



HIGH COURT OF AUSTRALIA

NOTICE OF FILING

This document was filed electronically in the High Court of Australia on 27 Aug 2026 and has been accepted for filing under the *High Court Rules 2004*. Details of filing and important additional information are provided below.

Details of Filing

File Number: A21/2026
File Title: Issak v. The King & Ors
Registry: Adelaide
Document filed: (R1) Form 27D - First Respondent's Submissions
Filing party: Respondents
Date filed: 27 Aug 2026

Important Information

This Notice has been inserted as the cover page of the document which has been accepted for filing electronically. It is now taken to be part of that document for the purposes of the proceeding in the Court and contains important information for all parties to that proceeding. It must be included in the document served on each of those parties and whenever the document is reproduced for use by the Court.

IN THE HIGH COURT OF AUSTRALIA
ADELAIDE REGISTRY

BETWEEN: **SADAM HUSSEIN ISSAK**
Appellant in A21/2026 and Second Respondent in A22/2026 and A23/2026

BEDHANE TARIKA BEKELE
Appellant in A22/2026, Second Respondent in A21/2026 and Third Respondent in
A23/2026

BESUFIKAD HAILE
Appellant in A23/2026, Third Respondent in A21/2026 and A22/2026

and

THE KING
First Respondent in A21/2026, A22/2026 and A23/2026

RESPONDENT'S SUBMISSIONS

Part I: CERTIFICATION

1. These submissions are suitable for publication on the internet.

Part II: CONCISE STATEMENT OF THE ISSUES

2. What is the proper construction of the elements of the offence of rape in s 48(1) of the *Criminal Law Consolidation Act 1935* (SA) ('CLCA'), cognisant of the relevant statutory definitions of consent and reckless indifference in ss 46 and 47 of the CLCA and their interaction with the principles of joint criminal enterprise ('JCE') liability?
3. Having regard to the discretionary aspects of ss 157(1)(b)(ii) and 158(4) of the *Criminal Procedure Act 1921* (SA) ('CPA'), what is the proper approach to

double jeopardy and discretionary considerations on a prosecution appeal against an acquittal entered by a jury on a trial Judge's direction?

4. Did the Court of Appeal ('CoA') err in its application of principle as the single common ground of appeal alleges, and, if so, is it appropriate in the circumstances for this Court to exercise the discretion afresh?

Part III: SECTION 78B NOTICE

5. No Constitutional matter arises in the appeals.

Part IV: FACTUAL MATTERS

6. At trial, Bekele and Issak were charged on an Information with two counts of aggravated indecent assault (Counts 1 and 3)¹ and five counts of rape (Counts 2, 4, 5, 6 and 7).² Haile was charged on the same Information with four counts of rape (Counts 4, 5, 6 and 7). The alleged sexual acts occurred in the early hours of the morning of 18 June 2023, first in a taxi, and later at Bekele's residence.
7. The respondent adopts the summary of the prosecution case with respect to each charge, the basis upon each appellant's liability for the charge and the relevant verdict produced in table form in the decision of Bleby and David JJA in the CoA's judgment.³ It does not appear from the appellant's written submissions that there is any significant dispute as to the CoA's treatment of factual matters with the exception of the matters raised by Issak at [68.4] relative to the CoA's characterisation of the strength of the prosecution case.⁴
8. It was the prosecution case that the complainant was grossly intoxicated such that she was incapable of consenting to the sexual acts, and each of these acts were committed pursuant to an understanding or arrangement, amounting to an agreement, to engage in the sexual acts without her consent, either knowing or being recklessly indifferent as to her lack of consent. The complainant had no, or very limited, recollection of the extent of that evening and the prosecution relied

¹ Contrary to s 56(1) of the *Criminal Law Consolidation Act 1935* (SA) ('CLCA'); Joint Core Appeal Book ('CAB') at 6-10.

² Contrary to s 48(1) of the CLCA; CAB at 6-10.

³ *R v Bekele* [2026] SASCA 9 at [45] (Bleby and David JJA); CAB at 42-43.

⁴ The respondent returns to this on the question of the disposition of the appeals.

on video footage depicting her interactions with the appellants including the charged sexual acts. This evidence, in its totality, demonstrated the nature of the alleged JCE in which the appellants participated. The prosecution case was that the agreement between Issak and Bekele was formed by the time they entered the backseat of the taxi with the complainant, and that Haile had joined the agreement no later than when the sexual acts occurred at Bekele's residence.⁵

9. The prosecution was put to proof on every aspect of its case, other than the issue of identity in relation to Bekele and Haile. Consent was a central issue at trial.
10. In his opening address, the prosecutor outlined the basis of the appellants' liability as follows:⁶
 - a. That the accused entered into an agreement with one or more other people to commit the relevant offence [one of rape or indecent assault];
 - b. That the accused participated in the joint agreement;
 - c. That while the agreement was on foot, one or more of the parties to the agreement did the acts necessary to commit the charged offence; and
 - d. That the accused had the state of mind necessary to commit the charged offence.
11. The prosecutor referred to both knowledge and reckless indifference as the relevant state of mind of each of the participants and that reckless indifference, in effect, could be satisfied by any of the limbs of s 47 of the CLCA.⁷
12. At the close of the prosecution case, the appellants asserted that there was no case to answer on the counts reliant upon JCE liability, as the evidence was incapable of establishing the existence of a JCE. Bekele and Haile also asserted that the agreement alleged by the prosecutor in opening was not an agreement to commit an offence.⁸
13. The trial Judge determined that the evidence on the prosecution case was not capable of establishing the existence of the JCE between the appellants on any

⁵ *R v Bekele* [2026] SASCA 9 at [130] (Bleby and David JJA); CAB at 57.

⁶ Trial Transcript at 37.36-38.12; Issak Book of Further Material ('Issak BFM') at 22-23.

