HIGH COURT OF AUSTRALIA

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Details of Filing

File Number:	A22/2026
File Title:	Bekele v. The King & Ors
Registry:	Adelaide
Document filed:	Form 27F - (Bekele) appellant's outline of oral submissions
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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.

Form 27F – Outline of oral submissions

Note: see rule 44.08.2.

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

OUTLINE OF ORAL SUBMISSIONS

Part I: INTERNET PUBLICATION

This outline is in a form suitable for publication on the internet.

Part II: PROPOSITIONS TO BE ADVANCED IN ORAL ARGUMENT

The first question

The Appellant anticipates adopting the submissions advanced by the Second Respondent (as Appellant in A21/2026) and relying on written submissions, except to supplement those submissions in one respect:

1. *Taufahema* (**JBA 1083**) and the authorities surveyed in that case (particularly at [59-69]) recognise that a "flawed" first trial, which relied on an agreement to carry out a non-existent "foundational crime" (i.e. an agreement to carry out a "foundational crime" that is not actually a crime), may in some circumstances be mended by a new trial where the prosecution intends to present a materially different case (*Taufahema* at [51, 53, 54-56, 58]).
2. The authorities surveyed suggest 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 (*Taufahema* at [67]).
3. In contrast to the facts in *Taufahema* and this Court's decision on the facts in that case, where it was held (at [68]) that the prosecution at the second trial did not propose to advance any factual allegation inconsistent with what the jury or the Court of Criminal Appeal have already found, and not to advance any factual allegation inconsistent with the case advanced at the first trial, in this case:

a. If a retrial were permitted and the prosecution were to present its case on the basis that the JCE formed prior to getting into the taxi was one to engage in sexual intercourse *without the complainant's consent* (i.e. *knowing* or *believing* she was so intoxicated as to be unable to consent), the prosecution would thereby be permitted to proceed upon a basis inconsistent with the jury's verdict of acquittal of the Appellant Bekele on Count 1; for it has been "conclusively established" that Bekele's sexual touching of the complainant's genitals in the taxi (the original subject of Count 1) was either consensual or, if in fact non-consensual, was carried out in circumstances where he did not know or believe she was not consenting (*cf. Taufahema* at [61] discussing *R v Wilkes* (1948) 77 CLR 511 at 518; and at [64] citing *King v The Queen* (1986) 161 CLR 423 at 433).

b. The "new case" to be presented here is both "highly improbable" (**BR [5], BFM 82-83**) and one which "deserts the assumptions which the jury's verdict requires" in respect of the acquittal on Count 1 (*Taufahema* at [63], again citing *Wilkes*).

The second question

As to the second special leave question arising on this appeal, the Appellant Bekele will advance the following propositions, with reference to his primary written submissions (**BWS**), the written submissions of the First Respondent (**RWS**), those in reply (**BR**), the joint book of authorities (**JBA**), Core Appeal Book (**CAB**) and his book of further materials (**BFM**).

1. The respondent has accepted a number of propositions (**BR [1]**), including that:

   a. the prosecution's articulation of the JCE in Opening at trial was in error (**RWS [19]** endorsing Reasons [163] **CAB 65**) and the case at trial thus flawed, accepting that there cannot be a criminal agreement to engage in sexual intercourse "with or without" consent;

   b. the common law doctrine of JCE operates where there is an express or inferred agreement (or arrangement or understanding amounting to an agreement) between persons *to commit a crime*, that is, to the "combination of elements that constitute a particular criminal offence" (**RWS [33]**);

   c. 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 (**RWS [33]**).

2. There is no dispute between the parties as to two of the three main contentions advanced by the Appellant (**BWS [5 a – b]**).

3. The controversy concerns whether *[Decision Restricted]* was wrong to conclude that 'advertent recklessness' was capable of forming a joint enterprise for rape (**BWS [5.c]**). This question concerns 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). The respondent overlooks this question. (**BR [2-3]**).

4. The authorities discussed in *[Decision Restricted]* support the opposite conclusion; that for proof of an agreement to commit an offence, it is neither sufficient to prove only that the accused entered into an agreement with another person to commit the acts or omissions which constitute the offence, nor that there was "advertent recklessness" to a factual circumstance necessary to render the agreed upon conduct criminal (if carried out in accordance with the agreement). An agreement to commit a particular offence means

an agreement to "the concatenation of factual elements (physical, mental and circumstantial) that give rise to criminal liability…" (*Rohan* at [28] **JBA 1065**). An agreement to commit a crime is the "fundamental bedrock" of JCE liability (**BR [6]**, *[Decision Restricted]* [177] **JBA 1521**).

5. Thus, nothing short of *knowledge or belief* in the facts and circumstances necessary to render the agreed upon conduct criminal will suffice for a JCE, just as for a conspiracy.

6. The fault elements for JCE rape can be simply stated: (**BWS [67]**)

    a. As to the physical element of conduct (that sexual intercourse will occur): *an intentional agreement* that one or other of the participants will engage in sexual intercourse with the complainant;

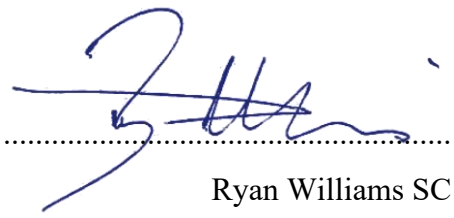
    b. As to the physical element of the attendant circumstance of non-consent – *knowledge or belief* by each of the participants, forming a common understanding between them, that the complaint *is not* (or *will not*) in actual fact be consenting at the time of the sexual intercourse agreed upon.

    c. As to participation pursuant to the agreement: *intention*.

7. The prosecution case at trial was never that the appellants *agreed* to engage in sexual intercourse with the complainant *without* her consent; that is, agreeing to sexual intercourse with the complainant *knowing or believing* that she would not be consenting to the acts agreed upon (owing to her intoxication or otherwise).

8. Such a case could at law sustain JCE liability, but would be fundamentally different to, and inconsistent with, the initial case at trial, where the prosecution made express concessions that the appellants could reasonably have contemplated the complainant *might have consented* (**BR [5], BFM 82-83**).

Dated: 5 November 2026



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Ryan Williams SC

Senior Legal Practitioner for the Appellant