



HIGH COURT OF AUSTRALIA

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Details of Filing

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Form 27E – Appellant’s reply

Note: see rule 44.05.5.

IN THE HIGH COURT OF AUSTRALIA
ADELAIDE REGISTRY

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

and

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

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

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

20 **APPELLANT’S REPLY**

PART I – CERTIFICATION

1. This reply is in a form suitable for publication on the Internet.

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PART II – ARGUMENT IN REPLY

A. Introduction

2. The Director’s written submissions (“**RS**”) advance three key contentions, which are referred to as the ‘proper construction contention’, the ‘no radically different case
30 contention’, and the ‘CoA’s consideration contention’. This reply will address the latter two contentions.

3. By its ‘no radically difference case contention’, the Director concedes (with respect, correctly) that a change in prosecution case is a relevant consideration to the exercise of the Court of Appeal’s discretion to grant permission to appeal. Given the approach taken by the Court of Appeal and the reformulation of the prosecution case set out at **RS[24(a)]**, this is tantamount to a concession that the Court of Appeal erred. The Director seeks to preserve the correctness of the ultimate decision of the Court of Appeal by reference to what appears to be a suggested threshold test: that of the ‘radically different’ case. Contrary to the Director’s submissions, no such threshold was suggested by any member of this Court in *The Queen v Taufahema*.¹

4. Insofar as the Director maintains, by its ‘CoA’s consideration contention’, that the Court of Appeal did consider the necessary change in the prosecution case, that submission also should not be accepted. As the Court of Appeal’s reasons disclose, it did not grapple with the intersection between the unfairness inherent in exposing an acquitted person to a second trial, and a proposed change in the prosecution’s case on that second trial.

B. Magnitude of change in prosecution case: no ‘radical change’ required

5. At **RS[8]**, the Director asserts that it was the prosecution case at trial that “*each of [the sexual] acts were committed pursuant to an understanding or arrangement... to engage in the sexual acts without [the complainant’s] consent*”. That assertion is wrong. The prosecution case as to the agreement was that the sexual activity would occur irrespective of whether or not consent was forthcoming. To the reference to the prosecution opening in Issak’s submissions (“**IS**”) at **[10]** may be added the exchange between the prosecutor and the trial judge during the course of argument on whether there was a case to answer at **ABFM 82-83**. The prosecutor said, “...*common sense says that there may be circumstances where the complainant might have consented. That could have been within the contemplation of the parties, but our case is that irrespective of whether she was going to, that’s what they decided to do.*”

6. The Director accepts that a necessary change in prosecution case on retrial is a consideration relevant to the Court of Appeal’s discretion to grant the Director permission to appeal, but contends, citing *Taufahema*, that the difference “*must be analysed to consider whether it is radically different in the circumstances of the case*” **RS[20(b)]**. The Director places considerable reliance upon the concept of a ‘radical

¹ [2007] HCA 11; (2007) 228 CLR 232.

change’ in the prosecution case, appearing to suggest that this term assumes some doctrinal significance following *Taufahema*, and in substance operates as a threshold test to the refusal of a grant of permission to appeal.

7. Insofar as it is submitted that, in assessing a proposed change in prosecution case, the Court of Appeal may have regard to the *magnitude* of the requisite change as relevant to the weight attributable to this consideration, that submission should be accepted. However, any suggestion of some magic to the words, ‘radical change’, or of a threshold at that standard, is unsupported by principle or by any authority of this Court, including *Taufahema*.
8. In the context of the discretion to order a re-trial, the language of ‘radical difference’ appears to be drawn from the judgment of McHugh J in *Jiminez v The Queen*.² In that case, the Crown conceded the jury had been misdirected, but sought to maintain the conviction on a different basis, namely that the culpable driving was driving when sleep was imminent. The case at trial had been that the culpable act of driving was driving while asleep. McHugh J, in holding the conviction could not stand, described the case as “radically different”. His Honour went on to determine that no re-trial should be ordered on the basis of what was described as a “general rule” that a new trial will not be ordered so that the Crown can put a different case at a second trial. The “radical difference” was determinative of the occurrence of a miscarriage of justice, but on the question of remedy, McHugh J resorted only to a general rule.
9. In *Taufahema*, the use of the phrase “radically different” appears to have arisen from a submission made by the appellant: see [59]. The facts were summarised at **IS [44]-[45]**. In dissent, Gleeson CJ and Callinan J considered that the change in the prosecution case was ‘radical’,³ but did not suggest that such a finding was a necessary precondition to their Honours’ conclusion that no re-trial should be ordered.
10. The majority did not accept the difference in case was ‘radical’.⁴ Of more present relevance, the majority referred to *Jiminez* and other authorities in support of an ultimate conclusion that a change of case would have to be *substantial to stand as a bar* to an order for a re-trial: [67].
11. No member of the Court suggested that a change of prosecution case would only weigh against a re-trial where that change is properly characterised as ‘radical’.

