



HIGH COURT OF AUSTRALIA

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Details of Filing

File Number: A23/2026
File Title: Haile v. The King & Ors
Registry: Adelaide
Document filed: Form 27A - Appellant's submissions
Filing party: Appellant
Date filed: 31 Jul 2026

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IN THE HIGH COURT OF AUSTRALIA
ADELAIDE REGISTRY

5 BETWEEN: **BESUFIKAD HAILE**
Appellant

and

10 **THE KING**
First Respondent

SADAM HUSSEIN ISSAK
Second Respondent

15 **BEDHANE TARIKA BEKELE**
Third Respondent

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APPELLANT'S SUBMISSIONS

PART I – FORM OF SUBMISSIONS

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

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PART II – STATEMENT OF ISSUES

2. The question on this appeal is:

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On a prosecution appeal against a directed acquittal under s 157(1)(b)(ii) of the Criminal Procedure Act 1921 (SA), to what extent is it relevant to the grant of permission or exercise of discretion that the case to be presented on a retrial would be materially different from the case advanced by the prosecution at trial, in circumstances where the case as advanced at trial was incapable of sustaining a conviction?

3. This appeal concerns the correctness of a decision by the Court of Appeal of the Supreme Court of South Australia (**Court of Appeal**) to grant permission to the Director of Public Prosecutions (**the Director**) to appeal jury acquittals entered at the direction of a trial judge where:

5 3.1. even if those acquittals had not been directed – convictions could not have been sustained because the Director pressed throughout a case which was incapable at law of sustaining convictions on the relevant counts; and

3.2. the Court of Appeal proposed a reformulated Crown case (**the reformulation**) not ever propounded by the Director and, by aid of the reformulation, ordered that the acquittals
10 be quashed and the relevant charges be retried; and

3.3. the reformulation (a reformulation of the joint enterprise alleged) amounts to a materially different case in that -

3.3.1. it is factually inconsistent with (it contradicts, rather than is different from) the case alleged at trial; and

15 3.3.2. it would entail the prosecution denying the reasonable possibility of factual allegations which it had contended were proved beyond reasonable doubt by the same evidence at trial (those factual allegations amounting to a defence to the charge).

4. The error alleged on this appeal is that the Court of Appeal did not have regard to
20 considerations relevant to the exercise of its discretion to grant permission to appeal, such that its discretion miscarried. The considerations to which it omitted regard were: necessary aspects of the principle of double jeopardy; and necessary factors which have the capacity to undermine the public confidence in the administration of justice (**“public confidence” considerations**).

25 5. If that error is established, the case calls for this Court to re-exercise the discretion and substitute a decision that permission to appeal be refused.

PART III – SECTION 78B NOTICES

6. The appellant does not consider that any notice should be given.

PART IV – CITATION OF REASONS BELOW

7. *R v Bekele & Ors; Haile v The King; Bekele v The King* [2026] SASCA 9 (COA).

PART V – FACTS AND BACKGROUND

Trial – the case and criminal liability

8. The appellant stood trial in the District Court of South Australia¹ with two other accused (the second respondent, **Issak** and the third respondent, **Bekele**), charged jointly and severally with various sexual offences, all of which were alleged as against a single complainant (**C**). The prosecution alleged a lack of consent to sexual activity on the basis that the complainant was too intoxicated to be able to freely and voluntarily consent to the sexual activity.²
9. Counts 1 -3 charged Bekele and Issak in respect of sexual acts committed against C by them in a taxi. Count 4 was withdrawn as being duplicitous with count 5.
10. Counts 5-7 charged Bekele, Issak and the appellant as jointly liable for three counts of rape, contrary to s 48 of the *Criminal Law Consolidation Act 1935* (SA) (**the CLCA**), committed at Bekele's residence. The appellant's liability on count 6 was based on his own act of sexual intercourse. His liability with respect to count 5 was for an act of sexual intercourse by Bekele. His liability in respect of count 7 was for an act of sexual intercourse by an unknown male (**R[45];CAB42-43**).
11. The joint criminal enterprise (**JCE**) alleged in the opening was: "*that there was an agreement that had been reached earlier between the accused that one or more of them would engage in unlawful sexual acts with [c], sexual acts irrespective of whether she was consenting or not*" (**T36.23-36.30;AFM21**); also later described as "[o]ne or both of them intend to engage in unlawful sexual acts with [c], sexual acts irrespective of whether she is consenting. In short, we say that they agree 'We're going to have sexual relations with this girl whether she consents or not'" (**T38.21-38.26;AFM23**). (**The trial JCE**)
12. The trial JCE was alleged to have been on foot between Bekele and Issak for counts 1-3. It was alleged that the appellant had joined that existing JCE after counts 1-3, and prior to commission of counts 5 and 7.

