



HIGH COURT OF AUSTRALIA

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Form 27E – Appellant’s reply

Note: see rule 44.05.5.

IN THE HIGH COURT OF AUSTRALIA

ADELAIDE REGISTRY

BETWEEN:

BEDHANE TARIKA BEKELE

Appellant

and

THE KING

First Respondent

SADAM HUSSEIN ISSAK

Second Respondent

BESUFIKAD HAILE

Third Respondent

APPELLANT’S REPLY

Part I: This reply is in a form suitable for publication on the internet.

Part II:

1. The scope of argument on the second question has been narrowed by the respondent’s acceptance that: (1) the prosecution’s articulation of the JCE in Opening at trial was in error¹ for there cannot be a criminal agreement to engage in sexual intercourse “with or without” consent;² (2) the common law doctrine of JCE operates where there is an express or inferred agreement (or arrangement or understanding amounting to an agreement)³ between persons *to commit a crime*, that is, to the “combination of elements that constitute a particular criminal offence”;⁴ (3) that 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,⁵ so the relevant temporal reference point for the examination of the fault elements must be at the time of entry into the alleged agreement; and (4) it is the element of “unlawful concert” that sets JCE apart from aiding and abetting.⁶

ISSUE 1 - An internal inconsistency, overlooking the fundamental question

¹ At Respondent’s Submissions (RWS) [19] by reference to Reasons [163] (Bleby and David JJA); CAB at 65.

² Implicit in the contention at RWS [21.a] that the NSW CCA in [*Decision Restricted*] accurately states the requisite fault elements for JCE liability for rape and that the prosecution case at a retrial will be necessarily different at RWS [20]; RWS [21.b]; [21.c].

³ RWS [34].

⁴ RWS [31], citing *Miller v The Queen* (2016) 259 CLR 380 at [4] (French CJ, Kiefel, Bell, Nettle and Gordon JJ) and *R v Barlow* (1997) 188 CLR 1.

⁵ RWS [33], citing *R v Rohan* (2024) 280 CLR 288 at [29-30] (Gageler CJ, Gordon and Edelman JJ).

⁶ RWS [36].

2. The respondent endorses [*Decision Restricted*]⁷ as accurately stating the requisite fault elements for JCE liability for rape.⁸ But then, the respondent has “regard to”, and attempts to reconcile or synthesise⁹ – but fails to grapple with the key difference between – two inconsistent expressions of the terms of an agreement necessary to found JCE to rape,¹⁰ overlooking the very question of what must be intended or known or believed in respect of the *essential circumstance* of non-consent (i.e. the fault element of each co-venturer as to an essential physical element, being a circumstance).¹¹
3. The controversy concerns *this* requisite state of mind, at the time of the agreement.¹² Strictly there must also be a subjective state of mind in respect of the perpetrator’s state of mind, but where the circumstance of non-consent is known or believed to be true at the time of the agreement, except in the case of an innocent agent, that will practically subsume the requirement of knowledge or belief on the part of a co-venturer that the perpetrator (also a participant in the same JCE) will have the requisite state of mind *at the time of the offence*.¹³ The real and fundamental question is, ‘what is the requisite state of mind of all parties to an agreement, at the time of the agreement, for the agreement to necessarily qualify as a *criminal* agreement to rape?’¹⁴
4. The expression of a JCE rape in [*Decision Restricted*] was “to engage in sexual activity or intercourse with [the complainants], *without their consent* ...[further fault element then set out]”. On the other hand, there is the expression of Bleby and David JJA at

Reasons [148]:

“as participants to an agreement [to engage in sexual activity with the complainant],¹⁵ 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*.”¹⁶

5. The fact that the prosecution conceded that the appellants could reasonably have contemplated the complainant *might have consented* is at odds with any Crown case

⁷ [*Decision Restricted*] [2025] NSWCCA 210.

⁸ At RWS [21.a].

⁹ At RWS [24.a].

¹⁰ At RWS [24].

¹¹ As distinct from the requisite state of mind of a co-venturer, in respect of the state of mind of the perpetrator as to that very circumstance.

¹² See [*Decision Restricted*] at [161].

