HIGH COURT OF AUSTRALIA

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Details of Filing

File Number:	A24/2025
File Title:	Potter (A Pseudonym) v. The King
Registry:	Adelaide
Document filed:	Appellant's submissions
Filing party:	Appellant
Date filed:	27 Nov 2025

Important Information

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IN THE HIGH COURT OF AUSTRALIA
ADELAIDE REGISTRY

BETWEEN: **POTTER (A PSEUDONYM)**
Appellant

and

THE KING
Respondent

APPELLANT'S SUBMISSIONS

Part I: Publication

1. This submission is in a form suitable for publication on the internet.

Part II: Statement of issues[1]

2. Is information or material derived from the use of a listening device or optical surveillance device where the use of that device was not reasonably necessary for the protection of the lawful interests of the person who used the device for the purposes of s 4(2)(a)(ii) of the *Surveillance Devices Act 2016* (**the SDA**) admissible pursuant to s 9 of the SDA?

3. Did the reception of evidence of a covert recording containing an admission to rape occasion a substantial miscarriage of justice such that the proviso cannot be applied?

Part III: Section 78B Notice

4. The appellant does not consider that notice is required to be given.

Part IV: Citation

5. The citation of the judgement of the Court of Appeal is *Potter (A Pseudonym) v The King* [2024] SASCA 108.[2]

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[1] The respondent's notice of contention raises additional issues, which will be addressed by the appellant in reply.
[2] References in this document in brackets [X] relate to paragraphs in the Court of Appeal's (**CA**) judgement. References to the Core Appeal Book are in the form "CAB[page number]".

Part V: Narrative statement of the relevant facts found or admitted

Overview

6. The appellant was charged on Information with four counts of rape, contrary to s 48(1) of the *Criminal Law Consolidation Act 1935* (SA). All the offences were alleged to have been committed against the appellant's wife. After a trial before Kudelka DCJ and a jury, the appellant was convicted of counts 2 and 4 by majority verdict. The jury were unable to reach a verdict in relation to counts 1 and 3. The appellant was sentenced to nine years and six months imprisonment, with a non-parole period of five years.[3]

Factual background

7. The appellant and the complainant married in 2015. They had two children. The first was born in July 2015 and the second in March 2017. The complainant suffered ill health following the birth of the second child.[4] She developed an infection and was ultimately diagnosed with postpartum thyroiditis and thyrotoxicosis in June 2017. As a consequence, she was unwilling to engage in sexual intercourse with the appellant for a period of time. The complainant gave evidence that she told the applicant not to have sex with her whilst she was asleep and healing from the birth of her second child, that it left her in pain, that she needed to heal, and that she would not get better and heal if he continued to have sex with her.[5]

8. Count 1 occurred about three weeks after the second child's birth.[6] The complainant woke up with the appellant on top of her, who was engaging in penile-vaginal sexual intercourse with her. The appellant got off the complainant when requested. The complainant gave evidence that there were other occasions in which she woke up and experienced pain in, or bleeding from, her vagina between count 1 and count 2.[7] Count 2 occurred in July 2017.[8] The complainant again woke to find the appellant holding her down, whilst engaging in penile-vaginal with her. The complainant yelled at the appellant to get off her. Count 3 occurred sometime after count 2, although the complainant could not say how long after.[9] The complainant again awoke to the

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[3] Following a successful appeal against sentence: CA[196]-[198], [200]; CAB99
[4] CA[25]; CAB61.
[5] CA[26], [31], [39]; CAB61-63.
[6] CA[26]; CAB61.
[7] CA[27]; CAB61.
[8] CA[30]; CAB61-62.
[9] CA[33]; CAB62.

appellant engaging in penile-vaginal intercourse with her. Unlike the first two occasions, the appellant continued to engage in intercourse despite her protestations to stop. The complainant gave evidence of a further incident in August 2019, which was led as an uncharged act.[10] The prosecution adduced evidence of an exchange via Facebook Messenger in which the appellant acknowledged this occasion.