⁷ Trial Transcript at 27-28; Issak BFM at 12-13. The prosecutor's opening address on matters of law appeared to mirror the terms of the South Australian Criminal Trials Bench Book (as currently available at [South Australian Criminal Trials Bench Book \(February 2026\).pdf](#)).

⁸ Trial Transcript at 978.33-979.11, 991.14-998.3; Issak BFM at 39-40, 52-59.

basis – and did not distinguish between knowledge or reckless indifference (or any particular variation of reckless indifference).

The CoA's approach

14. The relevant issue before the CoA was whether there was evidence at trial that was capable of supporting a verdict of guilty on each of Counts 2, 3, 5, 6 and 7 in respect of the appellants' liability through the alleged JCE. Further, on finding there was, noting the relevant double jeopardy considerations, whether the Director ought be granted permission to appeal, the appeal be allowed, the directed acquittals quashed and a new trial ordered.
15. Justices Bleby and David (with Kourakis CJ agreeing) concluded that, viewing the evidence as a whole, the circumstantial case that the sexual acts were perpetrated "pursuant to a joint criminal enterprise, constituting an agreement to have sexual intercourse with the complainant without her consent, was relatively strong"⁹ and there was a case to answer on each count reliant upon JCE liability.
16. Their Honours concluded that, "as participants to an agreement, [the appellants] must have known, or been aware of the possibility, that the complainant was too intoxicated to be able to consent" and that this, "in turn, demonstrated their agreement that sexual intercourse without her consent should occur".¹⁰
17. The Chief Justice also held there was a case to answer, though he provided a different formulation of the fault element applicable for an offence of rape involving JCE liability.¹¹
18. Both judgments considered the factors attending double jeopardy in the matter relevant to a grant of permission to appeal and to the dispositive orders sought. The Chief Justice noted this required a balancing of the proper administration of justice against the principles of double jeopardy, and ultimately found that the public interest lay in allowing the charges of serious sexual offending to be determined by the jury as the constitutional tribunal of fact entitled to pass the judgment of the community.¹²

⁹ *R v Bekele* [2026] SASCA 9 at [160] (Bleby and David JJA); CAB at 64-65.

¹⁰ *R v Bekele* [2026] SASCA 9 at [148] (Bleby and David JJA); CAB at 61.

¹¹ *R v Bekele* [2026] SASCA 9 at [8] (Kourakis CJ); CAB at 32.

¹² *R v Bekele* [2026] SASCA 9 at [3] (Kourakis CJ); CAB at 31.

19. Justices Bleby and David observed that double jeopardy considerations are regarded as stronger in a case of an appeal against an acquittal (compared to a Crown appeal against sentence),¹³ and noted the circumstantial force of the case at trial¹⁴ and the nature of the trial Judge's error of law.¹⁵ Their Honours also had regard to the error in the prosecution's articulation of the JCE in opening and observed that even without that additional consideration, the double jeopardy considerations were "...clear and real".¹⁶ Their Honours concluded that the error by the trial Judge had the capacity to undermine public confidence in the administration of justice, and that, both in respect of a grant of permission and any residual discretion, the balancing exercise favoured correcting that error.¹⁷

Part V: RESPONDENT'S SUBMISSIONS

20. The grants of special leave have two aspects. The first relates to double jeopardy considerations on a prosecution appeal where there will be a difference in the prosecution case at a retrial. The second relates to the decision of the New South Wales Court of Criminal Appeal ('NSW CCA') in *Decision Restricted*, and the proper construction of s 48(1) of the CLCA (read together with ss 46 and 47).
21. For the reasons that follow, the respondent contends that the appeal should be dismissed. As the submissions outlined below develop, the respondent:
- a. respectfully contends that the decision in *Decision Restricted* accurately states the requisite fault elements for JCE liability for rape having regard to the text, context and purpose of s 48(1) of the CLCA (read together with ss 46 and 47) and the relevant principles on JCE ('the proper construction contention');
 - b. contends that a difference between a prosecution case at a trial and a subsequent trial is relevant to the discretionary questions of whether there is a grant of permission¹⁸ or there ought to be a re-trial,¹⁹ but notes any

¹³ *R v Bekele* [2026] SASCA 9 at [153] (Bleby and David JJA); CAB at 62.

¹⁴ *R v Bekele* [2026] SASCA 9 at [160] (Bleby and David JJA); CAB at 64-65.

¹⁵ *R v Bekele* [2026] SASCA 9 at [156]-[158] (Bleby and David JJA); CAB at 63.

¹⁶ *R v Bekele* [2026] SASCA 9 at [163] (Bleby and David JJA); CAB at 65.

¹⁷ *R v Bekele* [2026] SASCA 9 at [164] (Bleby and David JJA); CAB at 65.

¹⁸ *Criminal Procedure Act 1921* (SA) s 157(1)(b)(ii) ('CPA').

¹⁹ CPA s 158(4)(b).

difference must be analysed to consider whether it is radically different in the circumstances of the case ('the no radically different case contention');²⁰ and

- c. contends that the necessary difference between the expression of the JCE by the prosecutor in opening the first trial of the appellants and the proposed expression of it at a retrial was considered by the CoA and does not compel a different result ('the CoA's consideration contention'). Throughout the prosecution of the appellants it has been alleged they are liable, by way of JCE liability, for rape on the basis of knowledge of, or reckless indifference to, the complainant's lack of capacity to consent. There is to be no alteration of the evidence at the subsequent trial.
22. In *Decision Restricted*, the NSW CCA expressed the relevant JCE as:²¹
 - a. "... that enterprise was to engage in sexual activity or intercourse with [the complainants], without their consent, knowing they were not consenting or realising they may not be consenting".
 23. Justices Bleby and David averred to that expression as:²²
 - a. "... as participants to an agreement [to engage in sexual activity with the complainant], 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. Having regard to each of those expressions, the respondent contends that the JCE on the evidence adduced at trial capable of supporting a verdict of guilty had it been left to the jury,²³ can be expressed as:
 - a. That the appellants agreed to engage in sexual activity or intercourse with the complainant without her consent, knowing, or being aware of the possibility, that she was intoxicated to the point of being incapable of freely and voluntarily agreeing to the activity or intercourse, and proceeding regardless of that possibility.

