HIGH COURT OF AUSTRALIA

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Details of Filing

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Important Information

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Form 27F – Outline of oral submissions

IN THE HIGH COURT OF AUSTRALIA
ADELAIDE REGISTRY

BETWEEN:

Sadam Hussein Issak
Appellant

and

The King
First Respondent

Bedhane Tarika Bekele
Second Respondent

Besufikad Haile
Third Respondent

APPELLANT'S
OUTLINE OF ORAL SUBMISSIONS

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

Part II:

Background

1. The evidence at trial:
   1.1. The case is adequately summarised by the chronology filed by the Director below: **ABFM123**.
   1.2. The evidence of the pre-taxi interactions between appellants and complainant was mute CCTV footage.

2. The prosecution opening:
   2.1. The prosecution opening alleged an agreement to engage in unlawful sexual acts with the complainant, irrespective of whether she was consenting: **ABFM21; ABFM23**.
   2.2. The "unlawful" nature of the acts was tethered to ambivalence about consent.

Key Propositions

3. The Director would be required to, and intends to, advance a different agreement at a retrial:
   3.1. The prosecutor reiterated the agreement that was opened on at the No Case to Answer stage: **ABFM82**
   3.2. The alleged agreement to have sexual activity irrespective of consent was not a criminal agreement: *[Decision Restricted]* [2025] NSWCCA 210 **JBA vol 5, 1445**
   3.3. The respondent has particularised a different proposed agreement to be advanced at the retrial **RS [24(a)].**

4. The necessary change in the agreement was a circumstance relevant to the discretion to grant permission to appeal pursuant to s 157(1)(b)(ii) of the *Criminal Procedure Act*: *R v Taufahema* (2007) 228 CLR 232 **JBA vol 4, 1083**.

5. The magnitude of the change in the prosecution case is a matter for weight: *Taufahema*.

6. The threshold for a change in the prosecution case to be relevant to the discretion to grant permission to appeal is materiality:
   6.1. The change in case need not be radical to be relevant. Neither *Jiminez v The Queen* (1992) 173 CLR 572 **JBA vol 3, 643** nor *Taufahema* stand for such a proposition;
   6.2. Those authorities support the contention that a radical change to the case would weigh heavily against, if not be fatal to, the application for permission to appeal;
   6.3. The change in case should tell more strongly against a retrial where the prosecution has invoked the appellate process.

7. The change in the prosecution case in this case would be radical, but at the least is material:
   7.1. The label of "narrowing" the agreement tends to minimise the importance of the difference between the agreement asserted at trial and the one to be advanced at the retrial.
   7.2. The proposed change goes to the heart of the appellant's liability. If he did the things alleged at the first trial, he is entitled to acquittals.
   7.3. It is artificial for the prosecution now to allege a different agreement corresponding to a changed understanding of the legal framework of the charge.

8. The Court of Appeal erred by failing to take the change the prosecution case into account when considering whether to grant permission to appeal:
   8.1. Chief Justice Kourakis did not expressly consider the change in prosecution case and can be taken to have agreed with the plurality on the point: **CAB31, [3]**.
   8.2. Justices Bleby and David's approach treated proof of an agreement as an academic exercise rather than one tethered to proof of an actual agreement: **CAB65, [162]**.
   8.3. That approach led to their Honours erroneously failing to recognise the relevance of the change in prosecution case when considering whether to grant permission to appeal.

Re-exercise of discretion

9. This Court should re-exercise the discretion and refuse permission to appeal:
   9.1. The change in prosecution case and double jeopardy considerations have already been addressed.
   9.2. The retrial is listed in August 2027. Some 14 months will have passed since the appellant was acquitted and released unconditionally into the community.
   9.3. Bekele and Haile's convictions are significant practical obstacles to a fair retrial. There is no direction capable of preventing the jury from speculating as to why they are not to be tried for the offences of which they have been convicted.
   9.4. The prosecution case was not overwhelming. It is not necessary for this Court to have regard to the whole of the record; the Director's chronology below is sufficient: **ABFM123**.
   9.5. The error of the trial judge was strictly an error of law, but was based solely on an assessment of the evidence. It was specific to this case. No general principle arises.

Dated: 5 November 2026

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Andrew Culshaw
Senior Legal Practitioner for the Appellant