SHORT PARTICULARS OF CASES
APPEALS

ADELAIDE
APRIL 2026

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POTTER (A PSEUDONYM) v THE KING (A24/2025)

Court appealed from: Supreme Court of South Australia Court of Appeal [2024] SASCA 108

Date of judgment: 5 September 2024

Special leave granted: 9 October 2025

Factual background

The appellant ('Potter') was charged with four counts of rape, contrary to s 48(1) of the *Criminal Law Consolidation Act 1935.* The complainant in each count was his wife. The wife suffered ill health following the birth of her second child. She gave evidence that she told Potter not to have sex with her whilst she was asleep and healing from the birth. Counts 1 to 3 occurred when the couple resided together in 2017. Count 4 occurred in January 2020 when the couple had separated but remained living in the same house. On the prosecution case, each offence of rape occurred whilst the wife was asleep in her bed. Potter gave evidence denying that he had engaged in sexual intercourse with her while she was asleep.

Procedural background

At trial, Potter sought the exclusion of a covert recording made by the wife of a December 2019 conversation between them (when they were no longer in a relationship), on the basis that it was unlawful for want of compliance with s 4(2)(a)(ii) of the *Surveillance Devices Act 2016* ('the SDA'). The recording captured the wife asking Potter a number of questions about an incident (or incidents) of rape while she was sleeping, during the time the couple lived together, with Potter making admissions about his conduct. The wife explained in affidavits that she made the recording to obtain an objective record which would, when she listened to it, deter her from re-entering a relationship with Potter.

Potter provided an explanation for the various alleged admissions. 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 prohibition on the utilisation of a recording device: s 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 interest of that person. The trial judge dismissed Potter's application and admitted the evidence, concluding that the recording was reasonably necessary for the protection of the lawful interests of the wife, pursuant to s 4(2)(a)(ii). Potter was convicted of counts 2 and 4 by majority jury verdict, with the jury unable to reach a verdict on counts 1 and 3. He was sentenced to nine years and six months imprisonment, with a non-parole period of five years.

Potter sought to appeal his conviction to the Court of Appeal on numerous grounds, including the admissibility of the covert recording pursuant to the SDA. Potter submitted that the recording contravened s 4 of the SDA and that the trial judge had erred in concluding that the recording was reasonably necessary for the protection of the wife's lawful interests. By majority, the Court of Appeal (Kourakis CJ (dissenting), Doyle & David JJA) held that the recording was made in breach of s 4(1)(b) of the SDA. Kourakis CJ held that the wife's use of her

phone to record the conversation was a use that was reasonably necessary. His Honour considered the question of lawful interests and 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.

The majority (Doyle and David JJA) found that the wife's purpose, and the associated lawful interest, was to protect herself from what she considered a harmful relationship, rather than vindication through the criminal justice system. The majority held that the recording was unlawful, on the basis that it was not reasonably necessary for the protection of the wife's lawful interests in escaping from her relationship with Potter. Their Honours then went on to consider whether the evidence ought to have been excluded in the exercise of the trial judge's public policy discretion. Their Honours ultimately determined that the 'balance fell in favour of receiving the evidence of the admissions'. Potter's appeal was dismissed.

This appeal

Potter submits that contrary to the conclusion of the majority, the consequence of non-compliance with s 4(2)(a)(ii) of the SDA was that the recording was not admissible pursuant to s 9(1)(d). Potter submits that s 9 is engaged only where there is an anterior finding of compliance with s 4(2)(a)(ii) and that the majority erred in finding that the exception was engaged. Further the majority erred in proceeding to consider the discretion to exclude, as this did not arise.

In this Court, the respondent concedes that the majority erred and that Potter's argument in support of his ground of appeal is correct. However, the respondent, by notice of contention, contends that the majority erred in concluding that the use of the device was not reasonably necessary for the protection of the wife's lawful interest.

The sole ground of appeal is:

1. The Court of Appeal erred in holding that the covert recording of a conversation between the appellant and the complainant was admissible pursuant to s 9(1)(d) of the SDA.

The respondent has filed a notice of contention:

1. The recorded conversation was admissible pursuant to s 9(1)(d) of the SDA because the use of the surveillance device was reasonably necessary for the protection of the lawful interests of the complainant, pursuant to s 4(2)(a)(ii) of the SDA.

CHAPLIN v SECRETARY, DEPARTMENT OF SOCIAL SERVICES & ANOR (M92/2025)

Court appealed from: Full Court of the Federal Court of Australia [2025] FCAFC 89

Date of judgment: 15 July 2025

Special leave granted: 6 November 2025

Factual background

Youth allowance is a form of social security payment which is means-tested by various methods, including by assessing a recipient's income under the *Social Security Act 1991* (Cth) ('the SSA'). Step 1 in point 1067G-H1 ('Point H1') of the 'Method Statement' for calculating income reduction requires the first respondent ('the Secretary') to work out a recipient's ordinary income on a fortnightly basis. Point 1067G-H23 ('Point H23') requires ordinary income 'to be taken into account in the fortnight in which it is first earned, derived or received'. The issue in this appeal is the interpretation of the words 'first earned, derived or received' in Point H23.

