

FEDERAL CIRCUIT COURT OF AUSTRALIA*CORBY & CORBY**[2015] FCCA 1099*

Catchwords:

FAMILY LAW – PRACTICE AND PROCEDURE – Mother seeks to tender tape recordings of conversations between the parties – recordings found to be lawful under *Surveillance Devices Act 2007* – section 7(3)(b)(i) of the *Surveillance Devices Act 2007* and section 138 of the *Evidence Act 1995* discussed – recordings admitted into evidence.

Legislation:

Evidence Act 1995, s.138*Surveillance Devices Act 2007*, ss.4, 7

Cases cited:

Chao v Chao [2008] NSWSC 584*DW v R* [2014] NSWCCA 28*Georgiou Building Pty Ltd v Perrinepod Pty Ltd* [2012] WASC 72*Huffman & Gorman* [2014] FamCA 150*R v Coutts* [2013] SADC 50*R v Lee* [2004] NSWCCA 82*Sepulveda v R* [2006] NSWCCA 379*Violi v Berrivale Orchards Ltd* [2000] FCA 791

Applicant:	MR CORBY
Respondent:	MS CORBY
File Number:	SYC 5639 of 2013
Judgment of:	Judge Sexton
Hearing date:	7 April 2015
Date of Last Submission:	7 April 2015
Delivered at:	Sydney
Orders made:	8 April 2015
Reasons delivered on:	16 April 2015

REPRESENTATION

Counsel for the Applicant:	Mr O'Brien
Solicitors for the Applicant:	Craddock Murray Neumann
Counsel for the Respondent:	Ms Lawson
Solicitors for the Respondent:	Gowland Legal
Counsel for the Independent Children's Lawyer:	Ms Neville
Solicitors for the Independent Children's Lawyer:	Louise Coady

ORDERS

- (1) The audio recordings between the parties made by the Mother on 25 March, 24 June and 8 July 2012 be marked Exhibit 4.
- (2) The Mother's solicitor email the audio recordings (admitted and marked Exhibit 4) to the Father's new solicitor by the close of business on Tuesday 21 April 2015.
- (3) The Mother's solicitor save the audio recordings onto a USB flashdrive and present the flashdrive to the Exhibits counter at the Sydney Registry by no later than 4.00p.m on Friday 24 April 2015.

IT IS NOTED that publication of this judgment under the pseudonym *Corby & Corby* is approved pursuant to s.121(9)(g) of the *Family Law Act 1975 (Cth)*.

**FEDERAL CIRCUIT COURT
OF AUSTRALIA
AT SYDNEY**

SYC 5639 of 2013

MR CORBY

Applicant

And

MS CORBY

Respondent

REASONS FOR JUDGMENT

Ex Tempore

1. On 7 April 2015, the commencement of the first day of the final parenting hearing in relation to the parties' only child X, the Mother's counsel sought the Court's leave to tender further evidence in the form of four short audio recordings of conversations between the Mother and the Father. The conversations are alleged to have occurred in 2012; the first on 25 March, the second and third on 24 June, and the fourth on 8 July, all prior to the parties' separation.
2. The recordings were only brought to the attention of the Mother's counsel (who then advised the Father and the Independent Children's Lawyer) just before the hearing commenced on 7 April. All parties were given the opportunity to listen to the recordings outside the Court. The Father then opposed the tender. The Independent Children's Lawyer supported the tender. The parties agreed that Dr Q, who was waiting at the Court, would be cross-examined before the question of the admissibility of the recordings was addressed.
3. After hearing submissions from Counsel for each party and for the Independent Children's Lawyer the same afternoon, listening to the

recordings with the consent of all parties and reviewing the relevant legislation and authorities overnight, on 8 April 2015 I determined to admit the evidence. I also granted the Father's application to adjourn the hearing until the end of June, and ordered the Mother to file short evidence in relation to the recordings, and the Father to file and serve evidence in response. I have reserved the Father's costs, sought on an indemnity basis. I now give oral reasons for my determination.

4. The Father acknowledges that it is his voice on the recordings. The Mother acknowledges that the recordings were made without the knowledge of the Father and that they are "private conversations" and therefore prima facie in contravention of section 7 of the *Surveillance Devices Act 2007*.

5. Section 7(1)(b) of the *Surveillance Devices Act 2007* provides that:

A person must not knowingly install, use or cause to be used or maintain a listening device...

...

(b) to record a private conversation to which the person is a party.

