HIGH COURT OF AUSTRALIA

GLEESON CJ,
GUMMOW, KIRBY, HAYNE, CALLINAN, HEYDON AND CRENNAN JJ

THE QUEEN APPLICANT

AND

MOTEKIAI TAUFAHEMA RESPONDENT

The Queen v Taufahema [2007] HCA 11
21 March 2007
S142/2006

ORDER

1. *Special leave to appeal granted.*

2. *Appeal allowed.*

3. *Set aside the order of the New South Wales Court of Criminal Appeal made on 8 May 2006 entering a verdict of acquittal and in its place order that there be a new trial.*

On appeal from the Supreme Court of New South Wales

Representation

N R Cowdery QC with D M L Woodburne and J A Girdham for the applicant (instructed by Solicitor for Public Prosecutions (New South Wales))

T A Game SC with G A Bashir for the respondent (instructed by Legal Aid Commission of New South Wales)

CATCHWORDS

The Queen v Taufahema

Criminal law – Joint criminal enterprise – Extended common purpose – Respondent alleged to be party to a joint criminal enterprise – Respondent convicted of murder – Appeal against conviction allowed on the ground of a wrong direction on a question of law – Conviction quashed and verdict of acquittal entered.

Criminal law and procedure – Retrial – Whether the verdict of acquittal should be set aside and a new trial ordered – Whether retrial can be ordered where the classification of the joint criminal enterprise differs from that presented at the first trial – Whether difference of classification constitutes a new case not made at the first trial – Meaning of "new case" – Whether retrial appropriate where case at trial adopted by prosecution for tactical reasons – Whether granting retrial on a "new case" is consistent with even-handed disposition of criminal appeals.

Courts – Court of Criminal Appeal – *Criminal Appeal Act* 1912 (NSW), s 8(1) – Discretion of Court of Criminal Appeal to order new trial upon successful appeal against conviction – Circumstances to be taken into account.

Courts – High Court of Australia – Practice and procedure – Special leave to appeal – Application by Crown for special leave to appeal against a verdict of acquittal entered by a Court of Criminal Appeal – Circumstances to be taken into account.

Words and phrases – "new case", "foundational crime", "extended common purpose".

Crimes Act 1900 (NSW), ss 18, 33B, 546C.
Criminal Appeal Act 1912 (NSW), ss 5(1), 6(1), 6(2), 8(1).

1 GLEESON CJ AND CALLINAN J. Following a trial in the Supreme Court of New South Wales before Sully J and a jury, the respondent was convicted of the murder of Senior Constable Glenn McEnallay. He was sentenced to imprisonment for 23 years, with a non-parole period of 16 years. He appealed against his conviction. The Court of Criminal Appeal (Beazley JA, Adams and Howie JJ) allowed the appeal and quashed the conviction[1]. The Court of Criminal Appeal declined to order a new trial, and entered a verdict of acquittal. That aspect of the orders of the Court of Criminal Appeal is the subject of the present application. The applicant does not challenge the quashing of the conviction, but contends that there should be a new trial. Although it is submitted that the Court of Criminal Appeal erred in declining to order a new trial, the argument now advanced by the applicant in support of such an order was not put to that Court, and the applicant has made it clear that, at a new trial, the case against the respondent would differ in certain respects from the case argued at the original trial and in the Court of Criminal Appeal.

The death of Senior Constable McEnallay

2 Senior Constable McEnallay was shot and killed by Sione Penisini, who was convicted of murder following a plea of guilty. The charge against the respondent was based upon his alleged complicity in the conduct of Sione Penisini. The relevant legal principles, which are not in dispute, will be identified below. First it is necessary to state, in summary form, the circumstances said to have given rise to such complicity.

3 At about 5.30 pm on 27 March 2002, two police officers, who were off duty, saw a green Holden car travelling at excessive speed in a Sydney suburban area. They noted the registration number. They reported what they had seen to Senior Constable McEnallay, a highway patrol officer who was in the vicinity. He made radio enquiries, and learned that the vehicle had been reported stolen some months earlier. Soon afterwards, he saw the vehicle. In it there were four men. Senior Constable McEnallay called for assistance, and drove up behind the vehicle. The vehicle increased speed, and he pursued. The pursuit was brief. The Holden collided with an obstacle on the road and stopped. Sione Penisini, one of the passengers, left the vehicle with a loaded revolver in his hand, and fired a number of shots into the police car from close range, mortally wounding Senior Constable McEnallay. The four men, each armed with a revolver, ran away. They were chased by police officers who had arrived at the scene shortly after the shooting of Senior Constable McEnallay. Three of the men (including the respondent) were captured immediately. One was arrested some days later.

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1 *Taufahema v The Queen* (2006) 162 A Crim R 152.

4 Apart from Sione Penisini, the other three men in the Holden were the respondent, who was the driver, the respondent's brother, John Taufahema, and Meli Lagi. All four men were on parole at the time of the incident. That was a matter of significance in the prosecution case. Apart from the weapons which each man carried when running away from the police, the police found, in or near the Holden, two pairs of gloves and a hockey mask. In outlining the prosecution case for the purpose of a pre-trial ruling on evidence, the prosecutor said:

> "It is the Crown case that the motive for the shooting and the motive for attempting to escape from the pursuing police ... was the fact that each of them was on parole; that each of them was in possession of a firearm, in a reported stolen vehicle, which firearm was loaded and also found in the vehicle was a mask and gloves of the type that would readily be used to effect disguise for the purpose of carrying out crime of some sort."

5 The prosecution case was that the four men all understood that, if apprehended, they would have been found to be in breach of their parole conditions, and would have been returned to prison to complete their sentences in custody. The respondent was charged with, and convicted of, unauthorised possession of a Smith and Wesson .357 revolver. That conviction is not the subject of this application. He was also charged with, and convicted of, murder.

Criminal complicity

6 The murder charge against the respondent was based on secondary liability. The principal offender was Sione Penisini. Under s 18 of the *Crimes Act* 1900 (NSW) ("the Crimes Act"), Sione Penisini was guilty of murder because it was his act which caused the death of the police officer, and that act was done with intent to kill or inflict grievous bodily harm, or with reckless indifference to human life. Since he fired at Senior Constable McEnallay from close range, there was a compelling inference that he acted with intent to kill or inflict grievous bodily harm. The principle of secondary liability of present relevance was stated by Brennan CJ, Deane, Dawson, Toohey and Gummow JJ in *McAuliffe v The Queen*[2]:

> "The doctrine of common purpose applies where a venture is undertaken by more than one person acting in concert in pursuit of a common criminal design. Such a venture may be described as a joint criminal enterprise. Those terms – common purpose, common design, concert, joint criminal enterprise – are used more or less interchangeably

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2 (1995) 183 CLR 108 at 113-114.

to invoke the doctrine which provides a means, often an additional means, of establishing the complicity of a secondary party in the commission of a crime. The liability which attaches to the traditional classifications of accessory before the fact and principal in the second degree may be enough to establish the guilt of a secondary party: in the case of an accessory before the fact where that party counsels or procures the commission of the crime and in the case of a principal in the second degree where that party, being present at the scene, aids or abets its commission. But the complicity of a secondary party may also be established by reason of a common purpose shared with the principal offender or with that offender and others. Such a common purpose arises where a person reaches an understanding or arrangement amounting to an agreement between that person and another or others that they will commit a crime. The understanding or arrangement need not be express and may be inferred from all the circumstances. If one or other of the parties to the understanding or arrangement does, or they do between them, in accordance with the continuing understanding or arrangement, all those things which are necessary to constitute the crime, they are all equally guilty of the crime regardless of the part played by each in its commission.

Not only that, but each of the parties to the arrangement or understanding is guilty of any other crime falling within the scope of the common purpose which is committed in carrying out that purpose. Initially the test of what fell within the scope of the common purpose was determined objectively so that liability was imposed for other crimes committed as a consequence of the commission of the crime which was the primary object of the criminal venture, whether or not those other crimes were contemplated by the parties to that venture. However, in accordance with the emphasis which the law now places upon the actual state of mind of an accused person, the test has become a subjective one and the scope of the common purpose is to be determined by what was contemplated by the parties sharing that purpose."

7 The principle referred to in the second of the above paragraphs is sometimes described as "extended common purpose"[3]. In *Clayton v The Queen*[4], the majority gave the following example:

"If a party to a joint criminal enterprise foresees the possibility that another might be assaulted with intention to kill or cause really serious

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3 *Clayton v The Queen* (2006) 231 ALR 500 at 504 [14].

4 (2006) 231 ALR 500 at 504-505 [17].

injury to that person, and, despite that foresight, continues to participate in the venture, the criminal culpability lies in the continued participation in the joint enterprise with the necessary foresight."[5]

8 If the alleged common criminal design, or the joint criminal enterprise, in this case had been the shooting of Senior Constable McEnallay, the case would have been one of common purpose of the kind described in the first of the two paragraphs from *McAuliffe* quoted above. A case of extended common purpose is one that alleges that the shooting occurred as an incident in the pursuit of some different criminal enterprise, but was foreseen by the respondent as a possibility, the respondent's culpability lying in the participation in the enterprise with such foresight.

9 The total time that elapsed between the first observation of Senior Constable McEnallay by the four men in the Holden and the fatal shooting was less than one minute. According to the applicant, it was probably closer to 20 seconds. The prosecution set out to satisfy the jury, first, that the respondent was a party to a criminal enterprise and, secondly, that the nature of the enterprise was such that the respondent could and did foresee the shooting as a possible outcome of the pursuit of the enterprise. Bearing in mind the sequence of events and the time frame, the development of a plausible case of extended common purpose was not without its problems. If four criminals, suddenly confronted by a police officer, flee, it is not self-evident that they are doing so in pursuance of an understanding or arrangement to flee. It is at least possible that they have decided individually that flight is a good idea. One thing, however, is clear. It was not the prosecution case at trial, or in the Court of Criminal Appeal, that the joint criminal enterprise which formed the foundation of the respondent's secondary liability for murder extended in time beyond the period between the first observation of the victim by the four men in the Holden and the shooting of the victim by Sione Penisini. Specifically, it was not the prosecution case at trial that this was, to take up an expression used in the applicant's submissions in this Court, "an armed robbery gone awry". An armed robbery is a joint criminal enterprise, and often it would be plausible to suggest that one of the participants foresaw the possibility that another participant would make hostile and fatal use of a weapon. At trial, the prosecution did not attempt to prove that the four men were on their way to commit an armed robbery. In the course of a pre-trial argument about the admissibility of certain evidence, Sully J remarked that the evidence about the way in which the men were equipped indicated that they "were obviously up to no good and the odds are they were going to commit a

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5 See also *Gillard v The Queen* (2003) 219 CLR 1; *Chang Wing-Siu v The Queen* [1985] AC 168; *Hui Chi-ming v The Queen* [1992] 1 AC 34; *R v Powell* [1999] 1 AC 1.

robbery". However, he went on to disclaim any suggestion that such a case could be left to the jury, and the prosecutor did not seek to make out such a case. Being "up to no good" is not a sufficiently particular description of a joint criminal enterprise. Suspicion that the men were "going to commit a robbery" is one thing; proof is another. The prosecution did not invite the jurors to find that this was a case of "an armed robbery gone awry", and Sully J did not direct them that it was open to make such a finding.

10 The specification of the joint criminal enterprise for the application of the principles of criminal complicity inevitably influenced the course of the trial. It was central to the trial judge's decision to admit certain evidence; it explained certain features of the conduct of the defence case; and it determined the way in which the prosecution case was left to the jury.

