008* (Vic), in order to be admissible as indirect evidence capable of proving inferentially that alleged offending has occurred, evidence of observed distress must be relevant for use in the proposed way. It must thereby be capable of affecting the probability of the existence of a fact in issue. In this case, that sexual penetration occurred.

23. Questions of relevance turn on how the proposed evidence is intended to be used.[35] To be relevant as indirect evidence that sexual penetration has occurred, the observed distress must be rationally capable of being characterised as attributable to the sexual offending alleged, as distinct from another cause.[36] If it is not open to the jury to exclude alternative explanations for the distress sought to be relied upon, the evidence is not capable rationally of being attributed to the alleged offending and is not relevant for that purpose.[37]

24. The result is that, if not relevant for another purpose, distress evidence which fails to satisfy the causation threshold is inadmissible under s 55 of the *Evidence Act*. If relevant and admissible for another purpose, its use as "distress evidence" is precluded by s 136 of the *Evidence Act*. Conversely, if the evidence *is* rationally capable of being viewed as attributable to the alleged offending, as distinct from another cause, it satisfies the "question of law at the threshold",[38] and it is then a matter for the jury (properly directed) to decide whether in fact the causal link is established on the evidence. The necessary directions may be given under the common law or s 32 of the JDA.[39]

25. The submissions of the appellant tend to conflate evidence of complaint – that is representations by a complainant that alleged offending has occurred, admitted as an exception to the hearsay rule under s 66(2) of the *Evidence Act* – with evidence of observations of distress on the part of a complainant which may or may not accompany a complaint and which is relied upon as a manifestation or artefact of the assault itself,

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34 *Flannery*, 591 (Winneke CJ, Pape and Starke JJ); *R v **Redpath*** (1962) 46 Cr App R 319, 321-322 (Parker LCJ, Winn and Brabin JJ).

35 See *Tsalkos*, [234] (Niall JA).

36 *Tsalkos*, [29]-[30] (Emerton P, McLeish and Boyce JJA).

37 Ibid. And see *Gulliford*, [151] (Wood CJ at CL; Spigelman CJ and Howie J agreeing); *Dhir*, [64], [68]-[69] (Kourakis CJ).

38 *Sailor*, 345 (McPherson JA).

39 Noting that the JDA is "not designed to be a comprehensive source of the law on jury directions": Victoria, Department of Justice and Regulation, Criminal Law Review, *Jury Directions: A New Approach* (2013) 34.

capable inferentially of proving that the offending has occurred.

26. There can be no doubt that, when a complaint is admitted under s 66(2) of the *Evidence Act,* the representation is admissible to prove, not just the consistency of the complainant's allegations, but the truth of the contents of the complaint.[40] Nevertheless, the representation continues to be hearsay evidence.[41] It cannot provide independent support for a complainant's account.

27. Observations of the distressed condition of a complainant used as indirect evidence tending to prove that an offence has occurred differs as a matter of principle from evidence of distress on the part of a complainant which is given as part of the commonplace and generally unobjectionable practice of a witness recounting the context in which a complaint is made.[42] While evidence of distress or other displays of emotion are capable of supporting the complainant's credibility, and in that sense will be relevant to establishing the fact in issue of whether sexual offending occurred, the pathway of reasoning is more attenuated. The pathway is that the contextual evidence renders the complainant's account more believable. It is not an artefact or manifestation of the offending. And, importantly, it is not capable of independently supporting the complainant's account.

28. Evidence of distress relied upon as indirect evidence of the occurrence of an alleged offence has the capacity to provide independent support for a complainant's account – that is, support for a complainant's account of alleged offending sourced other than from the complainant herself. It is that feature of distress evidence that historically enabled it to meet requirements for corroboration.[43]

29. While it is an historical fact that the requirement for the evidence of complainants to be corroborated has long since been abrogated, and juries in Victoria are no longer directed in terms of "corroboration",[44] corroboration does not carry any legal or technical connotation. It is synonymous with "support or supporting evidence".[45] The "purpose of this type of evidence and its correlation with circumstantial evidence remain unchanged."[46]

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40 *Evidence Act*, s 60; *Papakosmas v The Queen* (1999) 196 CLR 297, [33] (Gleeson CJ and Hayne J), [45] (Gaudron and Kirby JJ), [88] (McHugh J).

41 *SB v The Queen* [2020] NSWCCA 207, [116] (Rothman J; Hoeben CJ at CL agreeing).

42 *Seccull*, [87]-[88] (Niall JA and Kidd AJA); *Tsalkos*, [13]-[15] (Emerton P, McLeish and Boyce JJA), [235] (Niall JA).

43 See, eg, *Sailor,* 347 (McPherson JA).

44 *Evidence Act*, s 164(1).

