



HIGH COURT OF AUSTRALIA

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Form 27A—Appellant’s submissions

Note: See rule 44.02.2.

5 IN THE HIGH COURT OF AUSTRALIA
ADELAIDE REGISTRY

10 BETWEEN: **SADAM HUSSEIN ISSAK**
Appellant

and

15 **THE KING**
First Respondent

BEDHANE TARIKA BEKELE
Second Respondent

20 **BESUFIKAD HAILE**
Third Respondent

25 **APPELLANT’S SUBMISSIONS**

PART I – CERTIFICATION

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

30 **PART II – SUMMARY OF ISSUES**

2. Under s 157(1)(b)(ii) of the *Criminal Procedure Act 1921* (SA) (**CP Act**), the Director of Public Prosecutions (**Director**) may, with the permission of the Court of Appeal of the Supreme Court of South Australia, appeal against a jury acquittal

at the direction of the trial judge. This appeal concerns the correct approach to such a grant of permission. Specifically, special leave was granted on the following question:

- 2.1. 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. The Court of Appeal answered that question by finding that the change required of the prosecution case presented at trial rose no higher than a “*necessary confinement*” that the trial judge would have been obliged to explain to the jury in any event. Accordingly, the Court of Appeal did not accept that the requisite change of the Director’s case on retrial weighed against the grant of permission to appeal.
4. The appellant submits that the Court of Appeal erred in this respect: for a person to be retried on a different prosecution case arising from the same set of facts is, standing alone, a factor that substantially weighs against a grant of permission to appeal. Further, it aggravates the oppression occasioned by a grant of permission to appeal so as to give increased weight to considerations of double jeopardy. The Court of Appeal’s exercise of its discretion to grant permission to appeal miscarried because it failed to have regard to a relevant consideration.
5. If error is established, this is an appropriate case for this Court to re-exercise the discretion. On the re-exercise of that discretion, this Court should substitute a decision that permission to appeal is refused.

PART III – NOTICE OF CONSTITUTIONAL MATTER

6. No constitutional matter arises in this appeal.

PART IV – AUTHORISED REPORT CITATION

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

PART V – FACTS

A. Background Facts and Trial

8. The appellant was tried for seven counts of sexual offending against the *Criminal Law Consolidation Act 1935 (SA) (CLCA)*, namely five counts of rape contrary to s 48 and two counts of indecent assault contrary to s 56. On counts 1-3, he was charged jointly with Mr Bekele. On counts 4-7, he was charged jointly with both Bekele and Mr Haile: **Information CAB 6-10.**
9. On all seven counts, either Bekele or Haile was said to be the primary offender. The appellant's liability was said to arise as a participant in a joint criminal enterprise. Opening the prosecution case at trial, the prosecutor articulated the content of the joint criminal enterprise as being an agreement to engage in sexual acts with the complainant "*irrespective of whether she was consenting or not*": **ABFM23; Reasons [41]-[42] CAB 41-42.**
10. The three accused met the complainant on a night out in the early hours of Sunday 18 June 2023. They travelled with her in a taxi to Bekele's house. Bekele and the appellant engaged in sexual activity with the complainant in the back seat of the taxi, an obscured view of which was recorded by an internal camera: **Reasons [60]-[81] CAB 46-48.** This conduct was the subject of counts 1-3.
11. At Bekele's house, the conduct the subject of counts 4-7 occurred. Haile, who had been in the front seat of the taxi, was said to have joined the joint criminal enterprise at the house. The conduct the subject of those counts was recorded by mobile phone cameras: **Reasons [82]-[94] CAB 48-49.**
12. The complainant was intoxicated and had no recollection of the alleged offending. On the prosecution case, she was intoxicated to the point of being incapable of freely and voluntarily agreeing to the sexual activity and accordingly was deemed by s 46(3)(d) not to have consented to the sexual activity: **Reasons [41] CAB 41.** Consent was a live issue at trial.
13. At the conclusion of the prosecution case, the appellant sought directed acquittals on all counts. He argued the evidence was incapable of establishing the existence of the alleged joint criminal enterprise (**JCE No Case Submission**). Similar submissions, and others that were specific to them, were made by Bekele and Haile. Bekele and Haile also advanced a submission that the agreement alleged by the

prosecution could not found liability pursuant to principles of joint criminal enterprise (**Insufficient Agreement Submission**): **ABFM 31-101**.