²⁰ *R v Taufahema* (2007) 228 CLR 232 at [59]-[68] (Gummow, Hayne, Heydon and Crennan JJ).

²¹ *Decision Restricted* at [192] (The Court).

²² *R v Bekele* [2026] SASCA 9 at [148] (Bleby and David JJA); CAB at 61.

²³ *Doney v The Queen* (1990) 171 CLR 207 at 214-215 (The Court); *Director of Public Prosecutions Reference No 1 of 2017* (2019) 267 CLR 350 at [10] (The Court).

Principles: Double jeopardy and prosecution appeals

25. Fairness and public policy inform the application of the principle of double jeopardy in the context of criminal proceedings that expose a member of the community to liability for a second time.²⁴ Prosecution rights of appeal have consequently been recognised as of an exceptional character.²⁵
26. The conferral of the statutory right of appeal on the prosecution against interlocutory and final judgments in criminal matters in s 157(1)(b) of the CPA represents an infringement into the rule against double jeopardy.²⁶ It follows that the discretionary aspects of the exercise of that right, whether at the stage of permission or in the dispositive aspect of s 158(4), will be informed by double jeopardy.²⁷
27. Reforms were introduced in South Australia in 2008²⁸ in response to several recommendations made by the Council of Australian Governments Model that were prompted by this Court's decision in *R v Carroll*.²⁹ The reforms expanded the prosecution's right to appeal against an acquittal in any case where there is a directed acquittal "on any ground".³⁰ Indeed, the right to appeal against an acquittal is broader in South Australian than in other jurisdictions.³¹
28. On a successful appeal, the CoA may quash the acquittal and order a new trial in accordance with the powers conferred by s 158(4) of the CPA. It is under this

²⁴ See *Everett v The Queen* (1994) 181 CLR 295 at 305 (Brennan, Deane, Dawson and Gaudron JJ).

²⁵ See *Lacey v Attorney-General (Qld)* (2011) 242 CLR 573 at [16]-[17] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

²⁶ *Western Australia v Rayney* (2013) 46 WAR 1 at [362]-[370] (The Court); cf *Rohde v Director of Public Prosecutions (Cth)* (1986) 161 CLR 119 at 128-129 (Deane J).

²⁷ See *Green v The Queen* (2011) 244 CLR 462 at [25]-[26], [36] (French CJ, Crennan and Kiefel JJ).

²⁸ *Criminal Law Consolidation (Double Jeopardy) Amendment Act 2008* (SA) s 7.

²⁹ *R v Carroll* (2002) 213 CLR 635.

³⁰ Prior to 2008, the prosecution's right to appeal against an acquittal was limited to an acquittal by a judge sitting alone, or without an acquittal but involving appeals against a decision on an issue antecedent to trial as defined (ss 352(1)(ab) and 352(1)(b) of the *Criminal Law Consolidation Act 1935* (SA)).

³¹ For a consideration of various jurisdictions' provisions enabling prosecution appeals against acquittals, see M McMahon, 'Retrials of persons acquitted of indictable offences in England and Australia: exceptions to the rule against double jeopardy' (2014) 38 Crim LJ 159. On the second reading of the Criminal Law Consolidation (Double Jeopardy) Amendment Bill 2008 (SA), Parliament referred to the related provisions in s 107 of the *Crimes (Appeal and Review) Act 2001* (NSW) and it was proposed to "mirror them here": South Australia, *Parliamentary Debates*, House of Assembly, 13 February 2008, page 2040 (MJ Atkinson, Attorney-General).

statutory framework that there is a partial abrogation (or modification) of the double jeopardy principle in the exercise of the Court's discretion to order a new trial.

29. The importance of double jeopardy was recognised by the CoA and has been emphasised in a number of decisions in South Australia, with a particular emphasis on the importance of it in appeals against acquittals, and where there is no error of law demonstrated from a trial by judge sitting alone.³²
30. The conduct of the prosecution in an initial proceeding from which a right of appeal is sought to be exercised by the prosecution will be relevant to the discretionary aspects of any appeal process.³³ Double jeopardy principles on a prosecution appeal may be subject to statutory intervention.³⁴ They will involve the weighing of a defendant's interests, the interests of any complainant, and of the community more broadly, in all of the circumstances before an appellate court.

Principles: Complicity, JCE liability and inchoate liability

31. The common law doctrine of JCE operates where there is an express or inferred arrangement, understanding, or agreement between persons to commit a crime.³⁵ "Crime" is to be understood as the combination of elements that constitute a particular criminal offence.³⁶ If the crime agreed upon by the perpetrators is committed while the agreement remains on foot, each person is liable for the crime. That liability is primary, not derivative (unlike the liability of accessories who aid, abet, counsel or procure a crime).³⁷

³² *R v Brougham* (2015) 122 SASR 546; *R v Fitzgerald* (2023) 307 A Crim R 101; *R v Donovan* [2025] SASCA 7.

³³ See *Malvaso v The Queen* (1989) 168 CLR 227 at 240 (Deane and McHugh JJ); *Everett v The Queen* (1994) 181 CLR 295 at 303 (Brennan, Deane, Dawson and Gaudron JJ); *Taufahema v The Queen* (2007) 228 CLR 232 at [37] (Gleeson CJ and Callinan J).

³⁴ See, for example, in South Australia, s 150 of the CPA and *R v Brand (a pseudonym)* [2025] SASCA 17 on the statutory mandate to ignore double jeopardy on prosecution appeals against sentence where a grant of permission to appeal (to which double jeopardy remains relevant) has been obtained. See also *Munda v Western Australia* (2013) 249 CLR 600 at [88] (Bell J).

³⁵ *Miller v The Queen* (2016) 259 CLR 380 at [4] (French CJ, Kiefel, Bell, Nettle and Gordon JJ).