6. Section 7(3) provides that section 7(1)(b) does not apply to the use of a listening device by a party to a private conversation¹ if a principal party to the conversation, in this case the Mother, consents to the listening device being so used and the recording of the conversation "is reasonably necessary for the protection of the lawful interests of that principal party."²

7. The Mother's counsel submits that the recordings are admissible by reason of the provisions of 7(3)(b)(i). However, counsel submits that if the Court does not accept this submission, the evidence should be admitted under the provisions of section 138(1) of the *Evidence Act 1995* on the basis that the desirability of admitting the evidence outweighs the undesirability of doing so.

¹ Section 7(3)(b)

² Section 7(3)(b)(i)

8. Counsel for the Independent Children's Lawyer agrees that the Mother's conduct was reasonably necessary to protect her lawful interests within the terms of the exception of section 7(3)(b)(i). Counsel for the Independent Children's Lawyer adopts the Mother's counsel's submissions, except in relation to one of the four recordings on which the Child X's voice is clearly identifiable. Counsel submits that the *Surveillance Devices Act 2007* does not apply to that recording, because, given X's presence, it was not a "private conversation" as defined by section 4 of the Surveillance Devices Act.
9. Section 4 of the *Surveillance Devices Act 2007* defines "private conversation" as follows:

...any words spoken by one person to another person or to other persons in circumstances that may reasonably be taken to indicate that any of those persons desires the words to be listened to only:

(a) by themselves, or
(b) by themselves and by some other person who has the consent, express or implied, of all of those persons to do so,

but does not include a conversation made in any circumstances in which the parties to it ought reasonably to expect that it might be overheard by someone else.
10. Counsel for the Independent Children's Lawyer further submits that given the vast difference in each party's version of how the Father behaved towards the Mother during the relationship, the Court will ultimately be required to accept one party's version over the other. Counsel contends that the evidence sought to be admitted corroborates the Mother's version of the facts, and is therefore highly probative.
11. Counsel for the Father submits that the conversations were plainly "private conversations" within the meaning of the Act. Whether or not X heard any of the conversations is irrelevant. Counsel submits that the Court should be satisfied that X, as a member of the household, would have had the consent of the parties to overhear the conversation, either expressly or impliedly.
12. The Father's counsel submits that the recordings should not be admitted because they were unlawfully obtained. Counsel says that section 7(3)(b)(i) does not apply on the facts of this case. He relies on

a decision of *Huffman & Gorman*³ by Justice Foster. Counsel submits that the Mother has failed to adduce any evidence as to the circumstances in which the recordings were made, a prerequisite to proving the recordings were, “*reasonably necessary for the protection of the lawful interests of the Wife*”. Counsel contends that the content of the recordings is of key significance in the case, and given that the evidence was obtained covertly, for reasons unexplained, there must be a significant public policy issue in permitting a party to make use of evidence obtained in this way.

13. Counsel for the Mother submits that the decision in *Huffman & Gorman* was addressing a different question. Justice Foster was considering whether photographs taken covertly should be provided to the single expert. His Honour’s evaluation of the evidence and determination did not relate the admissibility of those tapes.⁴
14. Counsel for the Mother submits that the context in which the Mother made the recordings is clear from her counsellor’s report.⁵ The Mother told her counsellor she was being coerced to engage in unwanted sexual activity and was fearful of contracting a sexually transmissible disease. She was very afraid she would be raped if she refused the Father’s demands for sex.
15. In relation to why she delayed in disclosing the evidence of the recordings, the Mother said in short oral evidence that she told a friend about a year ago that she had the recordings and the friend told her they were illegal and she would not be able to use them. The Mother says she believed she would be in trouble if she tried to do anything with them, but when she came to Court on the first day of the hearing she brought everything with her, including those recordings, not knowing whether she could do anything with them. She said she told Dr Q at interview that she had them.
16. The Mother’s counsel said the conversations plainly occurred with the full knowledge of the Father, who should have disclosed their content in his affidavit material. He was aware he had berated the Mother over sexual matters but he has chosen to deny any form of intimidation or

³ [2014] FamCA 150

⁴ At paragraph 51 of *Huffman & Gorman* [2014] FamCA 150

⁵ At Annexure F of Mother’s affidavit sworn on 17 March 2015

coercion. The recordings, counsel submits, disclose the way the Father used to speak to the Mother, and support the Mother's version of events.