Evidence

13. In the early hours of the morning of Sunday 18 June 2023, C met the appellant, Bekele and Issak in the Adelaide CBD. Later, the four of them travelled back to Bekele's house in a

¹ The trial was conducted before a judge (**the trial judge**) sitting with a jury.

² See s 46(3)(d) of the *Criminal Law Consolidation Act 1935* (SA) (**CLCA**).

taxi. Bekele, Issak and C were in the back seat, and the appellant was in the front seat. The events in the taxi which underpinned counts 1-3 were, in part, captured by an internal CCTV camera which recorded the whole of the journey. The camera was positioned at the front of the car and faced rearward. Consequently, some of what occurred in the back seats between Bekele, Issak and C was obscured by the front seats and those sitting in them (R[60]-[81];CAB46-48).

14. C and the three men arrived at Bekele's residence. The sexual activity the subject of counts 5-7 was captured within a bedroom of the residence by mobile telephones (R[82]-[94];CAB-48-49).

15. The complainant was intoxicated at the time of sexual activity and was unable to recall it (R[41];CAB41).

No case to answer

16. Following the presentation of the prosecution case, counsel for the appellant, Issak and Bekele made no case to answer submissions. Counsel for the appellant made two submissions: first, that the evidence presented was not capable of establishing the existence of a JCE (**the insufficient evidence submission**); and, secondly, that the joint enterprise alleged an agreement which was incapable of sustaining a joint *criminal* enterprise (**the impermissible scope submission**).³

17. After the submissions of defence counsel concluded, there was an adjournment of the trial overnight. The following day, counsel for the prosecution addressed the arguments made by the appellant, Issak and Bekele. He first addressed the impermissible scope submission. He maintained that terms of the trial JCE in the opening address were correct and permissible. During the course of those submissions, the trial judge indicated that she was against the impermissible scope submission, and prosecuting counsel did not further address the issue (AFM80-82).

18. The trial judge found that there was no case to answer in accordance with the insufficient evidence submission. Accordingly, only charges alleging primary liability were left to the jury (that is, only count 6 in respect of the appellant; counts 1-4 in respect of Bekele; and no count in respect of Issak). Those that rested on the trial JCE were the subject of directed acquittals.⁴

³ AFM52-60

⁴ CAB11-16 (reasons for ruling on insufficient evidence submission) and CAB 17-19 (entry of verdicts). Count 2, concerning Bekele, was also subject to a direction to acquit, however, that count is not relevant to this appeal.

19. The trial resulted in the following verdicts: Bekele was acquitted of count 1 and convicted of counts 3 and 5; the appellant was convicted of count 6.

Court of Appeal

- 5 20. Before the Court of Appeal, the Director sought permission to appeal against the acquittals entered at the direction of the trial judge (**CAB25-26**). The appellant and Bekele sought permission to appeal their respective convictions. Permission to appeal was granted on some grounds, however, the appeals were dismissed (**R[233];CAB80-81**).
- 10 21. Following the hearing of the Director's application for permission to appeal, and before judgment had been pronounced, the New South Wales Court of Criminal Appeal delivered its reasons in *[Decision Restricted]*.⁵ It was held in that decision that an agreement to have sexual intercourse with a person 'with or without their consent' was not a criminal agreement. This was consistent with the impermissible scope submission advanced at trial.
- 15 22. The parties applied for and were given leave to file further submissions in writing addressing *[Decision Restricted]*. The appellant submitted that the formulation of the relevant agreement between the appellant and his co-accused was incapable of sustaining a joint criminal enterprise. He also submitted that in the event that the Director obtained the orders that he sought, then the case at retrial would necessarily involve the prosecution seeking to exclude, as a reasonable possibility, the case he had previously advanced as
- 20 being capable of proof beyond a reasonable doubt. The appellant submitted that this added weight to the consideration of double jeopardy principles (**AFM249-251**). Without disputing the correctness of *[Decision Reserved]*, the Director maintained that the "prosecution case was capable of resulting in a legitimate conviction" (**AFM255-257**).
- 25 23. The Court of Appeal granted the Director permission to appeal, allowed the Director's appeal, quashed the appellant's directed acquittals and remitted those counts to the District Court for retrial (**CAB82-84**). Bleby and David JJA did not find any reason to doubt the analysis in *[Decision Restricted]*, their Honours did not consider that the necessary change to the formulation of the prosecution case militated against a grant of permission (**R[162]-[163];CAB65**).
- 30 24. The Court of Appeal was in agreement as to the disposition of the appeal and that there was a case to answer (**R[1]-[3],[36], [152];CAB31,40-41, 62**). Chief Justice Kourakis, wrote