45 *Tsalkos*, [258] (Niall JA). See also *R v Baskerville* [1916] 2 KB 658, 667 (Lord Reading CJ).

46 ***Lynch*** *v The Queen* [2020] NTCCA 6, [77] (The Court).

30. The probative value of evidence of distress relied upon as independent evidence of the occurrence of an alleged offence lies in its capacity to be causally linked with the alleged offending other than by reliance on the content of the complaint.[47] It is its probative value independently of reliance on the (direct) account of the complainant that enables it to be indirect supporting evidence.

C. The need for a warning as to weight

31. The Court of Appeal was correct to hold, consistent with longstanding authority, that the trial judge ought to have directed the jury that evidence of distress "generally carries little weight" (**VSCA [52]; CAB 77-78**). As Nettle J observed in *R v Brdarovski*:[48]

> authority suggests that [evidence of distress] generally carries little weight and as a matter of prudence juries should ordinarily be warned of its inherent limitations. The need for such a warning is also likely to increase where, as here, the observation of the complainant's distressed condition is made at some time after the incident, is equivocal and could have been the result of incidents which did not form part of the charge.

i. Inherent limitations

32. There are sound reasons as a matter of principle for a trial judge to caution a jury of the inherent limitations of evidence of distress. The drawing of inferences based on a person's demeanour is by its nature an imprecise, variable and difficult task.[49] Seeking to interpret the external manifestation by another person of an internal emotional reaction is a task categorically different from the interpretation of words.[50] Human nature is variable. Some people are "stoic, and others more labile."[51] To assign a cause to an apparent emotional state requires the application of unstated assumptions – in some cases misconceptions – about expected or normal human reactions to particular events.

33. The dangers of misinterpretation were compounded in the present case because, whatever might be assumed about typical emotional reactions to traumatic events, the evidence here was of a different nature. The jury in the present case was asked to draw a causal link between alleged offending and an incident described as a "meltdown",

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47. *Tsalkos*, [15] (Emerton P, McLeish and Boyce JJA); *Sailor,* 347 (McPherson JA).
48. (2006) 166 A Crim R 366, [42]. See also, eg, *Flannery,* 591 (Winneke CJ, Pape and Starke JJ); *Seccull,* [100] (Niall JA and Kidd AJA).
49. *Fox v Percy* (2003) 214 CLR 118, [30]-[31] (Gleeson CJ, Gummow and Kirby JJ); *Société d'Avances Commerciales (Société Anonyme Egyptienne) v Merchants' Marine Insurance Co* (1924) 20 Ll L Rep 140, 152 (Atkin LJ): "an ounce of intrinsic merit or demerit in the evidence, that is to say, the value of the comparison of evidence with known facts, is worth pounds of demeanour."
50. See *R v **Favata*** [2006] VSCA 44, [145] (Vincent JA; Callaway and Buchanan JJA agreeing).
51. *Tsalkos*, [233] (Niall JA).

about which they were presented with limited evidence. Ms Russo in her evidence described her daughter's state during her meltdown as "just crazy … out there".[52] She had earlier described it as "psychotic".[53] As the respondent's counsel argued at trial, the prosecution sought to "[conflate] meltdowns with distress".[54]

34. Additionally, in the case of distress accompanying a complaint, the evidence is assessed not based on the jury's own observations but through the account of another witness, potentially being recalled after the passage of a considerable period of time, where there is a potential to stray into impermissible opinion evidence.[55] If making an assessment based on demeanour is difficult and imprecise, it is especially difficult and imprecise second-hand.

35. Similar observations have been made about a person's demeanour being relied upon as an example of incriminating conduct. Although not excluded in principle from the kinds of behaviour capable of constituting implied admissions of guilt, "as a practical proposition … it would be rare indeed when a judge would be entitled to leave evidence of demeanour or reactions to events or disclosures before the jury on this basis. Among the reasons for concern would be the potential imprecision and unreliability of the observations."[56] In such cases, a jury ought to receive "a very clear warning about the dangers of drawing such an inference from demeanour."[57]

ii. Informed by contemporary understandings

36. Whereas part of the caution which historically has attached to evidence of observed distress was based on outdated concerns about distress being "easily feigned",[58] contemporary understandings of the myriad ways in which people react to trauma in fact underscore the capacity of evidence of this kind to be misunderstood and misused.