9. The forensic issue in relation to counts 1 – 3 was the occurrence of each act. The appellant gave evidence denying that he engaged in sexual intercourse with the complainant whilst she was asleep. The defence case was that the complainant had formed a mistaken belief that the applicant had had sexual intercourse with her whilst suffering from a panic attack. In addition to the appellant's sworn denials, the defence case also relied upon an accumulation of matters to impugn the complainant's credibility and reliability, including the fact that the complainant was experiencing hallucinations and hearing voices around the time of counts 1 – 3.

10. Following the incident in August 2019, the appellant and the complainant separated. They continued to cohabitate, with the appellant sleeping in another room. The complainant gave evidence that throughout the particularised period, she engaged in consensual intercourse with the appellant.[11] The complainant specifically recalled an occasion in December 2019, albeit she made clear that it was not going to happen again.[12] In cross-examination, the complainant agreed that sexual activity resumed in May 2017,[13] including masturbation and fellatio,[14] and that there were occasions in which she engaged in consensual penile-vaginal intercourse with the appellant.[15] This first occurred towards the end of June 2017 or the beginning of July 2017.[16]

11. Count 4 took occurred on 26 January 2020, about two and a half years after the conduct the subject of count 3.[17] The complainant woke up to the appellant on top of her, having penile-vaginal intercourse with her. The appellant appeared startled. The complainant then said words to the effect of 'you might as fucking well'. The appellant continued to engage in penile-vaginal intercourse with the complainant before ejaculating onto the sheets. The forensic issue in

[10] CA[36]; CAB63.
[11] Tx99, Tx123-124.
[12] CA[38]; CAB63.
[13] Tx125.
[14] Tx122-123.
[15] CA[46]; CAB66.
[16] Tx124.
[17] CA[41]; CAB65.

relation to count 4 was proof that the complainant was not consenting. The defence case was that the complainant had instigated the sexual intercourse.

12. The appellant gave evidence in his defence.[18] He denied that he engaged in non-consensual intercourse. He also provided an explanation for various alleged admissions.

The covert recording

13. The complainant covertly recorded a conversation she had with the appellant on 14 December 2019. The conversation was described in the Court of Appeal "as a general argument about the state" of the appellant and the complainant's previous relationship.[19] On the prosecution case, the appellant made admissions to engaging in sexual intercourse with the complainant whilst asleep. These included "I sexually assaulted you", "I moved on top of you when you were asleep" and "I started having sex with you when you were asleep … and then I stopped".[20]

14. The appellant unsuccessfully challenged the admission of this recording prior to trial, contending the recording was unlawful for want of compliance with s 4(2)(a)(ii) of the SDA. The prosecution sought to justify the admissibility of the recording on the basis that the recording was reasonably necessary for the protection of the complainant's lawful interests. In support of this argument, the prosecution adduced two affidavits from the complainant deposing to the circumstances in which she made the recording. The relevant paragraphs should be set out in full:[21]

> I made a recording of a conversation I had with [the appellant] so that I could use it to convince myself never to go back to him no matter what happened or how he tried to convince me. It was used as a reminder to myself not to go back. At the time I had no intention of taking it further.
>
> …
>
> In relation to the audio recording I made of a conversation with [the appellant], this was made on the 14th of December 2019 at Lightsview. It was made in the kitchen / living area of our house. At the time of the recording, [the appellant] and I were living together. Although we were living together we had in fact separated. The reason for making the recording I have described [in the paragraph from the first affidavit set out above].

[18] CA[53]-[64]; CAB67-69.
[19] CA[39]; CAB63.
[20] CA[120]; CAB82. See also CA[45]; CAB65-66 for a more comprehensive reproduction of the conversation.
[21] CA[121]-[122]; CAB82-83.

