



# HIGH COURT OF AUSTRALIA

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### Details of Filing

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**IN THE HIGH COURT OF AUSTRALIA  
ADELAIDE REGISTRY**

**BETWEEN:**

**POTTER (A PSEUDONYM)**  
Appellant

and

**THE KING**  
Respondent

**APPELLANT'S REPLY**

**Part I: CERTIFICATION**

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

**Part II: REPLY TO THE ARGUMENT OF THE RESPONDENT**

The issue on the appeal

2. The respondent has conceded the error the subject of the appeal,<sup>1</sup> and has abandoned reliance upon the proviso<sup>2</sup> and s 10 of the *Surveillance Devices Act 2016* (SA).<sup>3</sup> The issue in this case is now: was the majority correct to find that the use of the device by the complainant was not reasonably necessary for the protection of her lawful interests, where:
  - 2.1. the device was used to record a conversation about acts of non-consensual sexual intercourse which had taken place about two years beforehand;
  - 2.2. the complainant used the device, not for the purpose of the investigation and prosecution of the appellant, but rather to obtain a record of the conversation for her personal use;
  - 2.3. the purported use was to guard against the resumption of a relationship with the appellant and, by inference, was to be used in the event the complainant's resolve weakened;

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<sup>1</sup> Respondent's submissions (RS) at [6].

<sup>2</sup> *Criminal Procedure Act 1921* (SA) s 158(2).

<sup>3</sup> RS[8].

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- 2.4. there was no imminent or quantifiable risk that the relationship would resume, and by extension, that the complainant would be exposed to future harm; and
  - 2.5. the complainant's intention was prospective, in that she was seeking to have an objective record 'just in case' it was required in the future.
3. The respondent's framing of the issue (RS[7]; see also RS[90]) rests upon a misstatement of the context in which the conversation occurred (RS[17], [84]), as well as the content of the conversation itself (RS[84]). This flawed framing distorts the way in which the respondent has characterised the complainant's lawful interest (as being to protect her bodily autonomy and agency generally from further non-consensual sexual intercourse (RS[88])); and argues that the use of the surveillance device was reasonably necessary to protect that lawful interest (RS[94]).
  4. The respondent contends that the context to the conversation was the appellant having "previously been apologetic, but dismissive, when the complainant had confronted him in relation to his sexual offending against her" (RS[17]). It is not correct to suggest, as the respondent does, that this "background" informed the complainant's decision to use the device, such as by providing a foundation for the complainant to fear there may be a challenge to the veracity of her account about the conversation. This formed no part of her reasoning process.<sup>4</sup> Indeed, the conversation to which the respondent refers took place the day after the conduct the subject of count 3, which was sometime after July 2017 and thus two years before the recorded conversation. The conversations were separate.
  5. The conversation itself was specific to sexual acts that occurred whilst the appellant and the complainant resided at Christies Beach and at a time when the complainant was unwell; so much is clear from the terms of the complainant's questioning of the appellant.<sup>5</sup> It follows that the complainant was interrogating the appellant about the conduct the subject of counts 1 – 3 rather than sexual acts at large, less still the uncharged act emphasised by the respondent in August 2019 at Lightsview (*cf.* RS[84]). The focus of the conversation was therefore on conduct that occurred at least two years before the recording was made.

#### Section 4(2)(a)(ii) and the defence of qualified privilege

6. The respondent relies upon the textual origins of "reasonably necessary for the protection of lawful interests", namely the defence of qualified privilege, to expand the scope of the exception in s 4(2)(a)(ii) so as to extend to the "pursuit or furtherance of an individual's affairs in the sense that it

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<sup>4</sup> See CA[121]-[122].

<sup>5</sup> CA[39].

has a real bearing upon action or decisions the individual may make” (RS[66]-[68]). This construction ignores the qualitatively different contexts in which the term is used.

7. The defence of qualified privilege, where the relevant harm is reputational damage, is directed towards protecting communications where the communicator has a duty or interest to make the statement and the recipient has a corresponding duty or interest to receive it. The communications are privileged because their making promotes the welfare of society.<sup>6</sup> It is for these reasons that ‘lawful interest’ has been construed with considerable breadth in that context. Rather than the informing legal principle being the protection of freedom of communication,<sup>7</sup> the express purpose of the *Surveillance Devices Act* is to afford protection to private conversations.<sup>8</sup> It is necessary to construe ‘lawful interest’ in restrictive terms so as not to undermine that protection.

#### Protection of the complainant’s lawful interest

8. There are three integers to the respondent’s formulation of the complainant’s lawful interest: (a) the complainant’s purpose in using the device was to obtain an objective record of the conversation, so as to gain the resolve to “extricate herself from the relationship, and withstand the appellant’s attempts to convince her to stay with him” (RS[85]); (b) the resumption of the relationship exposed her to risk of harm to her autonomy (RS[88]); and (c) the complainant was concerned about being able to reason in her best interests (RS[88]).
9. This formulation finds no support in the complainant’s account, either subjectively or objectively. At the time the device was utilised, the complainant’s relationship with the appellant had ended. The complainant sought to use the device to make an independent record of the conversation which was to be used in the future if necessary. First, this follows from the complainant’s use of the future tense: “... so that I *could* use it ...” and “It *was to be* used as a reminder to myself not to go back”.<sup>9</sup> Secondly, there was nothing to suggest that there was a real and identifiable concern that the complainant’s resolve was weakening, nor that the appellant was actively seeking to resume the relationship and thus the complainant was at risk of imminent potential harm.<sup>10</sup> Whilst the resumption of the relationship *could*, at an abstract level, result in the degradation of the complainant’s autonomy or further sexual violence, the majority were correct to observe that the offending being discussed had occurred over two years earlier.<sup>11</sup> Over the intervening time period,

<sup>6</sup> *Roberts v Bass* (2002) 212 CLR 1 at [62].