37. Under the recently enacted s 54K(5) of the JDA,[59] for example, relating to distress or emotion displayed by a complainant while giving evidence, a trial judge in Victoria

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52 AFM 27, line 10.
53 AFM 27, line 8.
54 RFM 6, lines 28-29.
55 See *Seccull,* [87] (Niall JA and Kidd AJA); *Evidence Act*, ss 76, 78.
56 *Favata*, [145] (Vincent JA; Callaway and Buchanan JJA agreeing). And see [147], noting the absence of instruction to the jury about "the particular care with which they had to approach the dangerous task of drawing inferences from demeanour."
57 *R v Barrett* (2007) 16 VR 240, [36] (Eames JA; Maxwell P and Habersberger AJA agreeing).
58 See, eg, *Redpath*, 322 (Parker LCJ, Winn and Brabin JJ).
59 Enacted after the respondent's trial by s 56 of the *Justice Legislation Amendment (Sexual Offences and Other Matters) Act 2022* (Vic). See also s 52(4) of the JDA.

must now direct the jury (unless there are good reasons not to)[60] 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; and both truthful and untruthful accounts of a sexual offence may be given with or without obvious signs of emotion or distress.

In the Statement of Compatibility to the Bill which introduced s 54K, the Minister explained that it was intended to: "guard against a jury making incorrect assumptions as to these issues" noting that "these new directions reflect extensive research on common misconceptions about sexual offence victim-survivors".[61]

38. Thus, far from being based on outdated stereotypes as the appellant contends, caution in the reception and use of distress evidence appropriately reflects a recognition that: there is no typical, proper or normal response to a sexual offence; people may react differently to, and appear differently in, different situations; and that assessments of such reactions are necessarily imprecise, variable and susceptible to misjudgment.

iii. Risk of over-valuing

39. In addition to being inherently equivocal and open to misinterpretation, evidence of distress is by its nature evidence of an emotional reaction, often a strong emotional reaction, liable therefore to elicit an emotional reaction in the jury.[62] It is sympathetic evidence, and understandably so. But that capacity does not contribute rationally to – or in rational proportion to – the capacity of the evidence to prove a fact in issue.

40. Moreover, despite the abrogation of the historical requirement that allegations of sexual offending be corroborated, the use of distress evidence as if it provides independent support for a complainant's account may still be a powerful argument to a jury.[63] Especially where (as in the present case) there are otherwise difficulties surrounding the credibility or reliability of the complainant, evidence which has the appearance of independence can assume outsized importance.

41. An argument to a jury, made expressly or in effect, that distress evidence provides a form of independent support for a complainant's account in circumstances where (if the appellant's submissions at **AS [63]** and **[78]** are accepted) the content of the

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60 JDA, s 54K(1).

61 Victoria, *Parliamentary Debates,* Legislative Council, 18 August 2022, 2953 (Harriet Shing, Minister for Equality). See also New South Wales, *Parliamentary Debates,* Legislative Assembly, 20 October 2021, 7513-7514 (Mark Speakman, Attorney General); Western Australia Law Reform Commission, Project 113, *Sexual Offences: Final Report*, October 2023, [105].

62 *Tsalkos*, [56] (Emerton P, McLeish and Boyce JJA).

63 *Tsalkos,* [259] (Niall JA); *Lynch*, [77] (The Court). See also *R v **Meyer*** [2007] VSCA 115, [11] (Nettle JA; Vincent and Redlich JJA agreeing).

complaint is said to establish the causal link, risks a jury engaging in bootstraps reasoning.[64] In the present case, the evidence of Ms Russo's observations of the complainant's distress was highlighted, separately from the complaint, as itself a piece of circumstantial evidence supporting the inference that the complainant had been offended against.[65] From this separation arises a risk of the evidence being relied on by the jury as a form of pseudo self-corroboration which, if it is permissible at all (disputed below at [73]-[75]), was at least liable to be over-valued in the absence of judicial direction. Indeed, even where evidence of observed distress is relied on only as the context of the complaint (to enhance the credibility of that complaint), there may, depending on whether the prosecutor seeks to highlight the distress evidence, be a need for the jury to be cautioned about the limitations of distress evidence.[66]

iv. The orthodox nature of the direction

42. The appellant's contention that a direction as to the weight of distress evidence impinges on the fundamental fact-finding role of a jury (**AS [51]**) is without substance.

43. There is nothing unusual about juries receiving directions about the weight or value of certain types of evidence. In this case, for example, the trial judge gave a direction pursuant to s 32 of the JDA warning that the evidence of the complainant may be unreliable (based on issues to do with the complainant's mental health, the limitations of her "blurry, fragmented recollections"[67] and the passage of time) and specifically warning the jury of "the need for caution in determining whether to accept the evidence and the weight to be given to it."[68]

44. Juries in Victoria are routinely warned against placing too much weight on the demeanour of witnesses: "There are too many variables to make the manner in which a witness gives evidence the only, or even the most important, factor in your decision."[69] As noted at [37] above, there is now a specific caution in relation to distress displayed by a complainant when giving evidence in the trial of a sexual offence to the effect that "both truthful and untruthful accounts of a sexual offence may be given with or without obvious signs of emotion or distress."[70]

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64 See [73]-[75] below.