15. The trial judge found that the complainant's use of the recording device was "reasonably necessary to protect her lawful interest, namely she had the right to protect herself from further crimes of rape by the accused in the form of not resuming her relationship with him".[22]

Part VI: **Argument**

***Surveillance Devices Act 2016* (SA)**

16. A 'listening device' is defined in s 3 of the SDA and includes 'a device capable of being used to listen to or record a private conversation or words spoken to or by any person in a private conversation (whether or not the device is also capable of operating as some other kind of surveillance device)'. A 'private conversation' is also defined in s 3 as 'a conversation carried on in circumstances that may be reasonably taken to indicate that at least 1 person to the conversation desires it to be heard only by other parties to the conversation'.

17. Pursuant to s 4 of the SDA, it is an offence for a person to knowingly install, use or cause to be used, or maintain, a listening device to record a private conversation to which the person is a party. The SDA provides various exceptions to this general, presumptive, prohibition on the utilisation of a recording device.

Reasonably necessary for the protection of lawful interests – s 9

18. Section 4(2)(a)(ii) provides that the prohibition in s 4 does not apply if the 'use of the device is reasonably necessary for the protection of the lawful interests of that person'. Embedded within s 4(2)(a)(ii) are two concepts: 'lawful interests' and 'reasonably necessary'.

19. The content of 'lawful interests' is not supplied by the SDA. It is a concept of uncertain content, to be construed in its particular statutory context, the purpose of the prohibition in s 4, and the associated exemptions.[23] The concept of the protection of lawful interests (under the SDA, its progenitor, and cognate legislation) has been considered in a succession of Australian superior and intermediate appellate court decisions.[24] Whilst a relatively broad view has been taken of

[22] CA[123]; CAB83.
[23] See *Nanosecond Corporation Pty Ltd v Glen Carron Pty Ltd* (2018) 132 SASR 63 at [101]-[102].
[24] See e.g., *Sepulveda v The Queen* (2006) 167 A Crim R 108; *DW v The Queen* (2014) 239 A Crim R 192; *Groom v Police (SA)* (2015) 252 A Crim R 332; *Davies v The Queen* (2021) 289 A Crim R 156; *Nanosecond Corporation Pty Ltd v Glen Carron Pty Ltd* (2018) 132 SASR 63; *Thomas v Nash* (2010) 107 SASR 309.

the phrase in some cases,[25] it is to be construed in its particular statutory context, and in particular, the presumptive protection afforded to private conversations by s 4. Thus, "while a threat to a person's physical safety, or the desire to uncover a crime or resist an allegation of crime, will often give rise to a lawful interest that would warrant protection through the use of a listening device, not every commercial or legal interest, or dispute in relation to such an interest, will suffice to establish a lawful interest" for the purposes of the SDA.[26] The requirements in s 4(2)(a)(ii) must be assessed by reference to the purpose or interest that in fact motivated the recording, not some ex post facto justification.[27]

20. The word 'necessary' connotes 'appropriate or adapted'.[28] The word 'reasonably' imports an objective test.[29] The determination of whether something is 'reasonably necessary' involves the exercise of judgmental evaluation.[30] Used here, the expression embodies the need to balance the public interest in maintaining the privacy of conversations as against the vindication of a lawful interest. Where the use of a device affects an interference with privacy, the interference must be no greater than is proportionate to the legitimate aim pursued (here, the putative lawful interest).[31]

21. Pursuant to s 9(1), it is an offence to knowingly use, communicate or publish information or material derived from the use of a surveillance device in circumstances where the device was used to protect the lawful interests of that person. Section 9(1) provides a number of exceptions. Relevantly, ss (1)(d) allows for the use of derivative material in the course, or for the purposes, of a relevant action or proceedings. This, in turn, is defined in s 3 to include the prosecution of an offence. Accordingly, s 9 amounts to a presumptive prohibition on the derivative use of information or material, notwithstanding that the use of the device fell within the scope contemplated by s 4(2)(a)(ii). It is clear from the chapeau of s 9 that the exceptions listed in ss (1)(a)-(h) are predicated on a determination that the use of the device was reasonably necessary

