



HIGH COURT OF AUSTRALIA

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Form 27A—Appellant’s submissions

Note: See rule 44.02.2.

IN THE HIGH COURT OF AUSTRALIA
ADELAIDE REGISTRY

BETWEEN:

BEDHANE TARIKA BEKELE

Appellant

and

THE KING

First Respondent

SADAM HUSSEIN ISSAK

Second Respondent

BESUFIKAD HAILE

Third Respondent

APPELLANT’S SUBMISSIONS

PART I – CERTIFICATION

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1. These submissions are in a form suitable for publication on the Internet.

PART II – SUMMARY OF ISSUES

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2. There are two issues that arise in this appeal. The first concerns a question specifically directed at the principle of double jeopardy (the “**first question**”):
 3. The second concerns the application of the fault element under the doctrine of joint criminal enterprise to the offence of rape under s 48(1) of the *Criminal Law Consolidation Act 1935* (SA) (“**CLCA**”) (the “**second question**”);
 4. With respect to the **first question**, the applicant respectfully endorses and adopts the submissions of the appellant, Issak. The exercise of the discretion, however, to remit the matter by the Court of Appeal in the case of the appellant pursuant to s 157(1)(b)(ii) of the *Criminal Procedure Act 1921* (SA), has moderately different considerations because the appellant was convicted of some counts at trial. Nevertheless, like Issak, if the Court considers it appropriate to do so, it may re-

exercise the discretion conferred upon the Court of Appeal by s 157(1)(b)(ii) and substitute a decision that permission to appeal from the acquittals entered at the appellant's trial should be refused.

5. In relation to the **second question**, the appellant submits that:
 - a. The Court in *[Decision Restricted]* (***[Decision Restricted]***) was correct in concluding that an agreement to have sexual intercourse with a person “with or without their consent” is not capable of forming a joint criminal enterprise.
 - b. *[Decision Restricted]* was correct in concluding that “inadvertent” recklessness is not capable of forming a joint criminal enterprise for the offence of rape¹.
 - c. *[Decision Restricted]* was wrong to conclude that “advertent” recklessness was capable of forming a joint criminal enterprise for the rape.²
6. In a case alleging rape contrary to s 48(1) of the *CLCA*, in which the prosecution alleges accused other than the perpetrator of the act of sexual intercourse are guilty on the basis of joint criminal enterprise (JCE), It must be proven that each participant *knew* (or, because it is a state of mind about a future state of affairs, *believed*) that the complainant would not be consenting to sexual intercourse at the time the agreement is formed. A common recognition of the mere possibility that the complainant is not, or may not be, at some future time, capable of consent – or even a recognition of the probability of non-consent – is not sufficient to found a criminal agreement as it is incompatible with the fault element required for participants in a joint criminal enterprise who must agree to carry out what *will be* – not that which *might be* – a crime.
7. In this regard, while the appellant contends that Kourakis CJ in the present case was correct to conclude that each participant to a JCE for an offence of rape must hold a requisite “belief” in the attendant circumstances of non-consent, and correct to criticise *[Decision Restricted]* for a formula that permits a form of recklessness as to non-consent for anyone other than the perpetrator, the Chief Justice, by concentrating on accessorial liability, failed to recognise that the requisite knowledge or belief as to non-consent for a JCE rape must be: (a) the collective understanding of the group; and (b) that which exists at the time of the formation of the agreement.

PART III – NOTICE OF CONSTITUTIONAL MATTER

8. No constitutional matter arises in this appeal.

¹ Section 48(1) *Criminal Law Consolidation Act 1935* (SA) (*CLCA*); s 61J *Crimes Act 1900* (NSW) (*Crimes Act*).

² *Ibid.*

PART IV – AUTHORISED REPORT CITATION

9. The decision of the Court of Appeal is unreported. Its medium neutral citation is *R v Bekele & Ors; Haile v The King; Bekele v The King* [2026] SASCA 9.

PART V – FACTS

A. Background Facts and Trial

10. The appellant was tried for seven counts of sexual offending against the *Criminal law Consolidation Act 1935* (SA) (*CLCA*), namely five counts of rape contrary to s 48(1) of the *CLCA* and two counts of indecent assault contrary to s 56 of the *CLCA*. On counts 1 – 5, the appellant was alleged to be the principal. On counts 6 – 7, his liability was said to derive from a joint criminal enterprise (*JCE*) with the appellants, Issak and Haile, and an unknown third person: **Information CAB 6-10**.

PART VI – ARGUMENT

(A) Concise statement of argument

11. The key propositions of law for which the appellant contends are these:
- Joint criminal enterprise (*JCE*) liability is fundamentally based upon an agreement (also expressed as common purpose, design, enterprise, understanding or arrangement) between the parties to the agreement (“co-venturers”, or “participants” in the enterprise) that one or more of them will engage in conduct that will – *not merely might* - amount to a crime.³
 - There here cannot be a criminal agreement, be it a conspiracy or foundation for a *JCE*, where the parties to the agreement are reckless as to the existence of a circumstance which is a necessary element of the offence.⁴ The scope of a criminal agreement involves matters that *each party* to the alleged agreement subjectively considered.⁵
 - The conduct, including the criminal act the object of the enterprise and any commonly contemplated incidental crime, must be subjectively agreed (authorised or assented) to by each party to the alleged agreement.⁶ In this way, *JCE* can be distinguished from extended joint criminal enterprise (*ECJE*), where a party has not agreed to the commission of a particular crime but may be liable where he/she has foreseen the commission of that crime might be committed in the course of carrying out the agreement to commit some other crime, and continues to participate

³ *Mitchell v The Queen* [2023] HCA 5; 276 CLR 299 (*Mitchell*) at [54] (Gordon, Edelman and Steward JJ) citing *Miller v The Queen* (2016) 259 CLR 380 (*Miller*) at 388 [4]; *McAuliffe v The Queen* (1995) 183 CLR 108 (*McAuliffe*) at 114; *Gillard v The Queen* (2003) 219 CLR 1 (*Gillard*) at 36 [111].