65 See the distress direction at CAB 13, line 13 - CAB 14, line 17, given on 8 September 2022; and the complaint direction at CAB 27, line 15 - CAB 28, line 23, given on 9 September 2022.

66 In the absence of such directions, the probative value of the evidence may be outweighed by its prejudicial effect under s 137 of the *Evidence Act*.

67 CAB 34, lines 26-27.

68 See JDA, s 32(3)(c).

69 Judicial College of Victoria, Criminal Charge Book, [1.6.1] 'Assessing Witnesses'. This is an example of a direction demonstrating that the JDA does not operate as a code.

70 JDA, s 54K.

45. As a further example, under s 36(3) of the JDA, trial judges are required to warn the jury of the need for "caution" in determining whether to accept identification evidence "and the weight to be given to it". They are required to inform the jury of significant matters that the judge considers may make the evidence unreliable and of the experience of the law that a witness may honestly and convincingly believe that his or her evidence is accurate when the witness is in fact mistaken.[71]

46. These routine directions in no way detract from the role of the jury as the trier of fact, about which they are mandatorily directed.[72] As Hayne J said in *Melbourne v The Queen*, "[i]t is trite to observe that the jury, not the judge, are the sole judges of questions of fact. But that does not mean that a trial judge can leave all questions of fact to the jury without giving them any directions."[73] Rather, the trial judge in a criminal trial "must instruct the jury about some matters that affect how they set about finding the facts. Thus in some cases the judge must warn the jury of dangers of which they must beware when they are considering the facts."[74] So much is reflected in the "Guiding principles" at s 5 of the JDA.[75] Hayne J referred to examples including directions about the dangers of identification evidence, before continuing: [76]

> The warnings about factual issues that I have mentioned are given to the jury not just because they relate to one or more of the issues in the case but because, if they are not given, the jury may omit consideration of important matters (of which they may be unaware) and wrongly conclude that guilt has been demonstrated beyond reasonable doubt.

47. Similarly, a direction to the effect that a type of evidence generally carries limited weight in no way detracts from the need to consider the probative value of evidence in the context of the case as a whole (cf **AS [55]-[56]**). It is simply evidence which, like identification evidence, the jury should approach with caution before attaching great weight to it, while also assessing that weight in the context of the case as a whole. There is no inconsistency in those two prescriptions.

48. Turning finally to the appellant's contention that a direction on the limitations of

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71 JDA, s 36(3)(b)-(c).

72 See, eg, CAB 8, line 30 - CAB 9, line 7.

73 (1999) 198 CLR 1, [144] (***Melbourne***). See also Murray Gleeson, "The Role of a Judge in a Criminal Trial", LawAsia Conference, Hong Kong, 6 June 2007, 12-13: "Although it is for the jury, not the judge, to weigh the evidence, decide what to accept and what to reject, or to doubt, and the weight to be given to it, appellate courts have identified certain circumstances in which it is the duty of trial judges to warn juries of matters which, in the experience of courts, require some caution on their part. ... The rationale behind the need for such warnings includes the risk that certain dangers are not necessarily obvious to lay jurors."

74 *Melbourne*, [144].

75 JDA, s 5(2).

76 *Melbourne*, [144].

distress evidence risks a trial judge offending s 51(1) of the JDA (**AS [75]**), once again that contention is without substance. Distress evidence may or may not accompany a complaint. If it does accompany a complaint, and if that complaint is a delayed complaint, it becomes a forensic reality that the passage of time may introduce intervening factors capable of having caused the observed distress. The significant forensic disadvantage direction under s 39 of the JDA presents an analogous example of a direction by which the law recognises a forensic consequence that can be occasioned by delay between the alleged offence and the trial.[77] As is routine, however, in the present case a s 39 direction was given, not just without contravening s 51 of the JDA, but alongside the trial judge properly directing the jury in accordance with s 52 of the JDA.[78] Indeed, far from undermining the central premise of s 51 of the JDA, that there is no typical, proper or normal response to a sexual offence, the proposed direction that limited weight should generally be attached to evidence of distress is consistent with and reinforces that very notion, as explained at [36]-[38] above.

v. <u>The particular need to warn the jury in this case</u>

49. For the reasons explained at **VSCA [26]; CAB 71** (and below at [67]-[72]), if a causal link was capable of being inferred between the alleged offending and observations of the complainant's "distress" in the present case (contrary to the argument advanced in Part VI below), the Court of Appeal was correct to conclude that the causal link was "[o]n any view … weak" (**VSCA [52]; CAB 77**). Thus, while the Court of Appeal acknowledged that there may be cases where evidence of distress carries greater weight (**VSCA [50]; CAB 77**), on no view was the respondent's trial such a case.