³⁶ *R v Barlow* (1997) 188 CLR 1.

³⁷ See *Likiardopoulos v The Queen* (2012) 247 CLR 265 at [19] (Gummow, Hayne, Crennan, Kiefel and Bell JJ); *IL v The Queen* (2017) 262 CLR 268 at [40] (Bell and Nettle JJ), [106]-[107] (Gageler J); *O'Dea v Western Australia* (2022) 273 CLR 315 at [55] (Gordon, Edelman

32. In contrast to inchoate liability for incitement, attempt, or conspiracy, which is established on proof of the incitement, attempt, or agreement, the liability for a participant in a JCE is only established on proof that the crime was committed while the enterprise remained on foot.
33. Whilst the identification of the acts and omissions the parties agreed upon, and the states of mind of each person when they entered the enterprise, is essential, it is no part of JCE liability to require proof that a person has a subjective awareness that they will commit a particular criminal offence.³⁸
34. This Court has repeatedly recognised that a tacit or inferential agreement is sufficient in establishing JCE liability. This reflects the practical development of the common law principle.³⁹ Further, it is significant that the statements of principle refer, broadly, to arrangements or understandings “amounting to an agreement”.⁴⁰
35. There are distinctions between the forms of complicity (aiding, abetting, counselling and procuring, JCE, and extended JCE) and also between those and inchoate forms of liability including incitement, attempt, and conspiracy.⁴¹ These distinctions reflect the different practical and moral considerations that inform the principles underpinning the doctrines:
 - a. JCE being a more flexible⁴² form of primary liability that treats the understanding or agreement of a group as in effect authorising each as agents of the other in the crime understood, arranged, or agreed upon.⁴³ The moral

and Steward JJ); *Mitchell v The King* (2023) 276 CLR 299 at [55] (Gordon, Edelman and Steward JJ); *R v Rohan* (2024) 280 CLR 288 at [41] (Gageler CJ, Gordon and Edelman JJ).

³⁸ See *R v Rohan* (2024) 280 CLR 288 at [29]-[30] (Gageler CJ, Gordon and Edelman JJ).

³⁹ *McAuliffe v The Queen* (1995) 183 CLR 108 at 114 (Brennan CJ, Deane, Dawson, Toohey and Gummow JJ); *Gillard v The Queen* (2003) 219 CLR 1 at [109]-[111] (Hayne J); *Miller v The Queen* (2016) 259 CLR 380 at [4] (French CJ, Kiefel, Bell, Nettle and Gordon JJ); *Mitchell v The King* (2023) 276 CLR 299 at [54] (Gordon, Edelman and Steward JJ); *R v Rohan* (2024) 280 CLR 288 at [29] (Gageler CJ, Gordon and Edelman JJ).

⁴⁰ See *McAuliffe v The Queen* (1995) 183 CLR 108 at 114 (Brennan CJ, Deane, Dawson, Toohey and Gummow JJ); *Osland v The Queen* (1998) 197 CLR 316 at [24] (Gaudron and Gummow JJ), [73] (McHugh J); *Gillard v The Queen* (2003) 219 CLR 1 at [110] (Hayne J); *R v Tangye* (1997) 92 A Crim R 545 at 556 (Hunt CJ at CL, McInerney and Sully JJ agreeing).

⁴¹ See *Huynh v The Queen* (2013) 87 ALJR 434 at [37] (The Court); *R v Rohan* (2024) 280 CLR 288 at [40]-[41] (Gageler CJ, Gordon and Edelman JJ), [65] (Gleeson and Jagot JJ).

⁴² Compared, for example, to liability for a conspiracy: *Decision Restricted* at [188] (The Court).

⁴³ In the sense discussed in *Osland v The Queen* (1998) 197 CLR 316, especially at [85] (McHugh J). See also [217] (Callinan J). See *IL v The Queen* (2017) 262 CLR 268 at [29]ff (Kiefel CJ, Keane and Edelman JJ), [103] (Gageler J).

culpability of a JCE “lies in the mutual embarkation”⁴⁴ of a crime where that crime, or one contemplated by the agreement, is committed by at least one party to the agreement;

- b. Extended JCE being a form of liability⁴⁵ that criminalises continued participation in a JCE with the knowledge of the possibility of a further crime being committed by other participants in the enterprise.⁴⁶ Liability for the continued participation being consistent with the principle that those who assist and encourage those in the commission of a crime are culpable;⁴⁷
 - c. Aiding, abetting, counselling or procuring affixing derivative liability on persons who, with knowledge of the essential aspects of another person’s crime,⁴⁸ provide assistance or encouragement to that other person. The culpability for the derivative liability lies in those assisting the commission of the offence;⁴⁹ and
 - d. The anticipatory nature of inchoate liability,⁵⁰ and consequential standards of proof,⁵¹ in the offences of attempt, incitement, and conspiracy, none of which require proof of a completed crime for liability to attach.⁵²
36. Liability pursuant to a JCE creates an “equivalence of criminal culpability” between the members of the enterprise,⁵³ consistent with the view of Professor Simester that it is the “...element of unlawful concert that adds the crucial normative ingredient to distinguish joint enterprise from ordinary aiding and

⁴⁴ *Mitchell v The King* (2023) 276 CLR 299 at [13] (Kiefel CJ).

⁴⁵ Whether that is primary or derivative is not relevant to this matter. See *IL v The Queen* (2017) 262 CLR 268 at [107] (Gageler J); *Mitchell v The King* (2023) 276 CLR 299 at [61] (Gordon, Edelman and Steward JJ).

⁴⁶ *Miller v The Queen* (2016) 259 CLR 380 at [36]-[45] (French CJ, Kiefel, Bell, Nettle and Gordon JJ).

⁴⁷ *Mitchell v The King* (2023) 276 CLR 299 at [15] (Kiefel CJ).