The appellant received youth allowance in fortnightly instalment periods between 10 July 2014 and 24 June 2015. During this period, the appellant was paid weekly in arrears as a casual employee with variable days and hours and the appellant's pay period did not align with the youth allowance instalment periods. At the end of each instalment period, the appellant was required to report the amount he had earned during the instalment period.

In April 2019, the Secretary became aware that the appellant mistakenly under-reported his income as he was reporting the net rather than gross amount. The Secretary therefore determined that the appellant's benefit of youth allowance exceeded his entitlement and raised a debt against the appellant pursuant to s 1223 of the SSA. Complications arose as the appellant only had records which provided information about his total hours worked but could not provide information about the specific days he had worked. The appellant commenced proceedings in the Administrative Appeals Tribunal ('the AAT') and sought review of the Secretary's decision.

Procedural background

On 8 January 2024, the AAT found that the Secretary had no evidence as to the appellant's earnings in the relevant instalment periods and therefore could not raise a debt against the appellant. The Secretary successfully appealed this decision to a Full Bench of the AAT. The Full Bench found that, for the purposes of Point H23, a person earns 'ordinary income' when that person becomes legally entitled to income, and in the appellant's case, the appellant had therefore 'earned' his wages on the day he was paid, rather than on the days the appellant worked.

The appellant appealed to the Full Court of the Federal Court. By majority, the Full Court (Thawley and Hespe JJ; Kennett JJ dissenting) dismissed the appeal and held that whilst there were errors in the Full Bench's reasoning, the outcome was correct. The majority found that on a balance of probabilities, the appellant had received youth allowance which exceeded his entitlement because he reported his net earnings instead of his gross earnings, and in the absence of evidence showing when certain income was 'earned', it is 'not possible to apply' Point H23, and so income may be taken into account instead when it was 'received'.

Kennett J would have allowed the appeal. His Honour found that the Secretary could not affirmatively be satisfied that there had been an overpayment (and therefore seek to recover that overpayment) unless the Secretary could provide admissible evidence that the amount of youth allowance received in one relevant fortnight was greater than the appellant's entitlement for that fortnight.

This appeal

The appellant submits that the Full Court erred by misconstruing s 1223 of the SSA and argues that the Secretary cannot raise a debt under the circumstances where the Secretary does not have affirmative evidence as to the appellant's 'entitlement' in the relevant instalment period. He submits that properly construed, considering the beneficial purpose of the SSA and the Secretary's powers to obtain information and documents, the wording of the relevant provisions does not confer any discretion on which parts should be applied. He argues that Point H23 operates to direct that the income was 'to be taken into account in the fortnight in which it' was earned. As the appellant first 'earned' that income before he 'received' it, this requirement could not be simply ignored on the basis it is no longer possible to apply because of the lack the material available years after the fact.

The Secretary submits that Point H23 provides a temporal rule as to when income is to be counted (to ensure that it is only counted once) but does not exclude income known to have been earned shortly before it was received simply because it could not be determined whether it was earned in the same fortnight it was received or in the preceding fortnight. He argues that in circumstances where Point H23 cannot be applied, a decision-maker can revert to Point H1 to nonetheless work out a person's income on a fortnightly basis by reference to when it was received. The Secretary further notes that recent amendments to the SSA also mean that future decisions concerning historic assessments of entitlement by reference to such income would be made according to a new methodology and not the provisions at issue in this appeal.

The second respondent, Legal Aid NSW, intervened in support of the appellant in the Full Court and has filed a submitting appearance in this appeal.

The grounds of appeal are:

1. The Full Court erred in holding that the 'decision' under review was a decision to ascertain Mr Chaplin's entitlement to youth allowance under the SSA. In doing so, it wrongly placed the 'onus of proof' on Mr Chaplin in respect of that decision.

2. The Full Court erred in holding that it was open to the Secretary to be satisfied that the amount of a fortnightly payment (or part thereof) was a debt due to the Commonwealth pursuant to s 1223(1) of the SSA only because the Secretary was satisfied that: (a) it was unlikely that the recipient was entitled to the total amount of some aggregate of fortnightly payments; and (b) the relevant payment formed part of that aggregate. In doing so, the Full Court wrongly construed s 1223(1).

3. The Full Court erred in holding that, for the purposes of calculating Mr Chaplin's entitlement to youth allowance under the Act, 'ordinary income' which was known to be 'earned' before being 'received' could be taken into account when it was 'received' under Step 1 of the method statement in s 1067G-H1.

By notice of contention, the Secretary seeks to raise the following ground:

1. Even if the approach taken in J[197] and J[203] had not been taken (or was wrong), the Full Court ought also to have held that income that is known to be earned in a particular weekly pay period before being received, but which is incapable of being allocated between two fortnightly instalment periods which each included part of the weekly pay period in which it was known to be earned, can be taken into account when it was received under point 1067G-H23.