50. Despite this, the failure by the trial judge to direct the jury as to the generally limited weight to be attached to evidence of distress was in fact exacerbated in the respondent's case by the judge's direction to the jury (immediately before offering distress as an example of indirect evidence) that indirect evidence "can be just as strong or even stronger" than direct evidence.[79]

D. The need for a direction on causation

51. The Court of Appeal was correct to conclude that, if the jury was to be invited to use evidence of the complainant's meltdown at the Children's Court as indirect evidence "indicative of the trauma of having been sexually penetrated by the accused",[80] then

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77 See also, for example, *Evidence Act 1995* (NSW), s 165B.
78 CAB 24, lines 15-25.
79 CAB 13, lines 25-26.
80 CAB 14, lines 4-5.

the trial judge was required to do more to assist the jury than to explain the arguments of the prosecutor and defence and give a general warning about the drawing of inferences (**VSCA [52]; CAB 77-78**). Instead, the Court of Appeal was correct to conclude that there were substantial and compelling reasons for the trial judge to direct the jury specifically "about the need … to be satisfied that there was a rational causal link between the distress and the alleged offending" (**VSCA [52]; CAB 78**).

52. Indeed, the Court of Appeal ought to have gone further and concluded that the trial judge was required to direct the jury to the effect that, before they could use observations of the complainant's "distress" as indirect evidence that sexual penetration had occurred, they had to be satisfied that the meltdown was caused by the alleged offending, as distinct from another cause.[81] In other words, they were required to exclude other explanations for the distress.[82]

53. The trial judge's directions rehearsing the arguments of counsel on the issue of causation "[did] not substitute for a direction of principle, stated by the judge to be such, in the context of informing the members of the jury of the principles of law which they were required to apply to their deliberations."[83] In relation to incriminating conduct, by way of example, s 21 of the JDA reflects the value in the trial judge assisting the jury with clear directions on the necessary steps in their line of reasoning before reliance can be placed on potentially equivocal evidence, such as post-offence lies or other incriminating conduct. Contrary to **AS [78]**, to simply leave the jury to rely on their "common human experience" in such circumstances is not consistent with the duties of the trial judge in a criminal trial.[84] It is not the role of the trial judge "to leave all questions of fact to the jury without giving them any directions".[85]

54. In this case, the need for the jury to be carefully and clearly assisted in respect of the permissible use of the evidence was particularly acute. If (contrary to the respondent's argument in Part VI below), it was open to the jury to infer a causal connection between the complainant's meltdown at the Children's Court and the alleged offending, at most it was a "weak" connection (**VSCA [52], [54]**; **CAB 77-78**).[86]

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81 Amended NOC. It is not suggested that the distress had to be the "*sole* reason why a complainant *could* have appeared distressed" (see **VSCA [49]; CAB 76**) (emphasis added).

82 *Nimely,* [27] (The Court); *Tsalkos*, [30] (Emerton P, McLeish and Boyce JJA). And see *Gulliford*, [151] (Wood CJ at CL; Spigelman CJ and Howie J agreeing); *Dhir*, [64], [68]-[69] (Kourakis CJ).

83 *R v TJF* (2001) 120 A Crim R 209, [66] (Studdert J; Beazley J agreeing).

84 The appellant's references to *IMM v The Queen* (2016) (2016) 257 CLR 300, [74] and *R v **Bauer*** (2018) 266 CLR 56, [100] at **AS [79]** relate to the risk of misuse of complaint evidence – not evidence of distress – in the context of the discretionary exclusion of evidence under s 137 of the *Evidence Act*. No such issue arose in the respondent's case.

85 *Melbourne*, [144] (Hayne J).

86 For the reasons explained at [67]-[72] below.

55. It was particularly important that it be made clear to the jury that, before they could use the evidence in the way proposed, they had to be satisfied that they could disentangle the circumstances of the complainant's attendance at the Children's Court, including her interactions as teenager with police and her mother, on that day. Absent satisfaction that the distress was not explained by those other potential causes, the evidence was not relevant in the manner proposed.

56. Thus, absent careful attention to the line of reasoning the jury was being invited to deploy, the evidence was liable to be misused. The requirement that the jury be satisfied of the requisite causal link before using the evidence in the way proposed was a matter "affect[ing] how they set about finding the facts", absent which the jury may "wrongly conclude that guilt has been demonstrated beyond reasonable doubt".[87]

57. The Court of Appeal was correct to conclude that the absence of a direction specifically informing the jury about the need to be satisfied of a causal link between the alleged offending and the "distress" sought to be relied upon occasioned a substantial miscarriage of justice, whether alone or in combination with the absence of a warning as to the limited weight of the evidence (**VSCA [53], CAB 78**).