⁴ *R v LK* [2010] HCA 17; 241 CLR 177 (*LK*) at [75] – [77] (French CJ), cited by Kourakis CJ in Reasons [23].

⁵ *Mitchell* at [54] (Gordon, Edelman and Steward JJ) citing *McAuliffe* at 114 and *Gillard* at [124].

⁶ *Mitchell* at [54] (Gordon, Edelman and Steward JJ).

in the enterprise with that foresight.⁷ The rationale for each basis of liability is distinct.⁸

- d. JCE liability is a form of primary liability: all parties are liable as principals in the first degree because those persons who do not physically perform the acts constituting the actus reus are acting in concert and have the relevant mens rea.⁹ It is all those things done “in accordance with the continuing understanding or arrangement...which are necessary to constitute the crime” which are attributed to all parties to the agreement.¹⁰
- e. JCE liability simpliciter (as opposed to extended joint criminal enterprise (EJCE)) will only extend to the agreed crime and any crime within the scope of the agreement; it is therefore essential to identify what acts and omissions the parties did agree upon and what it was that each contemplated might occur as a possible incident of the execution of their agreement. In this context, what each contemplated “might occur” means what incidental crime/s the parties to the agreement to carry out the foundational crime jointly contemplated might be committed in pursuit of their common criminal objective. Though it need not be express and may be proven by inference, the terms and scope of the agreement must be subjectively appreciated by each accused alleged to be parties to the agreement.¹¹
- f. A physical element of an offence may be conduct, a result of conduct, or a circumstance in which conduct, or a result of conduct, occurs.¹²
- g. Where the essential elements of a crime include a physical element that is a circumstance, whether the agreed conduct will amount to a crime will be dependent on the existence of that attendant circumstance. In such a case, whether an agreement to engage in conduct is a criminal agreement, sufficient to found JCE liability, will be dependent on determining whether the agreement involved a common subjective appreciation by the parties that the agreed upon conduct would – not that it might or even probably would – be carried out in those circumstances that render it criminal.
- h. For an accused person, other than the alleged perpetrator (i.e. the person who engages in the act of sexual intercourse, with the necessary fault element/s for

⁷ *Mitchell* at [56-59] (Gordon, Edelman and Steward JJ) citing *McAuliffe* at 117-118; *Clayton v The Queen* (2006) 81 ALJR 439 at 444-445 [26]; 231 ALR 500 at 506; *Miller* at 388 [4].

⁸ *Mitchell* at [14] (Kiefel CJ) citing *McAuliffe* at 114; *Miller* at 388 [4].

⁹ *Mitchell* at [55] (Gordon, Edelman and Steward JJ) citing, among other authorities, *IL v The Queen* (2017) 262 CLR 268 at 282 [29], 311 [103], 323-324 [146]-[149]; *O’Dea v Western Australia* (2022) 96 ALJR 710 at 721 [55]; 403 ALR 200 at 212-213, *Osland v The Queen* (1998) 197 CLR 316 at 350 [93], 383 [174], 413 [257].

¹⁰ *Mitchell* at [55] (Gordon, Edelman and Steward JJ) citing *McAuliffe* at 114.

¹¹ *Mitchell* at [54] (Gordon, Edelman and Steward JJ) citing *McAuliffe* at 114.

¹² *LK* at [126].

ordinary principal liability) to be guilty of rape on the basis of accessorial liability – that is, aiding, abetting, counselling or procuring – the prosecution must prove the *individual* accused knew or believed in the existence of those attendant circumstances which are necessary to render criminal the acts to which that individual accused, as an accessory, assisted or encouraged. The temporal reference point for that subjective knowledge or belief as to the circumstance (here, non-consent) is, for an accessory, at the time of the conduct amounting to aiding and abetting, for there must be a coincidence or contemporaneity between the actus reus and the mens rea.

- i. By contrast, for an accused person other than the alleged perpetrator to be guilty of rape on the basis of JCE liability, the prosecution must prove the accused parties to the enterprise each knew or believed in the existence of those attendant circumstances which are necessary to render criminal the acts to which these principals *agreed*; including and in particular for rape, the non-consent on the part of the complainant. The temporal reference point for that requisite common subjective knowledge or belief (or understanding) as to the relevant circumstance of non-consent must be at the time of the agreement.
 - j. There can be no JCE that depends upon recklessness (that is, knowledge or belief in the possibility, or even probability) of the existence of essential facts.
12. Thus, [*Decision Restricted*] is correct insofar as the Court there held that there could be no agreement involving “inadvertent recklessness”, but is incorrect insofar as it allowed for “advertent recklessness”.
 13. Neither “advertent recklessness” or “inadvertent recklessness” will be sufficient to found JCE liability for rape. There can be no recklessness as to the existence of an essential circumstance for JCE liability.
 14. An accurate statement of the requisite fault elements for an accused said to be liable for an offence of rape (s 48(1) of the *Criminal Law Consolidation Act 1935* (SA)) on the basis of joint criminal enterprise liability is, the appellant submits, a slightly modified form of that proffered by Kourakis CJ in the Court of Appeal in this matter, drawing upon that applying to an accessory as stated in *Giorgianni v The Queen* (*Giorgianni*)¹³; necessarily adapted to reflect the correct temporal reference point for the subjective appreciation of the essential attendant circumstances, and to incorporate the subjective appreciation as part of the agreement (not merely a subjective state of knowledge or belief varying between individuals, such as to be beyond the terms of the common understanding).