14. The trial judge acceded to the JCE No Case Submission and directed the jury to acquit each accused to the extent that the prosecution case relied upon joint criminal enterprise. For the appellant, the outcome was an acquittal on each of the charges he faced. He was released. For reasons that are presently immaterial, the jury was also directed to acquit Bekele of count 2: **Trial Judge's reasons: CAB11-16; Entry of verdicts: CAB17-19**.

15. The trial judge rejected the Insufficient Agreement Submission. That was of no practical effect at trial because the JCE No Case Submission was accepted.

16. The trial proceeded as against Bekele and Haile to the extent they were alleged to be the primary offenders on the various counts, resulting in the following verdicts:

16.1. Bekele was acquitted of count 1;

16.2. no verdict was taken on count 4 because of the risk of duplicity with count 5;

16.3. Bekele was convicted of counts 3 and 5 and Haile was convicted of count 6: **Reasons [38] CAB 41**.

B. Court of Appeal

17. The Director sought permission to appeal against:

17.1. the acquittals of the appellant on counts 2, 3, 5 and 6;

17.2. the acquittals of Bekele on counts 2, 6 and 7; and

17.3. the acquittals of Haile on counts 5 and 7: **CAB 24-26**.

18. Bekele and Haile applied for permission to appeal against their respective convictions. They were granted permission to appeal but their appeals were dismissed: **Reasons [233] CAB 80-81**. It is not necessary to further consider the appeals against conviction.

19. After the hearing of the Director's application for permission to appeal but prior to the pronouncement of judgment, the New South Wales Court of Criminal Appeal handed down its decision in *Decision Restricted*.¹ The relevant effect of that decision was that, consistent with the Insufficient Agreement Submission advanced

¹ [2025] NSWCCA 210.

by Bekele and Haile at trial, an agreement to have sex with a person ‘with or without’ consent was not a criminal agreement (at [136]; [190]-[191]).

20. The parties were granted leave to file further written submissions on the impact of *Decision Restricted* on the Director’s application for permission to appeal.

5 21. The appellant submitted that the agreement alleged by the prosecutor at trial was incapable of sustaining a joint criminal enterprise. To the contrary, if the appellant subscribed to the agreement that was alleged at trial, he would be entitled to his acquittals; he would not have been a party to a criminal enterprise.

22. It followed that if the Court of Appeal was to remit the matter for retrial, the
10 prosecution would necessarily be obliged to present a materially different case at the retrial. The case as presented at trial could not lawfully have resulted in any conviction against the appellant. The appellant submitted that the necessary change in the prosecution case was a weighty factor that gainsaid a grant of permission to appeal **ABFM 254**.

15 23. The Director did not dispute the correctness of *Decision Reserved* but maintained the prosecution case was capable of sustaining a lawful conviction **ABFM 257**.

24. Despite the fact that Bleby and David JJA found no reason to doubt the analysis in *Decision Restricted* **Reasons [145] CAB 60**, their Honours did not accept that the requisite change in the prosecution case was a factor that tended against the grant
20 of permission to appeal **Reasons [162]-[163] CAB 65**:

The error of the prosecution in opening was to describe the scope of the alleged agreement too widely. Ultimately, as observed earlier, it would have been the duty of the judge to correct the prosecution case in her directions to the jury. The fact that on a retrial the prosecution would be confined to a narrower case than it alleged at the first trial does not mean that it would be changing the facts on which it relied. Rather, the prosecution would be confined to a case to which, as a matter of law, it was always confined.

