

HIGH COURT OF AUSTRALIA

GAGELER CJ,
GORDON, STEWARD, JAGOT AND BEECH-JONES JJ

POTTER (A PSEUDONYM)

APPELLANT

AND

THE KING

RESPONDENT

Potter (A Pseudonym) v The King
[2026] HCA 25
Date of Hearing: 14 April 2026
Date of Judgment: 5 August 2026
A24/2025

ORDER

Appeal dismissed.

On appeal from the Supreme Court of South Australia

Representation

M E Shaw KC with W E Mickan for the appellant (instructed by Caldicott + Isaacs Lawyers)

M E Chalmers SC with S J Agnew and Z E M H Smith for the respondent (instructed by Director of Public Prosecutions (SA))

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CATCHWORDS

Potter (A Pseudonym) v The King

Criminal practice – Admissibility of evidence – Sexual offences – Where complainant was appellant's wife – Where complainant made covert recording without appellant's knowledge – Where appellant admitted to previously sexually assaulting complainant while she was asleep in covert recording – Where complainant made covert recording to remind herself not to resume relationship with appellant and risk being further sexually assaulted – Whether covert recording admissible – Whether covert recording reasonably necessary for protection of complainant's lawful interests.

Words and phrases – "bodily autonomy", "bodily integrity", "covert recording", "discretionary exclusion", "evidence", "lawful interests", "legal right, title, duty or liability", "legitimate interests", "listening device", "personal privacy", "private conversation", "protection", "qualified privilege", "reasonably appropriate and adapted", "reasonably necessary", "surveillance device", "unlawfully obtained".

Listening and Surveillance Devices Act 1972 (SA), ss 3, 4, 7.

Surveillance Devices Act 2016 (SA), ss 3, 4, 6, 9, 12.

1 GAGELER CJ, GORDON, STEWARD, JAGOT AND BEECH-JONES JJ. The appellant stood trial in the District Court of South Australia on four counts of rape.¹ The appellant was convicted on the second and fourth counts. The jury were unable to reach a verdict on the other two counts and were discharged.

2 The complainant in respect of each count was the appellant's wife. The prosecution alleged in respect of each count that the appellant had sex with the complainant without her knowledge and consent while she was asleep. The first three counts were alleged to have occurred whilst the appellant and complainant resided together during 2017 and early 2018 at an address in Christies Beach, in the south of Adelaide. The last count was alleged to have occurred in January 2020 while they were living together, albeit after they had separated, in Lightsvue. The appellant denied that the sexual conduct alleged in the first three counts occurred, and claimed that the intercourse the subject of the fourth count occurred whilst the complainant was awake and consenting.

3 In December 2019, prior to the occurrence of the conduct constituting count 4, the complainant recorded a conversation with the appellant on her mobile phone without his knowledge ("the covert recording"). In that conversation the appellant admitted to having previously sexually assaulted the complainant while she was asleep. Over objection, the trial judge admitted evidence of the recorded conversation. The trial judge held that the making of the recording was not unlawful,² because making the recording was reasonably necessary for the protection of the complainant's lawful interests within the meaning of s 4(2)(a)(ii) of the *Surveillance Devices Act 2016* (SA) ("the SDA"), specifically the complainant's interest in protecting herself from being raped by the appellant if she resumed a relationship with him. The effect of that ruling was that the evidence of the covert recording was admissible (and was adduced) at the appellant's trial.

4 The appellant appealed against his convictions. A majority of the Court of Appeal of the Supreme Court of South Australia (S Doyle and David JJA) held that s 4(2)(a)(ii) was not satisfied but dismissed the appeal on the basis that the evidence should have been admitted in the exercise of the trial judge's discretion to admit unlawfully obtained evidence.³ However, it was common ground in this Court that, if s 4(2)(a)(ii) was not satisfied, then there was no discretion to admit

1 *Criminal Law Consolidation Act 1935* (SA), s 48(1).

2 *Surveillance Devices Act 2016* (SA), s 4(1).

3 Citing *Bunning v Cross* (1978) 141 CLR 54.

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the evidence of the covert recording; it had to be excluded. The other judge of the Court of Appeal (Kourakis CJ) held that s 4(2)(a)(ii) was satisfied.

5 In this Court, the only issue was whether S Doyle and David JJA were correct to hold that the making of the covert recording did not satisfy s 4(2)(a)(ii) of the SDA. In so holding their Honours erred. Both Kourakis CJ and the trial judge correctly held that the complainant's use of her phone to make the covert recording was reasonably necessary to protect her lawful interests. Notwithstanding the reasoning of S Doyle and David JJA, the appeal should be dismissed on the basis of the matter raised by the notice of contention filed by the respondent, namely that the making of the covert recording by the complainant was not prohibited by s 4(1) of the SDA because s 4(2)(a)(ii) was satisfied.

The Surveillance Devices Act

6 The SDA has no statement of objectives. As explained below, amongst other matters, the SDA is intended to afford a measure of protection to private conversations against electronic recording.⁴

7 Part 2 of the SDA regulates the installation, use and maintenance of "surveillance devices", which includes "listening device[s]", "optical surveillance device[s]", "tracking device[s]" and combinations thereof.⁵ Part 3 governs the granting and use of surveillance device warrants and surveillance device authorities. The definition of "listening device" includes a "device capable of being used to listen to or record a private conversation".⁶ It was not disputed that the complainant's mobile phone answered that definition.

8 Within Div 1 of Pt 2, s 4(1) of the SDA provides that, subject to ss 4 and 6, "a person must not knowingly install, use or cause to be used, or maintain, a listening device—(a) to overhear, record, monitor or listen to a private conversation to which the person is not a party; or (b) to record a private conversation to which the person is a party". A contravention of s 4(1) is an offence which in the case of a natural person is punishable by a fine or imprisonment.⁷

4 See below at [44].

5 *Surveillance Devices Act 2016* (SA), s 3(1) (definition of "surveillance device").

6 *Surveillance Devices Act 2016* (SA), s 3(1) (definition of "listening device").