<sup>7</sup> *Marshall v Megna* [2013] NSWCA 30 at [4].

<sup>8</sup> See the authorities collected at CA[126].

<sup>9</sup> CA[121].

<sup>10</sup> *Thomas v Nash* (2010) 107 SASR 309 at [45], [49]; *Nanosecond Corporation Pty Ltd v Glen Carron Pty Ltd* (2018) 132 SASR 63 at [103]-[105].

<sup>11</sup> CA[132].

the complainant and the appellant had engaged in consensual sexual acts.<sup>12</sup> Indeed, the complainant's account allowed for the possibility that the recording was made after the complainant and the appellant had consensual sexual intercourse in December 2019.<sup>13</sup> It is implicit from the terms of the conversation that the offending in 2017 was the primary motivator for the use of the device and that the complainant was trying to understand what had occurred in the past (as distinct from a concern about further violations of her personal autonomy and integrity).

10. So understood, the complainant was concerned that her resolve *might* weaken in the future or that the appellant *might* attempt to resume the relationship (and by extension, seek to weaken her resolve) and therefore she desired to have something to use to resist the resumption of the relationship (*cf.* RS[85]-[88]). The prospective and hypothetical nature of the purpose is significant.<sup>14</sup> In addition, the inclusion of the noun 'protection' for the purpose of s 4(2)(a)(ii) must be given content. It is a textual indicator that an aspect of the enquiry is the extent to which the identified lawful interest was in need of "defence from harm, danger and evil" at the time the recording was made.<sup>15</sup> This is because the extent of the need for protection informs the question of whether the use of the device is 'appropriate or adapted'. Here, as the foregoing matters reveal, at the point the recording was made the identified lawful interest was not in need of defence: there was no imminent risk of harm, danger or evil (*cf.* RS[88]).<sup>16</sup>
11. Two further points should be made at this juncture. First, the complainant's desire to have a record of the conversation was not tied to a concern that she would later be accused of fabricating the conversation.<sup>17</sup> Indeed, on a number of previous occasions the complainant had confronted the appellant about allegations of non-consensual intercourse, who had engaged with the complainant and made admissions.<sup>18</sup> Secondly, the recording derived from the use of the device was not to be deployed to resolve an extant or imminent controversy, the determination of which would vitally depend on the complainant's word.<sup>19</sup>

### Reasonably necessary

12. The respondent's reliance upon *R v DRF*<sup>20</sup> (RS[93]) and the analogy with the investigation and prosecution of sexual offences (RS[74]; [94]) is misplaced. *DRF* was concerned with the use of a lawfully installed surveillance device, which, as Simpson JA acknowledged, is a well-established

<sup>12</sup> See [10] of the appellant's primary written submissions.

<sup>13</sup> RS[16].

<sup>14</sup> *Thomas v Nash* (2010) 107 SASR 309 at [45], [49].

<sup>15</sup> *Sepulveda v The Queen* (2006) 167 A Crim R 109 at [120].

<sup>16</sup> *Sepulveda v The Queen* (2006) 167 A Crim R 109 at [120].

<sup>17</sup> *Cf. Sepulveda v The Queen* (2006) 167 A Crim R 108 at [97]-[101].

<sup>18</sup> CA[27], [30]-[31], [34]-[36].

<sup>19</sup> *Thomas v Nash* (2010) 107 SASR 309 at [45], [49].

<sup>20</sup> (2015) 263 A Crim R 573 at [90].

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investigative technique designed to assist in obtaining evidence in the investigation and ultimately prosecution of sexual offences<sup>21</sup> (which otherwise ordinarily turn on issues of contested credit). It is implicit that the use of such devices is for the express purpose of the vindication of the relevant lawful interest through the judicial system. Whilst the complainant sought to record a conversation about serious criminal offending, her purpose was materially different for the reasons developed above. The respondent therefore does not engage with the complainant's true purpose in obtaining an "objective record of what had occurred" (*cf.* RS[94]).

13. The making of a recording, and the associated invasion of the appellant's right to privacy, was not a suitable and necessary measure where the complainant was seeking to obtain a record to which she *may in the future* have recourse (*cf.* RS[94]). A contemporaneous hand-written note would have served this purpose; the fact that such a note would not carry "the weight of a recording in the appellant's own voice" is not to the point and does not afford proper deference to the infringement of the appellant's right to privacy (*cf.* RS[94]).
14. As to the question of other alternatives, the respondent posits a hypothetical explanation for why police intervention was not a viable option (RS[95]). Had the complainant's lawful interest been to guard against further violations of her bodily integrity and to vindicate the appellant's past violations, the use of the device would not have been reasonably necessary as the complainant could have approached police with her complaints.<sup>22</sup>
15. The fact that the complainant sought to "make a personal record for her use only" (*cf.* RS[96]) and the limited ambit of the recording does not assist the respondent (*cf.* RS[97]). Rather, both features are indicators that the use of the device was not reasonably necessary when balanced against the invasion of the appellant's privacy.
16. The majority was correct to conclude that the use of the device was not reasonably necessary for the protection of the complainant's lawful interests.

**Dated: 10 February 2026**



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M. E. Shaw KC  
Frank Moran Chambers



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Frank Moran Chambers

<sup>21</sup> *R v DRF* (2015) 263 A Crim R 573 at [90].

<sup>22</sup> See *Sepulveda v The Queen* (2006) 167 A Crim R 108 at [139].