



HIGH COURT OF AUSTRALIA

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Details of Filing

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Important Information

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Form 27D—Respondent’s submissions

Note: See rule 44.03.3.

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

SECOND RESPONDENT’S SUBMISSIONS

Part I: Certification for publication

1. This submission is suitable for publication on the internet.

Part II: Concise statement of the issues

2. The appeal raises the correctness of the decision of the New South Wales Court of Criminal Appeal in *[Decision Restricted]*¹, and in particular the correctness of the determination that it is possible for a joint criminal enterprise to be formed to commit a crime based on “advertent recklessness”.

¹ [2025] NSWCCA 210.

3. Issak's contention is that:

- a. this is an issue that is peripheral to the determination of the three appeals before the Court; and
- b. regardless of the correctness or otherwise of the New South Wales Court of Criminal Appeal on this issue, there was no realistic scope for advertent recklessness on the prosecution case given that the agreement necessary to establish a joint criminal enterprise to commit rape is an agreement to engage in sexual intercourse without consent.

Part III: Section 78B notice

4. The respondent has considered whether any notice should be given in compliance with s 78B of the *Judiciary Act 1903* (Cth). No such notice is necessary.

Part IV: Contest as to the facts

5. There are no material facts set out in the appellant's narrative of facts or chronology that are contested.

Part V: Statement of argument

A. Summary

6. The appellant Bekele advances (**Bekele Submissions [5]**) three propositions arising from *[Decision Restricted]*:
- a. the Court was correct to conclude that an agreement to have sexual intercourse with a person "with or without" their consent does not amount to a joint criminal enterprise;
 - b. the Court was correct to conclude that what it described as inadvertent recklessness is incapable of being agreed upon such that it can form part of a joint criminal enterprise to commit the offence of rape; and

- c. the Court was wrong to conclude that what it described as advertent recklessness is capable of being agreed upon such that it can form part of a joint criminal enterprise to commit the offence of rape.
- 7. Only the first of those three propositions is central to Issak's case. As was set out in his submissions (at [23]-[24]), it was not in dispute and was accepted by the majority below.
- 8. The respondent Issak does not dispute either of the latter two propositions advanced by the appellant Bekele, each of which are likely to have only peripheral (if any) significance to Issak's case. Issak respectfully embraces Bekele's submissions.
- 9. On the second proposition, Issak does not seek to be heard further.
- 10. If Bekele's submissions on the third proposition are not accepted, Issak advances the following contentions in the alternative:
 - a. the availability of a joint criminal enterprise to commit rape based on advertent recklessness as to consent will, in most cases, be theoretical;
 - b. in this case, no such agreement was available on the evidence; and
 - c. the use by Bleby and David JJA (**Reasons [148] CAB 61**) of an asserted case to answer on "advertent recklessness" as a makeweight to conclude that a case to answer had been established on an agreement to engage in sexual intercourse without consent was logically flawed. That flaw tends to undermine their Honours' conclusion (**Reasons [160] CAB64-65**) that the circumstantial case on joint enterprise was "relatively strong".

B. Alternative submissions

B.1. A JCE to commit rape based on advertent recklessness will usually be theoretical

11. A joint criminal enterprise comes into being when two or more persons agree to commit a crime: *Miller v The Queen* [2016] HCA 30; (2016) 259 CLR 380 at [4] per French CJ, Kiefel, Bell, Nettle and Gordon JJ.²
12. It has not always been clear in decided cases precisely what is meant by “crime” in this context, particularly whether it is necessary there be agreement to the mental element of the offence.³ The difference in approach is academic in this case.
13. The offence of rape in South Australia has three elements being: **first**, the physical element of sexual intercourse; **secondly**, a circumstance attending the physical element, namely the absence of consent; and **thirdly**, the mental element of knowledge of, or reckless indifference towards, that circumstance.
14. On any analysis, the prosecution must prove that the participants in a joint criminal enterprise to commit rape agreed to engage in sexual intercourse without consent. Any agreement limited to the first element could never be said to be criminal in nature.
15. Whether the prosecution is required to additionally prove an agreement to the mental element of the offence, or whether the *mens rea* of each participant is to be assessed individually at the time of entry into the agreement, is a live question that does not require determination on this argument. Mr Issak submits the preferable view is that agreement on *mens rea* is necessary because it is only in that way that there is an agreement to commit a “crime”.

² Citing *McAuliffe v The Queen* [1995] HCA 37; (1995) 183 CLR 108.