² [1992] HCA 14; (1992) 173 CLR 572 at 590.

³ At [38].

⁴ At [68].

12. There is no magic in the term ‘radically different’ and, by its fixation upon these words, the Director’s submission poses the wrong question. That a different case is to be put on a re-trial is the relevant consideration for the Court of Appeal. It then falls to the Court of Appeal to ascertain the *extent* to which that difference might impact upon the fairness of exposing a person to a further trial. The more central the difference, the more strongly this factor will weigh against an order for a re-trial or, on a prosecution appeal, a grant of permission. Where it is the prosecution that invokes the appellate process, more weight again should be attached to the fact that a different case will be advanced at a re-trial. In such circumstances, the weighing process will necessarily require consideration of the intersection between the fairness of permitting the prosecution to change its case and the principles of double jeopardy (which was not an issue that fell to be considered in *Taufahema*). As has already been submitted, the Court of Appeal erred by failing to afford *any* weight to these matters. Issak’s position as to the appropriate weight to be afforded is set out at **IS [59]**.
13. Finally on this issue, it is wrong to say that at the new trial the prosecution will not advance any factual allegation inconsistent with the case advanced at the first trial: **RS[55]**. Although the evidence may not change, the proposed factual allegation set out at **RS[24(a)]** is different in fact and (if established) legal consequence to the factual allegations the subject of the prosecution opening and argument at the first trial.

C. The Court of Appeal did not consider the relevant issue

14. **RS[64]** misstates the effect of **IS[66]**.
15. In any event, the submission at **RS[64]** is misconceived. It is not to the point that the Court of Appeal outlined the appellant’s submissions and had regard to them. The point is that the Court of Appeal did not recognise that there was *any* intersection between the necessary change of prosecution case and the principles of double jeopardy applicable to a prosecution appeal against acquittal **CAB 65 [163]**. It is for this reason that the discretion miscarried. It is not necessary to repeat **IS [61]-[66]**.
16. Contrary to **RS[64]**, the terms of the Court of Appeal’s reasons are consistent exclusively with a conclusion that the Court of Appeal did not consider that the requisite change in prosecution case was relevant to the degree of unfairness worked by twice placing Issak in jeopardy by exposing him for retrial, and accordingly to the exercise of the discretion to grant permission to appeal. Thus, insofar as the Director now accepts (correctly) that a change in prosecution case is a relevant consideration to

the exercise of that discretion, that acceptance is irreconcilable with, and should be fatal to, the Court of Appeal's decision.

D. Conclusion

- 5 17. On the Director's concession as to the relevance of the change in prosecution case to the exercise of the Court of Appeal's discretion, the Court of Appeal's exercise of discretion to grant permission to appeal cannot be sustained. The Court of Appeal's decision should accordingly be set aside unless in the re-exercise of the discretion, this Court reaches the same outcome.
- 10 18. The magnitude of the required change in the prosecution case is relevant to the re-exercise of the discretion conferred by s 157(1)(b)(ii) of the *Criminal Procedure Act 1921* (SA). In this respect, there is no magic to whether the proposed change is a 'radical change'. For the reasons set out at **IS [68]** the interests of justice weigh against the Director being granted permission to appeal.
- 15 19. The appellant Issak submits this Court should re-exercise the discretion. The appeal should be allowed, the relevant orders of the Court of Appeal quashed and substituted with an order that permission to appeal is refused.

20 Dated 17 September 2026



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