



HIGH COURT OF AUSTRALIA

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THE QUEEN v MOTEKIAI TAUFACHEMA

A man convicted of the shooting murder of a police officer although he fired no shots himself should have faced a retrial rather than being acquitted on appeal, the High Court of Australia held today.

Mr Taufahema, 30, was the unlicensed driver of a stolen car carrying his brother John, Meli Lagi and Sione Penisini, who fired the shot that killed Senior Constable Glenn McEnallay on 27 March 2002 in Hillsdale in Sydney's south. The car was being driven erratically at excessive speed. Senior Constable McEnallay briefly pursued the car until it struck a gutter and stopped. While he called for back-up, the men, each carrying a loaded gun, leaped from the car. Mr Penisini fired five shots into the police car windscreen, four of which hit Senior Constable McEnallay, one of which caused fatal head wounds. Mr Taufahema was arrested after hiding his gun behind flowerpots, his brother and Mr Penisini were caught after attempting to carjack a passing vehicle, and Mr Lagi was arrested a few days later. Gloves, a hockey mask and bullets were found in the car.

Mr Taufahema was convicted of murder and of unlawful possession of a Smith & Wesson .357 revolver. He was sentenced to 23 years' jail with a non-parole period of 16 years. Mr Penisini pleaded guilty to murder, unauthorised use of a firearm and attempted carjacking. John Taufahema was convicted of murder, attempted carjacking, using a firearm to evade apprehension and using a prohibited firearm. Mr Lagi was acquitted of murder but found guilty of two firearms offences. All four were on parole at the time of the shooting. At Mr Taufahema's trial, the prosecution contended that he was party to a joint criminal enterprise of using a firearm to prevent arrest of the four men, but by the end of the trial this contention had changed to a joint enterprise to evade arrest, involving the shooting of a police officer as a foreseen possibility. In the Court of Appeal, the prosecution suggested that the joint enterprise was hindering a police officer in the execution of his duty. The Court allowed an appeal by Mr Taufahema against the murder conviction and ordered an acquittal rather than a new trial. Its reasons included flaws in the trial judge's directions, evading arrest not actually being a crime, and the evidence not supporting that any agreement was made to hinder a police officer.

The prosecution sought special leave to appeal against the order of acquittal, even though it had not argued for a new trial at the Court of Criminal Appeal. The application was referred to a Full Court and argued as on appeal. By a 4-3 majority, the High Court granted special leave to appeal, allowed the prosecution appeal, and ordered that the verdict of acquittal be set aside and a new trial held. The prosecution argued that at a retrial it would submit that the four men were engaged in a joint criminal enterprise of armed robbery and that shooting another person was foreseen as a possible incident of that joint enterprise. This issue had not been argued at the trial and arose for the first time in the High Court. The majority said this was regrettable but there was no absolute bar to either side raising fresh points. It held that the prosecution was not prevented from requesting a new trial to be conducted on a different basis, provided the difference was not substantial. The prosecution proposed to rely on the same evidence in a second trial but to characterise it in a different way. The majority held that at the first trial the criminal enterprise revealed by the evidence was not identified as armed robbery but the evidence was capable of supporting an inference that it was. It held that that interpretation should be decided by a second jury.

- *This statement is not intended to be a substitute for the reasons of the High Court or to be used in any later consideration of the Court's reasons.*