(B) Consideration

15. The fault element/s for rape by way of JCE are, the appellant respectfully contends, not strictly as the NSW CCA stated in *[Decision Restricted]*, nor as the majority (Bleby and David JJA) stated in *Bekele*, nor as Kourakis J stated in *Bekele*.
16. Of the various pronouncements, that in *[Decision Restricted]* is closest to being strictly correct, particularly as it appropriately concentrates on the agreement, but the Court erred in introducing any form of recklessness. Kourakis CJ's articulation also approaches correctness in many respects, but what his Honour proffers also requires modification to properly apply to JCE liability and to avoid a similar problematic introduction of recklessness of an essential fact.
17. In *Bekele*, the majority (Bleby and David JJA) expressed the fault element in **Reasons [148] CAB 61:**
18. Kourakis CJ disagreed, in particular at **Reasons [7] CAB 32**.
19. His Honour was correct to conclude [at **Reasons [7] CAB 32]** that a direction to that effect is contrary to High Court authority. However, the appellant respectfully submits that there are some material differences in this context between accessorial liability for rape, and JCE liability for rape.
20. Kourakis CJ said this [at **Reasons [6] CAB 31]** of Bleby and David JJA's formulation of the fault element [at **Reasons [148] CAB 61]** (numbering added to each sentence of the **Reasons at [6]** for ease of reference, and **emphasis added**):
 - 6.1 In my respectful opinion, to state the elements of rape by participation in a joint criminal enterprise in that way conflates the fault element for accessorial liability with the fault element prescribed by s 47 of the *Criminal Law Consolidation Act 1935* (SA) (the CLCA) for the perpetrator of an offence against s 48 of the CLCA.
 - 6.2 The former requires a belief in the existence of those attendant circumstances which are necessary to render criminal the acts to which the accessories agreed: in this case, that the complainant was not consenting.
 - 6.3 Absent that belief the conduct agreed upon is not criminal.
 - 6.4 It is an agreement to engage in sexual intercourse with a person without [sic] a belief in the circumstance, non-consent, which is necessary for the intercourse to constitute the crime of rape.
 - 6.5 The recognition of a mere possibility that the complainant is not consenting is not sufficient to satisfy the fault element applicable to an accessory.

6.6 At the very least, wilful blindness, which is the virtual equivalent of belief, is necessary.

21. The appellant respectfully agrees with 6.1, however because this case concerned JCE liability and not accessory liability (aiding and abetting), it appears that in the process of correcting the conflation as between the fault elements for a perpetrator of rape and an accused liable for rape on another legal basis, the Chief Justice appears to have himself conflated the fault element for an aider and abettor with that necessary to found JCE liability by way of a criminal agreement. They are, the appellant submits, almost identical but the significance of the existence of a foundational agreement in the case of JCE liability to the assessment of subjective appreciation mustn't be overlooked.
22. As for 6.2, because JCE liability turns attention to, and depends upon, the agreement (formed in advance of the conduct of the perpetrator), the temporal reference point for the requisite belief must be at the time of the agreement; not merely some time later, such as when encouragement might be provided by an accessory or indeed when the substantive offence is being committed by the perpetrator. At a point in time following the formation of the alleged criminal agreement, the state of knowledge or belief of participants may vary greatly and may be altered for some individuals on account of events and/or observations since the forming of the alleged agreement. That is beside the point for liability by way of a JCE which only requires, post-agreement, individual participation.
23. JCE liability depends upon what is within the scope of the agreement but, beyond that, only upon participation pursuant to that agreement. JCE liability does not disparately attach to those participants who learn new information following the agreement, rather the fault element/s depend upon what is commonly agreed upon, known, and believed, by each accused at the time of the agreement. If this is correct, as the appellant submits it is, then the fault element for a JCE participant must be examined at the time of the agreement. Knowledge or believe in circumstances necessary to render the conduct a crime will often have a present and prospective component – requiring a present belief in, or knowledge of, the existence of a future circumstance that is necessary to make the agreed conduct a crime at the time it is carried out.¹⁴
24. Kourakis CJ's proposition in 6.2, modified to correct for this, would be that "JCE liability for rape requires knowledge or belief by the parties to the agreement in the existence of those attendant circumstances which are necessary to render

criminal the acts to which they agreed: in this case (and in most if not all conceivable cases of rape) that knowledge or belief being that the complainant *will not* be consenting at the time of the sexual intercourse agreed upon.

25. With that modification to the temporal reference point for the state of belief or knowledge of a future circumstance, the appellant submits 6.3 is correct.
26. Proposition 6.4, with one apparent slip corrected, is also supported by the appellant. Presumably his Honour meant to say: “It is an agreement to engage in sexual intercourse with a person ~~without~~ [with] a belief in the circumstance, non-consent, which is necessary for the intercourse to constitute the crime of rape.”
27. Propositions 6.5 and 6.6 are similarly endorsed by the appellant. In particular, 6.6 deserves emphasis, and finds support in the authorities referred to by Kourakis CJ in what follows [at **Reasons [6] CAB 31**].
28. The Chief Justice, applying the principles for liability based on participation in a joint criminal enterprise established in *Giorgianni*,¹⁵ proffered this statement of the elements in the circumstances of this case at **Reasons [8] CAB 32**:

The accused, *believing* that the complainant would not consent to sexual intercourse or was incapable of consenting because of her intoxication, or closing their minds to that likelihood by ignoring the drunken appearance of the complainant, agreed that one or more of them would have sexual intercourse with her, as the opportunity arose, without taking any reasonable steps to ascertain whether she was in fact consenting and by proceeding regardless of any possibility that she was not. (emphases and underlining preserved).