⁴⁸ See *Giorgianni v The Queen* (1985) 156 CLR 473 at 493-494 (Mason J) on the requirement for intention formed on knowledge of the essential facts being the relevant “link in purpose” between the accessory and the principal offender that is not required where a joint enterprise is established.

⁴⁹ See, for example, *Mitchell v The King* (2023) 276 CLR 299 at [13] (Kiefel CJ).

⁵⁰ See Law Commission of England and Wales, *Inchoate Liability for Assisting and Encouraging Crime* (Law Com No 300, July 2006) at 4.5, p 40.

⁵¹ See Andrew Ashworth, *Principles of Criminal Law* (2003, 4th ed) at 472.

⁵² See *R v LK* (2010) 241 CLR 177 at [67] (French CJ), citing *Giorgianni v The Queen* (1985) 156 CLR 473 at 506 (Wilson, Deane and Dawson JJ).

⁵³ *R v Rohan* (2024) 280 CLR 288 at [73] (Gleeson and Jagot JJ).

abetting”.⁵⁴ The effect of attaching liability from the agreement, arrangement, or understanding recognises that those who act pursuant to it act as the instruments of the other participants within its scope.⁵⁵ This is distinct from liability for the agreement itself, or an individual or unilateral contribution to an offence in the absence of agreement.

37. None of the above reveals any rule that JCE liability is only capable of operating harmoniously with offences that have intentional fault elements.⁵⁶ Rather, where an offence requires a particular state of mind as an element of the offence, then (subject to any incompatibility, addressed below), that state of mind is a requisite part of the enterprise.⁵⁷ As McHugh J held in *Osland v The Queen* at [93], there is nothing contrary to the objects of the criminal law in holding a person acting in concert with another as a principal in the first degree where the relevant *mens rea* exists.⁵⁸ This is also coherent with this Court’s holding in *Rohan* that for a sexual offence against a child with no fault element as to age or consent, the principles of JCE liability can apply.⁵⁹
38. The relevant question where a matter involves the potential interaction between the principles of JCE and a statutory offence will be answered in considering the proper construction of the relevant provisions.⁶⁰ In this matter, this requires consideration of ss 46-48 of the CLCA.

The proper construction contention

39. The history of recklessness in the context of the offence of rape was discussed by this Court in *Banditt v The Queen*.⁶¹ That decision reveals that forms of advertent

⁵⁴ Simester, ‘The Mental Element in Complicity’ (2006) 122 *Law Quarterly Review* 578 at 598, cited in *Clayton v The Queen* (2006) 81 ALJR 439 at [20] and *Miller v The Queen* (2016) 259 CLR 380 at [34]. See also *R v Rohan* (2024) 280 CLR 288 at [64] (Gleeson and Jagot JJ).

⁵⁵ *Miller v The Queen* (2016) 259 CLR 380 at [138] (Keane J).

⁵⁶ Cf the submissions of the appellant in A22/2026. See also P Gillies, *The Law of Criminal Complicity* (Lawbook company, 1960) where it was observed that a person may be made liable by way of common purpose for an offence with “limited *mens rea*” where there is proof the offender had the same *mens rea* as the co-offender: at 94.

⁵⁷ See *R v Rohan* (2024) 280 CLR 288 at [77] (Gleeson and Jagot JJ).

⁵⁸ *Osland v The Queen* (1998) 197 CLR 316 at [93] (McHugh J).

⁵⁹ *R v Rohan* (2024) 280 CLR 288, accepting it was an application of those principles to the relevant Victorian statutory scheme.

⁶⁰ *Mitchell v The King* (2023) 276 CLR 299 at [35] (Gageler, Gleeson and Jagot JJ).

⁶¹ *Banditt v The Queen* (2005) 224 CLR 262, including in particular at [18]-[35] (Gummow, Hayne and Heydon JJ).

and inadvertent recklessness have been considered at common law⁶² and in subsequent statutes.⁶³ From at least the 1976 decision of the House of Lords in *Morgan*, it was recognised that a sufficient fault element for the offence of rape included where a defendant did not care “...whether or not” there was consent.⁶⁴

40. Against the above background, ss 46 and 47 of the CLCA were inserted into the CLCA in 2008.⁶⁵ It may be accepted that unlike the offence provision that applied in *Decision Restricted*, s 48(1) of the CLCA includes reckless indifference as an element of the offence of rape. To that extent, there are textual differences between the provisions in *Decision Restricted* and those of the CLCA relevant to this appeal.
41. Notwithstanding that textual difference, consistent with the approach of Justices Bleby and David in the CoA, and with the appellants Isaak and Haile, the respondent contends that textual difference is of no material significance. To that extent, for the reasons set out below and consistent with the NSW CCA, it is accepted that the “definition” provided for in s 47(c) is not compatible with JCE liability. Liability on the basis of 47(b) is not relied on in this case. Liability on the basis of s 47(a) is the advertent recklessness with which this appeal is concerned.
42. Section 48(1) (read with s 47) extends the common law fault element for rape beyond knowledge or awareness of a possibility of lack of consent, to include both advertent (s 47(a)-(b)) and inadvertent (s 47(c)) recklessness.⁶⁶ In the Second Reading Speech on the 2008 Bill,⁶⁷ the Attorney General explained that it sought to “[expand] the meaning of reckless indifference to reflect contemporary standards of acceptable sexual behaviour”.
43. Section 46 provides for an extended definition of consent to sexual activity, or lack thereof. In particular, s 46(3)(d) provides that a person is taken not to freely

⁶² *R v Morgan* [1976] AC 182.

⁶³ See, for example, *Report of the Advisory Group on the Law of Rape* (Cmnd 6532, December 1975); *Criminal Law Consolidation Act Amendment Act 1976* (SA); *Crimes (Amendment) Act 1989* (NSW).

⁶⁴ See the extracts from the relevant speeches in *Banditt v The Queen* (2005) 224 CLR 262 at [27] (Gummow, Hayne and Heydon JJ).