7 *Surveillance Devices Act 2016* (SA), s 4(1)(b) (maximum penalty in the case of a natural person).

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Relevantly, s 6(1)(a) of the SDA provides that s 4 does not apply to the use of a listening device to overhear, record, monitor or listen to a "private conversation" if the use of the device is in the public interest.

9 A "private conversation" is defined as a "conversation carried on in circumstances that may reasonably be taken to indicate that at least 1 party to the conversation desires it to be heard only by the other parties to the conversation" but does not include "a conversation made in circumstances in which all parties to the conversation ought reasonably to expect that it may be heard by a person who is not a party to the conversation".⁸ It is not in dispute that the complainant used her phone to make a covert recording of a "private conversation", as defined, to which she was a party.

10 Section 4(2)(a) provides that s 4(1) does not apply:

"to the use of a listening device by a party to a private conversation to record the conversation if—

- (i) all principal parties to the conversation consent, expressly or impliedly, to the device being used; or
- (ii) *the use of the device is reasonably necessary for the protection of the lawful interests of that person ...*" (emphasis added)

11 Sections 4(2)(b) to 4(2)(h) specify further exceptions to s 4(1). Those exceptions specifically include that s 4(1) does not apply to various circumstances involving the "installation, use or maintenance" of a listening device,⁹ to other circumstances that involve the "use" of a listening device,¹⁰ and to the unintentional hearing of a private conversation by means of a listening device.¹¹ Of present relevance is that ss 4(2)(b)(iv) and 4(2)(b)(v) provide that the prohibition in s 4(1) does not apply where the device is installed, used or maintained either by an investigation agent licensed under the *Security and Investigation Industry Act 1995* (SA) (in the case of s 4(2)(b)(iv)), or by a loss adjuster to whom the *Security and Investigation Industry Act* does not apply (in the case of s 4(2)(b)(v)), where the

8 *Surveillance Devices Act 2016* (SA), s 3(1) (definition of "private conversation").

9 *Surveillance Devices Act 2016* (SA), ss 4(2)(b), 4(2)(c), 4(2)(h).

10 *Surveillance Devices Act 2016* (SA), ss 4(2)(d), 4(2)(e), 4(2)(g).

11 *Surveillance Devices Act 2016* (SA), s 4(2)(f).

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device is used by the licensee or adjuster in the course of their respective functions, and where that "use is *reasonably necessary for the protection of the lawful interests* of a person" (emphasis added).

12 Division 2 of Pt 2 regulates the use, communication or publication of information or material derived from the use of surveillance devices. Within Div 2 of Pt 2, s 9(1) relevantly provides that, subject to certain exceptions, a person must not knowingly use, communicate or publish information or material derived from the use of a listening device in circumstances where the device was used to protect the "lawful interests of that person", as referred to in s 4(2)(a)(ii). The exceptions to s 9(1) include where the use, communication or publication of the information or material is: "to a person who was a party to the conversation or activity to which the information or material relates";¹² "with the consent of each party to the conversation or activity to which the information or material relates";¹³ or "in the course, or for the purposes, of a relevant action or proceedings".¹⁴ A "relevant action or proceeding" includes a prosecution of an offence¹⁵ such as those alleged to have been committed by the appellant. A contravention of s 9(1) is an offence punishable by a fine.

13 Also within Div 2 of Pt 2 is s 12(1), which prohibits the knowing use, communication or publication of information or material derived from the use of a surveillance device in contravention of Pt 2 (including s 4(1)). One exception to s 12(1) is s 12(2)(c), which, inter alia, permits the use, communication or publication of information or material derived from the use of a surveillance device for the purpose of a proceeding relating to a contravention of Pt 2. Another is s 12(3), which, for a person who obtains knowledge of information or material in a manner that does not involve a contravention of Pt 2, permits the communication and publication of the content of the private conversation but not the use of the recording itself.

14 As seems to have been common ground at the trial, the adducing of evidence of the covert recording by playing the recording involved the use,

12 *Surveillance Devices Act 2016* (SA), s 9(1)(a).

13 *Surveillance Devices Act 2016* (SA), s 9(1)(b).

14 *Surveillance Devices Act 2016* (SA), s 9(1)(d).

15 *Surveillance Devices Act 2016* (SA), s 3(1) (definition of "relevant action or proceeding").

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communication or publication of information or material derived from the use of a surveillance device, specifically a listening device. If the making of the covert recording satisfied s 4(2)(a)(ii) then the prohibition in s 4(1) did not apply. In that event, the use, communication or publication of information or material derived from the use of the surveillance device at the appellant's trial was permitted by s 9(1)(d) and did not contravene s 12(1), as the use of the listening device to make the covert recording would not contravene any provision of Pt 2. If the use by the complainant of the listening device to make the covert recording did not satisfy s 4(2)(a)(ii), then that use contravened s 4(1), s 9(1)(d) was not engaged, and the use, communication or publication of information or material derived from that use at the appellant's trial was prohibited by s 12(1). In that event, reflecting the parties' common position in this Court, no question of any discretionary exclusion (or inclusion) of the evidence of the covert recording should have arisen.¹⁶

Background

15 To explain the circumstances in which the covert recording was made, it is necessary to describe the complainant's evidence at the trial.

16 The appellant and the complainant commenced living together in 2014 and were married in November 2015. They have two daughters, one born in 2015 and the other in March 2017.

17 The first count of rape was alleged to have been committed in April 2017, some weeks after the birth of the complainant's second daughter, while they were living together at Christies Beach. The complainant said that she awoke at around 2.00am to 3.00am to find the appellant on top of her, penetrating her. The complainant said she told the appellant to get off her, and that "he was not to have sex with her whilst she was sleeping and was healing from giving birth" to their second daughter. She said the appellant was apologetic.