The course of the trial

11 Before the respondent was arraigned, there was argument, and a ruling by the trial judge, about the admissibility of evidence that all four occupants of the Holden were on parole. Reference has been made earlier to the prosecution submission about the motive of the men in avoiding arrest. The prosecution argued that the evidence was relevant to motive, and that, in applying s 137 of the *Evidence Act* 1995 (NSW), Sully J should accept that the probative value of the evidence outweighed the danger of unfair prejudice. Sully J, ruling that the evidence was admissible, said:

> "The Crown contends that that evidence is admissible, in particular against the accused at his trial, for the reason that it shows that he, the accused, had a strong motive to adhere, individually, to a joint criminal enterprise, namely, the avoidance by all or any of the four men of their lawful apprehension by the police, the shooting of Constable McEnallay having been an incident of the carrying out of that enterprise."

12 As the prosecution case was opened to the jury (although not as the case was finally left to the jury) it was in one respect different from the case as understood by Sully J in his pre-trial ruling on evidence. In his opening, the prosecutor said:

> "It is the Crown case that the accused was a party to a joint criminal enterprise that involved the use of a firearm by Sione Penisini; that that joint criminal enterprise was to use a firearm to prevent their lawful arrest, and detention by police ... [i]n this case Constable McEnallay, and it is contemplated during the course of that use of a firearm by this accused, that is his contemplation of the use of the firearm by Sione Penisini involved the possibility that there might be death or a serious injury occasioned. It is in that way that the Crown says that this

accused is also guilty of murder, notwithstanding that he didn't fire any shots at all."

13 That way of putting the case did not necessarily involve extended common purpose. Sione Penisini fired at Senior Constable McEnallay from close range. If there had been a joint criminal enterprise to use a firearm, that is to say, a concerted plan, to which the respondent was a party, to use a firearm to prevent arrest, in the circumstances it is difficult to imagine what kind of use might have been in prospect other than the use that in fact occurred. If there had been a joint plan, to which the respondent was a party, to use a firearm to prevent arrest, and the way in which the men intended to avoid arrest was that one of them would get out of the car and shoot at the police officer, then no extension of ordinary principles of common purpose would be necessary in order to make the respondent liable for culpable homicide. There was, however, no direct evidence of any such joint plan. It is not clear that it should have been inferred. In any event, as the trial progressed, the case altered. The alleged joint criminal enterprise to use a firearm to prevent arrest became, as foreshadowed by Sully J in his pre-trial ruling, simply a joint enterprise to evade arrest, and the conduct of Sione Penisini became, not conduct to which the respondent had agreed and which he had planned, but merely conduct which he foresaw as a possibility. Such a case may have been easier to prove factually. The prosecutor said he acted on "the KISS principle ..., that is keeping it simple". Plainly, it was a tactical decision, calculated to narrow the area of possible doubt, and therefore to make the prosecution case easier to establish.

14 Two points should be noted. First, in the present application the prosecution does not seek to put, or to be given another opportunity to put, a case of the kind opened and later withdrawn: a case that there was an agreement (in the sense explained in *McAuliffe*), to which the respondent was a party, that Sione Penisini would get out of the car and shoot the police officer. A case of murder on that basis would be straightforward legally, although factually difficult, but it is no longer the prosecution case, and ceased to be so during the trial. Secondly, the case the prosecution now seeks to make (extended common purpose founded on a joint criminal enterprise of armed robbery, of which the shooting was a foreseen incident) was never put at any stage of the trial.

15 Although, and perhaps because, the prosecution did not undertake the task of proving that the four men in the Holden were on their way to an armed robbery, the defence called evidence to show that three of the men, but not the respondent, were planning a robbery, or a series of robberies, in Melbourne. This, presumably, was to explain the contents of the vehicle, in a manner that exculpated the respondent. The respondent gave evidence about how he came to be driving the car, and about his movements on the day in question. Then the defence called a witness, Manuel Cackau, who said that he was to be the fourth man in the planned robberies. The plan, he said, was that he, Sione Penisini,

John Taufahema and Meli Lagi, would drive to Melbourne. The jury might well have regarded the evidence of the respondent and Manuel Cackau as implausible, but in the way the case was finally left to them that hardly mattered. In cross-examining the respondent, the Crown prosecutor did not put it to him that he was intending to participate in an armed robbery. The prosecutor put to the respondent that, being on parole, he knew that if he was caught with a gun he was in trouble.

16 At the close of the evidence, and before final addresses, there was discussion, in the absence of the jury, about the way the case would be left to the jury. Some of that is presently irrelevant. What is of importance is the way in which the joint criminal enterprise relied upon by the prosecution was refined and defined. This was reflected in the prosecutor's address and in the trial judge's summing-up.

17 In his address to the jury, the prosecutor said:

> "Here, the Crown says that there was a joint criminal enterprise to escape from lawful apprehension or detection by the men in the car; and the Crown says that in the course of carrying out that escape, one of them, Sione Penisini, shot at the policeman deliberately and fired those shots in such a way that they caused fatal wounds that he so unfortunately suffered. He did so whilst participating, the Crown says, in a joint criminal enterprise that all four men had embarked upon ... and were continuing upon at the time he fired the shots.
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> ...
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> For this accused to be guilty, the Crown says that he had to be participating in a joint criminal enterprise, namely, one of escaping jointly with the others or commonly with the others, from lawful apprehension by the police; that when he did so, he contemplated that a firearm might be used in some way to effect their escape; and that with that knowledge he contemplated a risk that death or serious injury might be caused, even unintentionally, by one of the participants; and that having contemplated that risk, he is guilty of the murder if one of the participants in the joint criminal enterprise caused the death of someone."

18 The expression "even unintentionally" appears to invite error, but that is beside the present point. Between the opening and closing addresses of the prosecutor the alleged joint criminal enterprise had been watered down, to the tactical advantage of the prosecution. No longer did the prosecution need to establish a joint plan to shoot Constable McEnallay. There was now said to be merely a joint enterprise to escape from lawful apprehension by the police. The respondent was said to have contemplated that a firearm *might* be used in some

way to effect the escape. The jurors were told that this was enough to convict the respondent of murder.

19 The trial judge gave the jury both written and oral directions as to the principles of criminal complicity and the application of those principles to the case. In his written directions he said:

> "The simplest approach is to ask whether the Crown has satisfied you beyond reasonable doubt:
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> 1. that the actions of the four men who were travelling in the [Holden] then being driven by the accused, give rise to an inference that they had reached [an] agreement or understanding that all four of them would jointly evade lawful apprehension by [Senior Constable McEnallay]; and
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> 2. that the accused then knew that there was at least one loaded revolver then being carried in the vehicle; and
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> 3. that the accused realised that, in the circumstances and the atmosphere then obtaining, there was a risk that any one of the men in the [Holden] might fire that weapon at the police officer; and that in such an event there was a real risk that the police officer might be killed or at least seriously injured; and
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> 4. that such risks crystallised in the shooting in fact by Penisini of the police officer.
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> If you are so satisfied beyond reasonable doubt, then this accused is as responsible as Penisini for the death of that police officer."

20 On that way of putting the case against the respondent, the joint enterprise was identified as evasion of lawful apprehension by Senior Constable McEnallay. It was not necessary for the prosecution to establish any agreement to shoot (or shoot at, if in the circumstances of this case there is a difference) the police officer. All that was necessary was for the respondent to realise that there was a risk that, in carrying out the agreement to evade apprehension, one of the other men in the car might shoot at the police officer. There remained, of course, the factual question: if four men, suddenly confronted by a police officer, try to get away, what is it that demonstrates that they have *agreed* to do so? Agreement is the key to this form of secondary liability. Without that, the case fails.

21 There was a legal problem with the way the case was left to the jury. Evading apprehension by a police officer is not itself a crime. There are certain

crimes that a person might commit in the course of evading apprehension. Section 33 of the Crimes Act makes it an offence maliciously to shoot at any person with intent to resist lawful apprehension. Section 33B makes it an offence to use, or attempt to use, or threaten to use an offensive weapon with intent to prevent or hinder lawful apprehension. There are other cognate offences, one of which was raised in argument in the Court of Criminal Appeal. The way in which the prosecution originally put its case identified a joint enterprise which, if it existed, was criminal. However, it may have been harder to establish factually. Ultimately, the enterprise relied on was expressed in a way that was open to legal criticism. Trial counsel for the respondent complained about this change in the prosecution case, but to no avail.

22 The jury convicted, and there is no reason to doubt that they followed what the trial judge described as the simplest approach to their task.

The decision of the Court of Criminal Appeal

23 The only ground of appeal to the Court of Criminal Appeal that is of present relevance was that the trial judge misdirected the jury on joint criminal enterprise and common purpose. It was submitted, among other things, that the "foundational crime" put to the jury was "not open as a matter of law".

24 In the course of written and oral argument in the Court of Criminal Appeal the prosecution did not seek to maintain that evading lawful apprehension is itself necessarily a crime, but argued that Sully J had in mind the offence created by s 546C of the Crimes Act, that is, resisting or hindering a member of the police force in the execution of his duty. In *Leonard v Morris*[6], Bray CJ said of the corresponding South Australian provision that hindering involves any form of interference or obstruction which makes the duty of a police officer substantially more difficult of performance. He did not define resisting.

25 Adams J, with whom Beazley JA and Howie J agreed, said:

> "The Crown contended in this Court that the foundational crime was that created by s 546C of the *Crimes Act* 1900. Whilst not resiling, in terms, from the case put below, that the foundational offence was evading arrest, the Crown prosecutor in this Court contended that another available offence was that of hindering the officer in the execution of his duty. One major obstacle in the way of this submission is that such a case was not put at trial.

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6 (1975) 10 SASR 528 at 530-532.

It was submitted that the word 'hinder' is a word of ordinary parlance without any special meaning and that its usual definition (for example, that in the Shorter Oxford English Dictionary) is 'to keep back, delay, impede, obstruct, prevent'. By not stopping the [Holden] when Senior Constable McEnallay signalled that he should do so by operating the siren and the flashing lights on his vehicle, it is submitted that the [respondent] sought to delay or impede an impending lawful arrest. (I interpolate that, the officer undoubtedly wished the vehicle to heed the signals and stop but whether he was then intending to arrest anybody is uncertain.) The Crown also contends, relying on the fact that all four offenders fled the scene, that they had agreed that they would run away from the officer and that the agreement to run away was an agreement to 'hinder' in the sense, again, of delaying or impeding and hopefully preventing their arrest. The researches of counsel did not produce any authority stating or approving such a wide use of 'hinder'. If correct, it would mean, for example, that an offender in Sydney who heard that a warrant for his arrest had been issued in Perth and left his place of residence to hide from the police would be guilty of an offence where the effective changing of his address was, in fact, to delay, impede or prevent it. (I mention that – as appears from the trial judge's directions extracted below – the Crown case at trial was not merely that the occupants of the car agreed to evade the officer, but that they had agreed to avoid arrest. There was no evidence, as stated above, that the officer was intending to arrest anyone when he was killed.)

In *Leonard v Morris* ... Bray CJ ... described the *actus reus* of the offence established by section 546C as 'any active interference or obstruction which makes the duty of the police officer substantially more difficult of performance'. This passage was adopted as correct by Sully J in *Worsley v Aitken & Anor* ... Worsley, it was alleged, took hold of the police officer's jacket when the officer was endeavouring to assist another officer then in the course of arresting another person during a melee, saying to the officer 'leave him alone, he's done nothing'. The officer desisted from his attempt to assist with the arrest of the suspect and pushed Worsley away before returning to his task. Of course, Sully J was there considering an actual physical interference by the accused person with the arrest which the officer was about to effect. That is not the use of hinder upon which the Crown relies in this case.

