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

BETWEEN: **BESUFIKAD HAILE**
Appellant

and

THE KING
First Respondent

SADAM HUSSEIN ISSAK
Second Respondent

BEDHANE TARIKA BEKELE
Third Respondent

APPELLANT'S OUTLINE OF ORAL SUBMISSIONS

Part I

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

Part II

A. ARGUMENT

The Director should not have been granted permission to appeal the acquittals, and a retrial should not have been ordered, because:

Public confidence

1. Consideration of public confidence in the administration of justice must include:
   a. the Director's obligation to frame a prosecution case based on a genuine assessment of the evidence and inferences arising, and prosecute a charge accordingly. It is not the function of the Director to decide, first, to prosecute a charge, and then consider how the evidence might be used to lead to guilt. The Director must prove the case against the defendant, act with fairness, detachment and with the objectives of establishing the truth and helping to ensure that the accused's trial is a fair one: *Whitehorn,* 663-664 (JBAVol 4, 1327-1328). The Director must not espouse a theory and then tailor a case accordingly: *Anderson (Hilton Bombing Case)*, 453 (JBA Vol 5, 1399); R [7].

b. the general rule that litigants are bound by their previous conduct applies with at least as much force to the prosecution as to the defence: *Taufahema* [37], [168]-[176] (JBA Vol 4, 1101, 1141-1143); *Reid* 348 (JBA Vol 5, 1834).

c. the court's role in: ensuring the discipline of the model litigant; guarding the impartiality of the courts and the separation of the court from the Director: *Taufahema* [37], [162],[169], [176] (JBA Vol 4, 1101, 1141-1143).

d. the interests of justice which must also be taken into consideration, the nature and strength of which will vary from case to case: *Reid*, 348 (JBAVol 5, 1834).

e. the fact that the evidence and charge are unchanged serves to reduce, not increase, the latitude that should be afforded to the Director in this case. If the evidence allows the Director to run a case now, that opportunity always existed: R[8]-[10].

Double jeopardy

2. Common law principles against double jeopardy remain relevant: *Donovan* [24],[25] (JBA Vol 5, 1776-1777).

3. "Double jeopardy" is a value which underpins the criminal law, grounded in deep social instincts: AS [45]; *Cooke v Purcell*, 54-56 (JBA Vol 5, 1404-1406).

4. The case must be rare and exceptional before a grant of permission to appeal against acquittal will be countenanced. Circumstances which raise the need for the principled intervention to address error or outcome that has the capacity to undermine public confidence in the administration of justice are required. It is questions of high public policy of sufficient importance to the interests of justice which will have the capacity to overcome the common law principles against double jeopardy: *Donovan* [25] (JBA Vol 5, 1776-1777).

5. Any criminal trial is an ordeal which a defendant ought not be condemned to undergo for a second time through no fault of his own unless the interests of justice require that they should do so: *Taufahema* [163]-[167] (JBA Vol 4, 1138-1141); *Reid* 350 (JBA Vol 5, 1836).

6. The state, with all of its advantages, should not be allowed to make repeated attempts to convict an individual for an alleged offence: *Cooke v Purcell* 55E (JBA Vol 5, 1405).

Flawed prosecution

7. The Director pressed, throughout, a basis for liability which was incapable at law of sustaining convictions: *Decision Restricted* [190]-[191] (JBA Vol 5, 1525-1526); AFM 256-257. An agreement to engage in sexual intercourse with a person is not an agreement to commit a crime. The agreement to have sexual intercourse with a person "with or without

their consent" is not capable of forming a joint criminal enterprise (**JCE**): *Decision Restricted* [126],[190]-[191] (JBAVol 5, 1504, 1525-1526)*; Miller* [4] (JBA Vol 3, 699).

Materially different case

8. The Director's JCE at trial: an agreement that one or more of the accused would engage in unlawful sexual acts with the complainant irrespective of whether she was consenting or not, also expressed as "we're going to have sexual relations with this girl whether she consents or not.": AS[11]; AFM21, 23. The Court of Appeal described the trial JCE: CA[97] CAB49-50; CA [149] CAB 61; CA[161]-[163] CAB 65. The CA reformulated the JCE: CA[8] CAB 32; CA[149] CAB61; CA[161]-[163] CAB 65.

9. Director's retrial JCE, formulated on this appeal is: that the appellants agreed to engage in sexual activity or intercourse with the complainant without her consent, 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 of intercourse, and proceeding regardless of that possibility: RS[24]. The Director concedes a shift in position: RS[54].

10. There is no established threshold for what amounts to a shift precluding retrial. Phrases such as "radically different", "a new case" and "substantial difference" appear in the authorities, but not as a "test". However described, the difference must be material in the circumstances of the case: *Taufahema* [38],[60],[67],[68] (JBA Vol 4, 1101, 1109, 1113-1114); *Jimenez* 589-591 (JBA Vol 3, 660-662).

11. A change in factual allegations (alone) may be sufficient: *Jimenez* 589 – 591 (JBA Vol 3, 660-662)*; Taufahema* [36], [38], [68], [160]-[161] (JBA Vol 4, 1100, 1101, 1113-1114, 1136-1137).

12. In this case, the change is not just a "narrowing" of the JCE. It introduces *inconsistency* as between the trial JCE and the retrial JCE: *cf Taufahema* [68] (JBA 1113-1114).

B. RE-EXERCISE OF DISCRETION

13. The discretion should be re-exercised and permission refused. In the circumstances, the interests of justice do not require that the appellant should be put to a second trial: AS [64]; *Taufahema* [178] (JBA Vol 4, 1143).

Dated: 5 November 2026



J E Abbey KC