29. His Honour said at **Reasons [9] CAB 32**:

The underlined term of the agreement, failing to take reasonable steps, is not a fault element. It is an agreement as to their conduct. It is that agreement which would render one joint participant guilty of a rape perpetrated by another who has proceeded recklessly and/or by failing to take reasonable steps.

30. The appellant again respectfully submits that this formulation requires some modification in order to accurately state the law and to avoid doing what the Chief Justice considered the majority had done; conflating the fault element of a perpetrator with the term of an agreement. With the modifications the appellant

proposes, the Chief Justice’s underlined term of the agreement – “failing to take reasonable steps to ascertain whether she was in fact consenting and by proceeding regardless of any possibility that she was not”, is simply unnecessary.

31. A correct statement of the necessary elements for JCE liability, properly incorporating the correct fault element (of knowledge or belief in the attendant circumstance for each participant, and as a term of the agreement) would be:¹⁶

The accused, each knowing or believing that the complainant would not consent to sexual intercourse or was incapable of consenting because of her intoxication, ~~or (which would include~~ closing their minds to that ~~likelihood~~ fact and its implications, that is, being willfully blind so as to avoid confirming what they believed and converting it into knowledge, which is the virtual equivalent of knowledge) ~~ignoring the drunken appearance of the complainant,~~ agreed that one or more of them would have sexual intercourse with her, as the opportunity arose, despite the fact she would not be consenting at the time of the intercourse.

32. This articulation draws support from *Giorgianni* and *R v LK (LK)*¹⁷.

33. The appellant, again with some minor qualifications, respectfully endorses Kourakis CJ’s discussion of *Giorgianni* at **Reasons [11-26] CAB 32-33**. Of particular significance are the following propositions which the appellant agrees can properly be applied, with necessary adaptations, to JCE liability:

- a. It is a necessary element of the culpability of a principal in the second degree (an accessory) that the accessory knows all the essential facts which render what is done a crime.¹⁸
- b. For that purpose, willful blindness is the equivalent of knowledge, but neither negligence nor recklessness is sufficient.¹⁹
- c. Willful blindness is to be distinguished from recklessness. Willful blindness is deliberately closing one’s eyes to the obvious, from fear that the true facts are better not known or, put another way, deliberately not thinking through the implications, or enquiring about what is apparent, so as to not be burdened with knowledge of the true facts. This is the virtual equivalent of knowledge.²⁰
- d. Where the fault element for the perpetrator of a particular offence is recklessness, and even where the offence is one for which it is not necessary to establish any

¹⁶ New underlining now reflecting the appellant’s additions, with strikethrough text reflecting omissions.

¹⁷ *R v LK* (2010) 241 CLR 177 (*LK*) at [66]-[67].

¹⁸ Reasons [11] CAB 32, citing *Giorgianni*.

¹⁹ *Giorgianni v The Queen* (1985) 156 CLR 473 particularly at 487-488 (Gibbs CJ).

²⁰ Reasons [13] CAB 33, referring to *Giorgianni v The Queen* (1985) 156 CLR 473 (Gibbs CJ).

fault element on the part of the perpetrator at all, that does not obviate the necessity for knowledge on the part of the secondary party of all the essential facts constituting the offence (including, relevantly, knowledge or belief in the existence facts – or the ‘attendant circumstances’ – which constitute the agreed conduct as a crime).²¹

- e. For a secondary offender, it is not sufficient if his knowledge or belief extends only to the possibility or even probability that the acts which he is assisting or encouraging are such, whether he realizes it or not, to constitute the factual ingredients of a crime.²²

34. Recognising that the basis for accessorial liability under consideration in *Giorgianni* was aiding, abetting, counselling and procuring (rather than JCE liability) Kourakis CJ stated at **Reasons [19] CAB 34**, that “the distinctions between the various forms of accessorial liability have largely disappeared” and, further, that “[t]here is no legally significant legally significant distinction between counselling and procuring on the one hand, and joint criminal enterprise on the other, for the purpose of identifying the fault element.” On one reading of these remarks, his Honour overlooked two legally significant matters: (1) that because JCE liability depends upon an agreement, the temporal reference point for the intention, knowledge or belief of the parties must be at the time of the agreement to engage in the conduct which will constitute a crime; and (2) because the agreement to commit a crime is the foundation element of JCE, the intention, knowledge or belief (or understanding) of or in the essential facts cannot merely be individual, but must be a common subjective appreciation such as to be incorporated as within the scope of, or part of the terms of, the agreement, understanding or arrangement.

35. Kourakis CJ goes some way to recognizing these matters by reflecting on the analogy to conspiracy in *Giorgianni* and the express reliance on *Giorgianni* in *LK*, in which it was held that the fault elements of conspiracy (which offence depends upon proof of the agreement, not proof of the agreed crime being carried out) included knowledge of the circumstances which rendered the *agreed conduct* a crime (i.e. rendered the agreed conduct a crime, *were it to have been carried out*.)²³

²¹ Reasons [14–18] CAB 33–34, citing *Giorgianni v The Queen* (1985) 156 CLR 473 at 493–494 (Gibbs CJ); at 493–494 (Mason J) including the passage from *Johnson v Youden* [1950] 1 KB 544 at 546 (Lord Goddard CJ); and at 506–5057 (Wilson, Deane and Dawson JJ).