⁶⁵ *Criminal Law Consolidation (Rape and Sexual Offences) Amendment Act 2008* (SA) s 5.

⁶⁶ See *Decision Restricted* at [146] (The Court).

⁶⁷ South Australia, *Parliamentary Debates*, House of Assembly, 25 October 2007, page 1468-1475 (MJ Atkinson, Attorney-General).

and voluntarily agree to sexual activity if the sexual activity occurs while the person is intoxicated (whether by alcohol or any other substance or combination of substances) to the point of being incapable of freely and voluntarily agreeing to the activity.

44. It is in the nature of JCE liability that the content of the enterprise must be something capable of arrangement, understanding or agreement (and proof). To that extent, statutory provisions that extend physical, circumstance, and fault elements of particular crimes may or may not be able to have JCE liability coherently attach to them. This will be in each case a question of construction – and in some cases, offences that have no particular fault element may be amenable to JCE liability without controversy.⁶⁸
45. While the above matters of context reveal the development of the offence of rape in South Australia, the respondent contends that, consistent with the decision in *Decision Restricted*, the only aspect of the definitions in ss 46 and 47 which is not compatible with JCE liability (having regard to the submissions about the nature of that liability above) is s 47(c). As a matter of logic, and consistent with *Decision Restricted*,⁶⁹ recklessness as defined in s 47(c) of the CLCA, is not something capable of understanding, arrangement or agreement as it would be contingent on the participants “giving thought” to whether or not the complainant was consenting.⁷⁰
46. Contrary to the effect of Bekele’s submission,⁷¹ there is no general incoherence with JCE liability for offences with recklessness as a fault element. For example:
 - a. Persons may form a joint enterprise to engage in an act or acts towards another person, knowing when they agreed that it is probable that the other person will die or suffer grievous bodily harm.⁷²
 - b. Persons may form a joint enterprise to trespass in a place of residence, knowing or being reckless as to whether anyone is in the place when they form that enterprise (s 170(2)(b) of the CLCA).

⁶⁸ See *R v Rohan* (2024) 280 CLR 288.

⁶⁹ *Decision Restricted* at [176] (The Court).

⁷⁰ *Decision Restricted* at [176] (The Court).

⁷¹ See, for example, [11(b)], [11(j)], [13], [16], [33(d)] and [61].

⁷² See *Osland v The Queen* (1998) 197 CLR 316 at [15] (Gaudron and Gummow JJ).

- c. Persons may form a joint enterprise to physically attack another person, being aware of a substantial risk that that attack could result in harm, and being willing to proceed with the attack despite the risk and without adequate justification (s 21 of the CLCA).
47. Further, the lack of any principled incoherence in applying the principles of JCE to offences with recklessness as a fault element is consistent with the fact that they are capable of application to offences without a fault element of either intention or recklessness. An example of this would be a joint enterprise between two persons to have sexual intercourse with a particular child (where consent, and any state of mind as to consent, are not elements of the underlying crime).⁷³
48. Having regard to the text, context and purpose of s 48(1) (read together with ss 46 and 47) of the CLCA, and principles of JCE liability, persons may form a JCE to commit sexual offences with the fault elements in s 47(a) and (b).⁷⁴
49. For the reasons outlined above the respondent respectfully contends that the analysis of the NSW CCA and of their Honours Bleby and David JJA accurately reflects the legal position. The doctrine of JCE is capable of coherent application to ss 46, 47(a)⁷⁵ and 48(1) of the CLCA on the basis of proof of an understanding or arrangement, amounting to an agreement, to have sexual intercourse with a person without that person's consent, where the participants in the agreement are at least recklessly indifferent to the complainant's lack of consent to sexual intercourse. That is consistent with the need to identify what is agreed upon and what the states of mind of the participants in the JCE is when the understanding, arrangement or agreement crystallises.⁷⁶
50. The requirement of knowledge of the essential circumstances for secondary liability (and that recklessness, however defined, is insufficient) only applies to persons who aid, abet, counsel or procure another person's crime. This fault element does not apply to persons who, by understanding, arrangement or

⁷³ *R v Rohan* (2024) 280 CLR 288.

⁷⁴ In respect of s 47(b) see *R v Bekele* [2026] SASCA 9 at [30] (Kourakis CJ); CAB at 38.

⁷⁵ The doctrine of joint criminal enterprise is capable of coherent application to reckless indifference as defined in s 47(b) of the CLCA, that is however not the prosecution case in this matter.

⁷⁶ *Gillard v The Queen* (2003) 219 CLR 1 at [124] (Hayne J); *Mitchell v The King* (2023) 276 CLR 299 at [54] (Gordon, Edelman and Steward JJ); *R v Rohan* (2024) 280 CLR 288 at [30] (Gageler CJ, Gordon and Edelman JJ).

agreement, are primarily liable for the crime the subject of that understanding, arrangement or agreement.⁷⁷ This also informs the difference between conspiracy (an inchoate crime that renders those who conspire liable at the point of agreement) and JCE (a common law principle that exposes participants in an understanding, arrangement or agreement to criminal liability for the crime the subject of the understanding, arrangement or agreement when that crime is in fact committed). These differences underpin the analysis of the NSW CCA, and Bleby and David JJA in the CoA, which the respondent contends should be accepted.

51. Contrary to [62] of Bekele's submission, JCE liability on the basis of s 47(a)⁷⁸ of the CLCA does not seek to attach criminal liability on a contingent circumstance in any impermissible or unprincipled way. The appellants' liability will depend on proof of the understanding or agreement and proof of the offences committed in furtherance of that agreement. It is this relationship that maintains the moral and principled link between the agreement and the crime committed in furtherance of it and is distinct from the way in which the principles of secondary liability or inchoate offences manifest criminal culpability for an offence.