⁵ [REDACTED].

separately to explain the reasons for the “*higher*” standard that his Honour applied to the fault element (R[4];CAB31). In the course of his Honour’s reasons the Chief Justice set out what his Honour considered to be the correct formulation of the joint enterprise in the circumstances of this case (R[8]-[9]; CAB [32]). On this reformulated agreement, his Honour found “...that there is evidence of each of the elements of accessorial liability for rape...” (R[36];CAB40-41).

25. In their joint reasons Bleby and David JJA, found that there was ‘no reason to doubt the analysis of principle in *[Decision Restricted]*’ (COA[145];CAB60). The plurality then went on to find that “[t]here was manifestly a case to answer” in respect of the existence of a joint criminal enterprise (COA[152];CAB62). The case that the appellant and his co-accused was required to answer was described by the plurality in the following way: “[t]hat as participants to an agreement, they must have known, or been aware of the possibility, that the complainant was too intoxicated to consent. This in turn demonstrated their agreement that sexual intercourse without her consent should occur” (COA[148];CAB61). Later their Honours said with respect to the trial JCE that “[t]he error of the prosecution in opening was to describe the scope of the alleged agreement too widely”. (COA[162]-[164];CAB65).

Reformulation

26. In the reasons of both the plurality and Kourakis CJ the relevant agreement is, by implication at least, subject to reformulation. In the reasons of Kourakis CJ the reformulation is in the following terms: “[t]he 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” (R[8];CAB32).⁶ The appellant submits that this is a reformulation because his Honour explains that this was “a proper statement of the elements in the circumstances of this case.”

27. The reformulation of the agreement by the plurality is as follows: “[w]hen all of the evidence is viewed as a whole, the circumstantial case that this was done pursuant to an

⁶ (Emphasis in the original.)

agreement to have sexual intercourse with the complainant without her consent, was relatively strong”.⁷ The appellant submits that when considered in conjunction with the finding that: “[t]he error of the prosecution in opening was to describe the scope of the alleged agreement too widely,”⁸ the appellant’s description of a reformulation is apt.

- 5 28. The prosecution has never expressly acknowledged that a reformulation of the trial JCE is necessary.

PART VI – ARGUMENT

A. THE ERROR ON APPEAL

10 The statutory scheme: sections 157-158 of the *Criminal Procedure Act 1921* (SA)⁹

29. In the scheme of criminal appeals in South Australia, the right of the prosecution to seek leave to appeal an acquittal is a relatively recent development. In 2000, the South Australian Parliament provided a limited right of appeal to the Director in relation to those acquittals delivered by judges sitting without a jury, with the leave of what was then the Full Court of the Supreme Court. In 2008, the Director’s right of appeal (with leave) was extended to an acquittal delivered by a jury at the direction of the trial judge: s 352(1)(ab) of the *CLCA* (since repealed, but materially identical to s 157(1)(b) of the *Criminal Procedure Act 1921* (SA) (**CP Act**)).

30. The Director enjoys a conditional right of appeal against acquittal by s 157(1)(b) of the *CP Act* where:

- 30.1. the Court of Appeal grants permission; and
- 30.2. the acquittal was entered by a judge sitting alone **or** the acquittal was entered by a jury at the direction of the trial judge.

31. Where permission is granted, the Court of Appeal may exercise one or more of the powers in s 158(4) of the *CP Act*, namely:

- 31.1. it may dismiss the appeal;
- 31.2. it may allow the appeal, quash the acquittal and order a new trial;
- 31.3. it may make consequential or ancillary orders.