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It is difficult to see that the subsequent recognition of this necessary confinement of the prosecution case somehow increases the force of the double jeopardy considerations that oppose a grant of leave. The double jeopardy considerations are, in any event, clear and real.

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25. The Court of Appeal granted the Director permission to appeal each of the acquittals in respect of which permission was sought, allowed the appeals, quashed each of the directed acquittals in respect of which permission was sought,² and remitted those counts for retrial.

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PART VI – ARGUMENT

A. The statutory scheme: sections 157-158 of the *CP Act*

26. The rights of appeal in criminal cases heard by the superior courts in South Australia are contained in s 157 of the *CP Act*. The Director's right of appeal against an acquittal is found in s 157(1)(b) and is conditional upon:

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- 26.1. a grant of permission by the Court of Appeal; and
- 26.2. the trial being by judge alone **or** the jury's acquittal being at the direction of the trial judge.

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27. Section 157(1) does not, in its terms, prescribe the considerations that inform the exercise of the discretion to grant permission to appeal.

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

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- 28.1. it may dismiss the appeal;
- 28.2. it may allow the appeal, quash the acquittal and order a new trial;
- 28.3. it may make consequential or ancillary orders.

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29. Where permission is granted, establishing error will obviously be a necessary precondition to an appeal being allowed. It is less clear on the plain words of the provision whether there remains a residual discretion to dismiss the appeal where error is established.

30. The plurality of the Court of Appeal accepted the existence of a residual discretion **Reasons [164] CAB 65**. Their Honours were correct to do so. 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). The appellant submits that the correct construction is that the Court of Appeal retains a residual discretion

² The Court of Appeal also initially quashed the acquittal of the appellant on count 7, though this was not the subject of an application for permission to appeal. The Court of Appeal subsequently explained that this was a slip, and amended its orders such that the appellant's acquittal on count 7 was restored: *R v Bekele & Ors; Haile v The King; Bekele v The King (No 2)* [2026] SASCA 31 **CAB 85-89**.

to dismiss a prosecution appeal in circumstances where permission has been granted and error has been established.

31. The current practice of the Court of Appeal is to (as it did in this case) list an application for permission to appeal against acquittal to be heard as on appeal proper. 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.³ The residual discretion is therefore subsumed in this case by the question of permission to appeal.

10 **B. Double jeopardy: a relevant consideration on permission to appeal**

32. 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.

33. In 2000, the Parliament provided a limited right of appeal to the Director in relation to 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).

34. As part of a broader scheme of procedural reform, in March 2018 the appeals provisions of the *CLCA* were transferred to the *CP Act*. Section 157(1)(b) of the *CP Act* is now materially identical to the previous s 352(1)(ab) of the *CLCA*.

35. In contrast, the common law's prohibition against double jeopardy is deeply entrenched. In essence, it provides that a person must not be tried twice for the same offence.⁴

36. The common law's aversion to double jeopardy is founded in notions of fairness and public policy.⁵ Legislation that infringes upon the prohibition on double

³ See e.g. *R v Brougham* (2015) 122 SASR 546 at [47]-[78]; *R v Donovan* (2025) 108 MVR 392 at [18]-[25].

⁴ See *Reg v Police Complaints Board; Ex parte Madden* [1983] 2 All ER 353 at 367 (McNeill J) and *Kepner v United States* (1904) 195 US 100 at 132 (Day J, writing for the Court), as referred to in *Davern v Messel* (1984) 155 CLR 21 at 30 (Gibbs CJ).

⁵ *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).

jeopardy should be construed narrowly, and requires expression in the clearest of language.⁶

37. The existence of the power to apply for permission to appeal by s 157(1)(b) of the *CP Act*, taken with the power conferred upon the Court of Appeal by s 158(4)(b) to quash an acquittal and order a new trial in respect of the charge in relation to which an acquittal had been entered, necessarily erodes the absolute nature of the prohibition against double jeopardy. The right of appeal is, however, conditional upon a grant of permission. In light of the principles set out above, the oppression which is worked by twice vexing a defendant is a relevant consideration in determining whether the Director should be granted permission to appeal pursuant to s 157(1)(b) of the *CP Act*.