PART VI: ARGUMENT ON THE NOTICE OF CONTENTION

58. The respondent's NOC raises a "question of law at the threshold, which is whether the inference can be drawn that the distress is causally related to the incident".[88] In this case, the proper answer to that question is "no". The Court of Appeal was wrong to conclude that "if the jury had been properly instructed, it would … have been open to conclude that a rational causal link had been established" (**VSCA [54]; CAB 78**).

59. The fact in issue here was whether sexual penetration occurred. Where it is sought to be relied upon as circumstantial evidence of the trauma of the alleged offending, observed distress to be rationally probative of that fact in issue must be capable of characterisation as having been caused by the sexual penetration alleged, as distinct from another cause. If on the evidence the apparent connection between the two is at most tenuous and remote, then the jury cannot rationally be invited to use the evidence of distress as indirect evidence indicative that an alleged offence has occurred.[89] Unless the jury can be satisfied that the distress was not the product of one or more of a variety of other causes, it is not rationally probative of the fact in issue.

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87 *Melbourne*, [144] (Hayne J).

88 *Sailor*, 345 (McPherson JA).

89 *Tsalkos*, [29]-[30] (Emerton P, McLeish and Boyce JJA). See also *Sailor*, 345 (McPherson JA).

60. This threshold causation test has been described as a question of whether the evidence is "intractably neutral" as between competing causes.[90] Whether evidence is intractably neutral must be assessed by reference to the cumulation of circumstantial evidence.[91]

61. The outworking of these principles is that, if not relevant for another purpose, distress evidence which fails to satisfy that causal threshold is inadmissible under s 55 of the *Evidence Act* (or, if the threshold is established but minimally so, it may be inadmissible under s 137). Such evidence will then not be before the jury.

62. If relevant and admissible for another purpose, its use as distress evidence is precluded, whether by s 136 of the *Evidence Act* or under the common law. The evidence is before the jury, but the prosecutor in their address, and the judge in their charge, are precluded from inviting the jury to engage in a line of reasoning which is not open.[92] (It may or may not be appropriate for the judge to direct the jury that the evidence may not be used other than for a permissible purpose.)

63. If the evidence does have the relevant capacity, it is admissible under s 55, subject to exclusionary rules including s 137. The line of reasoning can be left to the jury, and it is then a matter for the jury (subject to appropriate direction) to decide whether in fact the causal link is established.[93]

64. In this case, the Court of Appeal assessed the causal link between the alleged offending and the "distress" exhibited by the complainant at the Children's Court as, "[o]n any view … a weak one" (**VSCA [52]; CAB 77**). Instead, the Court of Appeal ought to have concluded that it was not open to a jury acting reasonably to infer that the complainant's meltdown at the Children's Court was caused by the trauma of having been sexually penetrated by the accused, as distinct from the multiple significantly distressing circumstances of her attendance at Court that day. The Court of Appeal ought to have held that the trial judge impermissibly left a line of reasoning to the jury that was not open.

65. The content of the complaint made by the complainant to her mother at the Children's Court was incapable – both as a matter of principle and on the facts of this case – of

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[90] *Tsalkos*, [28], [50] (Emerton P, McLeish and Boyce JJA); ***Flora*** *v The Queen* (2013) 233 A Crim R 320, [72]-[83] (Redlich, Weinberg and Coghlan JJA). See also *Edwards v The Queen* (1993) 178 CLR 193, 212-213 (Deane, Dawson and Gaudron JJ): "the innocent explanation for that lie was so plausible that the lie could not have been probative of guilt. … [T]his should have prevented the trial judge from concluding that the telling of the lie was capable of amounting to corroboration of the complainant's evidence".

[91] *Flora*, [82] (Redlich, Weinberg and Coghlan JJA).

[92] See, by analogy, *Favata,* [144]-[147] (Vincent CJ; Buchanan and Vincent JJA agreeing).

[93] See, eg *Flora,* [89]-[91] (Redlich, Weinberg and Coghlan JJA).

providing a basis on which a jury could rationally exclude the other potential causes of the complainant's "distress".

A. The evidence is "intractably neutral"

66. Ms Russo's evidence of the complainant's meltdown at the Children's Court was not rationally capable of being characterised as attributable to the sexual offending alleged, as distinct from alternative sources of distress on that day.