The description of the *actus reus* of this offence given by Bray CJ in *Leonard v Morris* has been regarded, in my experience, as applicable in this State for decades and I would not be prepared to extend the offence any further by a wider use of the word 'hinder' than that which it has hitherto been understood to have. I am of the view that the *actus reus* of the offence created by s 546C is indeed that ascribed to it by Bray CJ in

Leonard v Morris. It follows that the foundational offence upon which the Crown relied did not exist. In the circumstances, this conclusion is fatal to the correctness of the conviction. It is important, I think, to point out that it was not – at least, ultimately, for good reason I think – the Crown case that the [respondent] had a common purpose with Penisini to use a gun to threaten or attack Senior Constable McEnallay in order to evade or avoid arrest. There was simply no evidentiary basis for such a case, as the prosecutor at trial conceded. The highest point at which the Crown could aim was that the [respondent] foresaw the possibility that Penisini might use his weapon against the officer (though, on my view, this must be mere speculation). There was no evidence that could justify the conclusion that the [respondent] agreed with Penisini that he should use the gun to threaten, let alone shoot at the police officer or that he encouraged him to do so."

26 On the question whether there should be an order for a new trial, Adams J said:

"I propose that the conviction be quashed. In my view, there is no evidentiary basis for a conclusion that the [respondent] was party to an agreement that all four men would attempt to evade the police officer, as distinct from having made a decision that he would attempt to do so and knew that the others would do the same. Nor was there a basis for concluding that he adverted to the possibility that one of the others might use a gun in the course of evading the officer. The case proposed in this Court by the Crown, namely that there was an agreement to hinder the officer in the execution of his duty, was not put at trial and this Court should not order a new trial to permit such a different case to be put: *R v Chekeri* ... More fundamentally, the hindering identified – the running away – is not hindering within the meaning of s 546C of the Act. There is thus no foundational offence or joint criminal enterprise upon which the Crown can rely for the purpose of establishing the culpability of the [respondent] for the (conceded) unintentional consequence of shooting the police officer. As the [respondent] could not be convicted of murder or manslaughter on the cases as formulated by the Crown both at trial and in this Court, it seems to me that it is not appropriate to order a new trial."

27 By the conclusion of argument in the Court of Criminal Appeal, the prosecution, at various stages of the proceedings, had identified the joint criminal enterprise, participation in which resulted in the respondent's complicity in the crime of murder, in three different ways. First, the joint enterprise (or common criminal design) was said to be using a firearm to avoid arrest and detention. That would have involved an agreement that a firearm would be used to avoid arrest. This was abandoned during the trial. Secondly, as the case was left to the jury, the joint enterprise was said to be to evade lawful apprehension. Thirdly, in

the Court of Criminal Appeal, the joint enterprise was said to be hindering or resisting a police officer in the execution of his duty.

28 It was suggested in argument in this Court that the Court of Criminal Appeal misapplied legal principle by requiring for extended common purpose in a murder case, not merely an agreement to commit what was called the foundational offence, but also an agreement to the act causing the death of the victim. No such error appears from the reasons of Adams J. His reasoning, as would be expected, responded to the case as put to the Court of Criminal Appeal. He merely pointed out, with justification, that, for the attempted evasion of apprehension which was said to constitute the joint criminal enterprise which was the "foundational offence", there had to be an agreement (in the sense explained in *McAuliffe*) and not merely four men all attempting to get away from the police officer. Adams J did not suggest that, on the case as finally put by the prosecution, it would have been necessary to show, in addition to a "foundational" joint criminal enterprise, an agreement to the shooting.

29 The applicant's primary submission is that there should be a new trial so as to enable the prosecution to put, and a jury to consider, a case that this was "an armed robbery gone awry". On such a case, which was not put at trial or in the Court of Criminal Appeal, the relevant joint criminal enterprise, to which the respondent was a party, was armed robbery, and the respondent's secondary liability for the murder of Senior Constable McEnallay arose from his continuing participation in that enterprise with the foresight of the possibility that another person might be assaulted with intention to kill or cause really serious injury to that person.

30 If that had been the prosecution case at the trial before Sully J, the course of the trial would almost certainly have been different. The question of the admissibility of the evidence that the respondent and the other men in the Holden were all men with criminal convictions who were on parole at the time of their observation by Senior Constable McEnallay would have taken on a different complexion. It was obviously to the advantage of the prosecution to have that evidence, but the basis upon which Sully J decided to admit the evidence would not apply. Secondly, the conduct of the defence case would probably have been different. It is hardly likely that the defence would have called Manuel Cackau as a witness. Thirdly, the relationship between the "foundational crime" and the allegedly foreseen shooting of a third party would have borne a different aspect.

31 Where a case of murder is based upon the form of culpability described as "extended common purpose", the identification of the joint criminal enterprise, participation in which results in the accused's secondary liability, is an important particular of the case which the accused must meet. That is not to say that the prosecution must be able to identify the joint criminal enterprise with complete specificity. However, the judge and the jury must know enough about the

enterprise to enable a decision to be made, first, as to whether it is criminal, and, secondly, as to whether the shooting was within the scope of the common purpose reflected in that joint criminal enterprise in that it was foreseen as a possible incident of the enterprise as explained in cases such as *McAuliffe* and *Clayton*. The judge must know enough about the enterprise to rule on questions of admissibility of evidence. Counsel for the accused must know enough about the enterprise to decide how to conduct the defence case. That is why, in the proceedings before Sully J, so much attention was devoted, before and during the trial, to the formulation of this aspect of the prosecution case. The function of particulars in criminal proceedings was explained in *Johnson v Miller*[7], *Giorgianni v The Queen*[8], and *Stanton v Abernathy*[9]. If to do so is not inconsistent with the interests of justice, particulars may be amended during the course of a criminal trial, as they were in the present case. The joint criminal enterprise that was left to the jury for consideration at the end of the trial was different from that opened by the prosecution. The joint criminal enterprise put in argument in the Court of Criminal Appeal was different again. As has been explained, by the end of argument in the Court of Criminal Appeal, the prosecution at various stages of the proceedings had particularised the "foundational crime" said to be the source of the respondent's secondary liability for murder in three different ways. Yet those three different particulars had one thing in common: the focus of attention was the conduct of the four men in the Holden during the very brief time between their first observation of Senior Constable McEnallay and the shooting of Senior Constable McEnallay by Sione Penisini, and their desire to evade apprehension by him. It was this that made admissible the evidence that they were all on parole at the time. That was said to be the motive for their joint plan to avoid apprehension, and the existence of that alleged joint plan was what was said to produce the consequence that, when one of the men, in the course of attempting to avoid apprehension, shot and killed the police officer, they were all guilty of homicide.

The application for special leave to appeal

32 In *R v Benz*[10], this Court discussed the considerations relevant to the exercise of its power to grant special leave to appeal from a decision of a Court of Criminal Appeal which has quashed a conviction and entered a verdict of

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7 (1937) 59 CLR 467 at 489.

8 (1985) 156 CLR 473 at 497.

9 (1990) 19 NSWLR 656.

10 (1989) 168 CLR 110.

acquittal. An example of the exercise of that power is *R v Rogerson*[11]. As Mason CJ explained in *Benz*[12], while there is a reluctance to grant special leave to appeal against an acquittal by an intermediate appellate court, sometimes expressed by reference to the need to show "very exceptional circumstances"[13], the considerations of double jeopardy that would apply to an attempt to appeal from a verdict of acquittal by a jury are not the same as those that apply when a convicted person has initiated the appellate process, which includes the possibility of a decision by a final court of appeal. If an intermediate court of appeal, whose jurisdiction has been invoked by a convicted person, makes an error in that person's favour, the possibility remains of correction of that error within the appellate process itself. This will be of special importance if the error is of such a kind as is likely to affect the general administration of the criminal law, as in the case of an erroneous decision on a point of law or procedure of general application. It may also be of significance where correction of error is necessary to ensure the due administration of justice in the individual case[14]. It is, however, unnecessary to pursue the question of the kind of error by a Court of Criminal Appeal that will justify intervention by this Court even in the case of an acquittal. It is unnecessary because, in this case, the Court of Criminal Appeal made no error. Its reasons for decision, which were addressed to the arguments that were put to it, were correct. The applicant for special leave to appeal to this Court contends that the order of the Court of Criminal Appeal, by entering an acquittal and failing to order a new trial, was wrong, not because of any error in the reasoning of the Court of Criminal Appeal on the arguments put to it, but because, for a reason not advanced to or considered by the Court of Criminal Appeal, there should have been an order for a new trial. In brief, the purpose of the application for special leave to appeal is to have this Court, in the exercise of its appellate jurisdiction, vary the orders made by the Court of Criminal Appeal in allowing the appeal to that Court, and order that there be a new trial for a reason not previously argued.

33 In *Eastman v The Queen*[15] this Court rejected the idea that a court exercising criminal appellate jurisdiction has an obligation, of its own motion, to examine the material before it in search of any possible miscarriage of justice, regardless of the way in which the case has been put to it. In the present case, the

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11 (1992) 174 CLR 268.

12 (1989) 168 CLR 110 at 111-113.

13 *R v Lee* (1950) 82 CLR 133 at 138.

14 *R v Benz* (1989) 168 CLR 110 at 113-114.

15 (2000) 203 CLR 1.

Court of Criminal Appeal was not obliged, of its own motion, to consider whether there might have been a way of putting the case against the present respondent, even though not advanced at trial or before the Court of Criminal Appeal, which, if accepted by a jury, would have warranted his conviction for culpable homicide, whether murder or manslaughter. The failure of the Court of Criminal Appeal to undertake such a course was not an error, and does not constitute a precedent that, in the general interests of the administration of justice, requires correction.

34 Let it be supposed, however, contrary to the fact, that, at some stage before final orders had been made by the Court of Criminal Appeal, the present applicant had approached that Court to have the matter listed for further argument, and had submitted that, if the appeal were allowed, there should be an order for a new trial in order to enable the prosecution to put against the accused a case of culpable homicide, based on extended common purpose, in which the relevant joint criminal enterprise was an armed robbery. Unless it can be shown that the Court of Criminal Appeal's proper response to such an application would have been to hear the argument, agree with it, and order a new trial then the present application to this Court must fail. Even if that could be shown, there would be a further question relating to the limitations on the circumstances in which this Court will allow an appeal on a ground not taken at trial or in an intermediate appellate court[16]. If, however, that could not be shown, it would be unnecessary to examine that further question.

35 If an application of the kind supposed had been made to the Court of Criminal Appeal, that Court would have had to consider the nature of its power, upon allowing an appeal, to order a new trial. The source of that power is s 8(1) of the *Criminal Appeal Act* 1912 (NSW) which provides that on an appeal against conviction on indictment, the court may, either of its own motion, or on the application of the appellant, order a new trial in such manner as it thinks fit, if the court considers that a miscarriage of justice has occurred, and, that having regard to all the circumstances, such miscarriage of justice can be more adequately remedied by an order for a new trial than by any other order which the court is empowered to make. As Dawson J pointed out in *King v The Queen*[17], that section confers a broad discretion, and the discretion is to be exercised in accordance with settled principles. Dawson J said[18]:

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16 See, for example, *Crampton v The Queen* (2000) 206 CLR 161.

17 (1986) 161 CLR 423 at 433.

18 (1986) 161 CLR 423 at 433.

> "It is well established that the discretion to order a new trial should not be exercised when the evidence in the court below was not sufficiently cogent to justify a conviction or to allow the Crown to supplement a case which has proved to be defective. In particular, the Crown should not be given an opportunity to make a new case which was not made at the first trial."