38. In these circumstances, the Court of Appeal has identified that the discretion conferred by s 157(1) must be exercised having regard to the common law's general and deeply rooted aversion to double jeopardy.⁷ The correctness of that approach was not controversial below, is not understood to be controversial on this appeal and is consistent with previous observations of this Court in respect prosecution appeals against sentence.⁸

C. Change in the prosecution case: a relevant consideration on permission to appeal

i. What is “the prosecution case”? The significance of opening and particulars

39. In the present context, the “prosecution case” can be considered as being the combination of the offence charged, the particulars of the alleged offence and the evidence adduced to prove the case.⁹

40. A criminal trial is not framed by pleadings. The essential purpose of the prosecution opening address is, in many respects, akin to that of a claim in civil litigation: to put

⁶ *R v Snow* (1915) 20 CLR 315 at 322-323 (Griffith CJ). See also *Byrnes v The Queen* (1999) 199 CLR 1 at [50]-[55] (Gaudron, McHugh, Gummow and Callinan JJ); *Rohde v Director of Public Prosecutions* (1986) 161 CLR 119 at 128-129 (Deane J); *Lacey v Attorney-General of Queensland* (2011) 242 CLR 573 at [16] – [20] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

⁷ See *Brougham and Donovan*, footnote 3 above.

⁸ *Malvaso* at 234 and *Dinsdale v The Queen* (2000) 202 CLR 321 at [62] (Kirby J) as applied in *Western Australia v Wallam* 185 A Crim R 116 at [29] (McLure JA).

⁹ *The Queen v Taufahema* (2007) 228 CLR 232 at [37] (Gleeson CJ and Callinan J), explaining the observations of Dixon J in *R v Wilkes* (1948) 77 CLR 511 at 518.

the court and the defendant on notice of the facts the prosecution intends to establish to make good the charge(s) in the information.¹⁰

41. In *R v Tangye*,¹¹ Hunt CJ at CL explained that it is “*essential that any doubt about the nature of the Crown case, conceptually, be removed at that early stage*”. The prosecution is then obliged to adhere to the case it has framed: were it otherwise, a defendant may be caught by surprise and denied a real opportunity to meet the case against them.¹² It follows that it is not open for a trial judge, following final addresses by counsel, to direct the jury as to a pathway to a finding of guilt which is at odds with the manner in which the prosecution has put its case. To do so would inevitably deny a defendant procedural fairness.

ii. Prosecution of a different case on retrial: general principles

42. Regardless of whether an appeal is against conviction or acquittal, the post-trial reformulation on appeal of a prosecution case is liable to cause unfairness to an accused. Such a course enables the prosecution to remediate the weaknesses that were exposed by the conduct of the first trial. Despite the general application of this observation, the potential consequences will obviously be most keenly felt on an appeal against an acquittal, where any error of law that might be established will often have combined with some failing in the prosecution case to lead to a verdict adverse to the prosecution.

43. This Court has repeatedly warned against the prosecution adopting on appeal (and seeking to press on retrial) a case which is inconsistent with that initially presented at trial.¹³

44. Those warnings culminated in this Court’s decision in *The Queen v Taufahema*,¹⁴ which bears some factual parallels to the present case. In *Taufahema*, the accused was convicted of murder on the basis of extended joint criminal enterprise. The

¹⁰ See *Johnson v Miller* (1937) 59 CLR 467 at 489 (Dixon J).

¹¹ (1997) 92 A Crim R 545 at 556.

¹² *The Queen v Tran* (2000) 105 FCR 182 at 203-206 (Black CJ, Weinberg and Kenny JJ). See also *King v The Queen* (1986) 161 CLR 423 at 429 (Deane J, in dissent).