18 On 26 June 2017, the complainant was diagnosed with postpartum thyroiditis and thyrotoxicosis. The complainant said that between the time of the first count and receiving that diagnosis, she would wake up with pain in her vagina or bleeding from her vagina, because of which she suspected that the appellant had had sex with her while she was asleep. The complainant also said that there were times when the appellant asked her "was it good" and mentioned the morning after

16 cf *Surveillance Devices Act 2007* (NSW), s 3(2); *DW v The Queen* (2014) 239 A Crim R 192 at 202-204 [55]-[67]; see also *Listening Devices Act 1984* (NSW), s 7(2)(b); *Sepulveda v The Queen* (2006) 167 A Crim R 108 at 137-138 [145]-[152].

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pill. The complainant told the jury that she had requested that the appellant not have sex with her while she was asleep, that the appellant had agreed not to do so, and that he was apologetic for having done so.

19 The second count was alleged to have occurred on 11 July 2017 at Christies Beach. Late in the evening on 11 July 2017 the complainant called a telehealth service complaining that she was feeling anxious and dizzy and having trouble breathing. She took medication and went to sleep with her second daughter sleeping in a basket next to her bed. She awoke to find the appellant pinning her down and penetrating her. The complainant yelled at the appellant to "get off" and became distressed. The complainant said that the following day she again confronted the appellant, telling him that she did not consent to him having intercourse with her while she was asleep and needed time to heal. The appellant told her that he understood she was unwell and accepted his behaviour was "not okay".

20 The complainant could not recall the period of time that elapsed between the second and third counts but said that the third count was committed while they were still living at Christies Beach. She said she again woke to find the appellant holding her arms by her side and having sexual intercourse with her. She again told him to "get off". The appellant continued to have intercourse with her for "what felt like a minute or two", until the complainant pushed him off.

21 The complainant said that, during the period in which the first three counts occurred, she was committed to remaining in her marriage. The complainant said that given she had two small children to care for, had health problems and had minimal family or personal support, she was not in a position to leave the appellant. The complainant explained that she came from a "religious family" and believed in the sanctity of marriage.

22 The prosecution adduced evidence of an uncharged act in August 2019 committed by the appellant after he and the complainant had moved to Lightsvue. The complainant said she awoke to find herself with pain in her vagina and bleeding, as with the previous incidents. She again confronted the appellant. They exchanged messages via social media in which she protested about his having sex with her while she was asleep. The complainant told the jury that, following this incident, she decided to separate from the appellant, although they continued to live together in the same house with the appellant sleeping in a separate room.

23 By December 2019, the appellant was still living in the same house as the complainant. According to the complainant, "[t]he only reason he was still in the house was because he'd convinced me that he was going to move out of the house

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and that I would be left with the house in my name". During December 2019 the appellant and the complainant had consensual sex. The complainant stated that afterwards she "realised ... that I couldn't do it anymore" and thereafter she "made very strict boundaries". The complainant gave evidence that the appellant "understood" that further intercourse "wasn't to happen anymore".

24 On 14 December 2019, the complainant made the covert recording. The evidence does not reveal whether the recording was made before or after the occasion when the complainant and the appellant had consensual sex. During the recorded conversation, the complainant pressed the appellant to reveal what he did to her when they lived in Christies Beach. The appellant ultimately replied "I sexually assaulted you". Later he stated that "I started having sex with you when you were asleep and then I stopped". The complainant asked whether he used protection and the appellant said no. The complainant asked whether she was "responsive at all". The appellant replied "[n]ot really, no". In his evidence at the trial, the appellant accepted that he made those statements but said he made them to placate the complainant.

25 The fourth count took place on the evening of 25 January 2020 in Lightsview. The complainant was unwell and decided to go to bed after watching television. While the complainant was in her bedroom attempting to settle her daughter, the appellant offered to keep her company and the complainant agreed. They lay on their bed with the daughter between them. The complainant fell asleep, but awoke at 5.00am to find her daughter no longer in the bed and the appellant penetrating her.

The application to the trial judge to exclude the covert recording

26 The appellant applied to the trial judge to exclude the evidence of the covert recording. It was common ground that, to have the evidence of the covert recording admitted at trial, the burden was on the prosecution to establish the factual foundation to satisfy s 4(2)(a)(ii). To support that agreed position, this Court was referred to s 56 of the *Criminal Procedure Act 1921* (SA). However, that provision, contained in the "Summary jurisdiction" part of the *Criminal Procedure Act*, relates to summary prosecutions and does not concern a voir dire on a trial for an indictable offence.¹⁷

17 Such as rape pursuant to *Criminal Law Consolidation Act 1935* (SA), s 48(1). See *Criminal Procedure Act 1921* (SA), s 5(3).

27 As the moving party seeking the admission of the evidence of the covert recording,¹⁸ and given that s 4(2)(a) operates as an exception to the general prohibition in s 4(1),¹⁹ the prosecution bore the onus of proving the facts necessary to satisfy s 4(2)(a)(ii). In the absence of an express statutory provision,²⁰ a determination of the applicable standard of proof of the facts necessary to establish the admissibility of the covert recording is governed by the same common law principles as apply to the determination of the condition of the admissibility of a confessional statement that the confession was made voluntarily; namely, that the trial judge need not be satisfied beyond reasonable doubt of the facts necessary to establish voluntariness of the confession, but that "the judge must be satisfied on the balance of probabilities that this condition was fulfilled before [the judge] admits the evidence".²¹

28 Before the trial judge, the prosecution read an affidavit from the complainant in which she stated the following as to why she made the recording:

"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 to. It was to be used as a reminder to myself *not to go back*. At the time I had no intention of taking it further." (emphasis added)

29 The trial judge admitted the covert recording. In an *ex tempore* ruling her Honour noted that the complainant stated that, at the time of making the covert recording, she had no intention of having charges brought against the appellant. Her Honour concluded that the listening device was used in a way which was reasonably necessary to protect a lawful interest of the complainant, "namely she had the right to protect herself from further crimes of rape by the accused in the

18 *MacPherson v The Queen* (1981) 147 CLR 512 at 519.

19 *Vines v Djordjevitch* (1955) 91 CLR 512 at 519-520; *Chugg v Pacific Dunlop Ltd* (1990) 170 CLR 249 at 257-258.