36 In support of the proposition in the second sentence of that paragraph, Dawson J referred to what was said by Dixon J in *R v Wilkes*[19]. What, in the context, is meant by "a new case"? Plainly, it does not mean a different charge. Subject to certain rules of preclusion, or to considerations of oppression, if the prosecuting authorities fail to establish that an accused person committed one offence they may later charge him or her with another offence. In such circumstances, there is no new trial in other than a colloquial sense. There is a further and different trial. In the context of a new trial for the same offence, the reference to a "new case" must be to the particulars of the charge, and to the nature of the evidence that will be adduced in support of it, not to the elements of the offence.

37 It may be asked why "the Crown should not be given an opportunity to make a new case which was not made at the first trial". If the prosecuting authorities at trial fail to satisfy the jury of their case, as particularised, then that is the end of the matter. As a general rule, the jury's acquittal prevents a further attempt to prove the same offence. The prosecution cannot bring the same charge again, relying on new evidence, or new arguments. If, however, there is a conviction at trial, but the conviction is quashed on appeal, and there is an evidentiary basis for a possible "new case", can the Court of Criminal Appeal order that the prosecution may attempt, at a new trial, to make out a new case? The considerations identified in *Crampton v The Queen*[20] as reasons for the rule confining the circumstances in which a new point may be taken in this Court on a criminal appeal by an accused person are relevant in this context also. In particular, the adversarial procedure of criminal justice, which is bound up with notions of judicial independence and impartiality, and according to which the issues at trial are chosen and defined by the parties and their counsel, is at the heart of the matter. It is the executive branch of government that decides whether to prosecute, and what charges to lay. A trial is fought as a contest between the executive government and a citizen. The judge presides neutrally over that contest. Counsel for the respective parties define the issues, decide what witnesses will be called and what questions will be asked, and decide what

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19 (1948) 77 CLR 511 at 518.

20 (2000) 206 CLR 161 at 172-173 [15]-[20].

arguments will be pursued and what will be abandoned. The general rule that litigants are bound by the conduct of their counsel, a rule essential to the adversarial system, applies with at least as much force to the prosecution as to the defence.

38 The decision by trial counsel for the prosecution in the present case concerning the identification of the relevant joint criminal enterprise was a considered decision, with plain tactical implications. They included the admissibility of the evidence that the four men in the car were all on parole, and the ease or difficulty of proof of the alleged enterprise. The case which the applicant now seeks an opportunity to make at a new trial is a new case within the principles earlier stated. It is a case based on a radically different particularisation of the joint criminal enterprise fundamental to the respondent's alleged secondary liability for the killing of Senior Constable McEnallay. The Court of Criminal Appeal should have refused an order for a new trial on that basis, if an attempt had been made to raise the argument. That being so, the present application to this Court should fail.

39 Two further matters may be noted. First, it is far from clear that the case which the prosecution now seeks to put, and which was not put at trial, is of substantial plausibility. It is one thing to say that the four men in the Holden were up to no good and that it looks as though they were equipped for crime, probably an armed robbery. It does not follow that the evidence justifies a conclusion, beyond reasonable doubt, that at the time Senior Constable McEnallay came upon them they had embarked upon such a criminal enterprise. That may help to explain why this new way of putting the prosecution case was discarded in the first place. It is consistent with Sully J's original reaction to the case. We do not know, and cannot know, why the "armed robbery gone awry" theory did not appeal to counsel for the prosecution at trial. We do not know what was in counsel's brief. However, from such as we know, his decision not to follow that line of argument was understandable. This leads to the second matter. Suppose the respondent's appeal to the Court of Criminal Appeal had failed. Suppose his conviction of murder had been upheld, and he had sought special leave to appeal to this Court. Suppose he attempted to advance an argument that had not been put by his counsel at trial or in the Court of Criminal Appeal. He would have had to show exceptional circumstances to be allowed to put the argument. If it appeared that the argument had not been put in the courts below for a tactical reason, his prospects of being allowed to raise it in this Court for the first time would have been negligible. It would be anomalous if the prosecution were in a different position. The adversarial system has its advantages, and disadvantages, but it should work in a fashion that is even-handed.

Conclusion

40 Special leave to appeal should be refused.

GUMMOW, HAYNE, HEYDON AND CRENNAN JJ.

The background

41 *The procedural background.* The relevant background can be stated briefly. Motekiai Taufahema ("the accused") was convicted by a jury after a trial in the Supreme Court of New South Wales of murdering Senior Constable Glenn McEnallay. He was also convicted of unlawful possession of a Smith and Wesson .357 revolver. The Court of Criminal Appeal allowed an appeal against the murder conviction, and ordered an acquittal rather than a new trial. The prosecution seeks special leave to appeal against that order.

42 *The factual background.* There was evidence before the jury capable of supporting the following factual conclusions. Senior Constable McEnallay died seven days after being shot by Sione Penisini. Penisini was one of four men in a car which had been observed driving at excessive speed and erratically in other ways. Earlier in the day Penisini had telephoned the accused and his brother, John Taufahema. The latter two then travelled by train from Punchbowl to Blacktown. At Blacktown Station they met Meli Lagi. The three men went by taxi to Penisini's house, picked him up, and collected a car from a friend of Penisini. All four men were on parole. The car had been reported to the police as having been stolen. Although the accused was not licensed to drive, he drove the car to his house. He then drove the car until it came under the observation of Senior Constable McEnallay, who had been alerted by other police officers to the fact that the car had been seen being driven erratically on the way to the accused's house.

43 The following events then took place in no more than a minute before Senior Constable McEnallay was shot. The car containing the four men was pursued by and fled from Senior Constable McEnallay, struck a gutter, and stopped. Senior Constable McEnallay summoned aid. The four men leaped from the car. Penisini fired five shots into the windscreen of the police car, four of which hit Senior Constable McEnallay, and one of which caused head wounds from the effects of which he later died.

44 The four men, each carrying a loaded gun, which had been stolen two weeks earlier, ran away, but were pursued by police officers who had responded to Senior Constable McEnallay's call for aid. Penisini and John Taufahema were soon arrested after attempting to "car-jack" a passing vehicle. The accused was also soon arrested after being seen hiding the gun he was carrying behind some flowerpots in a garden (a matter about which he later lied to the police). The fact that the accused was in possession of the gun is no longer in dispute; his conviction on that charge was not in issue. Lagi was arrested some days later.

The police found in the car a hockey mask and a pair of gloves, and when they apprehended Penisini and John Taufahema they found nearby a second pair of gloves, a pair of sunglasses and a pouch of ammunition. They also found loose bullets near the car driven by the accused.

45 A primary claim which the accused made in an interview with the police and in his evidence at the trial was that he had no knowledge that there were any loaded firearms or other incriminating items in the car, and that he only came to possess a gun when Penisini threw him one after firing the shots. He also called a witness, Manuel Cackau, whose evidence, on the accused's argument, tended to suggest that while Cackau and the other three men planned to travel to Melbourne in order to commit robberies, the accused was not party to that agreement.

46 *The prosecution case at the trial.* The prosecution put its case in two ways at the trial. It opened the case to the jury by saying that the accused was party to a joint criminal enterprise, namely one involving the use of a firearm to prevent the lawful arrest of the men in the car by the police. But the prosecution case by the end of the trial as put by prosecution counsel to the jury and as explained in the trial judge's summing up was that there was a joint enterprise to evade arrest, involving the shooting of a police officer as a foreseen possibility.

Ground 2.4

47 Ground 2.4 of the applicant's draft Notice of Appeal was: "The Court of Criminal Appeal erred in refusing to order a re-trial and entering a verdict of acquittal in the circumstances of the present case."

48 *The Court of Criminal Appeal's conclusions.* The key elements of the position arrived at by the end of the Court of Criminal Appeal's judgment were as follows.

(a) It was necessary to allow the accused's appeal to the Court of Criminal Appeal because the directions of the trial judge were erroneous in relation to the foresight necessary if the accused were to be convicted of murder. In substance, counsel for the prosecution conceded that in the Court of Criminal Appeal[21].

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21 *Taufahema v The Queen* (2006) 162 A Crim R 152 at 165 [38].

(b) It was also necessary to allow the appeal for another reason. The prosecution case was left to the jury as depending on an agreement to commit a particular "foundational crime" in the course of which another crime had been committed which had been within the contemplation of the accused[22]. The difficulty identified by the Court of Criminal Appeal was that while the "foundational crime" relied on at the trial was a "crime of avoiding lawful arrest", that was in truth no crime[23]. A further difficulty arose out of an attempt to sidestep this difficulty by relying on an alternative candidate for the "foundational crime", advanced, according to the Court of Criminal Appeal, only in that Court[24], namely hindering a police officer in the execution of his duty. The Court of Criminal Appeal concluded that the evidence was incapable of supporting the view that any agreement to commit that crime had been made[25]. In this Court the Director of Public Prosecutions did not quarrel with the Court of Criminal Appeal's reasoning in those respects.

(c) The Court of Criminal Appeal also found other flaws in the trial judge's directions: they did not sufficiently distinguish between separate decisions by each of the four men in the car to escape and an agreement between them to do so[26]. In this Court the Director of Public Prosecutions did not quarrel with the Court of Criminal Appeal's reasoning in these respects either.

(d) Since the summing up rested on a "wrong decision" of a "question of law" within the meaning of s 6(1) of the *Criminal Appeal Act* 1912 (NSW), and

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22 Whether this part of the criminal law is usefully to be analysed by reference to "foundational crimes" is a matter which arose in argument. It did not form any part of the proposed grounds of appeal and in view of the brevity of the argument on the point, and the fact that it is not decisive of the outcome of this case, nothing more is said about it. But see *Gillard v The Queen* (2003) 219 CLR 1 at 39 [124] per Hayne J (second sentence).

23 *Taufahema v The Queen* (2006) 162 A Crim R 152 at 160-161 [20]-[23] and 162 [27].

24 *Taufahema v The Queen* (2006) 162 A Crim R 152 at 161 [24].

25 *Taufahema v The Queen* (2006) 162 A Crim R 152 at 161-162 [24]-[27].

26 *Taufahema v The Queen* (2006) 162 A Crim R 152 at 163 [30].

since no question of the proviso to that sub-section being applied could arise, the Court of Criminal Appeal was obliged to allow the appeal[27].

(e) Section 6(2) of the *Criminal Appeal Act* provides:

> "Subject to the special provisions of this Act, the court shall, if it allows an appeal under section 5(1) against conviction, quash the conviction and direct a judgment and verdict of acquittal to be entered."

Among the "special provisions" is s 8(1) which provides:

> "On an appeal against a conviction on indictment, the court may, either of its own motion, or on the application of the appellant, order a new trial in such manner as it thinks fit, if the court considers that a miscarriage of justice has occurred, and, that having regard to all the circumstances, such miscarriage of justice can be more adequately remedied by an order for a new trial than by any other order which the court is empowered to make."

Thus a final question was left – whether the Court of Criminal Appeal should order an acquittal or a new trial. To that question little attention was directed in argument before the Court of Criminal Appeal, and the ground on which the prosecution now says that a new trial should have been ordered, instead of the acquittal which the Court of Criminal Appeal actually ordered, was not raised with the Court of Criminal Appeal.

49 *The fundamental issue.* One of the key "circumstances" referred to in s 8(1), and one of the key factors in assessing whether a new trial is an adequate

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27 Section 6(1) provides:

> "The court on any appeal under section 5(1) against conviction shall allow the appeal if it is of opinion that the verdict of the jury should be set aside on the ground that it is unreasonable, or cannot be supported, having regard to the evidence, or that the judgment of the court of trial should be set aside on the ground of the wrong decision of any question of law, or that on any other ground whatsoever there was a miscarriage of justice, and in any other case shall dismiss the appeal; provided that the court may, notwithstanding that it is of opinion that the point or points raised by the appeal might be decided in favour of the appellant, dismiss the appeal if it considers that no substantial miscarriage of justice has actually occurred."

remedy, is "the public interest in the due prosecution and conviction of offenders"[28]. It is in "the interest of the public ... that those persons who are guilty of serious crimes should be brought to justice and not escape it merely because of some technical blunder by the judge in the conduct of the trial or in his summing up to the jury."[29] This passage highlights two points about the present case.