32. Where permission is granted, error must be established in order that an appeal be allowed. The provisions are not explicit as to what factors are relevant to, or will justify, grant of

⁷ (COA[160];CAB64-65).

⁸ COA[162];CAB65.

⁹ The submissions set out under this heading are largely adopted from the submissions of the appellant Issak in A21/2026.

permission; or as to whether a residual discretion exists to dismiss an appeal where error is found.

33. On the terms of the provisions, the appellant submits that the correct construction is that the Court of Appeal retains a residual discretion to dismiss a prosecution appeal in circumstances where permission has been granted and error has been established. In support of this:

33.1. the “may” in the chapeau to s 158(4) of the *CP Act* stands in contrast to the mandatory terms of the corresponding portions of sub-sections 158(1) and 158(7); and

33.2. given the rule against double jeopardy, a construction which finds a residual discretion on appeal against conviction (as is well established), and not on appeals against acquittal, should not be preferred.

34. The practice of the Court of Appeal is to list an application for permission to appeal against acquittal to be heard as on appeal proper (as it did in this case). The types of considerations that might inform the exercise of the residual discretion such as double jeopardy and the underlying strength of the prosecution case have been treated as going to the question of permission to appeal.¹⁰ The residual discretion, assuming its existence, may therefore be subsumed in this case by the question of permission to appeal.

Acquittal appeals – principles, discussion

35. It is recognised that, on an application by the Director for permission to appeal against acquittal, the need to give effect to the principles of double jeopardy will usually require that the Director demonstrate that there are considerations which, though they must include the outcome or merits, are broader than the particular case before the court.”¹¹ The application of double jeopardy principles to the determination of an application for permission to appeal against acquittal has been regarded as stronger than in the case of an application for permission to appeal against sentence.¹² So much was recognised by Bleby and David JJA.¹³

¹⁰ See e.g. *R v Brougham* (2015) 122 SASR 546 at [47]-[78]; *R v Donovan* (2025) 108 MVR 392 at [18]-[25].

¹¹ *R v Donovan, supra*, at [15], and the cases cited there.

¹² *R v Brougham* at [7] per Peek J with whom Gray and Nicolson JJ agreed; *R v Garner* [2021] SASCA 68 at [78]-[81]; *R v Fitzgerald* (2023)307 A Crim R 101 at [54]; *R v Donovan, supra*, at [15].

¹³ COA at [153]; COAB62.

36. It is submitted that, given the relevance of double jeopardy principles was elevated on the Director's application, any degree to which oppression was increased by a reformulated case became relevant to a greater extent.

37. In respect of acquittal appeals, the appellant notes that an error of law will more readily
 5 raise an issue of general importance or carry legal significance beyond the facts of a particular case – but particularly so when, *unlike* this case, that error is an error of law that does not turn solely on an assessment of the evidence in a single case.

38. It is contended that, where the Director has, in the course of prosecuting charges, made an error of law at trial which would have precluded conviction, that fact must be relevant when
 10 the Director then seeks permission to appeal an acquittal arising. While the trial judge's error was the error which *in fact* caused acquittals to be entered, it is not apt to the nature of the decision before the Court of Appeal, the appellant submits, to treat the trial judge's error as the only *relevant* error at trial. While the public policy and fairness principles which inform a grant of permission to appeal have no role in punishing the Director for an error
 15 made at trial, the fundamental and considered nature of this error, and the opportunities (with advantage) already enjoyed by the Director, will be relevant to whether a person ought to be oppressed beyond what is to be accepted as incidental to the proper administrations of justice. That error will be relevant in terms of both public and individual interests in the administration of justice.

20 39. Having found that the case at trial was incapable of sustaining a conviction due to the Director's error, the Court of Appeal did not have regard to the relevant conduct in assessing the merits of granting permission and ordering a retrial on what would necessarily be a materially different case.

40. If permission had been refused, or the appeal dismissed, the appellant would be sentenced
 25 for his conviction on count 6. He could be sentenced for that offence only, but on a basis appropriate to and consistent with the evidence of the events of that night.