20 *cf Evidence Act 1995* (Cth), s 142; *Evidence Act 1995* (NSW), s 142; *Evidence Act 2001* (Tas), s 142; *Evidence Act 2008* (Vic), s 142; *Evidence Act 2011* (ACT), s 142; *Evidence (National Uniform Legislation) Act 2011* (NT), s 142.

21 *MacPherson* (1981) 147 CLR 512 at 522. See also *Wendo v The Queen* (1963) 109 CLR 559 at 562, 572; *R v Hart* (1977) 17 SASR 100 at 103; *R v Tanner* [2005] SASC 416 at [31].

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form of not resuming her relationship with him". Her Honour concluded that, by operation of s 4(2)(a)(ii), s 4(1) of the SDA did not apply and thus the "recording was [not] unlawful". This can be taken as a conclusion that the admission of the covert recording into evidence was not precluded by s 12(1).

30 The trial judge's reasons treated the complainant's explanation for making the recording as in effect a reminder to herself "not to go back" to resuming a (personal or intimate) relationship with the appellant in which she would be exposed to the real risk of being raped. Given the context of her evidence, that conclusion was well open to the trial judge. In fact, no other conclusion was reasonably open.

The Court of Appeal's reasons

31 The appellant applied for permission to appeal against his convictions on counts 2 and 4.²² The relevant ground of his application contended that the trial judge erred in admitting the covert recording. The appellant contended that the recording was unlawful because it was made in contravention of s 4(1) of the SDA, and that the trial judge erred in concluding that the recording was not unlawful on the basis that the recording was reasonably necessary for the protection of the lawful interests of the complainant under s 4(2)(a)(ii) of that Act. The Court of Appeal granted the appellant permission to appeal against his convictions but dismissed the appeal.

32 In the Court of Appeal, S Doyle and David JJA rejected the trial judge's conclusion that the complainant's use of her phone to make the recording was "reasonably necessary for the protection of [the complainant's] lawful interests". Their Honours characterised the complainant's purpose in making the recording not as being to "address any fear or risk of further or ongoing offending", but rather as being a "reminder to herself not to resume the relationship" with the appellant. Their Honours observed that "[e]ven accepting that [the complainant] had a lawful interest in escaping from her relationship with the appellant, and that 'reasonably necessary' requires only that the recording be reasonably appropriate – as opposed to essential ... we do not consider that the recording was reasonably necessary for the protection of the complainant's lawful interests".

33 Thereafter, in a footnote, their Honours observed that, even though the making of the covert recording did not satisfy s 4(2)(a)(ii), "[b]y reason of s 9(1)(d) of the [SDA] it would not have been unlawful to use the recording at trial.

22 *Criminal Procedure Act 1921* (SA), ss 157-158.

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However, because it had been unlawfully obtained, there remained a discretion to exclude it." Their Honours' reference to the "discretion to exclude" the evidence was a reference to the common law discretion to exclude illegally obtained evidence for reasons of public policy.²³ Their Honours held that the evidence was highly probative, concerned serious offending, and was recorded for the complainant's "own purposes" (not for use in legal proceedings), and concluded that "the balance fell in favour of receiving the evidence".

34 Relevantly, Kourakis CJ held that the complainant's use of her phone to make the recording was a use that was "reasonably necessary for the protection of [the complainant's] lawful interests", being her bodily autonomy and integrity. His Honour observed that it was an "understandable human response to trauma to seek to understand the what, how, and why of the wrong suffered". His Honour concluded that "[i]nformed and sound choices" on how a person "will exercise their human right to bodily autonomy and integrity, including how to best protect or vindicate their right to be kept safe from harm, are best made when the answers to those questions are known".

The appeal to this Court

35 Pursuant to a grant of special leave to appeal, the appellant appeals against the Court of Appeal's dismissal of his appeal against his convictions. The appellant contended that S Doyle and David JJA misconstrued s 9(1)(d) of the SDA, and submitted that, once their Honours concluded that the covert recording was not lawfully obtained pursuant to s 4(1) of the SDA, it followed that any information or material derived from the use of the listening device could not be admitted into evidence.

36 The respondent conceded that, having found that the use of the listening device was contrary to s 4(1), S Doyle and David JJA erred in concluding that the admissibility of the covert recording was governed by the exercise of the public policy discretion, as opposed to that evidence being necessarily excluded by the SDA. For the reasons outlined above,²⁴ that concession was correctly made. Further, the respondent did not contend that, even if the evidence was inadmissible,

23 *Bunning v Cross* (1978) 141 CLR 54 at 78-80.

24 See above at [14].

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no miscarriage of justice was occasioned,²⁵ nor did the respondent seek to rely on the "proviso".²⁶ However, by a notice of contention, the respondent contended that the making of the covert recording by the complainant was not prohibited by s 4(1) of the SDA because s 4(2)(a)(ii) was satisfied, and the admission of the evidence constituted by or derived from the covert recording was therefore not excluded by s 12(1). In effect, the respondent sought to uphold that part of the reasoning of Kourakis CJ described above.²⁷

Scope and application of s 4(2)(a)(ii)

37 It follows that the resolution of the appeal turns upon whether S Doyle and David JJA erred in concluding that the use by the complainant of her mobile phone to record the conversation with the appellant was not "reasonably necessary for the protection" of her "lawful interests" for the purposes of s 4(2)(a)(ii). The debate on that issue in this Court addressed the scope and application of s 4(2)(a)(ii) and did so by considering statutory text and context,²⁸ including legislative history in so far as that history might assist "in fixing the meaning of the statutory text".²⁹ Ultimately, the meaning that would best achieve the statutory purpose is to be preferred to any other interpretation.³⁰

Legislative History

38 Three matters should be noted about the legislative history of the SDA.

25 See *Criminal Procedure Act 1921* (SA), s 158(1)(c); see also *Brawn v The King* (2025) 99 ALJR 872; 423 ALR 69.

26 That is, that the appeal may be dismissed, notwithstanding that the point raised in an appeal might be decided in favour of the appellant, because no substantial miscarriage of justice has actually occurred: *Criminal Procedure Act 1921* (SA), s 158(2).

