



HIGH COURT OF AUSTRALIA

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Details of Filing

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Important Information

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IN THE HIGH COURT OF AUSTRALIA
ADELAIDE REGISTRY

5 BETWEEN: **BESUFIKAD HAILE**
Appellant

and

10 **THE KING**
First Respondent

SADAM HUSSEIN ISSAK
Second Respondent

15 **BEDHANE TARIKA BEKELE**
Third Respondent

20 **APPELLANT'S REPLY**

Part I: Certification

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

25 **Part II: Argument in Reply**

2. Given the Director's written submissions (**RS**), it is common ground on the appeal:
 - a. that the JCE to be propounded at a retrial of the appellant would be different to the trial JCE (**the difference**) (**RS[24] and [54]**);
 - 30 b. existence of the difference is a relevant factor, conceptually, in whether to grant the Director permission to appeal or to order a retrial (**RS[21b]**); and
 - c. the nature of the difference will determine its weight in the balancing of private and public interests relevant to the relief granted on prosecution appeals against acquittal.

3. Relevantly for the purpose of this reply, the Director does not concede:

a. that the difference in this instance would give rise to inconsistency (**RS[55]**);
or

b. that the difference is sufficient, even on a Director's appeal, to operate as a bar to ordering a retrial.

4. The Director contends that, for the difference to be sufficient, it must be "radically" so. The appellant submits that, as a descriptor, "radically different" has value, but does not of itself amount to a legal "test".

5. Admeasuring difference of the relevant kind is a qualitative exercise. Difference may present in the form of thorough-going and comprehensive difference, or in compartmentalised but extreme difference. The materiality of the difference may manifest by a binary consequence (eg. the JCE is framed to include what is in effect a defence, or not), or by a consequence which is a matter of scale or one which is gradable.

6. The Director contends that '*the prosecution will not be advancing any factual allegation inconsistent with the case advanced at the first trial*' **RS[55]**. It is respectfully submitted that that is not correct.

7. In formulating and presenting its case, the prosecution is required to act with fairness and detachment and with the objectives of establishing the truth and helping to ensure that the accused's trial is a fair one.¹ The prosecution has a duty only to advance a case which is open on the evidence. The prosecutor should not espouse a theory and tailor a case accordingly.² It would be inconsistent with prosecutorial duties, for example, to decide to prosecute an offence and then see how the available evidence might support that. A decision to prosecute, and what to prosecute, arises from a genuine appraisal of what the evidence shows.

¹ *Whitehorn v The Queen* (1983) 152 CLR 657, 663-664 (Deane J).

² *Anderson (Hilton Bombing Case)* (1991) 53 A Crim R 421.

8. It follows therefore that the basis upon which the Crown conducted its case in the appellant's trial, namely that the evidence established an agreement that the intercourse was to occur with or without the consent of the complainant, was the Director's genuine assessment of what the evidence was capable of establishing an agreement that sexual intercourse was to occur with or without the consent of the complainant. The appellant does not suggest that the Director knowingly brought to court a JCE which included a defence. Rather, it is submitted that the trial JCE must have been a statement of the Director's genuine and considered assessment of the inferences that were available to be drawn from the evidence. The appellant does not suggest that the prosecutor acted with impropriety when he addressed the jury on the inferences which could be drawn from the evidence.

9. It must be, then, that at trial the Director's genuine and considered assessment of the evidence was that there was an inference available, beyond reasonable doubt, that the appellant and his co-accused had agreed to have intercourse with the complainant's consent. The Director's reformulation denies the availability of that inference, which inference amounts to a defence to the charge. Unlike in *R v Taufahema* (2007) 228 CLR 232 (*Taufahema*), the trial JCE and the reformulation are mutually exclusive. That repugnance must amount to inconsistency of a kind which engages a bar to retrial.

10. From this perspective, it does not advance the Director's argument that: the evidence (principally comprised of video footage and therefore static) and the foundational crimes would be the same on a retrial (see **RS[55] and [56]**). To the contrary, that serves to confirm that there is an inconsistency.

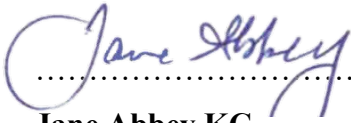
11. It is submitted that:

- a. the difference must be understood as creating an inconsistency between the case advanced at trial and the reformulation;³ and
- b. the difference is sufficient that the interests in favour of ordering a retrial are outweighed by the double jeopardy and "public confidence" considerations.

³ *Taufahema* at [68].

Dated: 17 September 2026

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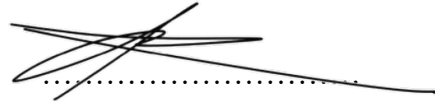
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