Discussion

17. I am satisfied, for reasons which follow, that the Mother's conduct in relation to all four records was lawful under section 7(3)(b)(i) of the *Surveillance Devices Act 2007* and should be admitted on that basis. Having made this determination, it is unnecessary for me to decide whether or not the conversation in which X can be heard on the recording is a "private conversation" within the meaning of the Act; that is, whether the Act applies to that particular conversation.
18. None of the counsel appearing before me made submissions on the relevant authorities.

"Lawful Interests"

19. The authorities in relation to the term "lawful interests" are discussed by the Court of Criminal Appeal in the decision of *DW v R*⁶. The Court there says that there is some uncertainty in the authorities as to what is sufficient for a lawful interest within the meaning of the section.⁷ The Court found no assistance from the explanatory notes.⁸
20. *DW v R* concerned an appeal from convictions relating to acts of aggravated indecent assault, incitement to aggravated acts of indecency, use of a child for pornographic purposes and possession of child pornography. The matters related to conduct by the appellant in relation to his daughter, aged between 12 and 14 years at the time of the offences. The child victim did not think her mother would believe her if she disclosed what her father was doing and made the recordings on the advice of a friend. She put her phone on record in her pocket and then asked her dad what she had to do. The trial judge had found

⁶ [2014] NSWCCA 28

⁷ At paragraph 27

⁸ At paragraph 29

that the complainant was frightened of her father, who was living with her in their home at the time of the recordings.

21. The Crown argued on appeal that the term “lawful interests” must go at least as far as the interests of the complainant there not to be sexually abused and not to be sexually exploited for pornographic purposes. After considering a number of authorities on the question of what constituted “lawful interests” in section 7(3)(b)(i), the Court of Criminal Appeal upheld the Trial Judge’s decision that the interests of the complainant – a child in that case – not to be the victim of the serious criminal offences that were alleged was a “lawful interest” for the purpose of section 7(3) of the *Surveillance Devices Act 2007*. I refer to a number of the authorities considered by the Court of Criminal Appeal.

- a) In *R v Lee*⁹, the Court was satisfied that the “*desire of a witness to protect her credibility generally; to support her credibility if she had to give evidence in a court proceeding about the matter; and to protect herself against exposure to being charged with making false allegations against other people about matters of considerable seriousness*” did constitute lawful interests for the purpose of the phrase used in the predecessor to section 7(3)(b)(i) of the *Surveillance Devices Act 2007*.¹⁰
- b) In *Sepulveda v R* [2006] NSWCCA 379, the Court of Criminal Appeal, though not forming a concluded view, suggested the phrase “lawful interest” may not extend as broadly as suggested by Branson J in the case of *Violi v Berrivale Orchards Ltd* [2000] FCA 791, where her Honour considered it would encompass “*legitimate interests*” or “*interests conforming to law*”.¹¹
- c) In *Georgiou Building Pty Ltd v Perrinepod Pty Ltd* [2012] WASC 72, the Western Australian Supreme Court referred to the New South Wales Supreme Court decision of *Chao v Chao* [2008] NSWSC 584, where it was found that a recording made where a serious dispute had erupted, and it was anticipated

⁹ [2004] NSWCCA 82

¹⁰ *Ibid* at paragraph 31

¹¹ *Ibid* at paragraph 32

there would be a dispute as to the different versions of an arrangement, might give rise to a lawful interest.¹²

- d) In *R v Coutts* [2013] SADC 50, the South Australian District Court considered a recording of a conversation by the complainant to be for the protection of the lawful interests of that person in circumstances where the accused was charged with numerous counts of sexual assault and assault against his former partner. The complainant alleged that the accused had told her that he had been previously charged with rape based on the complaint of another woman, but it had been his word against hers and that even if it was recorded, it could not be used in court. The recording there was described as a “*graphic account of threats, belittlement and sounds of forced sex, while the complainant was crying and in distress and pain.*” His Honour there identified the complainant’s “lawful interests” as being her interest in defending against the extreme levels of harm and danger she faced.¹³

22. In the present case, the Mother, in her trial affidavit, deposes to being frightened of the Father, whom she described as sexually coercive and intimidating toward her for the duration of her 13 year marriage and, at times, physically violent. She deposed to the Father demanding sex from her daily, requiring her to watch pornographic videos with him, often when he arrived home from work, whether or not their son X was present in the home and, according to the Mother, indifferent to the impact of his demands on her or on X. She deposed to the Father being verbally abusive toward her in front of X, to being aggressive toward X himself, to becoming angry to the point of damaging property. The Mother deposed to being regularly denigrated, belittled and undermined by the Father over the 13 year marriage, which she says resulted in her having little confidence in herself and to a belief that she had no choice but to give in to his demands. The Mother says in her trial affidavit¹⁴:

Mr Corby would become angry with me, if I said “I am too tired” and he would say to me in an aggressive tone: “You are my wife. You need

¹² Ibid at paragraph 34

¹³ Ibid at paragraphs 35 and 36

¹⁴ At paragraphs 46, 47, 48, 49 and 74 of Mother’s affidavit sworn on 17 March 2015

to give it to me every day.” I would try to avoid having sex with Mr Corby and say, “I am busy” or “I have to take X out” or “I am too tired.” At times, I would leave the home with X and go to the shopping centre or delay our return home so that I could avoid Mr Corby when he returned home. Mr Corby would usually return home after work and then leave 20 to 30 minutes to go to sports training. I would try my best to avoid that window of time when Mr Corby was home because I knew that would be when he would harass me for sex. If I was home, he would continuously demand and harass me until eventually it wore me down and I did not have the energy to resist any further.

The constant demands for sex and the pressure to have sex with Mr Corby almost daily made me miserable. In or about March 2008 I commenced to see a counsellor at (omitted) Medical Centre because of Mr Corby’s treatment towards me.

These ongoing requests for sex started in the early months of our marriage and continued throughout the entire relationship. Nearly every night (that is six to seven times a week) Mr Corby would say to me, “get in the bedroom and spread your legs” and “lie down and pretend you like it” or “Get something decent on” and “you know what you need to do – give it to me.” Other times he would throw underwear at me or a dress or top he wanted me to wear and say, “put it on...you need to give it to me.” Mr Corby always spoke to me in a demanding, forceful and demoralizing tone. Additionally, his body language was intimidating and dominant. Whilst he would be having sex with me, he would at times grab my shoulders, and move me into a position that he wanted me to be in whilst we were having sex. This would hurt me. Mr Corby was very forceful in making me stand in a certain position. Mr Corby would also demand I go into the study room while he was watching pornography and force me into certain positions and pleasure him sexually. He was always insistent that I remain in the same position the entire time I was to pleasure him and I often wondered whether I was being filmed during the time.

I felt I had to do what he asked and submit to his demands. During sex, I would lie there and wait for Mr Corby to climax. I was scared of Mr Corby. Mr Corby’s treatment towards me made me feel extremely scared, particularly in the latter years of our relationship.

...

In the last years of our marriage, he often yelled at me in words to the effect, “you bitch” if I didn’t agree to have sex or if I served him leftovers from the night before. He would say such words in the presence of X. I would say, “don’t speak like that in front of X” or “Stop. Don’t

says these words.” *There were times when I just did not respond to his verbal abuse, as it was easier to not respond and let the situation settle down. In an incident on (omitted) 2012, I refused to have sex with Mr Corby. He began screaming at me and saying “You fucking retarded bitch, get fucked and go to your fucking parents’ house where you fucking belong.” He then stormed out of the house and slammed the door. X was in the house during this incident.*

23. I am satisfied on the basis of the authority of *DW v R*, and the authorities referred to by the Court of Criminal Appeal, that the Mother had the right to protect her interest not to be intimidated or harassed, and not to be forced to respond to the Father’s demands for sexual activity, and that section 7(3)(b)(i) is therefore satisfied in relation to the term “*lawful interests*.”

“Reasonably necessary”

24. The next question is whether in the Mothers’ circumstances it was “*reasonably necessary*” for her to make the recordings to protect those “*lawful interests*”.
25. The Court in *DW v R*¹⁵ again considered the decision of *Sepulveda*, in which the Court found that the phrase “*reasonably necessary*” should be read as “*reasonably appropriate*” rather than “*essential*”. The Court there said that reasonable necessity should be judged objectively upon grounds that exist at the time of the recording. The Court found, in that case, the recording of the conversation was not “*reasonably necessary*” because there was no impediment to the complainant approaching police with his complaint. The complainant’s purpose in that case, in recording the conversation, was to extract an admission from the accused, and she accepted money in exchange for the tape of the conversation (though she gave the accused a different tape). The Court noted that the purpose of the legislation was to protect privacy by prohibiting the covert recording of a conversation other than (usually) by way of a warrant under the statute, and that to find such conduct “*reasonably necessary*” in the circumstances of that case would leave open the covert recording of a conversation by any person who alleged he or she was a victim of crime and spoke to the alleged

¹⁵ At paragraph 42 of *DW v R* [2014] NSWCCA 28

offender for the purpose of obtaining admissions. His Honour emphasised that it was important that a construction of the legislation not be adopted that would serve to undermine, in a significant respect, a primary purpose of the legislation.