27 See above at [34].

28 *Palmanova Pty Ltd v The Commonwealth* (2025) 99 ALJR 1362 at 1364-1365 [4]; 424 ALR 768 at 769-770.

29 *Federal Commissioner of Taxation v Consolidated Media Holdings Ltd* (2012) 250 CLR 503 at 519 [39].

30 *Legislation Interpretation Act 2021* (SA), s 14.

39 First, the SDA replaced the *Listening and Surveillance Devices Act 1972* (SA) ("the LSDA").³¹ Section 4 of the LSDA prohibited a person, subject to certain exceptions, from intentionally using any listening device to overhear, record, monitor or listen to any private conversation, whether or not the person was a party to the conversation, without the consent, express or implied, of the parties to that conversation. Section 7(1) provided that the prohibition in s 4 did not apply to or in relation to the use of a listening device, where the listening device was used to overhear, record, monitor or listen to any private conversation to which the person was a party and where the listening device was used "in the course of duty of that person, in the public interest or for the protection of the lawful interests of that person".

40 The second reading speech to an earlier but relevantly similar version of the SDA³² stated that these provisions of the LSDA were "too broad and ill-defined" and "unsuited to the threats to personal privacy posed by the technological realities of the 21st century".³³ Amongst other changes, the exception to the prohibition on using a listening device to overhear, record, monitor or listen to a private conversation "for the protection of the lawful interests of that person"³⁴ was modified to apply where the "use of the device is reasonably necessary for the protection of the lawful interests of that person".³⁵

41 Second, the LSDA had its origins in the *Right of Privacy Bill 1969* (SA),³⁶ which in turn was based on the *Listening Devices Act 1969* (Vic) ("the LDA

31 See *Surveillance Devices Act 2016* (SA), Sch 1, Pt 4, cl 4(1).

32 Being the *Surveillance Devices Bill 2014* (SA). Section 4(1)-(2) of the *Surveillance Devices Bill 2014* (SA) are in largely similar terms to s 4(1)-(2) of the *Surveillance Devices Act 2016* (SA).

33 South Australia, Legislative Council, *Parliamentary Debates* (Hansard), 5 June 2014 at 376 [4].

34 *Listening and Surveillance Devices Act 1972* (SA), s 7(1)(b).

35 *Surveillance Devices Act 2016* (SA), s 4(2)(a)(ii).

36 South Australia, House of Assembly, *Parliamentary Debates* (Hansard), 3 October 1972 at 1774.

(Vic)").³⁷ Subject to exceptions, the LDA (Vic) contained a prohibition on a person communicating or publishing the substance or meaning of a private conversation that was overheard, recorded, monitored or listened to by the use of any listening device.³⁸ One exception was where a party to the private conversation communicated or published the substance or meaning of the conversation "if the communication or publication [was] no more than [was] reasonably necessary ... for the protection of his lawful interests".³⁹ In the part of the second reading speech to the LDA (Vic) which concerned that exception, the relevant Minister stated that "[t]he phrases incorporated in this expression are not new to the courts and have been the subject of many decisions especially in the context of the defence of qualified privilege in relation to the law of defamation".⁴⁰

42 The common law doctrine of qualified privilege protects a defamatory statement made on an occasion where the maker has a duty or interest in making the statement and the recipient of the statement has a corresponding duty or interest to receive it.⁴¹ A resort to the common law doctrine of qualified privilege, especially its concept of reciprocity of interest between the person who makes a statement and a person who receives it,⁴² is understandable in the context of a statutory exception that is engaged by the communication or publication of the "substance or meaning" of a private conversation, such as that exception in the LDA (Vic).⁴³ However, that doctrine is of little utility in construing or applying a statutory exception that is engaged by the use of a listening device to record a private conversation, such as is the case with s 4(2)(a)(ii) of the SDA. Instead, the intentions of the person using the listening device in making the recording may be relevant in ascertaining what interests they sought to protect in using the listening device, and whether their actions were reasonably necessary to protect that

37 South Australia, House of Assembly, *Parliamentary Debates* (Hansard), 20 August 1969 at 1086-1087.

38 *Listening Devices Act 1969* (Vic), s 4(1)(b).

39 *Listening Devices Act 1969* (Vic), s 4(2).

40 Victoria, Legislative Council, *Parliamentary Debates* (Hansard), 26 March 1969 at 3426.

41 See, eg, *Roberts v Bass* (2002) 212 CLR 1 at 26 [62].

42 *Roberts* (2002) 212 CLR 1 at 28 [69].

43 *Listening Devices Act 1969* (Vic), s 4(2).

interest.⁴⁴ Otherwise, the potential utility of the common law of qualified privilege in construing s 4(2)(a)(ii) of the SDA is to confirm that the "lawful interests" referred to in s 4(2)(a)(ii) are not confined to legal duties and legal rights.⁴⁵

43 Third, since the passage of the LDA (Vic) most of the State and Territory jurisdictions have enacted versions of broadly similar legislation to the LSDA and SDA.⁴⁶ Many of those statutes establish a broad prohibition on, amongst other things, a person using certain electronic devices to record a private conversation to which the person is a party, subject to exceptions including where making the recording was reasonably necessary for the protection of the lawful interests of that person.⁴⁷ Thus, appropriately, judicial decisions considering one jurisdiction's legislation commonly refer to the decisions construing the corresponding provision of another jurisdiction's legislation.⁴⁸ However, the legislation is not uniform and the differences may be material. Of present relevance is that none of the legislation enacted by the other States and Territories has an equivalent to s 9(1) of the SDA,

44 See below at [47].

45 *Howe & McColough v Lees* (1910) 11 CLR 361 at 368-369; *London Artists Ltd v Littler* [1968] 1 WLR 607 at 619-620; [1968] 1 All ER 1075 at 1085. See below at [49]-[52].