¹³ *R v Wilkes* (1948) 77 CLR 511 at 518 per Dixon J; *King v The Queen* (1986) 161 CLR 423 at 429 (Deane J, with whom Gibbs CJ and Murphy J agreed) and at 433 (Dawson J, with whom Mason, Brennan and Wilson JJ agreed); *Parker v The Queen* (1997) 186 CLR 494 at 520 (Dawson, Toohey and McHugh JJ) and 539 (Kirby J); *Jiminez v The Queen* (1992) 173 CLR 572 at 590 (McHugh J); *Spies v The Queen* (2000) 201 CLR 603 at 638 (Gaudron, McHugh, Gummow and Hayne JJ).

¹⁴ (2007) 228 CLR 232.

foundational offence was not an offence known to the law. The appeal was necessarily allowed. The Court entered a verdict of acquittal.

45. The Crown was granted special leave to appeal on the question of the remedy. It sought a retrial. At any retrial, the prosecution case would have had to be reformulated; the legal pathway relied upon by the prosecution at the first trial was fatally flawed. By a majority of four to three, a retrial was ordered.

46. The majority (Gummow, Hayne, Heydon and Crennan JJ) considered that the authorities suggested that “*the difference between the case relied on in a first trial and the case to be relied on in a second trial must be substantial if the difference is to stand as a bar to an order for a second trial*”.¹⁵ The dispositive [68] of the majority reasons emphasised that the prosecution case on the retrial would **not be inconsistent** with the case at the first trial. The question was the legal characterisation of the agreement proved by the circumstantial evidence; and the evidence was capable of carrying multiple characterisations that were not mutually exclusive.

47. That stands in contrast to this case, where it is the content of the alleged **agreement itself** that would be different at a retrial. The inference that a jury would be asked to draw regarding the content of the alleged agreement at a retrial would necessarily be inconsistent with the inference said to have arisen from the same evidence at the first trial (arising from the necessity for the former to be a criminal agreement, whilst the latter is not). It bears repeating that to succeed at a retrial, the prosecution would have to disprove as a possibility the very agreement that it said was proven beyond reasonable doubt on the same evidence at the first trial.

48. Even before considering the identity of the party that invoked the appellate process, a correct application of the reasoning of the majority in *Taufahema* would lead to the conclusion that the nature of the necessary change in the prosecution case is one that would ordinarily disentitle the prosecution from a retrial.

49. In dissent as to the result, Gleeson CJ and Callinan J explained:¹⁶

It is the executive branch of government that decides whether to prosecute, and what charges to lay. A trial is fought as a contest between the executive government and a citizen. The judge presides

¹⁵ At [67].

¹⁶ At [37].

neutrally over that contest. Counsel for the respective parties define the issues, decide what witnesses will be called and what questions will be asked, and decide what arguments will be pursued and what will be abandoned. The general rule that litigants are bound by the conduct of their counsel, a rule essential to the adversarial system, applies with at least as much force to the prosecution as to the defence.

50. In a separate dissent, Kirby J referred to a number of the aforementioned authorities, observing that this Court and other courts, including the Privy Council,¹⁷ had repeatedly cautioned against the unfairness of enabling the prosecution to mount a different case on retrial from that which was presented at trial.¹⁸

51. It follows that in considering whether to grant permission to appeal, or otherwise when considering whether to exercise the discretion to order a retrial, a relevant factor that speaks firmly against such a grant or exercise of discretion is the necessary change in prosecution case at any retrial.

52. An obvious additional factor that distinguishes this case from all those cited above is that the prosecution engaged the appellate process, thus giving rise to double jeopardy considerations. The significance of that factor is considered further below.

iii. Change in prosecution case after a prosecution appeal: exacerbation of oppression

53. As earlier observed, the rationale for the rule against double jeopardy inheres within deeply rooted principles of fairness and public policy. As Black J put it in *Green v United States*:¹⁹

The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State, with all its resources and power should not be allowed to make repeated attempts to convict an individual [of an] offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity as well as enhancing the possibility that even though innocent he may be found guilty.

54. The capacity of the Crown to change its case on retrial aggravates each of the concerns articulated by Black J, but most particularly in this case the latter two:

¹⁷ See *Tsang Ping-nam v The Queen* [1981] 1 WLR 1462.

