



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: A22/2026
File Title: Bekele v. The King & Ors
Registry: Adelaide
Document filed: (R3) Form 27D - Third 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

5 BETWEEN: **BEDHANE TARIKA BEKELE**
Appellant

and

10 **THE KING**
First Respondent

SADAM HUSSEIN ISSAK
Second Respondent

15 **BESUFIKAD HAILE**
Third Respondent

THIRD RESPONDENT’S SUBMISSIONS

20

Part I: CERTIFICATION

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

Part II: CONCISE STATEMENT OF THE ISSUES

- 25 2. First, the application of double jeopardy principles to appeals against acquittal; and
3. Second, whether a joint criminal enterprise (**JCE**) to rape may be formed where the participants:
- 30 3.1. do not agree to a fact necessary to criminality (ie. sexual intercourse exclusively “without” the person’s consent);
- 3.2. can not agree a fact necessary to criminality (ie. sexual intercourse will be carried out whilst reckless (whether “advertently” or “inadvertently”) as to whether the person consents).

Part III: SECTION 78B NOTICE

4. The third respondent considers that notice is not required pursuant to s 78B of the *Judiciary Act 1903* (Cth).

5 **Part IV: FACTS**

5. The third respondent does not contest the appellant's narrative of facts or chronology.¹

Part V: ARGUMENT

10 *Appeal against acquittals*

6. As to the application of double jeopardy principles to appeals against acquittal, the third respondent relies upon the submissions filed in his own appeal.

Fault elements - JCE

- 15 7. The third respondent respectfully embraces the submissions of the appellant and the submissions of the second respondent (in support and in the alternative) on this appeal.

8. As to the requirements for formation of a joint criminal enterprise, for the reasons developed in the appellant submissions, the third respondent agrees with his contentions (**the contentions**) on appeal² that:

- 8.1. The Court in *[Decision Restricted]* was correct in concluding that an agreement to have sexual intercourse with a person "with or without their consent" is not capable of forming a joint criminal enterprise.

- 25 8.2. *[Decision Restricted]* was correct in concluding that "inadvertent" recklessness is not capable of forming a joint criminal enterprise for the offence of rape.³

- 8.3. *[Decision Restricted]* was wrong to conclude that 'advertant' recklessness was capable of forming a joint enterprise for the rape.⁴

¹ Appellant's written submissions (AS) at [10].

² As set out at AS [5a.] – [5c].

³ Section 48(1) *Criminal Law Consolidation Act 1935* (SA) (*CLCA*); s 61J *Crimes Act 1900* (NSW) (*Crimes Act*).

⁴ Ibid.

9. The object of a JCE must be a crime.⁵ A participant need not know that the object is a crime, but in order that the agreement is a criminal one, a participant must know the facts or attendant circumstances which in fact make the object a crime.
- 5 So, in order to enter into a joint criminal enterprise, a participant must, at the time of the agreement, know and agree to the facts which make the common purpose a crime.⁶ Otherwise, the effect must be that either no relevant agreement will have been made, or no *criminal* enterprise will have been agreed to. That is so given relevant statements of principle as to accessorial liability and by application of
- 10 logic.
10. In the case of rape, at a minimum⁷, the participants will not have agreed to a crime if they have not at least agreed to engage in sexual intercourse with the person at a time when the person is, in fact, not consenting. It follows that:
- 15 10.1. an agreement to engage in sexual intercourse “with or without” consent does not amount to a JCE to commit a crime because its scope encompasses lawful behaviour;
- 10.2. an agreement to engage in sexual intercourse “with or without” consent does not amount to a JCE to commit rape because at the time of
- 20 agreement a potential participant cannot know a necessary fact (a lack of consent, or lack of ability to consent) or know (given the nature of the fact) that it will crystallise;
- 10.3. that the requirement to know or believe that the act of intercourse will take place when the person is not consenting excludes agreement to
- 25 simultaneously holding a reckless state of mind in respect of consent.⁸

⁵ *Miller v The Queen* (2016) 259 CLR 380 at [4].

⁶ *Giorgianni v The Queen* (1985) 156 CLR 473; *McAuliffe v The Queen* (1995) 183 CLR 108; *Miller* op cit at [4] per French CJ, Kiefel, Bell, Nettle and Gordon JJ; *R v LK* (2010) 241 CLR 177.

⁷ *Michell v The King* (2023) 276 CLR 299 at [52] and [56], but see second respondent’s submissions on this appeal as to *Osland v The Queen* (1998) 197 CLR 316 at [69]-[75], [93]; and *The King v Rohan (a pseudonym)* (2024) 280 CLR 288 at [28]-[31].

⁸ It is submitted that agreement as to a criminal state of mind is also necessary in order that they have agreed to a crime, but that question is not an essential one on this appeal.

11. Accordingly, where there is an agreement to engage in sexual intercourse “with or without” consent, the participants do not agree to commit a crime. Where there is an agreement to commit rape, the participants can not agree that the sexual intercourse will be engaged in recklessly.

5

Part VI: TIME

12. No time additional to the 45 minutes estimated in Haile’s written submissions on his appeal (A23/2026).

10

Dated 27 August 2026



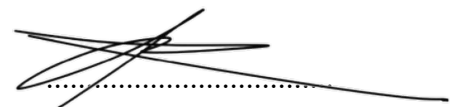
15

Name: Jane Abbey KC

Telephone: 08 8210 6400

Email: clerk@lenkingchambers.com.au

20



Name: Benjamin Armstrong

Telephone: 08 8210 6400

25

Email: clerk@lenkingchambers.com.au

ANNEXURE TO THIRD 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>Criminal Law Consolidation Act 1935 (SA)</i>	Historical version (8 March 2023 to 21 June 2023).	s 48	Act as in force on the date of the alleged offence	18 June 2023 (date of the alleged offences)
2	<i>Crimes Act 1900 (NSW)</i>	Historical version (1 December 2022 to 31 January 2023)	s 61J	Act in force on the date of the alleged offences in [<i>Decision Restricted</i>]	22 to 26 February 2022 (date of the alleged offences)