50 First, there is no doubt that Senior Constable McEnallay was murdered; almost all murders are very serious crimes, and murders of police officers while carrying out their duties are no exception to that generalisation.

51 Secondly, whether or not one chooses to call the errors identified by the Court of Criminal Appeal "blunders", they were certainly "technical", and they were errors by the trial judge rather than by the prosecution. For it was the trial judge rather than the prosecution who bore primary responsibility for the circumstances which led the Court of Criminal Appeal to allow the appeal[30]. Apart from the errors in summing up criticised by the Court of Criminal Appeal, it was by reason of the trial judge's influence, in a long debate with counsel for the prosecution after the evidence had closed but before final addresses, that the prosecution ended up not pressing its original case as opened to the jury, instead relying only on a case turning on a "foundational crime" of evading lawful apprehension which does not exist. The fact is that the trial which took place was a flawed one. The question is whether an order for a new trial is a more adequate remedy for the flaws in that trial than an order for an acquittal – that is, an order terminating the possibility of any investigation by a jury, in an unflawed fashion, of the accused's role in the circumstances leading to Senior Constable McEnallay's death. An order for acquittal conflicts with "the desirability, if possible, of having the guilt or innocence of the [accused] finally determined by a jury which, according to the constitutional arrangements applicable in [New South Wales], is the appropriate body to make such a decision."[31] In *Reid v The*

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28 *R v Anderson* (1991) 53 A Crim R 421 at 453 per Gleeson CJ.

29 *Reid v The Queen* [1980] AC 343 at 349 per Lords Diplock, Hailsham of St Marylebone, Salmon, Edmund-Davies and Keith of Kinkel.

30 cf *R v Anderson* (1991) 53 A Crim R 421 at 453 per Gleeson CJ (pointing to investigative failures by the authorities and "inappropriate and unfair" conduct by the prosecution at the trial).

31 *R v Anderson* (1991) 53 A Crim R 421 at 453 per Gleeson CJ.

Queen[32] the Privy Council approved the following statement of the Full Court of Hong Kong[33]:

> "It is in the interest of the public, the complainant, and the appellant himself that the question of guilt or otherwise be determined finally by the verdict of a Jury, and not left as something which must remain undecided by reason of a defect in legal machinery."

The reference to "complainant" is to be explained by the fact that that case was one in which a doctor allegedly raped a patient. It is not only those who live to complain about crime whose interests are relevant, but also the relatives and friends of those who do not. The Full Court of Hong Kong described the case before it as one "of peculiar heinousness", and so is this case. The question, then, is whether there is some good reason for not allowing a jury to decide whether the prosecution can prove its case, and for allowing the matter to remain undecided because of the defects in the first trial.

52 *Insufficiency of evidence at one trial does not justify an order for a second trial.* In *Gerakiteys v The Queen*[34], Gibbs CJ, when considering what was a sound exercise of the power of a court of criminal appeal to order a new trial, said:

> "It would conflict with basic principle to order a new trial in a case in which the evidence at the original trial was insufficient to justify a conviction[35]."

That proposition rests in part on the idea that if the evidence is unchanged at the second trial, accused persons should not be placed in jeopardy of conviction by a second jury where an appellate court has found that the evidence was insufficient

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32 [1980] AC 343 at 350 per Lords Diplock, Hailsham of St Marylebone, Salmon, Edmund-Davies and Keith of Kinkel.

33 *Ng Yuk Kin v The Crown* (1955) 39 HKLR 49 at 60 per Gould, Gregg and Wicks JJ.

34 (1984) 153 CLR 317 at 321. See also at 322 per Murphy J, 331 per Deane J.

35 See *Reid v The Queen* [1980] AC 343 at 349-350 per Lords Diplock, Hailsham of St Marylebone, Salmon, Edmund-Davies and Keith of Kinkel; and see also *R v Wilkes* (1948) 77 CLR 511 at 518 per Dixon J and *Andrews v The Queen* (1968) 126 CLR 198 at 211 per Barwick CJ, McTiernan, Taylor, Windeyer and Owen JJ.

at the first trial; and in part on the idea that a new trial should not be ordered merely to give the prosecution an opportunity of mending its hand and presenting new evidence at the second trial which it failed to present at the first[36].

53 That proposition does not apply in relation to either of the ways in which the prosecution case was put at this trial. That is partly because the prosecution does not propose to rely on any of these ways at the second trial which it is seeking. It is partly because the appeal did not succeed by reason of evidentiary insufficiency, but by reason of the fact that the foundational crime relied on was not a crime, and by reason of deficiencies in the summing up. The accused's notice of appeal in the Court of Criminal Appeal did not contend that the jury's verdict was unreasonable or could not be supported having regard to the evidence.

54 *The case to be advanced at the second trial.* The question whether there should have been an order for a new trial must be approached in the light of the way in which the prosecution wishes to conduct the second trial. It desires to contend that the accused and the other three men in the car were engaged in a joint criminal enterprise of armed robbery, and that shooting another person was foreseen as a possible incident of that enterprise. The issue is whether, had the Court of Criminal Appeal been informed of that desire, it ought to have ordered a new trial. That the prosecution should have raised this point for the first time in this Court is regrettable, but there is no absolute bar to accused persons doing this[37], and there can be no absolute bar to the prosecution doing so as well.

55 *Immaterial factors.* Among the factors which conventionally point against orders for new trials are some which were not relied on and do not arise here. One is whether a significant part of a sentence has been served[38]: here only a relatively small part of a very long sentence of 23 years imprisonment with a 16 year non-parole period has been served. Another is the expense and length of a second trial[39]: here the first trial took 15 days, but this was not disproportionate to its importance. Another is the length of time between the alleged offence and

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36 *Reid v The Queen* [1980] AC 343 at 349-350 per Lords Diplock, Hailsham of St Marylebone, Salmon, Edmund-Davies and Keith of Kinkel.

37 *Crampton v The Queen* (2000) 206 CLR 161.

38 *Jiminez v The Queen* (1992) 173 CLR 572 at 590 per McHugh J.

39 *Reid v The Queen* [1980] AC 343 at 350.

the new trial[40]: here it is not so great as to prejudice the accused. Another is whether a successful appellant to the Court of Criminal Appeal has been released from custody[41]: here the accused remained in custody after the Court of Criminal Appeal's order for acquittal, serving his sentence on the conviction for unlawful possession of a firearm. Other factors are relevant, but it is not said that they are here decisive, for example the fact that a trial is an ordeal for accused persons (and, it may be added, for witnesses and others affected by the prosecution and the events giving rise to it). Whether accused persons should have to undergo that ordeal for a second time, through no fault of their own, depends upon whether the interests of justice require it[42].

56 It is desirable to concentrate on the grounds said to justify the refusal of special leave to appeal. They are five in number. They may be analysed under the heads of prosecution tactics, departure from well-considered earlier tactics, no opportunity to make a new case, an implausible case and parity of treatment for prosecution and defence.

57 *Prosecution tactics.* Counsel for the accused relied heavily on the contention that it was in effect oppressive for the prosecution, having failed to achieve success in the way it ran the first trial, to try to achieve success in a second trial, particularly since the point on which it seeks to have a second trial was not raised before its special leave application to this Court. If that contention were sound, the prosecution could never raise a fresh point in this Court, and there could never be an appeal in this Court against an order of acquittal made by a court of criminal appeal. Yet the prosecution can raise fresh points in this Court, just as accused persons can, and there can be successful appeals in this Court against orders of acquittal made by intermediate courts of appeal, unusual though they may be. At other points of his argument, counsel for the accused did correctly concede that the Court of Criminal Appeal had discretionary power to order a new trial in the present circumstances, however difficult the decision

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40 *Parker v The Queen* (1997) 186 CLR 494 at 520 per Dawson, Toohey and McHugh JJ. See also *R v Anderson* (1991) 53 A Crim R 421 at 453 per Gleeson CJ; *Reid v The Queen* [1980] AC 343 at 350 per Lords Diplock, Hailsham of St Marylebone, Salmon, Edmund-Davies and Keith of Kinkel.

41 *Everett v The Queen* (1994) 181 CLR 295 at 302 per Brennan, Deane, Dawson and Gaudron JJ quoted discussion of a similar point in *R v Wilton* (1981) 28 SASR 362 at 367-368 per King CJ.

42 *Reid v The Queen* [1980] AC 343 at 350.

whether to do so or not. It follows that since the Court of Criminal Appeal was not asked to exercise its discretion on the basis now relied on, this Court may examine what that Court should have done if it had been asked to exercise it on that basis. That makes it necessary to examine whether the particular circumstances render it wrong to grant this particular special leave application and allow the appeal.

58 *Departure from well-considered earlier tactics.* A related submission turned on the proposition that it is common for appellate courts to conclude that no miscarriage of justice arises where an error of the trial judge is not complained of by counsel appearing for the accused in a criminal trial, or counsel otherwise conducts the trial in a particular way. However, it does not follow that counsel for the prosecution is debarred from requesting a new trial to be conducted on a different basis from an earlier trial in which a conviction was obtained and then set aside on appeal, merely because the basis on which the earlier trial was conducted appears to have been a carefully considered one. That may be a relevant factor, but it is to be taken into account with all other relevant factors, one of which is how different the new basis is from the old, and in what ways.

59 *No opportunity to make a new case.* A third ground said to justify the refusal of special leave to appeal was also pressed strongly by counsel for the accused. It relies on Dawson J's statement in *King v The Queen*[43], which the prosecution did not dispute, that "the Crown should not be given an opportunity to make a new case which was not made at the first trial". It reasons that a "new case" is to be assessed by reference to the particulars of the charge, and to the nature of the evidence that will be adduced in support of it. The reasoning draws an analogy with the restrictions on an accused person taking a new point in a criminal appeal. It states that the decision of counsel for the prosecution at the trial to identify the joint criminal enterprise as he did was a considered decision, with plain tactical implications, two of which were the admissibility of the evidence that the four men in the car were all on parole, and the ease or difficulty of proof of the alleged enterprise. The case intended for the second trial is a "new case" because it is a case based on a radically different particularisation of the joint criminal enterprise.

60 The authorities on whether appellate courts should order a new trial or an acquittal offer very little explicit exposition of what is meant, conceptually, by a "new case which was not made at the first trial". However, the way the authorities have been decided tends to show that the "new case" test is not easy

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43 (1986) 161 CLR 423 at 433.

for accused persons to satisfy. It is proposed to examine four of those authorities.

61 The authorities commonly cite[44] Dixon J's judgment in *R v Wilkes*[45]. *R v Wilkes* was a case in which a man and his wife were charged with three offences: the manslaughter of one Mrs Boulton; conspiracy with Boulton and one Mr Prior to procure the unlawful miscarriage of Boulton; and conspiracy with Prior to defeat the course of public justice. Prior was given a pardon, and was the main prosecution witness. Dixon J said that the prosecution "presented a case ... depending upon the view that the prisoners and [Prior] had been engaged in a series of steps directed to procuring the abortion of a pregnant woman, and that in the attempt to procure the abortion they, or one or more of them, had killed her and then had attempted to conceal their crime by telling a lying story accounting for the body."[46] Below that "case" will be called "the initial case". The jury acquitted on the first two counts but convicted on the third. The Court of Criminal Appeal of South Australia allowed an appeal in the following words[47]:

> "In the light of the seeming inconsistency of the verdicts, the absence of corroboration of Prior, and the criticisms we have made of the learned judge's directions, we cannot feel satisfied that the verdicts have been reached upon proper grounds. We do not think that this is a case in which we should order a new trial. There was, of course, evidence upon which a jury properly directed could have found the appellants guilty on the third count, and in ordinary circumstances it would have been proper to order a new trial. The present case is, however, complicated by the verdict on the first and second counts. We have no power to set aside a judgment of acquittal following a verdict of not guilty, and, consequently, we cannot order a new trial on all three counts. If we had the power we would do so ... On a new trial confined to the third count, Prior's story will have to be told again at length, in order to make it intelligible. In directing the jury afresh, the presiding judge must warn the jury against the danger of acting

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44 Thus Dawson J did so in *King v The Queen* (1986) 161 CLR 423 at 433, McHugh J did so in *Jiminez v The Queen* (1992) 173 CLR 572 at 590, and Kirby J did so in *Parker v The Queen* (1997) 186 CLR 494 at 539.