³ For statements that tend to suggest only agreement to the *actus reus* is necessary, see *Osland v The Queen* [1998] HCA 75; (1998) 197 CLR 316 at [69]-[75]; [93] per McHugh J and *The King v Rohan (a pseudonym)* [2024] HCA 3; (2024) 280 CLR 288 at [28]-[31] per Gageler CJ, Gordon and Edelman JJ in an analogous statutory context. C.f. *Mitchell v The King* [2023] HCA 5; (2023) 276 CLR 299 at [52] and [56] per Gordon, Edelman and Steward JJ and *[Decision Restricted]* at [195], citing *KA v The Queen* [2015] NSWCCA 111; (2015) 251 A Crim R 308.

16. Inherent in an agreement to engage in sexual intercourse without consent is knowledge that the victim is not consenting. In circumstances where participants in a joint enterprise agree to engage in non-consensual sexual intercourse with a victim, it is difficult to envisage circumstances other than:

- a. (on the agreement to *mens rea* approach) they have also agreed that they are proceeding in the actual knowledge the victim is not consenting; or
- b. (on the individual *mens rea* approach) each of them individually knows that the victim is not consenting.

17. It follows that if the New South Wales Court of Criminal Appeal was correct to hold that advertent recklessness could found a joint criminal enterprise to commit (the New South Wales equivalent of) rape, the case where that determination finds any practical use will be a rare one. Once an agreement to engage in sexual intercourse without consent is established, that the state of mind of the participants at the time of entry into that agreement might be anything short of actual knowledge will usually be a theoretical possibility.

18. So much was acknowledged by the Court at [195] of *[Decision Restricted]*, in which the Court went so far as to question whether it was necessary to prove agreement as to the mental element of the offence at all.

B.2. Application to the evidence in this case

19. There was no rare or unusual aspect of the evidence in this case that gives rise to a departure from the logic set out above.

20. Although the prosecution at trial never clearly asserted **when** the alleged agreements were made, Bleby and David JJA found that (**Reasons [130] CAB 57**):

...the totality of the evidence is capable of establishing, beyond reasonable doubt, the existence of an agreement that Bekele and Issak formed no later than on their entry into the taxi and in which Haile joined no later than when the sexual acts occurred at Bekele's residence.

21. Let it be assumed for the sake of the argument that the prosecution made good the existence of the relevant joint criminal enterprise to have sexual intercourse with the complainant without her consent at those times. Once the existence and scope of the agreement is accepted, there was nothing to suggest any other conclusion than that the relevant participants, having agreed to non-consensual sexual intercourse, had a state of mind short of actual knowledge of the absence of consent⁴ that inheres in such an agreement.

22. Whether as a matter of law because [*Decision Restricted*] was incorrect on this point, or on the facts of this case if [*Decision Restricted*] was correct, there was no realistic role for advertent recklessness on this prosecution case.

B.3. The use of advertent recklessness as a makeweight by the majority

23. On the issue of whether the trial judge erred by finding that there was no case to answer, Bleby and David JJA held (**Reasons [148] CAB 61**):

The respondents had a case to answer of ‘advertent recklessness’ (which concept is the subject of s 47(a) of the CLCA), to use the phrasing of the New South Wales Court of Criminal Appeal. That case was that as participants to an agreement, they must have known, or been aware of the possibility, that the complainant was too intoxicated to be able to consent. This, in turn, demonstrated their agreement that sexual intercourse without her consent should occur.

24. It is not quite clear whether, in this passage, the Court was reasoning that there was a case to answer on there being **an agreement** to engage in advertent recklessness as to consent, or that there was a case to answer that each of Bekele, Haile and Issak were **individually** advertently reckless. Whichever it was, recklessness as to consent is incapable of “demonstrat[ing]” an agreement that sexual intercourse without consent should occur. To the contrary, it is a short step from the mental state of advertent recklessness, whether agreed or individual, to a (non-criminal) agreement to have sexual intercourse “with or without” consent.

⁴ Whether in fact, or constructively by reason of her intoxication.

25. Reasoning in this way at least runs the risk of lapsing into wrongly diluting the agreement that is required as a matter of law to establish a joint criminal enterprise to commit rape.

26. Although there is no challenge on this appeal to the conclusion that the trial judge erred by finding that there was no case to answer on the existence of a joint criminal enterprise, one relevant factor to the exercise of discretion to grant permission to appeal is the strength of the prosecution case (**Issak Submissions [68.4]**).

27. Issak submits that the erroneous reasoning set out above tends to demonstrate further that the prosecution case that there was a joint criminal enterprise to commit rape was not a particularly strong one.

Part VI: Statement of argument on Notice of Contention or Cross-Appeal

28. N/A

Part VII: Estimate of time for oral argument

29. No time additional to the 45 minutes estimated in Issak's written submissions on his appeal (A21/2026). It is anticipated, depending on the course of argument, that Issak will rely on his written submissions on this point.

Dated 27 August 2026



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