67. *First,* the immediate circumstances of the complainant's meltdown were distressing in and of themselves. In the lead up to the Children's Court hearing, the complainant had run away from home, as a result of which Ms Russo had called police and engaged DHHS.[94] That morning, the complainant (at that time a teenager) had been picked up by police and brought to Court.[95] The Court hearing was the first time Ms Russo and the complainant had seen each other since the complainant had run away from home several days before.[96] The complainant had been drinking alcohol and smoking marijuana the previous night and had "a lot of crap in [her] system".[97] The precise nature of the hearing was not clear.[98] The complainant's account of the hearing was that she "was given the option to choose between foster care and my dad[99] and I chose foster care at the time".[100] Ms Russo's evidence was that she thought that the complainant came home with her.[101] The complainant described attending the Children's Court that day as "pretty traumatic".[102]

68. *Second,* there were significant evidentiary gaps about the circumstances in which the meltdown, and the complaint, occurred. There was no evidence as to where or when the complainant's meltdown started or what events or conversations (if any) occurred before or as it commenced. There was no evidence to establish, for example, whether the meltdown began in the police car, nor whether it occurred before, during or after the Children's Court hearing and any discussion about foster care. There was no evidence indicating how far into the meltdown the complainant reported the alleged offending by the respondent or otherwise as to the immediate context in which the complaint was made.

69. *Third,* the complainant's meltdown at the Children's Court occurred some twelve

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94 AFM 23, lines 11-14.
95 AFM 15 (Q362).
96 AFM 28, lines 11-12.
97 AFM 15 (Q363-365).
98 It appears to have been a hearing of some kind in the Children's Court Family Division.
99 The complainant's father had been violent towards her and an alcoholic: See AFM 25, lines 15-27.
100 RFM 5, lines 14-17. See also AFM 11 (Q158).
101 AFM 24, lines 25-26.
102 AFM 15 (Q362).

months after the alleged offending, during which time any number of intervening and unrelated events had occurred. As Emerton P, McLeish and Boyce JJA recently observed in *Tsalkos*:[103]

> The value of distress as independent evidence diminishes rapidly with the passing of time. The longer the interval from the alleged events, the more difficult it is to be sure that the distress is not due to some other intervening or unrelated cause.

70. While there is no particular time limit after which observed distress will cease to be sufficiently connected to alleged offending to constitute support for a complainant's account, "[e]ventually a stage in time is reached where, without resorting to the testimony of the complainant, it ceases to be possible to link this distress with its alleged cause."[104] The need to disentangle multiple potential causes of observed distress, and the difficulties associated therewith, increase with the passage of time. That is so notwithstanding that alleged offending may remain fresh in a complainant's memory for a long time,[105] and that complainants who delay in making a complaint are no less credible as a class than other complainants. It is simply a reality of the passage of time that intervening events will make it more difficult to infer that observed distress was caused by alleged offending and not another cause.[106]

71. *Fourth,* whereas a jury's assessment of distress evidence will necessarily turn on unstated and perhaps unsound assumptions about the emotional responses people might have to particular events, the circumstances of this case involve further uncertainty and complexity, as explained at [33] above. The "distress" sought to be relied upon in this case appeared to be the manifestation of one or more mental health issues suffered by the complainant at the relevant time. Though it was apparent that the complainant had been treated and diagnosed by experts, none were called to assist the jury in their understanding.[107] The appellant's reliance on the "common human experience" of distress (**AS [78]**), while not immutable in any event as the submissions above demonstrate, is certainly inapt in the present case.

72. *Fifth,* the quality of the distress evidence was poor. The evidence was given by Ms Russo some 16 years later, with self-professed limitations on her recollection as a

103 At [26].
104 *Sailor,* 346 (McPherson JA).
105 *Bauer*, [89] (Kiefel CJ, Bell, Gageler, Keane, Nettle, Gordon and Edelman JJ).
106 *Tsalkos*, [26] (Emerton P, McLeish and Boyce JJA).
107 See RFM 4 (Q388-391).

result.[108] The complainant had little if any recollection of the incident when she gave her evidence-in-chief in 2018.[109] In cross-examination in 2021 said that she "didn't remember [the meltdown] for a long time but I do remember it now".[110]

B. Resort to the content of the complaint is no answer

73. The appellant contends that the causal link between the alleged offending and the complainant's meltdown at the Children's Court can be supplied by the content of the complainant's representations to her mother, at an unknown stage of the meltdown, that the respondent had raped her (**AS [78]**). Both for reasons of principle, and on the facts of this case, that contention cannot be supported.