46 See, eg, *Listening Devices Act 1991* (Tas); *Listening Devices Act 1992* (ACT); *Surveillance Devices Act 1998* (WA); *Surveillance Devices Act 1999* (Vic); *Surveillance Devices Act 2007* (NSW); *Surveillance Devices Act 2007* (NT). In Queensland, the use of listening devices is regulated by the *Invasion of Privacy Act 1971* (Qld).

47 *Listening Devices Act 1991* (Tas), ss 5(1) and 5(3)(b)(i); *Listening Devices Act 1992* (ACT), ss 4(1) and 4(3)(b)(i); *Surveillance Devices Act 1998* (WA), ss 5(1) and 5(3)(d); *Surveillance Devices Act 2007* (NSW), ss 7(1) and 7(3)(b)(i); see also *Invasion of Privacy Act 1971* (Qld), ss 45(1) and 45(2). Further and unlike in South Australia, in most other jurisdictions, to fall within this exception a "principal party to the conversation" must also consent to the listening device being so used: *Listening Devices Act 1991* (Tas), s 5(3)(b); *Listening Devices Act 1992* (ACT), s 4(3)(b); *Surveillance Devices Act 1998* (WA), s 5(3)(d); *Surveillance Devices Act 2007* (NSW), s 7(3)(b).

48 See, eg, *AW v Rayney* [2010] WASCA 161 at [257]; *Thomas v Nash* (2010) 107 SASR 309 at 317 [46]; *Dimech v Tasmania* (2016) 30 Tas R 230 at 234 [8]; *Dong v Song* (2018) 331 FLR 326 at 329-330 [14]-[15].

which imposes restrictions on a person using, communicating or publishing information or material derived from the use of a listening device where the device was used to protect the lawful interests of that person.

Reasonably necessary to protect

44 This legislative history reinforces what is suggested by the terms of the provisions of the SDA in issue in this case namely that, subject to specific exceptions, those provisions seek to protect personal privacy by restricting electronic recording of, monitoring or listening to private conversations. It follows that there is no reason to construe the definition of "private conversation"⁴⁹ narrowly lest that undermine the scope of the protection to privacy afforded by s 4(1).⁵⁰ There is a difference between a conversation which is private and a conversation which is confidential. As Doyle CJ observed in relation to the relevantly similar definition of "private conversation" in the LSDA,⁵¹ "[a] conversation can be private even though the participants are at liberty to tell others about it".

45 Consistent with this scheme of protecting personal privacy, the exceptions in s 4 which concern the use of listening devices to protect the "lawful interests" of a person, being the exceptions contained in ss 4(2)(a)(ii), 4(2)(b)(iv) and 4(2)(b)(v), are limited in various respects. All three of those exceptions require that the use of the listening device to make the recording be "reasonably necessary" for the "protection" of those lawful interests. Sections 4(2)(b)(iv) and 4(2)(b)(v) are further confined in their operation to requiring the use of the device to be in the exercise of the functions of the investigation agent or loss adjuster. Even where those provisions are satisfied, under the SDA the use, communication or publication of information or material derived from the use of the listening device

49 See definition of "private conversation" at [9].

50 *Legislation Interpretation Act 2021* (SA), s 14.

51 *Thomas v Nash* (2010) 107 SASR 309 at 316 [37]; a private conversation was defined, for the purposes of the *Listening and Surveillance Devices Act 1972* (SA), as meaning "any conversation carried on in circumstances that may reasonably be taken to indicate that any party to the conversation desires it to be confined to the parties to the conversation": *Listening and Surveillance Devices Act 1972* (SA), s 3 (definition of "private conversation").

in the circumstances referred to in s 4(2)(a)(ii) is limited to the circumstances specified in s 9(1)(a)-(h).

46 As noted above, that part of s 4(2)(a)(ii) which refers to the use being "reasonably necessary" for the protection of lawful interests was introduced in the SDA to limit the operation of the equivalent provision of the LSDA, which required only that the use to record the conversation be "for the protection of the lawful interests of that person".⁵² Even so, given the multitude of circumstances to which the provision may apply and the other limits on the scope and application of s 4(2)(a)(ii), "reasonably necessary" is not to be understood as meaning that the use had to be "essential", but instead it is sufficient if the use was "appropriate" to protect the lawful interest.⁵³ The respondent's contention that the term means "reasonably appropriate and adapted" and imports a form of proportionality analysis⁵⁴ should be rejected. That test derives from a different context where different considerations arise.

47 The term "reasonably" imports an objective evaluation to be applied to the circumstances existing at the time of the use of the listening device to record the private conversation.⁵⁵ However, as this case illustrates, that evaluation is to be undertaken by reference to the circumstances faced by the party using the device to record the conversation at the time the device was used.⁵⁶ The person's reasons for making the recording will inform but not determine the analysis (including the proper characterisation of the relevant lawful interest). Those reasons can be established by direct and indirect evidence.⁵⁷

48 Further, to satisfy s 4(2)(a)(ii), the use of the listening device must be reasonably necessary for the "protection" of the relevant lawful interest. The

52 *Listening and Surveillance Devices Act 1972* (SA), s 7(1)(b).

53 *Sepulveda* (2006) 167 A Crim R 108 at 132 [117].

54 Citing *Rowe v Electoral Commissioner* (2010) 243 CLR 1 at 140-142 [459]-[466].

55 *Sepulveda* (2006) 167 A Crim R 108 at 136 [139].

56 See for example *DW* (2014) 239 A Crim R 192 at 201-202 [47], [50]-[52].

57 See *DW* (2014) 239 A Crim R 192 at 201 [48].

concept of "protection" connotes defence or preservation from harm or danger⁵⁸ or impairment.