Relevant concepts – discussion, principles

41. Application of the criminal law is attended by jurisprudential tenets and concepts which
 30 are directed generally at ensuring fairness and maintaining confidence in the administration of justice. For example, it has been recognised in Australia that the existence of the defences of *autrefois acquit* and *autrefois convict*; the rule against double jeopardy; and the

doctrine of abuse of process make it unnecessary to introduce the doctrine of issue estoppel into the criminal law.¹⁴

42. The rule against double jeopardy protects a person from being placed in danger of prosecution and punishment more than once for an offence for which they have already
 5 been finally convicted or acquitted by a competent court. Until relatively recently, it has prevented prosecution appeals from verdicts of acquittal. The common law's defence against double jeopardy has a long history, is deeply entrenched, and is founded in notions of fairness, decency and public policy.¹⁵

43. The rule has individual (private) and procedural (public) benefits. It has been observed
 10 that:

*"It gives effect to the necessity of achieving finality in criminal litigation. It addresses the power imbalance that exists between prosecution authorities and the accused by limiting the power of the state to prosecute and investing an accused and the prosecution with asymmetric rights of appeal. In particular the rule recognises the hardship and
 15 distress caused to a person who subject to repeated prosecution. The rule also promotes efficient investigation by prosecution authorities (and police) by providing only one opportunity to secure a conviction. Finally, the rule recognises the increased risk of wrongful conviction associated with multiple prosecutions."*¹⁶

44. In this context, and as a result of the asymmetric approach engendered by the rule against
 20 double jeopardy, distinction has been drawn as between convictions and acquittals.¹⁷ Importantly for the considerations on appeal, for example:

44.1. "[i]t does not follow that an error of the kind which would warrant setting aside a conviction and requiring a new trial will warrant the setting aside of an acquittal and the ordering of a retrial. To equate those situations would be to ignore the
 25 principles based on double jeopardy."¹⁸; and

44.2. an acquittal (directed, or otherwise) will not be regarded in future proceedings as a finding of innocence.

¹⁴ *Rogers v The Queen* (1994) 181 CLR 251 per Mason CJ at 254-255.

¹⁵ *R v Carroll* (2002) 213 CLR 635 at [128] (McHugh J); *Malvaso v The Queen* (1989) 168 CLR 227 at 233-234 (Deane and McHugh JJ); *Everett v The Queen* (1994) 181 CLR 295 at 305 (Brennan, Deane, Dawson and Toohey JJ). See also *Pearce v The Queen* (1998) 194 CLR 610 at [73]-[75] (Kirby J) and *Cooke v Purcell* (1988) 14 NSWLR 51 at 54B-57C (Kirby P).

¹⁶ *McMahon, M.*, "Retrials of persons acquitted of indictable offences of England and Australia: Exceptions to the rule against double jeopardy" (2014) 38 CrimLJ 159 at 160.

¹⁷ Eg. *R v Brougham* (2015) 122 SASR 546 at [69]-[70] (Peek J, with whom Gray and Nicholson JJ agreed).

¹⁸ *Safework NSW v BOC LTD and Another* [2020] NSWCA 306 at [54].

45. “Recognising the diverse manifestations and stages of operation of the rule, it has been described as a ‘concept’ rather than ‘a definitive legal principle on its own terms’.”¹⁹ It was unanimously held in *Bui* that the rule is properly understood as a *value* which underpins the criminal law.”²⁰ In that way, it will *always* be relevant to a decision about whether a person ought to face trial more than once in the same cause.²¹
46. The rule against double jeopardy also underpins the exercise of the inherent power of a court to stay a prosecution as an abuse of process, where again the same public and private interests are required to be considered in exercise of the court’s discretion or jurisdiction. Like the concept of abuse of process, given its application at various stages in criminal proceedings, the concept of double jeopardy may best be understood as a foundation for exercise of the court’s jurisdiction or discretion, rather than as a fixed set of rules to be applied in particular circumstances.
47. The “value” which is expressed by the rule against double jeopardy necessarily attends a decision to grant permission to appeal an acquittal and a decision to order a retrial. That much is uncontroversial. It is submitted that the considered decisions made by the Director in the course or executing adversarial process (such as a “pleading” or commitment to what the evidence proves, and the framing of a case at trial)²² must be taken into account in those decisions. As Lord Devlin observed in *Connolly*, the “doctrine of res judicata occupies the same place in the civil law as the doctrine of autrefois does in the criminal...But from early times it has been recognised that some protection must be given to defendants against multiplicity of actions in respect of issues that could have been raised and were not.”²³

Double jeopardy and a materially different case

48. The increased significance of double jeopardy principles on a Director’s appeal against acquittal means that the relevance of a materially different case on a prospective retrial was increased.