The no radically different case contention

52. The prosecution case at trial was that each member of the JCE had observed the complainant's level of intoxication for some 30 minutes prior to engaging in sexual activity with her, and either knew or was recklessly indifferent as to her lack of consent (relevantly her incapacity to consent) prior to forming a mutual understanding to engage in sexual acts with her without her consent.
53. As Bleby and David JJA observed, the description of the scope of JCE encompassing inadvertent recklessness in the prosecutor's opening was too broad.⁷⁹
54. The necessary shift in the respondent's formulation of the elements of an offence of rape on the basis of a JCE in this case, as articulated at [24], does not amount to a radically different case in the sense referred to in *R v Taufahema*.

⁷⁷ See *R v Rohan* (2024) 280 CLR 288 at [41] (Gageler CJ, Gordon and Edelman JJ), [63]-[66] (Gleeson and Jagot JJ).

⁷⁸ Or s 47(b) of the CLCA, noting that is not however the prosecution case.

⁷⁹ *R v Bekele* [2026] SASCA 9 at [162] (Bleby and David JJA); CAB at 65.

55. At the new trial, the prosecution will not be advancing any factual allegation inconsistent with the case advanced at the first trial. The evidence remains unchanged, particularly noting it is principally comprised of video footage. The foundational crimes for the JCE will also remain unchanged - offences of rape and indecent assault. There will be no substantial amendment to the Information. The acts that it is alleged the parties agreed on will remain the same. There will be no change to the contention as to the timing of when the agreements formed.⁸⁰
56. There is also no radically different particularisation of the JCE. In that sense, the shift is in the description of the states of mind of the appellants as it relates to the particular form of reckless indifference pursuant to ss 46 and 47 of the CLCA – away from a description that was closer to the expression recognised in *Morgan* (“whether or not she was consenting”) and cleaving to the text of s 47(a) (“...being aware of the possibility and willing to proceed regardless”). The shift does not involve amending the nature of liability (to include secondary liability by way of aiding and abetting) or proposing to call any different evidence. The necessary confinement does not reflect an insidious or improper attempt to contend for a conviction of the appellants for offences that they were not in jeopardy of at the first trial, or reveal a tactical or deliberate attempt to have improperly sought convictions of the appellants.

The CoA’s consideration contention

57. The CoA’s determination that there was a case to answer for the relevant offences on the bases of both knowledge and reckless indifference was correct. The focus of the common ground of appeal is instead on the significance of the double jeopardy considerations to the exercise of the discretionary aspects of ss 157(1)(b) and 158(4) of the CPA.
58. The respondent contends the analysis of the relevant evidence by Kourakis CJ and Bleby and David JJA demonstrates there was a case to answer that ought to have been left to the jury.
59. Further, the difference between the prosecution case as articulated by the prosecutor, and as now informed by this Court’s determination of the second

⁸⁰ As noted above, the prosecution case was that the agreement between Issak and Bekele was formed by the time they entered the backseat of the taxi with the complainant, and that Haile had joined the agreement no later than when the sexual acts occurred at Bekele’s residence.

aspect on which special leave was granted, should not compel any different result than the one reached in the balancing exercise of the discretion by the CoA.

60. There was substantial evidence at trial capable of being accepted as sufficient to infer an understanding or arrangement amounting to an agreement to engage in sexual intercourse with the complainant, knowing that she was not capable of consenting to each act of sexual intercourse. That reveals that, whatever this Court's determination of the second aspect of special leave, there was a case to answer on the charge of rape on the basis of JCE. However, the respondent contends that there was also a case to answer on the legally permissible pathway to liability of JCE on the basis of reckless indifference.
61. The principled intervention of the CoA was required to correct an error of law that had a clear capacity to undermine public confidence in the administration of justice: the removal of the determination of liability for serious sexual crime from the constitutional tribunal of fact. As outlined by their Honours Bleby and David JJA, although the trial Judge did not err in her summary of the applicable principles, when regard is had to the whole of the evidence, "it is difficult to see that the ruling of no case to answer constituted anything other than a misapplication of principle".⁸¹
62. There is significant public interest in serious criminal allegations being tried by the constitutional trier of fact. To allow the ruling to stand in circumstances where there was a case to answer on both knowledge and reckless indifference would be contrary to the powerful social imperative that those who are charged with serious criminal offences be brought to trial,⁸² and that where a prosecution case has the relevant evidentiary capacity, it must be left to a jury.⁸³
63. The erroneous decision of the trial Judge is of a specific character that enlivens a mechanism to put someone in jeopardy again.⁸⁴ The necessary shift relating to

⁸¹ *R v Bekele* [2026] SASCA 9 at [158] (Bleby and David JJA); CAB at 63.

⁸² *Strickland (a pseudonym) v Director of Public Prosecutions (Cth)* (2018) 266 CLR 325 at [106] (Kiefel CJ, Bell and Nettle JJ).

⁸³ *Doney v The Queen* (1990) 171 CLR 207.

⁸⁴ CPA s 158(4). See in the context of dismissal of a charge *Broome v Chenoweth* (1946) 73 CLR 583 at 599-600 (Dixon J), cited with approval in *Island Maritime Ltd v Filipowski* (2006) 226 CLR 328 at [12] and [20] (Gleeson CJ, Heydon and Crennan JJ), [75] (Kirby J), [94] (Callinan J), noting the significance of an acquittal, however entered, in the absence of statutory provisions enabling an appeal: *R v Snow* (1915) 20 CLR 315; *NH v Director of*

reckless indifference, and the related references to that by the prosecutor, are relevant to double jeopardy considerations but for the reasons expressed by the CoA are not a radical change in the prosecution case and do not compel an order that would have the effect of the evidence on which there is a case to answer being precluded from being tested at trial.

64. Issak's contention at [66] that the CoA did not engage with the difference in the prosecution case when weighing the double jeopardy considerations is inconsistent with the terms of the judgment. The CoA, in considering the grant of permission, outlined both the submissions made by the appellant and the nature of the difference⁸⁵ and, having had regard to those matters, ordered the retrial.⁸⁶
65. Issak further contends at [68.3] that a retrial would be necessarily unfair on the basis of inevitable speculation by the jury. The respondent observes that, as noted in *Gilbert v The Queen*,⁸⁷ in our system of criminal justice it is assumed juries understand and obey the directions given to them. It is to be accepted that on a retrial directions may be required and a jury would be directed that they can only determine the case in accordance with those directions, on the evidence adduced at trial.