Lawful interests

49 It is within these limitations on the operation of the exception in s 4(2)(a)(ii) that the concept of "lawful interests" is to be considered. In *Violi v Berrivale Orchards Ltd*,⁵⁹ Branson J observed in relation to the phrase "lawful interests" in the equivalent provision of the *Listening Devices Act 1984* (NSW)⁶⁰ that, without reference to authority, "lawful interests" does not call for a "legal interest in the sense of a legal right, title, duty or liability" but means interests which are not "unlawful" and are akin to "legitimate interests".⁶¹

50 In *Sepulveda v The Queen*,⁶² Johnson J queried whether, given the statutory context, Branson J's approach to determining what constitutes a "lawful interest" in the *Listening Devices Act 1984* (NSW) was too wide.⁶³ Johnson J's concern that the protection afforded to private conversations by the prohibition in s 4(1) not be undermined is a valid one.⁶⁴ However, once it is recognised that the phrase "lawful interest" has a wider meaning than legal right, title, duty or liability,⁶⁵ then identifying and expressing a textual or contextual basis to limit the meaning of the expression "lawful interest" is problematic and should be avoided.⁶⁶ Instead, the expression "lawful interest" is "best left to be applied case-by-case, subject to some

58 *Sepulveda* (2006) 167 A Crim R 108 at 132 [120].

59 (2000) 99 FCR 580.

60 *Listening Devices Act 1984* (NSW), s 5(3)(b)(i).

61 *Violi* (2000) 99 FCR 580 at 586 [28].

62 (2006) 167 A Crim R 108.

63 *Sepulveda* (2006) 167 A Crim R 108 at 134 [126].

64 See *Thomas v Nash* (2010) 107 SASR 309 at 317 [49].

65 See above at [42].

66 *Consolidated Media Holdings Ltd* (2012) 250 CLR 503 at 519 [39].

general guidelines".⁶⁷ Specifically, the phrase should be applied by reference to the entirety of s 4(2)(a)(ii), including the limitations that have been noted.

51 Thus the better approach with respect to s 4(2)(a)(ii) of the SDA is to identify the relevant interest said to have been in need of protection, to determine whether that interest was lawful and to address, having regard both to the nature of that interest and to the fact that s 4(2)(a)(ii) is an exception to a protection afforded to private conversations, whether in all the circumstances the use was reasonably necessary (in the sense of appropriate) to protect that interest. That was in effect the approach of Branson J in *Violi*,⁶⁸ where her Honour held that a party's recording of two conversations, with the intention of publishing the recording to persons who were not parties to the conversations if the other party denied the "truth" of the conversations,⁶⁹ was not reasonably necessary to protect the lawful interests of the person who recorded the conversations.⁷⁰ The correct approach is also illustrated by the facts and outcome of *Levy v Bablis*,⁷¹ where a private conversation was recorded for the purpose of "trap[ping]" former business associates into engaging in further conduct, and then to use the threat of disclosure to "persuade" them to meet their asserted obligations under earlier transactions.⁷² While it may be accepted that the maker of the recording had a lawful interest in having contractual obligations owed to him fulfilled and in bringing proceedings to secure the performance of those obligations,⁷³ the making of the recording was not undertaken to "protect" any such lawful interest and was not otherwise reasonably necessary.⁷⁴

67 *Thomas v Nash* (2010) 107 SASR 309 at 317 [47]; *Dong v Song* (2018) 331 FLR 326 at 332 [28].

68 (2000) 99 FCR 580 at 586-587 [30]-[32].

69 *Violi* (2000) 99 FCR 580 at 582 [3].

70 *Violi* (2000) 99 FCR 580 at 587 [33]. See also *Nanosecond Corporation Pty Ltd v Glen Carron Pty Ltd* (2018) 132 SASR 63 at 90 [94]-[95].

71 [2013] NSWCA 28.

72 *Levy v Bablis* [2013] NSWCA 28 at [109].

73 *Levy v Bablis* [2013] NSWCA 28 at [109].

74 *Levy v Bablis* [2013] NSWCA 28 at [109].

52 While there are many forms of "interest" that can amount to a "lawful interest", different interests have different significance in the application of s 4(2)(a)(ii). In *Thomas v Nash*, Doyle CJ observed that many of the cases in this field proceed on the basis that "where the conversation relates to a serious crime, or an allegation of a serious crime, or to resisting such an allegation, a court is more likely to find that the recording of a conversation relating to the crime can be made in the protection of the person's 'lawful interests'".⁷⁵ Subject to the important proviso that the legislation considered in *Thomas v Nash* (and other cases concerning the LSDA) required only that the recording of the private conversation be "for the protection of the lawful interests of that person",⁷⁶ rather than being "reasonably necessary" for that protection, the observation in *Thomas v Nash* reflects the importance attached to both the interest sought to be vindicated by the substantive provision of the criminal law in issue and the interest of a person in defending an unjust accusation.

53 Thus, for example, in *DW v The Queen* a child aged between 12 and 14 who was the victim of sexual abuse recorded a conversation with the perpetrator on her mobile phone. The recording supported the child's evidence and was contrary to certain assertions made by the perpetrator.⁷⁷ The interest of the child in not being the victim of serious criminal offences was held to be a lawful interest for the purposes of the equivalent provision of the *Surveillance Devices Act 2007* (NSW).⁷⁸ Ward JA inferred that the purpose of the child in making the recording was to have some evidence which she could use to convince others to "believe her or to corroborate her word ... or to protect herself from further assaults".⁷⁹ Her Honour found that, given the child's age and family circumstances, the trial judge did not err in concluding that the making of the recording was reasonably necessary for the protection of the child's lawful interests in "protecting herself from being indecently assaulted and photographed for the purposes of child pornography".⁸⁰ The facts of *DW* illustrate the interrelationship between the component parts of the

75 *Thomas v Nash* (2010) 107 SASR 309 at 317 [48].

76 *Listening and Surveillance Devices Act 1972* (SA), s 7(1)(b).

77 *DW* (2014) 239 A Crim R 192 at 196-197 [14]-[22].

78 *Surveillance Devices Act 2007* (NSW), s 7(3)(b)(i); *DW* (2014) 239 A Crim R 192 at 199 [37].

79 *DW* (2014) 239 A Crim R 192 at 201 [48].