¹⁹ *McMahon, M.*, “Retrials of persons acquitted of indictable offences of England and Australia: Exceptions to the rule against double jeopardy” (2014) 38 CRimLJ 159 at 159, quoting *Pearce v the Queen* (1998) 194 CLR 610 at 629.

²⁰ *Ibid*; *Bui v DPP (Cth)* (2012) 244 CLR 638 (emphasis in original).

²¹ Of interest for present purposes, an acquittal by a judge of a superior court (as distinct from an acquittal entered by a judge’s direction) falls squarely within the central double jeopardy principles (*Brougham* [29], [32]; *Thompson v Mastertouch TV Service Pty Ltd* (1978) 38 FLR 397).

²² See *Johnson v Miller* (1937) 59 CLR 467 at 489 (Dixon J) as to the issue of particulars in a criminal trial; *R v Tangey* (1997) 92 A Crim R 515 as to the need to remove uncertainty from a criminal trial at an early stage.

²³ *Connolly v DPP* [1964] AC 1254 at 1355-1360.

49. The prosecution case in a criminal trial is framed by the indictment and by the opening address of the prosecutor. In that address, the prosecutor, who has necessarily determined which charges are to be pursued, explains to the trier of fact what the charges are and the pathway or pathways to criminal liability that are relied upon. It is upon that basis that the trial is conducted. It is the expected course that, the charges pursued and the pathway to criminal liability remain static as between the opening address, the closing address and the trial judge's summing up. Even allowing for variation in formulation of the pathway to liability as between the opening address and the closing address, the pathway will remain static as between the closing address and the summing up. Expressed differently, summing up to a jury on a prosecution case reformulated by the judge (in particular, on the pathway to liability) would have been in this case.²⁴

50. Logically, where the prosecution reformulates a case post-trial, the endeavour of the prosecution is to enhance its chances of securing a conviction at the subsequent trial. In that way an accused person is exposed, at least in theory, not only to the risk of being convicted of that offence but also, if the reformulation has its desired effect, an increased risk of that occurring. The reformulation will most commonly, but not exclusively, be directed towards that aspect of the original trial which was found to be defective.

51. Against a background of previous decisions speaking against the practice of the prosecution attempting to reformulate cases on appeal with intention of retrying them on a different basis, *The Queen v Taufahema*²⁵ fell to be decided.²⁶ In that case the accused successfully appealed his conviction for murder. The New South Wales Court of Criminal Appeal allowed the appeal, quashed the conviction and entered a verdict of acquittal. The pathway to criminal liability, relied upon at trial, was not available because the "foundational offence" upon which the JCE rested was not known to the law. For the purposes of an appeal against the acquittal, the Crown reformulated the JCE so that its foundational offence was one which was known to the law. The appeal was allowed by majority and a retrial was ordered.

52. The majority (Gummow, Hayne, Heydon and Crennan JJ) gave detailed consideration to four decisions which related to the Crown attempting to put a different case at [a retrial]

²⁴See, for example, *King v The Queen* (1986) 161 CLR 423 per Dawson J, with whom the other members of the majority agreed.

²⁵ (2007) 228 CLR 232.

²⁶ For example *The Queen v King* (1986) 161 CLR 423, *R v Wilkes* (1948) 77 CLR 511 at 517-518 (Dixon J) and *Jiminez v The Queen* 173 (1992) CLR 572.

and in so doing considered the decision in *Jiminez v The Queen*.²⁷ It shares some similarities with the instant case, in that the evidence to be led remains consistent but the use to which it is put is at odds with the case as it was originally presented. In *Jiminez* McHugh J considered that the case that was to be put at a retrial, based on the concessions

5 of the Crown, was “radically different” to that which was put at the original trial.²⁸ The majority considered that if a difference between the case first put and the later case was to operate as a bar to the ordering of a further trial, that difference must be substantial.

53. In disposing of the “no opportunity to make a new case argument” at [68] the majority considered that the prosecution’s reformulation sought to characterise those facts which the

10 evidence may have established in a different, but not radically different way. It was emphasized that there was **no inconsistency** between the factual allegations and case initially advanced, and the case later propounded.