¹⁸ At [109] and [158]-[176].

¹⁹ (1957) 355 US 184 at 187-188; as adopted by McHugh, Hayne and Callinan JJ in *Pearce v The Queen* (1998) 194 CLR 610 at 614.

54.1. The ordeal, and the state of anxiety, inflicted upon a defendant who faces a retrial after being acquitted is exacerbated because the case to be presented is different to the case that was presented on the trial at which the defendant was acquitted, and indeed is one capable of giving rise to criminal liability.
 5 For the prosecution to change its case on a retrial leaves open the suggestion (to the defendant, and to the public at large) that the prosecution is entitled to engage the appellate process to fix its own errors; and

54.2. The risk that an innocent person will be convicted is all the greater where the prosecution is enabled to conduct a trial on one basis and then, having
 10 failed to obtain a conviction on the first trial, to identify the holes in its own case, and repair them for a second trial.

55. Where, as here, the prosecution's own case would have led the court into error (independent of the error the Director complained of on the application for permission to appeal), it is especially unfair that the prosecution should have the
 15 opportunity to correct that error on retrial and that a defendant should be compelled to face a new and different prosecution case accordingly. Such a course necessarily aggravates the oppressive effect of twice jeopardising the defendant.

iv. Conclusion on the change in prosecution case on prosecution appeal

56. An appellate court's reticence to order a retrial in which the prosecution will be
 20 required to change its case, articulated as highly as "*stand[ing] as a bar to an order for a second trial*" in certain circumstances by the majority in *Taufahema*, must be heightened where the prosecution has engaged the appellate process. As observed by Gleeson CJ and Callinan J in *Taufahema* when considering the reluctance of this Court to quash an acquittal entered on a defendant's appeal, "*the considerations of*
 25 *double jeopardy that would apply to an attempt to appeal from a verdict of acquittal by a jury are not the same as those that apply when a convicted person has initiated the appeal process, which includes the possibility of a decision by a final court of appeal.*"²⁰ Nothing in the majority reasons suggests to the contrary.

57. It follows that as a starting point for the exercise of the discretion to grant permission
 30 to appeal under s 157(1)(b), a correct application of principle requires the following:

²⁰ At [32].

57.1. substantial weight to be afforded to the fact that on any retrial, the prosecution would be obliged to advance a case that was inconsistent with the case it advanced at the first trial; and

57.2. substantial weight to be afforded to considerations of double jeopardy, over and above the reluctance on the part of this Court to grant special leave where an intermediate appellate court has entered an acquittal. The weight to be afforded to this consideration is affected, and in this case enhanced, by the exacerbation of oppression caused by a change in prosecution case.

58. The Court of Appeal failed to, or failed to correctly, apply these principles.

59. In summary, the appellant's submission is that a correct application of the principles ought lead to a conclusion that seldom, if ever, should the Director be granted permission to appeal an acquittal where a different case would be prosecuted at the retrial.

60. The majority in *Taufahema* concluded, in granting a retrial, that the change of case was "*regrettable and undesirable, but... not sinister*".²¹ Where, in contrast to *Taufahema*, the appeal in question is a prosecution appeal against acquittal, the same characterisation should lead to the opposite conclusion. In such circumstances, no retrial should be granted. Permission to appeal should be refused.

D. The Court of Appeal's error in this case

i. Minimisation of the required change in the prosecution case

61. As set out above, Bleby and David JJA concluded that the "*necessary confinement of the prosecution case*" such as to require the establishment of a narrower agreement for the foundation of joint criminal enterprise would not occasion any aggravation of the the double jeopardy considerations that oppose a grant of leave.