Disposition of the appeal

66. The respondent contends that the above reveals that there is no error disclosed by the CoA's approach to the substantive question raised by the ground of appeal – whether permission should have been granted.
67. The respondent notes that this Court has in certain circumstances moved to exercise a relevant power impacted by error it finds to have occurred,⁸⁸ and in others remitted the matter to the Court from which the appeal arose for

Public Prosecutions (SA) (2016) 260 CLR 546 at [57], [61] and [74] (French CJ, Kiefel and Bell JJ).

⁸⁵ *R v Bekele* [2026] SASCA 9 at [161]-[162] (Bleby and David JJA); CAB at 65.

⁸⁶ CPA s 158(4). See also *R v Bekele* [2026] SASCA 9 at [163]-[164] (Bleby and David JJA); CAB at 65.

⁸⁷ *Gilbert v The Queen* (2000) 201 CLR 414 at [13] (Gleeson CJ and Gummow J). See also, *Moore (a pseudonym) v The King* (2024) 282 CLR 460 at [42] (Gageler CJ, Edelman, Steward, Gleeson and Beech-Jones JJ).

⁸⁸ *Green v The Queen* (2011) 244 CLR 462 at [81] (French CJ, Crennan and Kiefel JJ); *Pell v The Queen* (2020) 268 CLR 123 at [129] (Kiefel CJ, Bell, Gageler, Keane, Nettle, Gordon and Edelman JJ); *R v HCZ* [2026] HCA 24 at [39] (Gageler CJ, Edelman, Gleeson, Jagot and Beech-Jones JJ).

determination according to law⁸⁹ (including Crown appeals involving double jeopardy considerations).⁹⁰ In the circumstances of this matter, providing the appellants do not dispute the CoA's analysis of the circumstantial evidence,⁹¹ the respondent accepts this Court could, if it found the CoA erred, move to re-exercise the discretion.⁹²

68. In the event this Court exercises the discretion afresh, the respondent contends that in the separate and independent exercise of the discretion,⁹³ it remains appropriate that the appellants be remitted for retrial.

Part VI: TIME ESTIMATE

69. The respondent estimates that 60 minutes will be required for the presentation of its oral argument.

27 August 2026



M. E. Chalmers SC
Office of the Director of Public
Prosecutions (SA)
(08) 7322 7055
mary.chalmers@sa.gov.au



T. J. Costi
Office of the Director of Public
Prosecutions (SA)
(08) 7322 7055
tali.costi@sa.gov.au



W. M. Scobie
Crown Solicitor's Office (SA)
(08) 7322 7055
william.scobie@sa.gov.au

⁸⁹ *Cornwell v The Queen* (2007) 231 CLR 260 at [102] (Gleeson CJ, Gummow, Heydon and Crennan JJ); *Miller v The Queen* (2016) 259 CLR 380 at [82]-[83] (French CJ, Kiefel, Bell, Nettle and Gordon JJ).

⁹⁰ *Malvaso v The Queen* (1989) 168 CLR 227 at 233 (Mason CJ, Brennan and Gaudron JJ), 241 (Deane and McHugh JJ); *Markarian v The Queen* (2005) 228 CLR 357 at [46]-[47] (McHugh J).

⁹¹ It appears the appellants Bekele and Haile do not take issue with the CoA's description or treatment of the prosecution case. Isaak's submission at [68] may impugn the factual findings of the CoA and, if so, this Court may not be in an appropriate position to evaluate given it does not have the whole of the material that the CoA had before it when exercising the discretion.

⁹² Consistent with *Malvaso v The Queen* (1989) 168 CLR 227 at 233 (Mason CJ, Brennan and Gaudron JJ) and 241 (Deane and McHugh JJ).

⁹³ In the context of the sentencing discretion in *Kentwell v The Queen* (2014) 252 CLR 601.

ANNEXURE TO RESPONDENT'S SUBMISSIONS

No	Description	Version	Provision(s)	Reason for providing this version	Applicable date or dates (to what event(s), if any, does this version apply)
1	<i>Crimes (Amendment) Act 1989</i> (NSW)	As enacted.	s 3	For illustrative purposes only.	Assented to on 21 December 1989.
2	<i>Crimes (Appeal and Review) Act 2001</i> (NSW)	Current version.	s 107	For illustrative purposes only.	NA
3	<i>Criminal Law Consolidation Act 1935</i> (SA)	Historical version (8 March 2023 to 21 June 2023).	ss 46, 47, 48, 56	Act in force on the date of the offence.	18 June 2023 (date of the offences).
4	<i>Criminal Law Consolidation Act 1935</i> (SA)	Historical version (3 August 2008 to 3 September 2008).	ss 352(1)(ab), 352(1)(b)	Act as amended by the <i>Criminal Law Consolidation (Double Jeopardy) Amendment Act 2008</i> (SA).	NA
5	<i>Criminal Law Consolidation Act Amendment Act 1976</i> (SA)	As enacted.	s 4	For illustrative purposes only.	Assented to on 9 December 1976.
6	<i>Criminal Law Consolidation (Double Jeopardy) Amendment Act 2008</i> (SA)	As enacted.	s 7	For illustrative purposes only.	Assented to on 10 July 2008.
7	<i>Criminal Law Consolidation (Rape and Sexual Offences) Amendment</i>	As enacted.	s 5	For illustrative purposes only.	Assented to on 17 April 2008.

	<i>Act 2008</i> (SA)				
8	<i>Criminal Procedure Act 1921</i> (SA)	Current version.	ss 150, 157, 158	Act in force on the date of judgment in Court of Appeal.	13 February 2026 (date of judgment in Court of Appeal).