26. In *DW v R*, the Court was satisfied the complainant's recording was "reasonably necessary" to protect her "lawful interests". There was no evidence from the complainant as to her purpose in making the recording, nor was she cross-examined as to her motive in doing so. She did not immediately take it to police or to any authority figure. Her evidence was, in fact, that she hid the recording. She did not seek to obtain money in exchange for the recording. The Court found no reason to infer that the recording was not made for the purpose of the complainant having some evidence which she could use to convince others to believe her, or to corroborate her word, or to protect herself from further assaults. The Court distinguished *Sepulveda v R* [2006] NSWCCA 379 in that the recording was made by an adult, not a child, was not made several years after the alleged assaults, but while they were ongoing, and prior to any investigation of the assaults by police. The Trial Judge accepted that the complainant was frightened of the perpetrator with whom she was living at the time, as a result of his behaviour towards her. The Court accepted that it was not practicable in the circumstances of that case for the complainant to contact police to arrange a warrant to record the conversations with her father. The Court of Criminal Appeal noted that in the *R v Coutts*¹⁶, the Court considered it was not a realistic option for an adult complainant, who was trapped in a violent and abusive relationship, to report her predicament to police.
27. In the present case, the Father denies having ever behaved in an abusive, controlling, or coercive manner. He denies demanding sex from the Mother, intimidating, or harassing her, and while he acknowledges damaging property in anger on two occasions, he otherwise denies committing any form of family violence.
28. I agree with the Mother's counsel that the Court has some evidence about the context in which the Mother made the recordings from her counsellor's report dated 13 September 2013, annexed to her trial

¹⁶ [2013] SADC 50

affidavit,¹⁷ in which the counsellor related the Mother's reports over many years of the Father's abusive conduct. The report records the Mother's reports of the Father's violence, abuse, and sexual coercion on a daily basis throughout the marriage, and to her fear of the repercussions of leaving the relationship, both for herself and for X.

29. I am satisfied the observations of the Court of Criminal Appeal in *DW v R*, in relation to the term "*reasonably necessary*", apply in the present case. In *DW v R*, as here, the Mother alleges that the recordings were made at the time the alleged behaviours were actually occurring. The Mother was living with the Father in the same home. She says she was frightened of him. She told her counsellor she was frequently teary, unable to sleep, was worried about money if she left the marriage and was fearful of her son being left overnight in the Father's care. She reported being fearful of the repercussions of reporting the Father to police. She held onto the tapes and did not disclose them to authorities. I find no reason to infer that the recording was not made for the purpose of the complainant having some evidence which she could use to convince others to believe her, or to corroborate her word, or to protect herself or X from further such behaviour. While the complainant in the present case is an adult, she was, if her evidence is accepted, caught up in an abusive relationship with a man who damaged her self-worth and left her miserable and exhausted. If this was so, as the Court found in *R v Coutts*, it may not have been a realistic option for her to report her predicament to police and obtain a warrant for conversations with her husband to be recorded.
30. The evidence also discloses that the Father may have had a public face very different from his private face, a possibility accepted by Dr Q, who agreed that the Father may be charming and delightful in company, while intimidating and frightening in the home, as alleged by the Mother. The Mother here, as in *DW v R*, was not trying to extract an admission, as in the case of *Sepulveda v R*, but rather to establish her credibility if there was ever a dispute about what had actually happened.
31. I am therefore satisfied that the provisions of 7(3)(b)(i) have been satisfied and that the recordings were "*reasonably necessary*" to

¹⁷ At Annexure F of Mother's affidavit sworn on 17 March 2015

protect the Mother's "lawful interests." I have decided that the recordings should be admitted on that basis. The ultimate weight to be given to these matters is, of course, yet to be determined.

32. However, all counsel made submissions on section 138(1) of the *Evidence Act 1995*, and I therefore considered whether I would have exercised my discretion under section 138 of the *Evidence Act 1995* to admit the evidence if I had come to a different view on the provisions of the *Surveillance Devices Act 2007*. The question there would have been whether the evidence should be admitted on the basis that the desirability of admitting the evidence outweighs the undesirability of admitting the evidence, having regard to the relevant matters in section 138(3), as urged by the Mother's counsel and the Independent Children's Lawyer's counsel.