²² Reasons [18] CAB 34, citing *Giorgianni v The Queen* (1985) 156 CLR 473 at 506–507 (Wilson, Deane, Dawson JJ).

²³ Reasons [19] CAB 34.

36. The point Kourakis CJ makes at **Reasons [19] CAB 34**, that an agreement to commit a crime is the foundational element of both conspiracy and joint enterprise is, with respect, correct and of critical importance in this context. It is why the application of the principles in *Giorgianni* must be adapted, as they were in *LK*,²⁴ so as to reflect the fact that for a conspiracy (and for a JCE), the requisite fault element for a participant in either has a prospective component – it is a state of mind (knowledge or belief) current at the time of the agreement, referable to a future fact or circumstance that is known to exist or believed will exist (here, that the complainant is not capable of consenting, but more to the point, *will not in fact* be consenting at the time of the sexual intercourse agreed upon).
37. Just as an alleged conspirator will not be guilty of conspiring to commit money laundering if he or she is reckless as to whether the money is or will in fact be proceeds of crime (he or she must *intend* the money to be proceeds of crime, despite recklessness being sufficient for a perpetrator of the substantive offence),²⁵ so too is recklessness as to the (future) fact of non-consent insufficient to found JCE liability for rape, notwithstanding that recklessness – and even less – is sufficient for a perpetrator of the substantive offence. An agreement to engage in sexual intercourse by persons who are aware of the substantial and unjustifiable risk that the factual circumstances will be such as to constitute an offence, is not an agreement to commit a crime so cannot found either conspiracy or JCE liability.²⁶
38. As was noted by the plurality in *LK*, “...a person does not agree to commit an offence without knowledge of, or belief in, the existence of the facts that make the conduct that is the subject of the agreement an offence (as distinct from having knowledge of, or belief in, the legal characterization of the conduct.”²⁷
39. An agreement to commit an offence does not embrace an agreement that an act be done that may, or may not, be criminal.²⁸ In *LK*, the plurality noted:
- “[a]t the time the agreement was made the money may, or may not, have been (or have become) proceeds of crime.”**²⁹
40. Thus this Court held the agreement, if carried out in accordance with the intention of the parties, might not have involved dealing with money that “is” proceeds of

²⁴ See Reasons [21-26] CAB 34-36, discussing *LK*.

²⁵ See *LK* particularly at [75] and [78] (French CJ); at [90] and [117] (Gummow, Hayne, Crennan Kiefel and Bell JJ).

²⁶ Adopting the framing of the question of the plurality in *LK* at [83].

²⁷ *LK* at [117].

²⁸ See *LK* at [116-117].

²⁹ *LK* at [122].

crime.³⁰ For that reason, there was no case to answer on the criminal conspiracy alleged by the Crown.

[Decision Restricted]

41. The appellant submits that *[Decision Restricted]* provides a comprehensive and correct analysis of the doctrine of JCE liability as it applies to the substantive offence of rape, except insofar as it departs from a common law requirement that each participant to a JCE must know or believe all of the essential facts and circumstances that make that which is agreed to, criminal. *[Decision Restricted]* was incorrect not just in the formulation of how advertent recklessness might be incorporated in a criminal agreement, but in permitting any form of recklessness as to the essential fact of non-consent on the part of participants to a JCE to be sufficient for JCE liability for rape.
42. In *[Decision Restricted]*, the three applicants were convicted of aggravated sexual assault and other sexual offences alleged to have been committed on a weekend bucks party. At trial, the prosecution relied on principles of joint criminal enterprise in relation to 10 of the 11 counts.
43. The submissions on behalf of the applicants in that case³¹ are essentially the same as those the appellant advances in this case.
44. The New South Wales offence of aggravated sexual assault³² is materially indistinguishable from the South Australian offence of rape in s 48(1) of the *CLCA*. Both statutory forms of the offence of rape require proof that a person (the perpetrator) has sexual intercourse (the conduct element) without the consent of the other person (the essential circumstance of non-consent) and that the accused knows – actually or constructively – that the other person does not consent.³³ A perpetrator alleged to have committed the offence of rape contrary to either the NSW provision or the SA provision is deemed by statute to have the requisite fault element as to the non-consent of the other person sexual activity in certain circumstances amounting to what may be described as “advertent recklessness” or “inadvertent recklessness” as to consent.
45. Recklessness sufficient to satisfy the special deemed knowledge provision in NSW is made out where the “accused realises there is a possibility the other person does not consent to sexual intercourse but proceeds regardless” (advertent recklessness) or where the accused does not consider at all whether the other

³⁰ *Ibid.*

³¹ See *[Decision Restricted]* at [96-108] and in reply at [120-125].

³² Section 61J of the *Crimes Act 1900* (NSW).

³³ *Ibid.*

person is consenting (inadvertent recklessness). These provisions are, for relevant purposes, the equivalent of the SA provisions, section 47(a) of the *CLCA* (advertent recklessness) and section 47(c) of the *CLCA* (inadvertent recklessness).