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[25] *Violi v Berrival Orchards Ltd* (2000) 99 FCR 580. See *Nanosecond Corporation Pty Ltd v Glen Carron Pty Ltd* (2018) 132 SASR 63 at [101]-[105].
[26] *Nanosecond Corporation Pty Ltd v Glen Carron Pty Ltd* (2018) 132 SASR 63 at [104]. See [91]-[100] for a detailed survey of authority.
[27] *RRG Nominees Pty Ltd v Visible Temporary Fencing Australia Pty Ltd (No 3)* [2018] FCA 404 at [32]; *cf. DW v The Queen* (2014) 239 A Crim R 192 at [48]-[49].
[28] *Sepulveda v The Queen* (2006) 167 A Crim R 108 at [116]-[118].
[29] *Sepulveda v The Queen* (2006) 167 A Crim R 108 at [116]-[118]; *AW v Rayney* [2010] WASCA 161 at [257].
[30] *Thomas v Mowbray* (2007) 233 CLR 307 at [20]-[27].
[31] *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181 at [39].

for the protection of the lawful interests of that person. The exceptions are otherwise not enlivened. If so, derivative use is not authorised by s 9.

22. Pursuant to s 12, a person must not knowingly use, communicate or publish information or material derived from the use of a surveillance device[32] in contravention of Part 2 of the SDA.[33] Section 12 is considerably broader in its scope than s 9 (and s 10), in that it applies to all information and material, not just that obtained in furtherance of the protection of a lawful interest or the public interest. Additionally, s 12(2) provides a further, but considerably more constrained, exception to the general prohibition. None of the exceptions in s 12(2) are engaged here.

Public interest – s 10[34]

23. Section 6 provides that the prohibition in s 4 does not apply if the 'use of the device is in the public interest'. Like 'lawful interest', the 'public interest' is not defined for the purposes of the SDA. It is a term with no fixed or precise content.[35] The assessment of the public interest calls for a discretionary value judgment to be made by reference to undefined factual matters, confined only insofar as the subject matter and the scope and purpose of the statutory enactment allow.[36] Questions about what is in the public interest will ordinarily require consideration of a number of competing arguments about, or features or facets of, the public interest.[37]

24. Section 10(1) provides a prohibition on the derivative use of information or material obtained from a surveillance device in circumstances where the device was used in the public interest

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[32] A listening device is a surveillance device for the purposes of the SDA: s 3.

[33] Section 12 is contained within Part 2, together with ss 4 and 9.

[34] Given ground 2 of the respondent's notice of contention (CAB109), it will become necessary to address s 10 and the public interest exception. This is despite the fact that the prosecution at trial did not invoke s 10, nor make an application pursuant to s 11. Indeed, the trial judge and the Court of Appeal did not consider whether the admission of the covert recording was in the public interest. See *Coulton v Holcombe* (1986) 162 CLR 1; *Burrell v The Queen* (2008) 238 CLR 218 at [15]-[16]; *Bird v DP (A Pseudonym)* (2024) 98 ALJR 1349 at [39].

[35] *Plaintiff S10/2011 v Minister for Immigration and Citizenship* (2012) 246 CLR 636 at [30].

[36] See *O'Sullivan v Farrer* (1989) 168 CLR 210 at 216; *Pilbara Infrastructure Pty Ltd v Australian Competition Tribunal* (2012) 246 CLR 379 at [42].