45 (1948) 77 CLR 511 at 518.

46 *R v Wilkes* (1948) 77 CLR 511 at 517.

47 *R v Wilkes* (1948) 77 CLR 511 at 513-514.

on his evidence. It will also be necessary[**48**] to tell them that, as between the Crown and the accused, it has been conclusively established that they did not kill Mrs Boulton and, further, that they did not conspire with Prior and Mrs Boulton to procure her miscarriage. With these directions, doubt will immediately arise as to Prior's story, and the judge is likely to feel that he ought to advise the jury not to convict."

62 Dixon J said[**49**]:

"On the case made for the Crown it was difficult for the jury to convict on the third count consistently with their acquittal on the first two counts. Logical possibilities have been suggested as to the manner in which the jury might have arrived at the result. It is suggested that they might have failed to believe substantial parts of the story to which the accomplice deposed and have combined the rest with part of the account given by the accused, which they may have been inclined to accept. The suggestion is that in some such way the jury may have supposed that the attempted abortion which caused the deceased's death was carried out, not by the accused, but by an unnamed and unknown person who would be a fifth actor in the drama."

63 Dixon J then continued[**50**]:

"It must be conceded of course that, as logical possibilities, such hypotheses are conceivable. But the case made for the Crown did not contemplate any such supposition, and it would in my opinion be entirely unsatisfactory to leave a verdict of guilty on the third count standing on the assumption that the jury took such a view. It is a view which is contrary to all the probabilities ... and it is contrary to the substance of the case presented to them by the learned judge in his summing up, and, as I have no doubt, by the Crown. To set aside a verdict of such a description is an ordinary example of the proper use of the power conferred upon the Court of Criminal Appeal. It is an exercise of the discretion of the court from whose order we ought not to grant special leave to appeal."

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48 Dixon J questioned whether it would be necessary to tell the jury these things, while accepting their correctness: *R v Wilkes* (1948) 77 CLR 511 at 518.

49 *R v Wilkes* (1948) 77 CLR 511 at 517.

50 *R v Wilkes* (1948) 77 CLR 511 at 517-518.

In this passage Dixon J was making it plain that he saw the conclusion of the court below as defensible by reason of inconsistency in the verdicts. To allow an appeal on that ground is to set aside the jury verdict as unreasonable; it is to say that, accepting the acquittals on the first two counts, and the jury's view of the evidence as reflected in the acquittals, as correct, the remaining evidence was insufficient to justify a conviction on the third count. That is an application of the proposition referred to above, that where a criminal appeal succeeds on the ground that the evidence at the trial is insufficient to justify a conviction, it is against principle to order a new trial. That point was made by Dixon J when he turned specifically to the new trial issue[51]:

> "After quashing the conviction, the Supreme Court went on to say that they would not order a new trial, and their Honours gave a number of reasons why they would not order a new trial. Again, I think that it was for them to decide in the exercise of their discretion whether they would or would not order a new trial. I myself most certainly would have come to the same conclusion, namely, that in the circumstances a new trial should not be granted. I would have done so because it would necessitate the presentation by the Crown either of the case on which the accused had substantially been acquitted or of a new case which had not been made at the first trial, a case moreover which, I should have thought, was highly improbable and a desertion of the assumptions which the jury's previous verdict seems to require."

By "the case on which the accused had substantially been acquitted" Dixon J meant what was called above "the initial case". By the "new case" Dixon J meant the "logical possibilities" involving a "fifth actor in the drama" as the person responsible for the attempted abortion. So viewed, *R v Wilkes* is remote from the present circumstances. There is here no inconsistency of verdicts. The accused here has not been acquitted by a jury, substantially or at all, in relation to any charge. Neither the jury nor the Court of Criminal Appeal has made any factual finding in favour of the accused; the Court of Criminal Appeal has merely found errors in the summing up and legal errors about the foundational crime. And the "new case" here is not one which depends on merely "logical possibilities" or "conceivable hypotheses" which postulate some new crime committed by a "fifth actor". It cannot be said that the "new case" here is either highly improbable or one which deserts the assumptions which the jury's verdict requires.

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51 *R v Wilkes* (1948) 77 CLR 511 at 518.

64 A second case discussing the principle that the Crown should not be given an opportunity to make a new case which was not made at the first trial is *King v The Queen*[52]. In that case Dawson J (Gibbs CJ, Wilson and Brennan JJ concurring) stated that principle and said it would have applied in circumstances similar to those discussed by Dixon J in *R v Wilkes* involving inconsistent verdicts[53]. In *King v The Queen*, King and Matthews were charged with murdering King's wife. King was convicted but Matthews was acquitted. The Court of Criminal Appeal of New South Wales directed a new trial. King sought special leave to appeal on the ground that an acquittal should have been ordered. Dawson J said[54]:

> "If the verdict against King in this case was inconsistent with the verdict in favour of Matthews, then the Crown could properly succeed against King upon a retrial only by putting a new case. It certainly ought not be allowed to proceed in any retrial upon a basis inconsistent with the jury's verdict of acquittal of Matthews."

However, he concluded that the two verdicts given by the jury were not inconsistent, and the new trial order stood. There is no difficulty arising from inconsistency of verdicts in the present application for special leave to appeal.

65 *Jiminez v The Queen*[55] is a third example of a case discussing this principle, with it being decided not to order a new trial because, to use the words of the only judge who relied on this point, McHugh J, "a second trial would allow the Crown to make a case different from that which it put to the jury at the first trial."[56] That was a case in which the prosecution contended at the trial that the accused could be convicted of causing death by driving in a manner dangerous to the public by reason of having gone to sleep. On appeal the prosecution conceded that that approach was erroneous in law. McHugh J concluded[57]:

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52 (1986) 161 CLR 423.

53 (1986) 161 CLR 423 at 433.

54 (1986) 161 CLR 423 at 433.

55 (1992) 173 CLR 572.

56 (1992) 173 CLR 572 at 590.

57 (1992) 173 CLR 572 at 589.

> "Having regard to the concession which the Crown made in this Court, the only case which the Crown could put against the applicant was that he was guilty of driving in a manner dangerous to the public because he knew or ought to have known that there was a real risk that he would fall asleep. But that case was never put to the jury."

He then said[58]:

> "[T]he case for the Crown at the trial was so radically different from the only case which could be put on the concessions of the Crown in this Court that there has been no trial according to law."

The latter case was a "new case". Thus the initial case in *Jiminez v The Queen* turned on events after going to sleep, the other on events before. The two cases dealt with events different in time, place and quality. Plainly the difference between the two "cases" under consideration in *Jiminez v The Queen* is of a quite different kind from the two "cases" in the present application for special leave to appeal.

66 Finally, in *Parker v The Queen*[59] Dawson, Toohey and McHugh JJ refused to order a new trial to enable the prosecution to present a fresh case which would require "a substantial amendment to the indictment", including a change in the persons from whom the property allegedly was stolen. Here no amendment to the indictment is called for.

67 These authorities 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.

68 In the present case, what the prosecution proposes to do at the second trial of the accused is not 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. It proposes to tender the circumstantial evidence tendered at the first trial – of the telephone calls made by the four men on the day in question, of the surveillance of two of the men as they travelled by railway, of their movements around Sydney, and of the incriminating materials they possessed (four loaded guns, all stolen; extra ammunition; a hockey mask; two pairs of gloves; sunglasses). That

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58 (1992) 173 CLR 572 at 590.

59 (1997) 186 CLR 494 at 520.

evidence illuminates the nature of the enterprise on which the men were engaged. The enterprise can be characterised in different ways. That is, what the prosecution proposes to do is rely on the same evidence as was called at the first trial, but to seek to characterise the facts which that evidence may establish in a different way, but not a radically different way. At the first trial the criminal enterprise revealed by the evidence was not called "armed robbery", but the evidence was capable of supporting the inference that it was. Indeed, the defence embraced that inference in calling Cackau to say that the three men other than the accused were engaged in an enterprise of armed robbery. All the prosecution proposes to do at the second trial is to rely on an inference which could have been drawn in the first trial. The evidence that the four men were on parole, which was held relevant at the first trial as showing that the accused had a strong motive to adhere to a joint enterprise of avoiding apprehension by the police, will not necessarily be held irrelevant at the second trial. It may be relevant at that trial as going to the possibility of a firearm being used, for the consequences of apprehension for persons engaged in the joint enterprise of robbery are likely to be seen by them as worse if they were on parole. It has not been shown that the evidence to be called by the prosecution at the second trial will be different in any other respect. Counsel for the accused conceded that if the characterisation which the prosecution wishes to make of the evidence at the second trial had been put at the first, there would have been no difference in the evidence called, except for Cackau. In fact it has not been shown that the accused would not have called Cackau had the "new case" been presented at the first trial, since the point of doing so was to seek to establish that the accused was not part of the criminal enterprise. That goal was as important as it will be in the second trial, and the only way of achieving it was to call Cackau. As for tactical considerations, no doubt it was easier for the prosecution to seek to establish the case left to the jury than the case opened at the first trial at a factual level, and possibly the "new case", had it occurred to counsel for the prosecution, was originally not run because of its perceived difficulty. In the circumstances as they have unfolded, however, it is hard to see why it is unfair for the prosecution to be allowed to remould its case in the manner proposed. What has happened may be regrettable and undesirable, but it is not sinister.

69 *Implausible case?* The fourth ground for dismissing the application for special leave to appeal which has been relied on is said to be that it is far from clear that the "new case" is of substantial plausibility. Assuming this to be relevant at all, it is necessary to remember that the Privy Council said in *Reid v The Queen*[60] that "it is not necessarily a condition precedent to the ordering of a

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60 [1980] AC 343 at 350 per Lords Diplock, Hailsham of St Marylebone, Salmon, Edmund-Davies and Keith of Kinkel.

new trial that the Court of Appeal should be satisfied of the probability that it will result in a conviction." Their Lordships said that even if on the second trial an acquittal is more likely than a conviction, a second trial can be ordered. While counsel for the accused pointed to factual difficulties in the contention which the prosecution wished to advance in the second trial, he did concede that if there were a second trial, the contention amounted to a case which could go to the jury.

70 *Parity of treatment for prosecution and defence.* The fifth ground relied on for dismissing the application is that counsel for the accused could only have put a new argument to this Court in exceptional circumstances, and the same rule should apply to counsel for the prosecution. It may be accepted that the same principle should apply to both prosecution and defence when an attempt is made, in relation to the validity of a conviction, to rely on an argument in an appellate court which was not advanced at trial. It may also be accepted that that is so in relation to whether, after an appellate court has held that a criminal trial has miscarried on legal grounds, an order should be made for a new trial or an acquittal. But it has not been shown that acceptance of the prosecution's arguments in this case involves treating it any differently from the accused.

71 *Conclusion.* Had the basis on which the prosecution wishes to proceed in the second trial been put to the Court of Criminal Appeal, the correct order would have been an order for a new trial.