¹³ See [*Decision Restricted*] at [193], referring to *Osland v The Queen* (1998) 197 CLR 316,

¹⁴ *R v Jackson* [1985] Crim LR 442 (CA); *R v Reed* [1982] Crim LR 819 (CA).

¹⁵ This elaboration in the square parentheses taken from the respondent’s submissions; RWS [23].

¹⁶ At RWS [22-23] (emphases added).

that the appellants entered the alleged agreement/s *knowing* the complainant was incapable of consenting.¹⁷ Leaving that aside as it pertains more to the first special leave question, the respondent reformulates yet another different expression representing a hybrid of the expressions above, namely (formatted for illustration):¹⁸

- a. That the appellants agreed to engage in sexual activity or intercourse with the complainant *without her consent*
 - b. *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”.
6. Whatever may be said for (b), such a state of mind cannot serve as a substitute for the requirement to prove the intentional agreement, understanding or arrangement as to (a); being essential to render the carrying out of the agreed conduct, if carried out in accordance with the agreement, criminal. The respondent fails to grapple with this issue and attempts to draw some support from the observation that JCE is a “more flexible” form of primary liability than conspiracy.¹⁹ Plainly, JCE liability encompasses not only the crime agreed upon, but also any other incidental crime jointly contemplated by the parties. But whatever flexibility extends from the roots, just like conspiracy, each basis of liability is deeply rooted in – that is dependant as its “fundamental bedrock” upon²⁰ - a *criminal* agreement.

ISSUE 2 - a JCE to commit a reckless or strict liability offence

7. Contrary to the respondent’s characterisation of the appellant’s position²¹ it is not contended that there is a “rule that JCE liability is only capable of operating harmoniously with offences that have intentional fault elements.”²² Such a contention would contradict *Rohan*. The appellant’s position, which reconciles *Rohan* and *LK* in much the same way as in *[Decision Restricted]* is as set out in the appellant’s primary submissions.²³ In short, for a JCE there needs to be, fundamentally, an intentional agreement to do that which will necessarily amount to a crime (i.e. *if* the agreed upon conduct were to be carried into effect in accordance with the agreement, a crime *would necessarily* have been committed).

¹⁷ Bekele ABFM82; T1021.33-38; Bekele ABFM83; T1022.3-5. CfRWS [60].

¹⁸ At RWS [24].

¹⁹ RWS [35.a], citing *[Decision Restricted]* at [188].

²⁰ *[Decision Restricted]* at [177]; *R v Rohan (a pseudonym)* [2024] HCA 3; 280 CLR 288 at [41].

²¹ RWS [37].

²² RWS [37], referring broadly to the appellant Bekele’s submissions.

²³ Appellant Bekele’s Written Submissions at [62-65]. See *[Decision Restricted]* particularly at [162-172] and [184-187].

8. The fact that there may be coherence between JCE liability and offences for which recklessness is the fault element, and even with offences of strict liability, is not to the point. No development in either the common law or statute has removed the requirement to prove an agreement to do that which, if done in accordance with the agreement, will *necessarily* be a crime. In this regard there is no difference between a criminal conspiracy and a criminal agreement founding JCE liability.²⁴ An agreement to drive from A to B in an ambitious *but not impossible* timeframe (where the parties advert to the possibility or even probability that speeding will be involved) fails to amount to a criminal agreement not because the offence has no fault element, but because the agreement is to do that which is *not necessarily* a crime.²⁵
9. An agreement to do X, where X is some form of conduct, may itself be sufficient to constitute a particular crime. Or, the criminal character of X may depend upon C, where C is the circumstance/s in which that conduct is to be carried out.²⁶
10. If the agreement is to do X ‘irrespective of C’, or ‘even if’ C (as distinct from an agreement to do X if Y, where Y is a condition precedent or qualification to the agreed upon conduct being actuated) ²⁷ the agreement will be a criminal one, capable of making out a charge of conspiracy or forming the foundation for a JCE, provided an offence will *necessarily* be committed *if* the agreement to do X were to be carried out in accordance with the agreement. In that scenario, the agreement to do X must itself be sufficient to constitute an agreement to do that which *will necessarily be* a crime. *Rohan* illustrates that point.
11. If, however, the doing of X would not itself be sufficient to constitute a crime, because X only assumes a criminal character if done in circumstance C, the agreement can only be a criminal agreement if the agreement between the parties is in substance one “to do X, *knowing or believing* (if not specifically *intending*) X will be done in circumstances C”. Just as intention of an individual may be *evidenced by* their reckless behaviour or wilful blindness, so too may collective knowledge or belief, but *evidence of*

²⁴ Contrary to RWS at [50], this is consistent with the statement in *Rohan* at [41] and [63-66].