[37] *Osland v Secretary of the Department of Justice* (2008) 234 CLR 275 at [137]; *Pilbara Infrastructure Pty Ltd v Australian Competition Tribunal* (2012) 246 CLR 379 at [42]. Different aspects of the public interest in the context of the SDA can be seen in *In the Matter of Greyhound Racing SA Ltd* [2023] SASC 63, there in the context of an application to rely upon a covert recording of live baiting for the purposes of inquiries to be conducted into potential breaches of governing rules and disciplinary proceedings. This is a public interest of considerable pedigree: see *Australian Broadcasting Corporation v Lenah Games Meats Pty Ltd* (2001) 208 CLR 199. See also *In the Matter of Hyde* [2023] SASC 146, there in the context of an electoral petition alleging illegal practices which were alleged to have affected the election of councilors. Again, this is a public interest of considerable pedigree: see *Bridge v Bowen* (1916) 21 CLR 582 at 597.

unless in accordance with an order of a judge. It will be noted that s 10 bears structural similarities with s 9: there is a presumptive prohibition on the use of material obtained from a surveillance device, even if the use of the device itself is lawful perforce of s 6. Section 11 enables a person to apply to a judge for an order authorising the use, communication or publication of information or material derived from the use of a surveillance device. In this way, s 11 is facilitative of s 10.[38]

The approach of the Court of Appeal

25. The appellant challenged his convictions in the CA, contending that the trial judge erred in admitting the covert recording. The appellant contended that the recording contravened s 4 of the SDA and that the trial judge erred in concluding that the recording was reasonably necessary for the protection of the lawful interests of the complainant.

Kourakis CJ

26. Whilst Kourakis CJ held that the complainant's use of her phone to record the conversation was a use that was reasonably necessary, the balance of his Honour's analysis was concerned with the question of lawful interests. Kourkis CJ held that a lawful interest could consist of the investigation and prosecution of an offence, particularly where the person making the recording believes that he or she is a victim of the offending (CA[5]; CAB58). His Honour considered that such persons have an interest in bodily integrity and autonomy, including the protection of their wellbeing, peace of mind, human dignity, and vindication, as well as an interest in informed decision making in relation to those issues (CA[6]-[8]; CAB58). His Honour concluded that the balance between the interests of a putative victim who believes he or she is the victim of a crime, and the interests of an accused in the privacy of conversations about alleged conduct "should favour" the victim (CA[9]; CAB58).

27. It is clear from the foregoing that Kourakis CJ engaged with the application of s 4(2)(a)(ii) at a high level of abstraction and in an absolute way, holding that the balancing exercise always favoured a putative victim and that certain measures sufficiently protected the interests of an accused person. It is difficult to establish such absolute rules in relation to concepts as protean as 'lawful interest' and 'reasonably necessary'. Indeed, such an approach collapses the two limbs of s 4(2)(a)(ii) and turns a necessary-but-insufficient condition into a sufficient condition. The

[38] And s 9(1)(g).

inclusion of reasonable necessity is a textual acknowledgement that there will be cases in which the use of a surveillance device is not appropriate, notwithstanding the existence of a lawful interest.

28. It follows that the evaluative judgment required by s 4(2)(a)(ii) must be tied to the particular circumstances of the given case, and without making any *a priori* assumptions concerning the nature or quality of the relevant lawful interest. Kourakis CJ did not consider the question of reasonable necessity from this footing.

The majority judgment

29. The majority (Doyle and David JJA) held that the complainant's purpose, and the associated lawful interest, was to protect herself from what she considered a harmful relationship (CA[133]; CAB86-87). In reaching this view, their Honours emphasised that the recording was made two years after the offending discussed in the conversation had occurred and that the complainant did not make the recording to gather evidence in relation to her allegations of earlier offending or to address any fear or risk of further or ongoing offending (CA[132]; CAB86). The majority also emphasised that the complainant's "rationale … was connected with her ending her relationship with the appellant and … as a reminder to herself not to resume the relationship" (CA[132]; CAB86).

30. Whilst acknowledging that the relationship had deteriorated in the context of allegations of rape, the majority considered that the complainant's concern was not vindication through the criminal justice system but rather to guard against the resumption of the relationship (CA[132]; CAB86). The way in which the majority dealt with this issue correctly avoided treating this purpose (which the complainant deposed to) as synonymous, or interchangeable, with the desire to guard against further violations of the complainant's bodily autonomy and integrity in the form of further rapes (which the complainant did not depose to). The latter, which is emblematic of the approach by Kourakis CJ, has the effect of impermissibly imputing a purpose to the complainant retroactively.