46. In *[Decision Restricted]*, there were two key issues relevant to this appeal.
47. The first was whether the description “with or without consent”, as the prosecution alleged in the appellant's case, was capable of being a criminal agreement sufficient to found JCE liability for rape.³⁴
48. The NSW CCA (Free JA, Hamill and Rigg JJ) correctly concluded, the appellant submits, that the actus reus of the crime, which needed to be the subject of the agreement, was sexual intercourse without consent. An agreement to engage “with or without consent” was not an agreement capable of forming JCE liability.³⁵
49. The second issue was the inclusion of “recklessness” in the description of the agreement, namely, “to sexually touch and/or sexually assault the two complainants with or without their consent, *knowing they were not consenting and/or reckless to that fact*.”³⁶ The applicants in *[Decision Restricted]* submitted that the inclusion of “recklessness” within the formulation of the alleged criminal agreement was both illogical and impermissible.³⁷
50. The New South Wales Court of Appeal’s remarks are, with respect, correct and instructive in many respects, including:
 - a. That fundamental to JCE liability is the requirement that the Crown prove beyond reasonable doubt that what was agreed upon, this being a crime (whether or not that legal quality was known by the participants),³⁸
 - b. The survey of the relevant JCE authorities;³⁹
 - c. The requirement for proof of an agreement to commit an offence, and proof of participation;⁴⁰
 - d. That while the issue of ‘non-consent’ deals with the mind of the complainant, it is a circumstance of the actus reus.⁴¹ Thus while that is not determinative of the question as to whether the agreement must be described by reference to non-

³⁴ *[Decision Restricted]* at [97].

³⁵ *[Decision Restricted]* at [190].

³⁶ *[Decision Restricted]* at [100]. No definition of “reckless” was provided by the trial judge. It was submitted that the definition of “reckless” (advertent and inadvertent) would have been used by the jury when considering whether the JCE had been established.

³⁷ *[Decision Restricted]* at [101], [102], [103].

³⁸ *[Decision Restricted]* at [126].

³⁹ *[Decision Restricted]* at [126-129].

⁴⁰ *[Decision Restricted]* at [130-131].

⁴¹ *[Decision Restricted]* at [139].

consent, it is an important starting point which focuses consideration on the agreement;⁴²

- e. The mens rea attaching to the circumstance of non-consent, being statutorily broadened (for a perpetrator of sexual assault) so as to capture mere absence of reasonable grounds for a belief in consent, being far less demanding than recklessness in other contexts.⁴³
 - f. The reasons for holding that the cases of *KA* and *Rohan* are distinguishable and do not support the arguments advanced by the Crown;⁴⁴
 - g. The significance and applicability of this Court's decisions in *LK*, *Ansari* and *Giorgianni*;⁴⁵
 - h. That a "fundamental bedrock of joint criminal enterprise liability" is an "agreement to commit a crime, or arrangement amounting to a mutual understanding" to do so.⁴⁶
51. Ultimately, the Court concluded that "advertent" recklessness was capable of application to JCE in relation to the charges, if, in the circumstances, the participants held a subjective realisation of the prospect of non-consent "tangible enough to found an agreement to have sexual intercourse with them without their consent".⁴⁷
52. After referring to *LK*, the NSW CCA said:⁴⁸

...The legislature has specifically chosen to include mental states less demanding than actual knowledge of absence of consent as attracting liability for sexual assault. We are of the view that the prosecution can, in a trial of the type before the Court, ask the jury to draw an inference from the circumstances proved that the participants must have and did know that the complainants were not consenting, **or sufficiently recognised this as a prospect, to demonstrate their agreement that sexual intercourse without the complainants' consent should occur, if they were not consenting.**

53. For the reasons Kourakis CJ sets out in the present case at **Reasons [28-29] CAB 38**, this pronouncement is problematic. The appellant respectfully endorses the Chief Justice's comments at **Reasons [28-29] CAB 38**. Whilst avoiding the

⁴² [Decision Restricted] at [139-142].

⁴³ [Decision Restricted] at [143], although this was not an issue at trial as the Crown relied wholly on knowledge – see [144]. And see further [Decision Restricted] at [145-147].

⁴⁴ [Decision Restricted] at [149-171], citing *KA v R* (2015) 251 A Crim R 308; [2015] NSWCCA 111; and *The King v Rohan* (2024) 280 CLR 288; [2024] HCA 3.

⁴⁵ [Decision Restricted] at [172-174] citing *Ansari v The Queen* [2010] HCA 18; (2010) 241 CLR 299 and, as to *LK* in particular, see [184-187].

⁴⁶ [Decision Restricted] at [177].

⁴⁷ [Decision Restricted] at [189], [190], [195].

⁴⁸ [Decision Restricted] at [188].

unnecessary alternative “integration” his Honour proposes at **Reasons [30] CAB 38** and **Reasons [8] CAB 32**, the appellant also endorses the further points made by the Chief Justice at **Reasons [30] CAB 38** that:

...the state of mind in which the agreement is made, and adhered to, must be a belief, or willful blindness, as to non-consent. An appreciation of a ‘prospect’ [of non-consent] is insufficient.

54. Because willful blindness is the virtual equivalent of knowledge, and because belief is sufficient, once one accepts that the state of mind in which the agreement is made, and adhered to, must be a belief, or willful blindness, as to non-consent, there is simply no need to complicate the requisite elements applicable to a party to an alleged JCE by introducing any form of recklessness.
55. The NSW CCA in *[Decision Restricted]* was, the appellant submits, correct to underscore the importance of a clear focus on what it is that is alleged to have been agreed upon.⁴⁹ Nevertheless, but again with qualifications, the appellant respectfully agrees with Kourakis CJ’s criticisms of the problematic aspects of *[Decision Restricted]* at **Reasons [32-34] CAB 39**, supporting his Honour’s articulation of the correct position at law being:
 - a. The extension of the definition of knowledge to include inadvertent recklessness is the fault element of the perpetrator; and
 - b. Lack of consent of the complainant is an attendant circumstance, and is neither a fault nor conduct element of the offence.
56. With respect to Kourakis CJ, it does not follow that just because the attendant circumstance of non-consent is neither a fault nor conduct element, it cannot be a necessary physical element capable in law and in fact of comprising a term of the agreement under the doctrine of JCE. Further, as to Kourakis CJ’s point at **Reasons [32] CAB 39**, whilst conceptually the participants to a joint enterprise to rape do not *agree* what the victim’s state of mind is or will be, and may have different beliefs as to non-consent in a given case, that does not mean as a matter of law that there cannot be a common understanding as to lack of consent, forming a necessary part of an agreement. Contrary to Kourakis CJ’s reasoning at CA[32], an agreement may, and often will, incorporate a common understanding of an attendant circumstance.
57. An example of a JCE to commit theft is illustrative. Whilst non-consent on the part of the complainant (to the conduct of one or more accused taking and dealing with his property) will always be a necessary element of theft, parties to a planned