²⁵ *R v Jackson* [1985] Crim LR 442 (CA); *R v Reed* [1982] Crim LR 819 (CA).

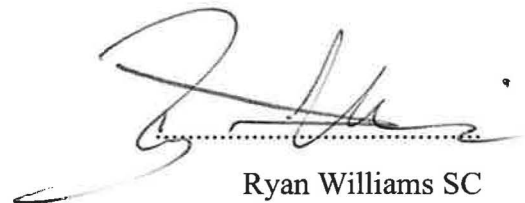
²⁶ A circumstance that is required to render the agreed upon conduct criminal (if carried out in accordance with the agreement) must not be confused with a circumstance which serves as a contingency or condition precedent to the carrying out of criminal conduct agreed upon. See Smith JC and Hogan B, *Criminal Law* (LexisNexis Butterworths (UK), 7th ed, 1992, 281-282.

²⁷ This can be put aside as it is not suggested that the alleged JCE was to do X, where X is engage in sexual acts with the complainant, but *only if* she is not consenting, where the circumstance of the complainant’s non-consent would be both an essential circumstance required to render the conduct criminal and a condition precedent to the conduct; plainly a criminal agreement.

recklessness or wilful blindness will not, as a matter of law, necessarily be sufficient to amount to intention or knowledge or belief if one of those states of mind is required by law.²⁸

12. In *Rohan*, the elements of the substantive offence were such that an agreement to do X required no knowledge or belief in some circumstance C for the agreement to do X to constitute a criminal agreement.²⁹ X₁ was supplying drugs *to the particular girls* and X₂ was engaging in sexual activity *with Cindy* (who was, in fact, a child). Proof of no circumstance was required in order to render the doing of *that conduct* (both X₁ and X₂) criminal, so agreeing to do *that conduct* was sufficient for the agreement to be criminal. *LK* is an example where an agreement to do X was not necessarily a criminal agreement because, for the conduct X (to deal with money) to be criminal required proof of some C (that the money *is* proceeds of crime).³⁰
13. Here the circumstance C required to render X (sexual intercourse with the complainant) criminal included the *actual* non-consent on the part of the complainant. Only an agreement to do X, knowing or believing in C, could found a JCE for rape. For an agreement, to do X (where X is engage in sexual acts with the complainant) *whether or not* C exists (or “irrespective of C”, or “even if” C, or where the parties advert to the risk or even probability of C) will fail to be one which is *necessarily* a criminal agreement. The examples provided by the respondent³¹ do not advance the argument.³²

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²⁸ See *The King v Ko* [2026] HCA 29 (per Gageler CJ, Gordon and Beech-Jones JJ particularly at [33]-[59] explaining *Kural v The Queen* [1998] HCA 16; 162 CLR 502 and *Smith and Afford* [2017] HCA 19; 259 CLR 291; Edelman J agreeing at [65] and Jagot J agreeing at [173-174], noting Steward J and Gleeson J each dissented but only in the result, agreeing with the propositions of law described by the plurality).

²⁹ As discussed in *[Decision Restricted]* at [162-172].

³⁰ See *LK* in particular at [74-77] (French CJ) and at [117]-[123] (Gummow, Hayne, Crennan, Kiefel and Bell JJ).

³¹ RWS at [46].

³² People can agree upon the commission of an act which is *itself risk-producing* and, if an offence would *necessarily* be made out if the agreement were to be carried into effect, a criminal agreement will have been formed. But an agreement to do that which *will* create a risk *amounting to a crime* is distinct from an agreement to engage in risky behaviour which may or may not amount to a crime. See Gilles P, *The Law of Criminal Conspiracy* (The Federation Press, 2nd ed, 1990) 31-32 and Bronitt S & McSherry B, *Principles of Criminal Law* (Law Book Company, 1st Ed, 2001) at 416, doubting *Miller v The Queen* (1980) 32 ALR 321.