31. Whilst the majority accepted that the complainant had a lawful interest in escaping from her relationship with the appellant, their Honours considered that the recording was not reasonably necessary. The conclusion should be set out in full (CA[134]; CAB87):

> We do not think it was reasonably appropriate for the complainant to record the private conversation she had with the appellant for the purpose of protecting her right to end their relationship. To hold otherwise would be, in our view, to pay insufficient regard to the legislative purpose underpinning the general prohibition against the recording of private conversations under s 4(1) of the [SDA].

32. Having determined that the recording was unlawful, the majority identified that its task was to "consider whether the recording ought to have been excluded in an exercise of the trial judge's public policy discretion to exclude unlawfully obtained evidence" (CA[135]; CAB87). In the associated footnote, the majority asserted that "by reason of s 9(1)(d) of the [SDA], it would not have been unlawful to use the recording at trial. However, because it had been unlawfully obtained, there remained a discretion to exclude" (CA[135] fn54; CAB87). The majority ultimately considered that the "balance fell in favour of receiving the evidence of the admissions" (CA[140]; CAB89).

The recording was not admissible

33. It is clear from the foregoing that the reasoning of the majority was comprised of three integers. *First,* that a recording obtained in contravention of s 4(2)(a)(ii) was admissible in criminal proceedings pursuant to s 9(1)(d) of the SDA. *Secondly,* that the consequence of non-compliance with s 4(2)(a)(ii) was discretionary exclusion through the exercise of the public policy discretion to exclude unlawfully obtained evidence. *Thirdly*, there was a distinction, for the purposes of the SDA, between unlawfully obtained evidence (s 4(2)(a)(ii)) and the lawful use of unlawfully obtained evidence (s 9(1)(d)).

34. Contrary to the conclusion of the majority, the consequence of non-compliance with s 4(2)(a)(ii) was that the covert recording was not admissible pursuant to s 9(1)(d). As noted above, s 9 applies to the use of material or information derived from a surveillance device where that device was used by a person to protect the lawful interests of that person. That is to say, s 9 is engaged *only* where there is an anterior finding of compliance with s 4(2)(a)(ii). Otherwise, the derivative use exceptions in s 9(1) are not enlivened, including that in s 9(1)(d). So much so has been accepted by the respondent.[39] The majority therefore erred in finding that that exception was engaged and facilitated the admission of the covert recording. The majority also erred by posing the dispositive question as being that of discretionary exclusion, which did not arise.

[39] See the respondent's written submissions, application for special leave to appeal, [27].

35. The prohibition, and as a corollary the exceptions, in s 12 were engaged as the information or material here was derived from the use of a surveillance device in contravention of Part 2.[40] However, as noted, none of the exceptions applied in the circumstances of this case so as to allow the admission of the covert recording.

36. The consequence of the majority's conclusion was that an inadmissible covert recording was adduced in the appellant's trial.

37. Given the finding of the majority, there was no consideration of whether this irregularity amounted to a miscarriage of justice. As noted, the covert recording was relied upon on the prosecution case as amounting to an admission to raping the complainant.[41] The admission, particularly in the form in which it was adduced (i.e., an objective record of the words uttered), was highly likely to have influenced the jury's verdict.[42] The admissions also formed a part of a body of discreditable conduct evidence,[43] which on the prosecution case was relevant to show that the appellant had a propensity to commence penile-vaginal intercourse with the complainant whilst she was asleep.[44] The jury were directed that this propensity was relevant to proof of each of the charged counts.[45]

38. The logical conclusion is that there has been an irregularity in the appellant's trial. In light of the foregoing matters, the irregularity had the capacity to realistically affect the reasoning of the jury to a verdict of guilty thus amounting to a miscarriage of justice.[46]

The proviso cannot be applied

39. The respondent's notice of contention indicates that the respondent will contend that this Court should find that no substantial miscarriage of justice has actually occurred.[47] The Court of Appeal never considered the proviso.

