



HIGH COURT OF AUSTRALIA

5 August 2026

POTTER (A PSEUDONYM) v THE KING
[2026] HCA 25

Today, the High Court unanimously dismissed an appeal from a judgment of the Court of Appeal of the Supreme Court of South Australia ("the Court of Appeal").

The appellant stood trial in the District Court of South Australia on four counts of rape against the complainant, his wife, and was convicted on the second and fourth counts. 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. The last count was alleged to have occurred in January 2020, while they were living together, after they had separated.

In December 2019, prior to the occurrence of the conduct constituting the fourth count, 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. The complainant gave evidence that she made the covert recording "so that I could use it to convince myself never to go back to him no matter what happened".

Over objection, the trial judge admitted evidence of the recorded conversation. The trial judge held that the making of the covert recording was not unlawful under s 4(1) of the *Surveillance Devices Act 2016* (SA) ("the SDA"), because making the covert recording was "reasonably necessary for the protection of the lawful interests" of the complainant within the meaning of s 4(2)(a)(ii) of the SDA.

On appeal, a majority of the Court of Appeal (S Doyle and David JJA) held that s 4(2)(a)(ii) of the SDA was not satisfied. Whilst accepting that the complainant had a lawful interest in "escaping from her relationship with the appellant", S Doyle and David JJA held that the covert recording was not reasonably necessary to protect that lawful interest. However, S Doyle and David JJA dismissed the appeal, on the basis that the covert recording should have been admitted in the exercise of the trial judge's discretion to admit unlawfully obtained evidence. The other judge of the Court of Appeal (Kourakis CJ) held that s 4(2)(a)(ii) of the SDA was satisfied.

It was common ground in the High Court that if s 4(2)(a)(ii) of the SDA was not satisfied, then there was no discretion to admit the evidence of the covert recording, it had to be excluded, and the admission of the evidence of the covert recording would amount to a miscarriage of justice.

The High Court dismissed the appeal, unanimously holding that the making of the covert recording satisfied s 4(2)(a)(ii) of the SDA. The Court held that in the circumstances, recording the appellant's admission was reasonably necessary to protect the complainant's lawful interest, being her right of bodily autonomy and integrity.

This statement is not intended to be a substitute for the reasons of the High Court or to be used in any later consideration of the Court's reasons.