theft will not *agree* to the complainant's lack of consent to the dealing. But by inference from the circumstances commonly known or believed by those who agree to the conduct, including the evidence of just what was planned, a JCE theft can as a matter of fact, and must as a matter of law, involve a common understanding that the conduct agreed to would be carried out without consent.

58. On this footing, and contrary to **Reasons [34] CAB 40**, it is not “artificial to treat individual beliefs of the participants as a term of the agreement.” A common understanding that the complainant is not capable of consenting, or otherwise will not consent at the time of the agreed conduct, is not only possible but, on the basis of the authorities surveyed, is necessary for there to be JCE liability. True it is that “[o]nly parties to the agreement, who believe that the other person is not consenting, are accessories to the perpetrator of the crime of rape.” But in this case, as in the case of *[Decision Restricted]*, the prosecution alleged a JCE. If the prosecution failed to prove the knowledge or belief on the part of the alleged parties to the agreement as to non-consent, liability on the basis of JCE will have failed; whatever might be said for individual accessorial liability. That may reveal a flaw in the legal basis of liability selected by the prosecution in each case, if the evidence is insufficient to prove a common belief, knowledge or understanding in the lack of consent at the time of the formation of the agreement. But it is not a flaw in the legal doctrine itself, supplying any impetus or justification for an incorporation into the doctrine the concept of recklessness or any other aspect of the special statutory provision that lowers the bar for a perpetrator's own state of appreciation as to non-consent for rape.

No special liability provision extending to JCE

59. As alluded to above, in *LK*, this Court recognised that conspiracy to commit money laundering contrary to s 400.3(2) of the *Criminal Code* (Cth) (**the Code**) – just as in the case of the substantive offence of money laundering against that section – was subject to the special liability provision that provided for absolute liability in respect of one physical element, being the value of the money concerned. This was held to qualify the proposition that a conspirator can only be guilty if they agree to commit an offence with knowledge or belief in the existence of all of the elements of the offence. It is important to note that that qualification existed only by virtue of an express statutory provision which extended to the offence of conspiracy to commit that offence.⁵⁰

60. In the absence of special liability provisions which expressly extend to conspirators or participants to a JCE⁵¹ the common law governs the elements applying to those said to be liable other than as perpetrator of the substantive offence.
61. There is simply no basis, let alone a need, to incorporate advertent or inadvertent recklessness into JCE rape. The “difference in the viability of reliance on advertent and inadvertent recklessness”,⁵² even if it exists, remains problematic and unnecessary. It certainly does not provide a justification for allowing within the doctrine of JCE for rape, advertent recklessness as a deemed form of knowledge that the legislature has provided for in the case of a perpetrator. Indeed, assuming that extended statutory liability applying to a perpetrator can or should be further extended by the application of the common law JCE doctrine is tantamount to creating a new form of liability; “constructive, constructive” rape.⁵³

The correct statement of the fault elements for JCE rape

62. Put simply, for JCE liability (just as for conspiracy), the foundational agreement, if carried into effect, must inevitably comprise a criminal offence. The requisite knowledge, belief and/or intent of the parties to the alleged agreement attaches to all of the essential facts and circumstances making the acts within the scope of the agreement criminal, and that must be assessed at the point in time of the agreement. For an accused to be liable for an offence of rape on the basis of JCE requires each participant to have known or believed that the complainant would not consent to sexual intercourse at the time the agreement is formed. That may come in the form of willful blindness, but nothing less will suffice. A recognition of the mere possibility, or even probability, that the complainant may not, at some future time, be capable of consent, is not an agreement to commit a criminal act as required for JCE.
63. Applying that reasoning, if the prosecution case at its highest in this case was that the participants intentionally entered into an agreement to engage in sexual intercourse *whether or not* the complainant was in fact consenting; that is, *even if* it would amount to rape, it was not open for the appellants to be found guilty of rape on that basis. If that was the agreement, then at the time of that agreement, it was not known or believed by each accused that the complainant was in fact not

⁵¹ See *LK* at [75-77] (French CJ); and [117-122] (Gummow, Hayne, Crennan, Kiefel and Bell JJ).

⁵² [*Decision Restricted*] at [148].

⁵³ See *Mitchell* particularly at [96] (Gordon, Edelman and Steward JJ), albeit the appellant recognises the different considerations that apply to constructive murder.