Respectfully, this assessment is flawed in at least two respects:

61.1. **First**, to describe the necessary new case as a 'narrower' case was, at best, a minimistaion of the significance of the necessary change in prosecution case and at worst a mischaracterisation. It treated proof of the existence and scope of the alleged agreement as an academic exercise, rather than one tethered to proof beyond reasonable doubt of an actual agreement that was actually entered into by the appellant (and his co-accused). The prosecution

²¹ At [68].

was obliged to prove both the existence and the scope of any agreement beyond reasonable doubt. If the jury accepted the existence of the agreement alleged at the first trial, the appellant would have been entitled to an acquittal. The case sought to be advanced by the prosecution on retrial would require the exclusion, beyond reasonable doubt, of the very agreement which it alleged at the first trial.²² The issue was not that the new case was ‘narrower’. Although that description was literally accurate, it carried an implication that the new case was no more than a necessary aspect of the agreement originally alleged. In fact, the difference is fundamental to the ability to fix criminal liability upon the appellant. The issue that the Court of Appeal needed, but failed, to grapple with was the significance of the difference between the case at trial and the necessary new case.

61.2. **Secondly**, the Court of Appeal was wrong to observe that the error in the prosecutor’s opening could have been corrected by the trial judge in her Honour’s summing up to the jury. Apart from the artificiality of such a counterfactual in circumstances where her Honour rejected the Insufficient Agreement Submission, it would have been erroneous, and a denial of procedural fairness (as explained in *Tangye*), for the trial judge to open a new pathway to guilt at the conclusion of the trial.

62. The minimisation of the significance of the prosecution’s proposed change in case, and the erroneous conclusion that the trial judge could have corrected the basis upon which the prosecution case had been advanced at trial, led to a conclusion that the proposed change in the prosecution case on retrial did not aggravate the applicable double jeopardy considerations and was otherwise irrelevant to the question of a grant of permission to appeal.

63. That conclusion was contrary to principle and to authority.

ii. Failure to consider the oppressive effect of a change in prosecution case

64. The Court of Appeal’s consideration of what it referred to as “[t]he double jeopardy considerations” was opaque. Apart from a declaration by Bleby and David JJA that

²² This was not, for example, a case in which the prosecution would merely be confined to a different and lesser charge which was always open: cf *Sio v The Queen* (2016) 259 CLR 47 at [79]-[81] (French CJ, Bell, Gageler, Keane and Gordon JJ).

they were “*clear and real*”, neither the plurality nor Kourakis CJ grappled with the oppression that would be caused by a retrial or explained why that oppression was outweighed by the desirability of a retrial on a new prosecution case.

5 65. Respectfully, consideration of the “*double jeopardy considerations*” did not rise above incantation. For the reasons already set out, the change in the prosecution case would necessarily occasion unfairness to the appellant over and above the ‘usual’ case of double jeopardy, particularly by way of greater anxiety and ordeal by being required to answer an alleged agreement which is objectively more serious (indeed, one which is capable of giving rise to criminal liability) than was framed
10 by the prosecution at his first trial.

66. The conclusion of Bleby and David JJA to the effect that nothing in the “*necessary confinement of the prosecution case*” would increase “*the force of the double jeopardy considerations that oppose a grant of leave*” did not engage with the specific effect of twice jeopardising the appellant, and was inconsistent with a long
15 line of authority in this Court and in other courts. In these circumstances, and in circumstances where the reasons of Kourakis CJ did not consider any of the circumstances advanced by the appellant as aggravating the oppressive effect of granting the Director permission to appeal, the Court of Appeal’s exercise of discretion miscarried. Its grant of permission to appeal should be set aside.

20 **E. Re-exercising the discretion**

67. This Court is in as good a position as the Court of Appeal to exercise the discretion as to whether to grant permission to appeal pursuant to s 157(1)(b) of the *CP Act*. If error is established, the appellant invites this Court to re-exercise the discretion. The Director should be refused permission to appeal in respect of the appellant’s
25 acquittals.

68. There are five primary reasons why the appellant says that, on the re-exercise of the discretion, this Court should refuse permission. Those reasons may be summarised briefly:

68.1. **First**, the appellant should not be required to face a second trial on a
30 prosecution case which is materially different from that advanced at first instance. It is not necessary to repeat the submissions above.