54. The instant case can be contrasted with the situation in *Taufahema* insofar as the agreement which must be alleged at the subsequent trial will be materially different and will be

15 inconsistent with that which was advanced at the first trial. That inconsistency, of course, involves the prosecution disproving, as a reasonable possibility at the second trial, something which was said to have been capable of proof beyond a reasonable doubt at the first.

55. What can be found in both the joint reasons of Gleeson CJ and Callinan J and in separate

20 reasons of Kirby J, all in dissent, is an emphasis on the adversarial nature of a criminal trial and the position that the prosecution occupies as the opponent of the accused citizen.²⁹ What also emerges from the joint reasons of Gleeson CJ and Callinan J is that their Honours considered that the double jeopardy considerations which attend an appeal against an acquittal by jury are not the same as those which attend the appellate process when it is

25 initiated by the convicted person.³⁰

56. Much will depend upon application to the particular case, and so there will be a limit on the value of a comparison as between cases. In *Castagna*,³¹ the New South Wales Court of Criminal Appeal surveyed some relevant cases in considering the appropriate orders in disposition of a conviction appeal. The prosecution did not foreshadow any new factual

²⁷ Ibid.

²⁸ (1992) 173 CLR 572 at 590.

²⁹ (2007) 228 CLR 232 at [37] (Gleeson CJ and Callinan J) and [161], [164]-[165] (Kirby J).

³⁰ (2007) 228 CLR 232 at [32] (Gleeson CJ and Callinan J).

³¹ *Castagna v R; Agius v R* [2019] NSWCCA 114 at [190] to [205].

material on a retrial, but did foreshadow a different characterisation of that evidence by amending the particulars of an alleged conspiracy. The Court determined not to order a retrial, taking into account a number of considerations, some of which were peculiar to that case. It was important to the decision that the conclusion reached by the Court of Appeal on appeal meant that the appellants were in fact entitled to a verdict by direction, and it would be unjust in these circumstances to order a new trial to enable a new case to be agitated.³²

“Public confidence” considerations

57. The decision of the Court of Appeal to grant permission and order a retrial was reached by findings in respect of the “public interest” and maintaining “public confidence in the administrations of justice”. Given the importance of these concepts to the decision, and the multiplicitous and flexible character of the group of concepts which might cohere under these names in application to a particular case, it is submitted that very little was said in identifying and applying them. Chief Justice Kourakis said only that, having found a case to answer:

“The jury, the constitutional tribunal of fact, should be allowed to pass judgment of the community on whether the evidence, which establishes a case to answer, proves the commission of the offences beyond a reasonable doubt. Balancing the proper administration of justice against the principles of double jeopardy, the public interest clearly lies in allowing those charges of serious sexual offending to be determined by a jury. Indeed, it would undermine public confidence in the administration of justice to allow the acquittals to stand.” (COA[3];CAB31)

58. Having found that the case to answer “cannot be said to be weak”, and that it was “hard to see” that the reformulation of the case on retrial would “increase double jeopardy considerations that oppose a grant of leave”, Bleby and David JJA said that: “the directed acquittals have the clear capacity to undermine public confidence in the administration of justice. In the circumstances of this case, we are satisfied that this consideration outweighs the principles of double jeopardy that would attend the respondents being tried again. Accepting the existence of a residual discretion...we nonetheless grant the Director leave to appeal...” (COA[164];CAB65).

³² Ibid at [203].

59. There is no doubt that the Court of Appeal was required to take into account public confidence considerations. The formulation of that consideration in *Donovan*, extracted in the plurality reasons at [154] is, respectfully, correct. It is the “principled intervention” which maintains that confidence.

60. There is an undeniable interest in the prosecution and conviction of serious crimes, and testing of those allegations before a properly constituted trier of fact.³³ Public confidence in the administration of justice may be affected by directed acquittals. It may also be affected by matters commonly going to double jeopardy, such as: lack of restriction on the ability of the prosecution to “try again” with the benefit of hindsight; lack of finality and certainty, not just for an accused, but for other participants and persons affected by a trial proceeding. Public confidence may be affected by an order for a retrial in circumstances where, even without it, the appellant stood convicted of a serious sexual offence in respect of which it could be expected he would receive a lengthy term of imprisonment.