(or more to the point, would not in fact) be consenting at the time of the agreed upon sexual intercourse.⁵⁴

64. Caution is needed in articulating just what the requisite state of knowledge or belief as to non-consent must be. A belief in a prospective (that is, future) circumstance or state of affairs that *will exist* must be distinguished from a belief about a prospect (that is, risk or probability) of a circumstance or state of affairs existing in future. In *LK*, the prosecution case was that the object of the conspiracy was an agreement to deal with money that *is* proceeds of crime. This Court recognized that the substantive offence of money laundering under s 400.3(2) of the Code provided for two alternative physical elements as to the taint. The substantive offence could be committed if the money “is”, at the relevant time, proceeds of crime, or alternatively if at the relevant time there is a risk that it *will become* an instrument of crime. After deciding the case on a basis that supports the appellant’s arguments advanced herein, this Court said :⁵⁵

It may be that a different analysis applies if the offence the object of the conspiracy is an agreement to deal with money (or other property) that will become an instrument of crime⁵⁶. This is because the factual element of the substantive offence is defined in terms of risk; there is no equivalent to the element in s 400.3(2)(b)(i) that the money *be* proceeds of crime. It is, however, not necessary to explore these questions here.

65. As in *LK*, it is not necessary here to explore what is legally required where the factual element of a substantive offence is defined in terms of risk. Whilst there are various offences for which an objective risk is a physical element, the relevant factual element here – the attendant circumstance of a complainant’s non-consent – is one that must exist in actual fact for the offence of rape to be made out in any case.
66. Adapting the statement of principle as to the fault element expressed by the plurality in *LK*,⁵⁷ in this case it was incumbent on the prosecution to prove that each accused intentionally entered an agreement to commit the offence that it averred was the subject of the JCE. This required proof that each meant to enter into an agreement to commit the offences of rape charged. ... a person does not agree to commit an offence without knowledge of, or belief in, the existence of the

⁵⁴ See *LK* at [122].

⁵⁵ *LK* at [123].

⁵⁶ The Code, s 400.3(2)(b)(ii).

facts that make the conduct that is the subject of the agreement an offence (as distinct from having knowledge of, or belief in, the legal characterisation of the conduct). With the only reservation being any special liability provision applying to the substantive offence also expressly broadening the basis for liability for an alleged conspirator or JCE participant, proof of the intention to commit the offence/s charged will require proof of knowledge of, or belief in, all essential matters that make the conduct agreed to criminal.

67. The fault elements for JCE rape can therefore be simply stated:

- a. As to the physical element of conduct (that sexual intercourse will occur): *an intentional agreement* that one or other of the participants will engage in sexual intercourse with the complainant;
- b. As to the physical element of the attendant circumstance of non-consent – *knowledge or belief* by each of the participants, forming a common understanding between them, that the complaint *is not* (or, better, *will not*) in actual fact be consenting at the time of the sexual intercourse agreed upon.
- c. As to participation pursuant to the agreement: *intention*.

Application of principles to the facts

68. Whilst the appellant largely endorses the legal analysis of Kourkis CJ, because his Honour incorrectly fixed the temporal reference point of the fault element at the time of the offence and not the alleged formation of the agreement, and because his Honour allowed for differential individual appreciation or contemplation as if in the realm of EJCE or aiding and abetting, it is respectfully contended that his Honour then fell into error in the application of the legal principles to the evidence and issues in the case.

69. Kourakis CJ correctly observed that the standard as to the fault element that applies has a bearing on the question of whether the evidence establishes a case to answer, and did propose a more demanding standard than the majority.⁵⁸ However, in applying the principles as his Honour understood them to be, when assessing the question of a case to answer, his Honour said “C appeared so intoxicated that it can be inferred that each accused believed she was not in a fit state to consent.” His Honour did not limit the question to what evidence informed a conclusion as to the belief or understanding *at the time of the alleged agreement*.⁵⁹

Availability of aiding and abetting

⁵⁸ Reasons at [4] CAB 31.

⁵⁹ Reasons at [35]-[36], CAB 40.

70. The appellant notes in addition to Issak's submissions on the first question on this appeal, if in response to any perceived weakness in a (new) JCE case, the prosecution seeks instead to advance a case of accessorial liability on the basis of aiding and abetting, that would be to resort to a fundamentally different basis of liability and one which was specifically disavowed at trial.

Conclusion

71. The points advanced in respect of the second question on this appeal underscore the related contentions in answer to the first question: that the Court of Appeal failed to take account of the significance of the agreement alleged by the prosecution being incapable of founding a lawful conviction for rape, and the significance of a materially different agreement being alleged by the prosecution at a retrial as a weighty double jeopardy consideration.

PART VII – ORDERS SOUGHT

2. The appellant seeks the following orders:
 - a. the appeal be allowed; and
 - b. to the extent that they apply to the appellant, orders 1 – 4 of the Court of Appeal made on 13 February 2026 be set aside and, in their place, there be an order that permission to appeal is refused.

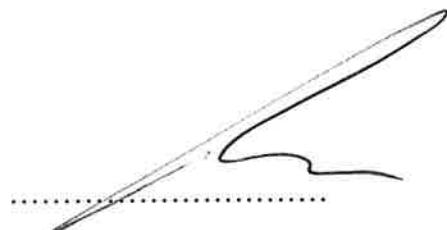
PART VIII – ESTIMATE FOR ORAL ARGUMENT

3. The appellant estimates that presentation of his oral argument (including reply) will require 1 - 2 hours.

Dated: 30 July 2026



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**ANNEXURE TO APPELLANT'S SUBMISSIONS: RELEVANT STATUTORY
PROVISIONS**

1. *Criminal Law Consolidation Act 1935* (SA): 8 March to 21 June 2023, sections 47, 48 and 56. Act in force on the date of the offending: 18 June 2023.
2. *Crimes Act 1900* (NSW): Sections 61HJ and 61J. Legislation referred to in the decision of *[Decision Restricted]*.