74. *First*, evidence of an observed emotional state sought to be relied on as indirect or circumstantial evidence from which it can be inferred that a sexual offence occurred earns its logical force by remaining separate from a complainant's account.[111] The trial judge is not required to consider the circumstantial evidence of distress in isolation. Whether the evidence is really "intractably neutral" must be assessed by reference to the cumulation of circumstantial evidence.[112] However, because it is received and used as indirect evidence that supports the complainant's account, its assessment and use occur as a matter of logic without reliance on the content of the complainant's account. To do otherwise would be to countenance a form of self-corroboration.[113] As Barton J explained in *Ridley v Whipp*, "If one part of a person's evidence is relied on for corroboration of the remainder, the answer instantly arises that the part relied on is as much under the original reservation as the part sought to be corroborated." [114]

75. Put another way, when the question is whether evidence of a complainant's distressed condition is capable of use as circumstantial evidence supportive of the complainant's account, to rely on the content of the complainant's account to establish that it was caused by the alleged offending is to engage in circular or "bootstraps" reasoning.[115] It is to assume the truth of the very conclusion that the causal link is being relied upon

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108 See, eg, AFM 23, lines 28-31. Ms Russo initially told the complainant that she had not reported the alleged offending to her until later in life but then she remembered the meltdown at the Children's Court: CAB 14-15 (Q359-362).

109 AFM 10 (Q153); AFM 11 (Q158); AFM 14 (Q353); AFM 15 (Q364).

110 AFM 18, lines 25-26.

111 See *Tsalkos,* [15] (Emerton P, McLeish and Boyce JJA); *Sailor,* 347 (McPherson JA).

112 *Flora*, [82] (Redlich, Weinberg and Coghlan JJA).

113 As to which see *Meyer*, [9] (Nettle JA; Vincent and Redlich JJA agreeing): "It is rudimentary that a complainant's testimony is incapable of constituting independent evidence in support of her own allegations". See also *Paull v The Queen* [2021] VSCA 339, [44]-[46] (The Court); *Seccull*, [96] (Niall JA and Kidd AJA); and see **VSCA [56](1); CAB 78**.

114 (1916) 22 CLR 381, 389.

115 See *Meyer,* [9] (Nettle JA; Vincent and Redlich JJA agreeing).

to prove. For that reason, the threshold question for the trial judge as to whether observed distress is rationally capable of being characterised as attributable to the sexual offending alleged is not answered by resort to the content of the complaint.

76. *Secondly*, even if reliance on the content of the complaint were permissible, on the facts of this case the observations of the complainant's distress were equivocal in any event. Particularly because "some people may show obvious signs of emotion or distress when [recounting] a sexual offence, while others may not",[116] and "both truthful and untruthful accounts of a sexual offence may be given with or without obvious signs of emotion or distress",[117] the significance of the other potential causes of the complainant's distress combined with the evidentiary gaps (as explained at [67]-[72] above), mean that the evidence was intractably neutral in any event.

C. Conclusion

77. It was not open to a jury acting reasonably to infer that the complainant's "distress" at the Children's Court was caused by the alleged offending and not another cause. The Court of Appeal ought to have concluded that a substantial miscarriage of justice occurred[118] because the jury was invited to use the complainant's meltdown at the Children's Court as indirect evidence "indicative of the trauma of having been sexually penetrated by the accused"[119] in circumstances in which the requisite causal link between the "distress" and the alleged offending was not open.

D. Costs

78. The respondent seeks an order for costs in the event that the appeal is unsuccessful.

Part VII: Estimate of time for oral argument

79. The respondent estimates that two hours will be required for oral argument.

Dated 9 January 2025

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[116] See JDA, s 54K(5)(a).
[117] JDA, s 54K(5)(b).
[118] Pursuant to s 276(1) of the *Criminal Procedure Act 2009* (Vic).
[119] CAB 14, lines 4-5.

IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

BETWEEN: **THE KING**
Appellant

and

RYAN CHURCHILL (A PSEUDONYM)
Respondent

ANNEXURE TO RESPONDENT'S SUBMISSIONS

Pursuant to *Practice Direction No 1 of 2024*, the following statutory provisions are referred to in the submissions of the respondent.

No	Description	Version	Provisions	Reason for providing this version	Applicable date
1.	*Evidence Act 2008* (Vic)	26 (1 July 2020 to 24 May 2024)	ss 55, 56, 60, 66, 76, 78, 136, 137, 164	Act in force at trial	5 to 12 Sept 2022
2.	*Jury Directions Act 2015* (Vic)	11 (19 Oct 2018 to 31 Dec 2022)	ss 1, 5, 9, 11, 12, 14, 15, 16, 32, 36, 39, 51, 54K	Act in force at trial	5 to 12 Sept 2022
3.	*Justice Legislation Amendment (Sexual Offences and Other Matters) Act 2022* (Vic)	As made (6 Sept 2022)	s 56	For illustrative purposes	9 January 2025
4.	*Criminal Procedure Act 2009* (Vic)	99 (25 March 2024 to 10 Sept 2024)	s 276	Date of judgment in Court of Appeal	28 June 2024