Grounds 2.1-2.3

72 Grounds 2.1-2.3 of the draft Notice of Appeal are as follows:

> "2.1 The Court of Criminal Appeal adopted an unduly narrow and erroneous approach to the determination of what constitutes a foundational crime for the purposes of ascribing liability to secondary parties to offences committed as possible incidents of that foundational offence.
>
> 2.2 The Court of Criminal Appeal wrongly confined the definition of the foundational offence to an offence committed in the context of a contingency arising in the course of the joint enterprise without any, or proper, regard to the joint enterprise already in progress from which the contingency resulting in the incidental offence arose. This narrow approach to the definition of the foundational offence required the Crown to establish a separate foundational offence distinct from the joint criminal enterprise already in progress.

2.3 The Court of Criminal Appeal erred in holding that a secondary participant in a joint criminal enterprise involving carrying loaded firearms from which a deliberate shooting eventuates cannot be guilty of either murder or manslaughter unless it can be established that there was a separate agreement to commit a foundational offence, distinct from the existing joint enterprise, arising from the circumstances immediately before the shooting, of which shooting was a possible incident."

73 It is not necessary to deal with these grounds. The order which the prosecution seeks is an order that the Court of Criminal Appeal's verdict of acquittal be set aside and that in lieu thereof there be an order for a new trial. Whether that order should be made depends on what conclusion is reached about ground 2.4. Grounds 2.1-2.3 could be sound without affecting the verdict of acquittal, and they could be unsound without affecting the reasoning leading to the conclusion that there should be a new trial. The prosecution submitted that the Court of Criminal Appeal's supposed errors were important, and likely to affect other cases. That may be doubted: the Court of Criminal Appeal's reasoning is so closely linked to the particular facts of this case as to prevent it standing for any general principle of law. It must also be doubted whether the Court of Criminal Appeal fell into the errors alleged.

Orders

74 Special leave to appeal should be granted. The appeal should be allowed. The order of the New South Wales Court of Criminal Appeal entering a verdict of acquittal should be set aside, and in lieu thereof there should be an order for a new trial.

75 KIRBY J. These proceedings come from orders of the Court of Criminal Appeal of New South Wales[61]. By those orders, that Court[62] unanimously quashed the murder conviction of Mr Motekiai Taufahema ("the respondent"). That conviction was based on the respondent's liability as a party to a joint criminal enterprise[63] resulting in the fatal shooting of a police officer, Senior Constable Glenn McEnallay ("the deceased").

76 In place of that conviction, the Court of Criminal Appeal ordered that a verdict of acquittal be entered. It is against the latter order that the prosecution has sought special leave to appeal to this Court. The panel before whom the application for special leave was argued referred the application to be heard by a Full Court[64]. The application was duly argued as on the return of an appeal.

77 As is usually the case, once matters reach this Court, there are arguments for both sides. However, consistently with the past authority of the Court and with the applicable legal principles, special leave to appeal should be refused.

The background facts

78 *The circumstances of homicide*: The facts are stated in other reasons[65] and in the reasons of Adams J which constitute those of the court below[66].

79 On 27 March 2002, the respondent was one of four persons travelling in a motor vehicle which had been reported as stolen. He was driving the vehicle in a southern suburb of Sydney. The vehicle was noticed by the deceased, who was driving an unmarked police vehicle[67]. He pursued it, activating the siren and lights[68]. After attempting to accelerate away from the deceased's vehicle, the

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61 *Taufahema v The Queen* (2006) 162 A Crim R 152.

62 Adams J; Beazley JA and Howie J concurring.

63 See reasons of Gleeson CJ and Callinan J at [6]-[10] ("joint reasons").

64 [2006] HCATrans 526 at 460 per Gleeson CJ and Heydon J.

65 Joint reasons at [2]-[5]; reasons of Gummow, Hayne, Heydon and Crennan JJ at [42]-[45] ("majority reasons").

66 (2006) 162 A Crim R 152 at 154-158 [2]-[15].

67 (2006) 162 A Crim R 152 at 154-155 [5].

68 (2006) 162 A Crim R 152 at 154 [2].

vehicle driven by the respondent soon came to a stop[69] after hitting a gutter[70]. The occupants of the vehicle, including the respondent, hurriedly alighted. One occupant, Mr Sione Penisini, as he was leaving the vehicle, fired a number of shots in the direction of the deceased. One of these shots killed the deceased.

80 Meanwhile, the respondent and the other occupants of the vehicle he was driving fled on foot. According to the respondent, Mr Penisini threw him an object wrapped in a bandanna which, as he caught it, he realised was a gun. In the course of his flight on foot, the respondent disposed of this object behind some flower pots in the backyard of a nearby house, but it was quickly recovered. After his apprehension, the respondent underwent interview by police that was electronically recorded. Essentially, he asserted that he was merely the driver of the vehicle and had gone along with his brother, Mr John Taufahema, a passenger who sat behind him in the vehicle. The respondent claimed he was unaware of the presence of the guns, or of gloves, a mask and pouch and extra bullets that were later found in or near the car. He stated that it had been his intention to alight from the car to visit a friend at a residence close to where the confrontation with the deceased had occurred.

81 A defence witness, Mr Manuel Cackau, testified that he had agreed with Mr Penisini that they would commit armed robberies in Melbourne. He was waiting to be collected by Mr Penisini and the two other men (Mr John Taufahema and Mr Meli Lagi) when the deceased was killed. He, and not the respondent, had been the fourth man involved in the plan to proceed to Melbourne for this concededly criminal purpose[71].

82 All bar one of the occupants of the vehicle driven by the respondent were arrested on the day of the events resulting in the deceased's death[72]. Mr Penisini, the shooter, pleaded guilty to the offences of murder, unauthorised use of a firearm and attempted carjacking in circumstances of aggravation (the last offence occurring during his unsuccessful endeavour to escape police apprehension). The joint trial of the respondent together with Mr John Taufahema and Mr Lagi was listed to commence in August 2003 before Wood CJ at CL and a jury. However, the respondent's counsel was ill on that day, occasioning the postponement of his trial. The trial of his brother and Mr Lagi eventually proceeded. In the case of Mr John Taufahema, the trial resulted in jury verdicts of guilty of murder; of the use of an offensive weapon

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69 See (2006) 162 A Crim R 152 at 154 [2].

70 (2006) 162 A Crim R 152 at 155-156 [9].

71 See also joint reasons at [15].

72 The fourth man, Mr Lagi, was arrested some days later.

with intent to prevent arrest; of attempted carjacking; and of use of a prohibited firearm. Mr Lagi was acquitted of murder but found guilty of the offences of using an offensive weapon in company to prevent arrest and possessing a prohibited firearm. In October 2003, sentences of imprisonment were imposed by Wood CJ at CL on each of those accused, and on Mr Penisini[73].

83 *The trial of the respondent*: When the delayed trial of the respondent commenced in March 2004 before Sully J and a jury, he was arraigned on an indictment containing three counts. The first count alleged that he had murdered the deceased. The second count alleged that he had shot at the deceased in company with Mr Penisini, his brother and Mr Lagi with intent to avoid lawful apprehension. The third count alleged possession of an unauthorised firearm. The respondent pleaded not guilty to all counts. The prosecution abandoned the second count during the trial. The jury returned verdicts of guilty on the first and third counts.

84 On the conviction of possession of an unauthorised firearm, the trial judge sentenced the respondent to a fixed term of five years imprisonment to date from the commencement of his custody on 27 March 2002 and to expire on 26 March 2007. However, on the conviction of murder, the respondent was sentenced to 21 years imprisonment with a non-parole period of 14 years. This resulted in an overall sentence of 23 years imprisonment with a non-parole period of 16 years. It was the latter conviction alone that the respondent challenged in his appeal to the Court of Criminal Appeal. He did not contest his conviction and sentence in respect of the firearm offence.

85 The respondent has been in custody since his arrest on 27 March 2002. At the time of the hearing of the present application, the respondent was serving his sentence for the firearm offence, which he is due to complete on 26 March 2007. The respondent has already served the balance remaining on an outstanding custodial sentence, which had been revived when a parole order, earlier made in an unrelated matter, was revoked after the respondent was apprehended in the foregoing circumstances. Notwithstanding the result in this case, the respondent is also serving a non-parole period for unrelated offences in respect of convictions entered on 27 May 2005. That sentence will expire on 26 November 2007.

86 The prosecution did not assert that the respondent was guilty of personally using the firearm against the deceased or in that sense responsible for the deceased's homicide. The only footing upon which the prosecution propounded the guilt of the respondent for the crime of murder was on the basis of his being

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73 On appeal, Mr John Taufahema's conviction for murder was quashed and a new trial ordered: *Taufahema v The Queen* [2007] NSWCCA 33.

involved in an extended common purpose arising out of a joint criminal enterprise with other offenders.

87 Much time was taken in the respondent's trial before Sully J to identify the "foundational crime" which the alleged offenders had agreed together to commit, in the execution of which the "incidental crime" was committed, namely the killing of the deceased[74]. In this Court, much of the argument was addressed to the attempt by the prosecution, which the respondent submits should not be allowed, to propound a "foundational crime" for a retrial that is different from that propounded by the prosecution whether before Wood CJ at CL or before Sully J or in the Court of Criminal Appeal[75]. It is this proposed shifting of ground on the part of the prosecution that enlivens the most important issues argued in the present application.

At trial and on appeal

88 *An earlier joint trial*: In respect of the earlier trial of the respondent's brother and Mr Lagi, the prosecution presented its case on the basis that the "foundational crime" was an offence against s 33B of the *Crimes Act* 1900 (NSW)[76]. That provision made it an offence for any person to use, attempt to use, threaten to use, or possess an offensive weapon, or to threaten injury to any person, relevantly, "with intent to prevent or hinder the lawful apprehension or detention … of himself … or hinder a member of the police force from investigating any act or circumstance which reasonably calls for investigation by the member".

89 It was on this basis that Wood CJ at CL directed the jury in the joint trial in respect of the murder count against Mr John Taufahema and Mr Lagi. The jury in that proceeding were told that the prosecution had to prove that each accused "was party to a joint enterprise with the men who were in this company that, if faced with the possibility of being arrested, one or other of them would use a firearm with intent to prevent such arrest". That jury were also told that the accused might be convicted if "it was possible that, in using a firearm to prevent their arrest, the user would do so in a way that either resulted in the death of, or really serious bodily injury to, the person attempting to arrest them"[77].

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74 These are the expressions used by Hunt CJ at CL in *Tangye* (1997) 92 A Crim R 545 at 558, cited in (2006) 162 A Crim R 152 at 160 [19].

75 For an analysis of the principles of "criminal complicity" in the context of this case, see joint reasons at [6]-[10].

76 See also joint reasons at [21].

77 Extracted in (2006) 162 A Crim R 152 at 160 [21].

90 There was no mention in this charge of a "foundational crime" of being a party to a joint enterprise to commit an armed robbery, or robberies, in Melbourne or anywhere else, in pursuance of which, the "incidental crime" of the homicide of the deceased had occurred. The "joint enterprise" was focussed exclusively on the alleged agreement, if faced with arrest, that one of the participating accused would use a firearm to prevent that possibility.

91 *The respondent's trial*: When the respondent's trial was commenced before Sully J and a new jury, unsurprisingly perhaps, given the earlier trial of his brother and of Mr Lagi (and the successful outcome of the prosecution so far as the brother was concerned), the same approach was initially taken by the prosecutor. However, in the course of the respondent's trial, the prosecutor expressly withdrew the contention that the "foundational crime" was the alleged offence against s 33B of the *Crimes Act*. Instead, he relied on what was described as "an attempt to evade or avoid lawful apprehension"[78].