80 *DW* (2014) 239 A Crim R 192 at 202 [53].

statutory test in s 4(2)(a)(ii). The nature of the lawful interest of the child was of the highest order. All other matters being equal, the greater that "interest", the stronger the case for concluding that the use of a listening device to record an admission concerning the infringement of that interest was reasonably necessary to protect that interest.

The making of the covert recording by the complainant was not contrary to s 4(1)

54 In characterising the complainant's purpose of making the recording as being a "reminder to herself not to resume the relationship" with the appellant, S Doyle and David JJA identified the relevant lawful interest as the complainant's interest in "escaping from her relationship" with the appellant. While the right of personal autonomy enjoyed by an adult in choosing to remain in or leave a relationship is a lawful interest, that was not the proper characterisation of the relevant lawful interest sought to be protected by the complainant. The complainant's concern was not to resume her relationship. The covert recording (and its use⁸¹) was the reminder to the complainant, by replaying it to herself, to avoid being exposed to the real risk of being raped and sexually assaulted (principally while she was sleeping). The questions she asked of the appellant that were covertly recorded were principally focused on establishing whether he raped her and not any other aspect of their relationship.

55 The lawful interest that the complainant was seeking to protect was properly characterised by Kourakis CJ as her right of bodily autonomy and integrity (and any associated personal wellbeing). S Doyle and David JJA's mischaracterisation of the relevant lawful interest as the complainant's interest in ending her relationship with the appellant understated the significance of the lawful interest sought to be protected. Important as a person's personal autonomy in respect of their choice of personal relationships is, that interest is different from and of lesser importance than the "right in an individual to choose what occurs with respect to his or her own person".⁸² Bodily integrity and autonomy are recognised by the common law as a "fundamental right".⁸³ The lineage of the common law's refusal

81 *Surveillance Devices Act 2016* (SA), s 9(1)(a).

82 *Secretary, Department of Health and Community Services v JWB (Marion's Case)* (1992) 175 CLR 218 at 233, citing Blackstone, *Commentaries on the Laws of England*, 17th ed (1830), bk 3, ch 8 at 120.

83 *Marion's Case* (1992) 175 CLR 218 at 249, 253.

to deny protection against interferences with bodily integrity and the importance attached to that integrity was explained by Gageler CJ, Gordon, Gleeson and Jagot JJ in *YBFZ v Minister for Immigration, Citizenship and Multicultural Affairs*.⁸⁴ Their Honours referred to the "pre-eminent value the law of this country gives to ... bodily integrity".⁸⁵ Rape is a violent affront to that value, and the interest of a person in not being raped is an interest deserving of the very strongest protection in the application of s 4(2)(a)(ii).

56 The essence of the appellant's case in this Court was that the complainant did not make the recording to use as evidence in any investigation or prosecution of the appellant but in effect as only a "note to herself", to function as a reminder not to resume a relationship with the appellant in the future. The appellant submitted the same result could have been achieved by the appellant making a contemporaneous handwritten note. The appellant also contended that the subject matter of the conversation concerned events from 2017 when the complainant and the appellant lived in Christies Beach and was not concerned with any ongoing threat, and that the complainant could have approached the police. The appellant further noted that the recording was made around the time the complainant engaged in consensual sex with the appellant.

57 As explained, the assessment of whether making the covert recording was reasonably necessary to protect the complainant's lawful interest in not being raped is to be undertaken objectively but having regard to the circumstances the complainant faced at the time the recording was made. Those circumstances rendered the complainant extremely vulnerable. The appellant had raped her previously while she slept on multiple occasions in 2017 shortly after she gave birth, apologised for his actions but had not ceased and raped her again as recently as August 2019. As of December 2019, the complainant had various significant health issues, responsibility for two small children and a limited support network. The complainant was separated from the appellant but they were living in the same home. These circumstances exposed the complainant to the potential of either resuming, albeit reluctantly, the relationship with the appellant, or the status quo of him remaining in the home for a sustained period continuing. Both scenarios exposed her to the real risk of being raped again (as she was in January 2020). The

84 (2024) 99 ALJR 1 at 10 [9]; 419 ALR 457 at 465.

85 *YBFZ* (2024) 99 ALJR 1 at 11 [12]; 419 ALR 457 at 466; see also *YBFZ* (2024) 99 ALJR 1 at 11-12 [14]-[15], 12 [18], 19 [58], 36-37 [140], 39 [150]-[151]; 419 ALR 457 at 467, 468, 477, 501, 504-505. See also *EGH19 v The Commonwealth* (2026) 100 ALJR 400 at 419-420 [68]-[69], 450 [207], 465-466 [292], 469 [306].

Gageler CJ
Gordon J
Steward J
Jagot J
Beech-Jones J

22.

fact that the appellant and complainant engaged in a one-off instance of consensual sex around the time of that recording only reinforced that potential.

58 In those circumstances it was readily understandable and, more relevantly, reasonably necessary (ie appropriate) that the complainant would record the appellant's admission as a powerful audio reminder of the peril she faced if she remained in the same home as the appellant, or resumed a relationship with him. Just as visual imagery can be "peculiarly communicative",⁸⁶ an audio recording of such stark admissions was a far more powerful reminder than a handwritten note to herself. Further, just because it was possible for the complainant to approach the police at that point does not mean that it was not reasonably necessary to use her mobile phone to record the conversation. Both the police response to any complaint, and the course and timing of any police investigation, could not have been known to the complainant and were out of her control. The fact that the subject matter of the conversation concerned events some years previous meant nothing in the context of a clear and ongoing risk posed by the appellant's presence in her home.

59 The trial judge did not err in holding that the use by the complainant of her mobile phone to make the covert recording of the conversation with the appellant on 14 December 2019 did not contravene s 4(1) of the SDA. The evidence of that conversation was properly admitted at the appellant's trial.

Orders

60 Ground 1 of the notice of contention should be upheld. The appeal should be dismissed.

86 *Farm Transparency International Ltd v New South Wales* (2022) 277 CLR 537 at 566 [80]; see also *Levy v Victoria* (1997) 189 CLR 579 at 624.