33. Section 138 provides that:

(1) *Evidence that was obtained:*

- (a) *improperly or in contravention of an Australian law, or*
(b) *in consequence of an impropriety or of a contravention of an Australian law,*

is not to be admitted unless the desirability of admitting the evidence outweighs the undesirability of admitting evidence that has been obtained in the way in which the evidence was obtained.

(2) *Without limiting subsection (1), evidence of an admission that was made during or in consequence of questioning, and evidence obtained in consequence of the admission, is taken to have been obtained improperly if the person conducting the questioning:*

(a) *did, or omitted to do, an act in the course of the questioning even though he or she knew or ought reasonably to have known that the act or omission was likely to impair substantially the ability of the person being questioned to respond rationally to the questioning, or*

(b) *made a false statement in the course of the questioning even though he or she knew or ought reasonably to have known that the statement was false and that making the false statement was likely to cause the person who was being questioned to make an admission.*

(3) *Without limiting the matters that the court may take into account under subsection (1), it is to take into account:*

- (a) the probative value of the evidence, and*
- (b) the importance of the evidence in the proceeding, and*
- (c) the nature of the relevant offence, cause of action or defence and the nature of the subject-matter of the proceeding, and*
- (d) the gravity of the impropriety or contravention, and*
- (e) whether the impropriety or contravention was deliberate or reckless, and*
- (f) whether the impropriety or contravention was contrary to or inconsistent with a right of a person recognised by the International Covenant on Civil and Political Rights , and*
- (g) whether any other proceeding (whether or not in a court) has been or is likely to be taken in relation to the impropriety or contravention, and*
- (h) the difficulty (if any) of obtaining the evidence without impropriety or contravention of an Australian law.*

34. The Mother's counsel, supported by the Independent Children's Lawyer, argues that this case concerns risk. Counsel contends that if the evidence of the recordings is admitted, it will corroborate the Mother's version of the Father's behaviours. Counsel submits that at least part of one of the recordings is already included in the Mother's trial affidavit at paragraph 74, and the general subject matter of the other recordings is included in her trial affidavit, in which the Mother deposes to many incidents involving abuse by the Father. The Mother's counsel submits that the recordings provide greater detail of matters already deposed to by the Mother. Counsel argues that given the Father must have direct knowledge of the conversations, he cannot be prejudiced by the recordings being admitted.

35. The Father's counsel agreed that the content of the recordings is of potentially key significance in the case. However, counsel submits that the Court should not allow the admission of such evidence at the eleventh hour, given that the rules of court provide the parties to disclose all evidence on which a party intends to rely in a timely way. Here, the Father has been hijacked and there is no proper framework to justify what the Mother has done. The Father has not committed a criminal offence. The Mother has had possession of the recordings since they were made in 2012, yet she has held onto them. She did not disclose them in the AVO proceedings between the parties. She did not disclose them in her affidavit material, yet she had them in her possession before her interview with the court expert. Counsel argues

the Mother can rely on other evidence to argue her case without the recordings being admitted into evidence.

36. In determining that I would have exercised my discretion in favour of the Mother on this issue, I have regard to these matters:
- a) These are parenting proceedings concerning an 11 year old child, and the Court must therefore determine what parenting arrangements are in the child's best interests. The parenting capacity of each party is squarely in issue.
 - b) The Mother alleges a pattern of coercive, controlling conduct towards her during the 13 years of the parties' relationship, allegations substantially denied by the Father, but which, if found to be true, are extremely serious, impact on parental capacity, and may lead the Court to conclude that the child is presently at risk in the Father's care. The evidence is therefore relevant, and potentially important.
 - c) In determining X's best interests, the Court must give priority to his physical and psychological safety. The recordings are relevant to that issue.
 - d) Dr Q, the court expert, emphasised the pivotal importance of the Court's finding as to whether or not the Mother has told the truth about how the Father behaved during their relationship when deciding what parenting arrangements would be in X's best interests. Dr Q said that the Father made no admissions and showed no remorse, so if the Mother has been truthful, the problems are, indeed, serious, and would have a significant bearing on her recommendations. In her opinion, interpersonal violence and sexual coercion will not be modified by counselling.
 - e) The improper conduct by the Mother in the obtaining of the evidence is not of the worst kind. There is no suggestion it was contrived in some way.
 - f) It is unlikely the Mother would have been able to make the recordings with the permission of the Father.

37. Having already made the order to admit the recordings, I now mark the recordings Exhibit 4 in these proceedings.

I certify that the preceding thirty-seven (37) paragraphs are a true copy of the reasons for judgment of Judge Sexton

Associate:

Date: 30 April 2015