68.2. **Secondly**, the appellant was wholly acquitted at trial **ABFM 161 at [62(d)]**; **ABFM 226**. To grant the Director permission to appeal would involve the

purest form of double jeopardy in circumstances where the appellant was entitled to the benefit of the acquittals obtained at trial, to his release from jeopardy and freedom as a subject, and to the peace and security of putting his trial behind him.²³

- 5 68.3. **Thirdly**, to grant the Director permission to appeal (and to order a retrial) would work a practical unfairness given the conviction of Bekele and Haile of the offences in respect of which they were the primary offenders **ABFM 230-231**. On any retrial, it could hardly go unnoticed by a jury that neither Bekele nor Haile would be tried for the charges in respect of which they
- 10 have already been found guilty. No amount of judicial direction could sensibly prevent the jury from speculating as to the reason that the primary offenders on each count were not being tried. That a jury might guess that the primary offenders had already been convicted is a real, not fanciful, concern. If realised, it would be highly prejudicial to any defence that might
- 15 be advanced by the appellant, especially on the question of consent.
- 68.4. **Fourthly**, and contrary to the observation of the Court of Appeal **Reasons [160] CAB 64-65**, this was not a strong prosecution case. The clearest argument in support of that proposition is that the very inference that the prosecution said was proven beyond reasonable doubt by the evidence at
- 20 the first trial is an inference that entitles the appellant to acquittals if it is even possibly true. That such a case was advanced at all demonstrates the speculative nature of (at least) the scope of the alleged agreement, in circumstances where there is almost no evidence of the words spoken between the three appellants at any relevant time. The prosecution case was
- 25 also less than overwhelming on the dual issues of consent and the appellant's state of mind as to consent. The complainant gave no evidence on the topic. The totality of the prosecution case relied upon inferences being drawn from video footage to the effect that the complainant was too intoxicated to consent. The Court of Appeal's analysis of various aspects of
- 30 the evidence is not beyond dispute, specifically:

²³ See *Whittaker v The King* (1928) 41 CLR 41 CLR 230 at 248 (Isaacs J); *Davern v Messel* at 67-68 (Deane J). As Peek J observed in *Brougham* at [78], "The position is at its most stark in the case of a person who has been acquitted of all charges and is to be taken to be innocent."

68.4.1. the complainant's words and conduct as recorded at **Reasons [63]-[65]; [87]-[89] and [94] CAB 46-49** are open to be construed as suggestive of an ongoing consensual interaction;

68.4.2. the Court of Appeal omitted from **Reasons [83] CAB 48** the complainant's exclamation "*oh my fucking God. I'm going to fucking come. I'm going to fucking come*" **ABFM 136**; and

68.4.3. descriptors of the complainant as appearing to be in discomfort **Reasons [64]; CAB 46** and distress **Reasons [78]; [84]; [87] CAB 47-48** are open to competing inferences.

68.5. **Fifthly**, 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 in the particular case **ABFM 160 at [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 **Reasons [158] CAB 63**.

69. In all of the circumstances, it is not in the interests of justice that the Director have permission to appeal in order to conduct a retrial on a different basis from that which was presented at the first trial, in a manner which would deprive the appellant of the total acquittal that he obtained at trial, would unfairly prejudice his defence on retrial, and would not be a strong prosecution case in any event. This Court should accordingly re-exercise the discretion to refuse the Director permission to appeal.

PART VII – ORDERS SOUGHT

70. The appellant seeks the following orders:

70.1. the appeal be allowed; and

70.2. 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.

PART VIII – ESTIMATE FOR ORAL ARGUMENT

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

5 Dated: 30 July 2026



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

1. *Criminal Procedure Act 1921* (SA): current version, sections 157-158. Act in force
5 at the time of the commencement of the appeal on 30 June 2025 and at all times
thereafter.
2. *Criminal Law Consolidation Act 1935* (SA): 8 March to 21 June 2023, sections 48
and 56. Act in force on the date of the offending: 18 June 2023.

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