HIGH COURT OF AUSTRALIA

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Details of Filing

File Number:	A21/2026
File Title:	Issak v. The King & Ors
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Important Information

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Form 27F – Outline of oral submissions

Note: see rule 44.08.2.

IN THE HIGH COURT OF AUSTRALIA
ADELAIDE REGISTRY

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

BEDHANE TARIKA BEKELE
Appellant in A22/2026, Second Respondent in A2 l/2026 and Third Respondent in A23/2026

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

and

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

THE FIRST RESPONDENT'S
OUTLINE OF ORAL SUBMISSIONS

Part I: Certification

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

Part II: Outline of Argument

The offence of rape in South Australia **(RWS, [31]-[51])**

1. Sections 46 to 48 (inclusive) of the *Criminal Law Consolidation Act 1935* (SA) ("*CLCA*") defines the fault element of reckless indifference and further articulates the circumstances in which a person will be taken not to consent to sexual activity.

    a. These provisions refined and extended the common law fault element of rape as discussed by this Court in *Banditt v The Queen* (2005) 224 CLR 262, [18]-[35] **(JBA (Vol. 3), 466-471; RWS, [39])**.

2. Joint criminal enterprise ("JCE") liability is a form of primary liability for which the "acts of the perpetrator that are within the scope of the agreement, and therefore done with the authority of the other parties, are attributed to the other parties to the agreement" **(*Mitchell v The King* (2023) 276 CLR 299, [13], [54]-[55]; JBA (Vol. 3), 750 and 761)**. The liability attaches because of the fact of the agreement, arrangement or understanding between the participants.

3. The analysis of JCE liability as it relates to s 48 *CLCA* commences with the proper construction of those provisions **(RWS, [21(a)], [39]-[51])**.

4. For a person to be liable for the acts of another pursuant to JCE liability there must be an agreement to commit a crime. To identify the factual elements of "a crime" requires the proper construction of the offence provision **(*R v Rohan* (2024) 280 CLR 288, [28]; JBA (Vol. 4), 1065)**.

5. The distinctions between JCE liability and other forms of accessorial liability or inchoate liability reflect the different practical, moral and legal considerations that inform the principles underpinning these doctrines **(RWS, [35])**.

    a. Accessorial liability is a form of derivative liability and requires knowledge of the essential aspects of the crime. That knowledge is the link in purpose between the accessory and the principal offender. The culpability for the derivative liability lies in those assisting the commission of the offence **(RSW, [35])**.

    b. A similar principled difference exists between JCE liability and inchoate liability **(*R v LK* (2010) 241 CLR 177, [67]; JBA (Vol. 4), 1022; RWS, [35])**.

6. Recklessness as defined in s 47(a)-(b) *CLCA* is not incompatible with JCE liability **(*Decision Restricted,* [189]; JBA (Vol. 5), 1524; RWS, [37] and [49])**.

7. The contentions raised by Bekele relating to the necessary fault element do not reflect the above statements of principle attending JCE liability **(RWS, [46])**.

a. There is no principled reason to overlay a requirement of knowledge of all essential circumstances to JCE liability.

b. There is no logical or irrational incompatibility in an agreement including reckless indifference as defined in s 47(a) *CLCA*. More than one person can turn their minds to the fault elements defined in s 47(a)-(b) *CLCA*.

c. The requirement that the crime must be committed pursuant to the agreement and whilst the agreement remains on foot ensures there is no unprincipled lack of contemporaneity **(*cf.*, BWS, [11(h)] and [56])**.

Double jeopardy and appeals against acquittals **(RWS, [21], [25]-[30], [52]-[56])**

8. The Director has a conditional right of appeal against an acquittal under ss 157(1)(b)(ii) and 158(4) of the *Criminal Procedure Act 1921* (SA) ("*CPA*") **(JBA (Vol. 1), 380-382); RWS 25-30)**. This Court and the Court of Appeal of South Australia ("CoA") have repeatedly emphasised the importance of the concept of double jeopardy as it applies to the discretionary aspects of that right.

9. Material differences in a party's case on a proposed retrial are relevant to those discretionary considerations. In the exercise of the discretion, the weight to be attributed to this factor will depend on the circumstances of the case and the nature of the material difference.

10. Given that double jeopardy considerations will necessarily rise and fall in a particular case, the broad nature of the discretion is not amenable to a precise statement of a threshold requirement or test as to that power.

    a. Parliament has also not particularised a specific qualitative threshold (*cf.*, the right of appeal on an interlocutory judgment as prescribed under ss 157(1)(e) and 157(3) *CPA* **(JBA (Vol. 1), 381)**;

11. The first respondent points to this Court's language in *R v Taufehema* (2007) CLR 232 **(JBA (Vol. 4), 1083)** as an expression of weight to be given to the change in the prosecution case in the balancing exercise, in the circumstance of a particular case.

The CoA were correct to grant permission in the circumstances of this case **(RWS, [21], [57]-[65])**

12. The first respondent accepts that the case to be presented on the retrial is materially different in the sense that the particularisation of the agreement is necessarily confined as a matter of law as one on the basis of s 47(a) *CLCA* or knowledge **(RWS [24], [53]-[56])**.

13. The double jeopardy considerations in this matter were always "clear and real" **(*R v Bekele & Ors* [2026] SASCA 9, [163]; JBA (Vol. 5), 1708)**. The CoA, in exercising the discretion, expressly averred to the necessary confinement **(*R v Bekele & Ors* [2026] SASCA 9, [162]-[163]; JBA (Vol. 5), 1708)**. The CoA did not err in its consideration of these matters.

14. On a retrial, the prosecution will not be advancing any factual allegation inconsistent with the case advanced at the trial. The evidence remains unchanged. The form of liability remains unchanged **(RWS, [55]-[56])**.

15. The exercise of the discretion also demands the Court consider the nature of the error of law that led to the directed acquittal, the strength of the prosecution case and public interest considerations **(*R v Bekele & Ors* [2026] SASCA 9, [161]-[164]; JBA (Vol. 5), 1708)**.

16. There is a significant public interest in these serious criminal allegations being tried by the constitutional trier of fact **(*R v Taufehema* (2007) CLR 232, [49], [51]; JBA (Vol. 4), 1105-1106; RWS, [61]-[62])**. There is a powerful social imperative that those who are charged with serious criminal offences be brought to trial, and that where a prosecution case had the evidentiary capacity, it must be left to a jury **(*R v Taufehema* (2007) CLR 232, [49], [51]; JBA (Vol. 4), 1105-1106; RWS, [62])**.

Disposition **(RWS, [66]-[68])**

17. The first respondent contends the CoA did not err in their consideration of double jeopardy principles, and in the exercise of the discretion. The appeal should be dismissed.

18. In the alternative, having considered this Court's recent treatment of disposition in *O'Connell v The King* [2026] HCA 41, [71]-[78], the respondent contends that this Court does not have before it the whole of the record relevant to the exercise of the discretion, and it is appropriate for the matter to be remitted to the CoA for determination according to law.

Dated: 5 November 2026

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