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[40] Section 12(1).
[41] CAB21-24.
[42] *Castle v The Queen* (2016) 259 CLR 449 at [65].
[43] Section 34P of the *Evidence Act 1929* (SA).
[44] Section 34P(2)(b) of the *Evidence Act 1929* (SA).
[45] CAB18.
[46] *Brawn v The King* (2025) 99 ALJR 872 at [10]-[11]; *MDP v The King* (2025) 99 ALJR 969.
[47] *Criminal Procedure Act 1921* (SA) s 158(2). See *Coulton v Holcombe* (1986) 162 CLR 1; *Burrell v The Queen* (2008) 238 CLR 218 at [15]-[16]; *Bird v DP (A Pseudonym)* (2024) 98 ALJR 1349 at [39].

40. The task required in applying the proviso requires that the court address the "negative proposition" stated in *Weiss v The Queen*,[48] namely by asking whether "the evidence properly admitted at trial proved, beyond reasonable doubt, the accused's guilt of the offence on which the jury returned its verdict of guilty".[49] In considering the proviso, the court must have regard to the nature and effect of the error or miscarriage. In some cases, the error may prevent the court from satisfying itself of the negative proposition.[50]

41. Here, the error prevents this Court from being able to assess whether guilt was proved to the criminal standard. The applicant's trial turned on issues of contested credibility.[51] As noted, and in addition to challenging the credibility and reliability of the complainant, the applicant gave evidence. The wrongful reception of an admission had the capacity to materially bear upon the jury's evaluation of both accounts. This is a case in which this Court would be required to seek to resolve a conflict between oath and oath, where the resolution of that conflict must depend upon the reliability of the jury's verdict.[52] The natural limitations of proceeding on the record preclude a conclusion that guilt was proven beyond reasonable doubt.

42. It is not to the point that the prosecution case included a number of other admissions. To reason in this way is to contend that this Court's own satisfaction of guilt beyond reasonable doubt means there is no substantial miscarriage of justice. This incorrectly converts a necessary-but-insufficient condition for the application of the proviso into a sufficient condition.

Part VII: Orders sought

43. The appellant seeks the following orders:

43.1. The appeal is allowed.

43.2. The order of the Court of Appeal dismissing the appellant's appeal against conviction be set aside.

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[48] (2005) 224 CLR 300 at 317.
[49] *Brawn v The King* (2025) 99 ALJR 872 at [11].
[50] *Kalbasi v Western Australia* (2018) 264 CLR 62 at [15].
[51] *Kalbasi v Western Australia* (2018) 264 CLR 62 at [15], referring to *Castle v The Queen* (2016) 259 CLR 449. See also *Hofer v The Queen* (2021) 274 CLR 351 at [62].
[52] *Hofer v The Queen* (2021) 274 CLR 351 at [63], [70] *cf.* [137].

43.3. The appellant's conviction imposed by the District Court of South Australia on 8 August 2023 be set aside.

43.4. There be a retrial.

Part VIII: **Estimate of time to present oral argument**

44. The appellant estimates that 1½ hours will be required to present his oral argument.

Dated: 27 November 2025

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ANNEXURE TO APPELLANT'S SUBMISSIONS

No	Description	Version	Provision(s)	Reason for providing this version	Applicable date or dates (to what event(s), if any, does this version apply)
1	*Surveillance Devices Act 2016* (SA)	Historical (7 October 2021 – 20 September 2023)	ss 3, 4, 6, 9, 10, 11, 12	In force at the time of trial.	July – August 2023
2	*Surveillance Devices Act 2016* (SA)	Historical (7 November 2019 – 6 October 2021)	s 4	In force at the time the recording was made.	December 2019