61. In circumstances where the weight to be given to double jeopardy principles is increased by reason of the Director engaging the appellate process, it cannot be said that the effect on public confidence flowing from the directed acquittals in this case is sufficient to outweigh other public policy considerations.

62. It is submitted that the Court of Appeal erred by minimising what was a materially different case; and by omitting to have regard to the oppressive effect of that change.

A. QUESTION ON APPEAL – CONCLUSION

63. **The appellant answers the question on appeal as follows:**

In circumstances where the prosecution case advanced at trial was incapable of sustaining a conviction, the presentation of a materially different case on a retrial is materially relevant to the grant of permission. The advancing of a materially different case at a subsequent trial will foreclose the availability of the remedy which will be sought by the Director on an appeal pursuant to s 157(1)(b)(ii) of the CP Act, which will inevitably be a retrial.³⁴ In those circumstances, the grant of permission to the Director to appeal against a directed acquittal would be inutile.

³³ *R v Reid* [1980] AC 343,

³⁴ The appellant submits that the application for an order for a retrial in terms of inevitability because the availability of this remedy stands in contradistinction to the remedy which is available to him on the reservation of a question of law; see ss 153 and 155 of the CP Act and noting that by reason of s 155(2)(c) the order of acquittal in the circumstances of the reservation of a question of law precludes disturbing the acquittal at first instance.

B. REMEDY – RE-EXERCISE OF DISCRETION

64. If error be demonstrated, this court should re-exercise the discretion and refuse permission to the Director to appeal against the appellants acquittals on counts 5 and 7 because:

64.1. The appellant should not, in the circumstances, be required to face a second trial on a prosecution case which is materially different from that advanced at his first trial, for the reasons set out above;

64.2. Absent any retrial, the appellant stands to be sentenced for a serious sexual offence (rape, count 6). While he may not be sentenced for any offence for which he has not been convicted, he will be sentenced against a background of the events of that night, and it should be expected that he will be sentenced to a lengthy period of imprisonment;

64.3. Upon a retrial of counts 5 and 7, a jury would receive evidence of the appellant's act of penetration on count 6, but would not be asked to return a verdict against him in respect of that conduct. The same is true in respect of evidence of uncharged (convicted) acts at a joint trial with his co-accused. The question arises whether a direction could be formulated which adequately guards against speculation, impermissible reasoning and unfair prejudice, whether he is tried jointly or separately;

64.4. Although the error asserted by the Director on appeal was an error of law, it was an error of law that turned solely upon an assessment of the evidence (AFM150[62(b)]). It did not raise an issue of general importance or carry legal significance beyond the facts of the immediate case. As the plurality acknowledged, the trial judge explained the reasoning exercise correctly in her Honour's ruling (CAB63;COA[158]); and

64.5. In an important sense the appellant was entitled to the acquittals entered at trial, even if it be accepted that they were reached by an incorrect path. The outcome effected by the Trial Judge having directed acquittals was the correct outcome of that trial, given the case pressed by the Director.

PART VII – ORDERS SOUGHT

65. The appellant seeks the following orders:

65.1. the appeal be allowed; and

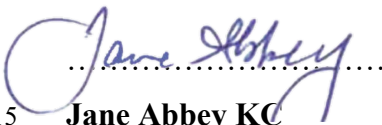
65.2. to the extent that they apply to the appellant, orders 1 – 4 of the Court of Appeal made on 13 February 2026 be set aside and, in their place, there be an order that permission to appeal is refused.

5 **PART VIII – ESTIMATE FOR ORAL ARGUMENT**

66. The appellant estimates that presentation of his oral argument (including reply) will require up to one hour.

Dated: 31 July 2026

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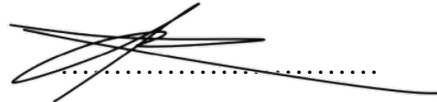
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**ANNEXURE TO APPELLANT'S SUBMISSIONS: RELEVANT STATUTORY
PROVISIONS**

1. *Criminal Procedure Act 1921* (SA): current version, sections 153,155 and 157-158. Act in
5 force at the time of the trial, commencement of the appeal and all relevant times thereafter.
2. *Criminal Law Consolidation Act 1935* (SA): 8 March to 21 June 2023, sections 46, 48 and
56. Act in force on the date of the offending: 18 June 2023.

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