92 Moreover, in the Court of Criminal Appeal, the prosecution did not seek to sustain the trial contention that the "foundational crime" was an offence under s 33B[79]. Instead, in the Court of Criminal Appeal, the prosecution contended that the "foundational crime" was quite different, namely that created by s 546C of the *Crimes Act*[80]. That is a provision making it an offence for a person to resist or hinder a member of the police force in the execution of his or her duty. The prosecution did not, in terms, exactly resile from the case that had been put at trial. However, in the Court of Criminal Appeal, it contended that the prosecution was entitled to rely on the other "available offence", of hindering an officer in the execution of his duty[81]. Given the specific language of s 546C of the *Crimes Act*, the Court of Criminal Appeal was unwilling to extend that offence beyond preventing or hindering lawful apprehension to the broader offence of evading or avoiding lawful apprehension propounded as the "foundational crime" on the appeal to that Court.

93 In this Court, the prosecution did not seek to contest the conclusions of the Court of Criminal Appeal in rejecting the successive ways in which, at trial or on appeal, it had propounded the relevant "foundational crime" to sustain the "extended common purpose" that it alleged had existed between the respondent and the other occupants of the vehicle. Instead, the prosecution propounded a

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78 See (2006) 162 A Crim R 152 at 160-161 [22]. See also joint reasons at [16]-[22].

79 (2006) 162 A Crim R 152 at 161 [22].

80 (2006) 162 A Crim R 152 at 161 [24].

81 (2006) 162 A Crim R 152 at 161 [24].

new, and quite different, joint criminal enterprise. This was allegedly that involving the men setting out to commit armed robbery, with loaded pistols (the foundational crime), in the course of doing which, the applicable "incidental crime" occurred, namely the intervention of a police patrol car and the confrontation with the deceased, in the course of which Mr Penisini shot the deceased and killed him.

94 The respondent argues that, not only does this presentation of a new prosecution case amount to a case quite different from that propounded against him at trial, it was not even hinted at before the Court of Criminal Appeal. On this basis, the respondent submits that the prosecution should not have another fresh and different chance to secure his conviction on a completely distinct footing.

95 *The applicable legislation*: The power of the Court of Criminal Appeal, in disposing of the respondent's appeal to it, was relevantly that set out in s 8(1) of the *Criminal Appeal Act* 1912 (NSW)[82]. This states:

> "On an appeal against a conviction on indictment, the court may, either of its own motion, or on the application of the appellant, order a new trial in such manner as it thinks fit, if the court considers that a miscarriage of justice has occurred, and, that having regard to all the circumstances, such miscarriage of justice can be more adequately remedied by an order for a new trial than by any other order which the court is empowered to make."

96 One such order which "the court is empowered to make" is that provided in s 6(2) of the same Act. By that provision it is enacted:

> "Subject to the special provisions of this Act, the court shall, if it allows an appeal under section 5(1) against conviction, quash the conviction and direct a judgment and verdict of acquittal to be entered."

97 The reference to s 5(1) is a reference to the right of appeal enjoyed by a person "convicted on indictment" where the appeal is taken to the court "(a) against the person's conviction on any ground which involves a question of law alone". The respondent's appeal to the Court of Criminal Appeal was such an appeal. He successfully alleged that there was "no evidentiary basis for a conclusion that [the respondent] was party to an agreement that all four men would attempt to evade the police officer, as distinct from having made a decision that he would attempt to do so and knew that the others would do the same"[83]. The Court also held that the prosecution case, based on s 546C of the

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82 See also majority reasons at [48(e)].

83 (2006) 162 A Crim R 152 at 165 [39].

Crimes Act, as propounded on appeal, was not that which had been propounded at trial. Thus, it held that it should not "order a new trial to permit such a different case to be put"[84]. Critically, the Court found that running away did not amount in law to "hindering" a police officer within s 546C of the *Crimes Act*. Hence, the "foundational offence" necessary to establishing a joint criminal enterprise involving the respondent was non-existent in each of the ways the prosecution had earlier sought to express its case[85].

98 *The Court of Criminal Appeal*: It was in the foregoing circumstances that the Court of Criminal Appeal addressed itself to the discretion which it enjoyed. This required it to consider whether the miscarriage of justice that the respondent had demonstrated should be cured by making "an order for a new trial" or by making the "other order" which it was empowered to make in the circumstances, namely the order of quashing the conviction and directing that a judgment and verdict of acquittal be entered.

99 In the exercise of its discretion, and in the circumstances now sufficiently described, the Court of Criminal Appeal reached the conclusion that the "other order" should be made. It said[86]:

> "There is … no foundational offence or joint criminal enterprise upon which the Crown can rely for the purpose of establishing the culpability of the [respondent] for the (conceded) unintentional consequence of shooting the police officer. As the [respondent] could not be convicted of murder or manslaughter on the cases as formulated by the Crown both at trial and in this Court, it seems to me that it is not appropriate to order a new trial."

100 This, then, is the way that the court below reached the conclusion that a verdict of acquittal should be entered. It so ordered.

101 Now, the prosecution comes to this Court seeking special leave to appeal to propound its new and different basis for a conviction of the respondent of murder on the basis of a "joint criminal enterprise". Certainly, it is not the basis previously suggested. It was not the basis upon which the jury had originally convicted the respondent. Nor does it appear to have been the basis, in the joint trial, in which that jury convicted Mr John Taufahema. It had never been ventilated until after the Court of Criminal Appeal, within the issues before it, entered the verdict of acquittal in the case of the charge of murder against the

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84 (2006) 162 A Crim R 152 at 165 [39] applying *Chekeri* (2001) 122 A Crim R 422 at 434 [57].

85 (2006) 162 A Crim R 152 at 165 [39].

86 (2006) 162 A Crim R 152 at 165 [39].

respondent. Should such a course, so very belatedly advanced, now be permitted and facilitated by this Court?

The issues

102 *The requirement of special leave*: The immediate question is whether this Court should grant the prosecution's application for special leave to appeal and allow its appeal, in the circumstances disclosed, on the basis that, without relying on any new or different evidence, the prosecution should be afforded the opportunity of a retrial at which it might present the case against the respondent in a new and different way. Anterior to the resolution of that question is whether the applicant has demonstrated that the Court of Criminal Appeal erred in declining to order a retrial and in entering the verdict of acquittal in the circumstances of the case, although not on any basis then propounded before that Court.

103 Other reasons in this Court have explored in some detail the background facts, the conduct of the trial and of the appeal, and the issues for decision[87]. However, to arrive at my orders, it is sufficient for me to recognise that, in disposing of the appeal to it, the Court of Criminal Appeal enjoyed a broadly expressed discretionary power to dispose of the appeal before it by ordering a new trial or by entering an acquittal. It elected in favour of the latter course. It did so on the basis of arguments put to it which the applicant now seeks, in this Court, substantially to abandon, alter and re-express. Changing course in this way is not impermissible in law. Nor are the arguments advanced by the applicant without force. However, a principled consideration of the arguments, in the disposition of a matter of such a serious character, attracts the application of well-established rules which it is the duty of this Court to apply, in a way conforming to law.

104 *Principles governing the application*: The actual decision of the Court of Criminal Appeal to enter an order of acquittal of the respondent was made without extended elaboration. Doubtless this was because of the way in which the question of the disposition was presented to that Court for its decision. As this Court is now asked to grant special leave in order to reverse the disposition, and to order a new trial, three basic principles of law are enlivened.

105 First, as has been said many times, this Court is not simply another court of criminal appeal. The Court's constitutional functions constitute it a court of

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87 Joint reasons at [1]-[32]; majority reasons at [41]-[56].

error[88]. In discharging that responsibility, and considering an application for special leave to appeal, this Court is required to exercise its discretion, whether to grant or refuse special leave, so as to fulfil that function. In accordance with federal law, it is required to have regard, amongst other things, to considerations of national and public importance as to the state of the law and also to the interests of the administration of justice, including in the particular case[89].

106 Secondly, the Court of Criminal Appeal was obliged to perform its function, of deciding the order for the disposal of the appeal to it, by conforming to the legislation granting it jurisdiction and power. Relevantly, this required it to enter an order of acquittal or, if a demonstrated miscarriage of justice could "be more adequately remedied" by so doing, to order a new trial.

107 An omission to advance a relevant ground of appeal before the Court of Criminal Appeal does not provide a constitutional barrier to a party later raising a fresh argument in this Court. The "error" in the disposition of the Court of Criminal Appeal may be demonstrated retrospectively, and objectively, by reference to a ground advanced for the first time in this Court, whilst the proceedings are still current before the Judicature[90]. So much has been said in respect of grounds of appeal advanced belatedly by an accused. In point of legal principle, the same must be true for a ground raised belatedly by the prosecution[91].

108 Thirdly, in recognition of the particular duties of the prosecution (particularly in the accusatorial form of criminal justice observed in Australia), its superior resources and the significant burden of repeated criminal trials on persons accused, special obligations must be assumed by the prosecution in an appeal, when seeking to overturn an order of acquittal. As Dixon J observed in *R v Wilkes*[92]:

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88 *Mickelberg v The Queen* (1989) 167 CLR 259 at 267, 279, 298-299; *Eastman v The Queen* (2000) 203 CLR 1 at 79-89 [240]-[266]. See also *Australian Broadcasting Corporation v O'Neill* (2006) 80 ALJR 1672 at 1696 [95]; 229 ALR 457 at 484.

89 *Judiciary Act* 1903 (Cth), s 35A. See *Crampton v The Queen* (2000) 206 CLR 161 at 173 [20] per Gleeson CJ: "[A] second appeal is intended to be reserved for special cases. It is not there for the purpose of giving any sufficiently determined and resourceful litigant a third chance of success."

90 *Gipp v The Queen* (1998) 194 CLR 106 at 116 [23] per Gaudron J, 154-155 [138] of my own reasons, and 161 [164] per Callinan J; *Crampton* (2000) 206 CLR 161 at 171 [10], 184 [51], 189 [73], 219 [165].

91 cf majority reasons at [57]-[58].

92 (1948) 77 CLR 511 at 516.

> "An application for special leave to appeal from a judgment of acquittal is a rare thing."

Such an appeal has been held to be constitutionally permissible[93]. However, it invokes "an exceptional discretionary power"[94].

109 Repeatedly, this Court[95], intermediate courts[96] and other courts, including the Privy Council[97], in similar terms, have stressed that[98]:

> "It is not in the interests of justice as administered under the common law system of criminal procedure that the prosecution should be given another chance to cure evidential deficiencies in its case against the defendant."

And, moreover[99]:

> "The Crown should not be permitted to present a quite different case through a new trial. … [I]t would be unfair to the appellant to order a new trial in which he would have to meet a significantly different case to that the jury were asked to consider."

110 In particular circumstances, the foregoing broad statements have been adapted by reference to specific considerations relevant to the particular case[100].

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93 *Lloyd v Wallach* (1915) 20 CLR 299. But cf *Secretary of State for Home Affairs v O'Brien* [1923] AC 603.

94 *Wilkes* (1948) 77 CLR 511 at 516-517.

95 See eg *King v The Queen* (1986) 161 CLR 423 at 433; *Jiminez v The Queen* (1992) 173 CLR 572 at 590-591; *Parker v The Queen* (1997) 186 CLR 494 at 520-521, 538-539.

96 See eg *Anderson* (1991) 53 A Crim R 421 at 453 per Gleeson CJ; *Ibbs* (2001) 122 A Crim R 377 at 384-386 [26]-[33] per Malcolm CJ; *Chekeri* (2001) 122 A Crim R 422 at 434 [57]-[61] per Howie J.

97 *Reid v The Queen* [1980] AC 343 at 349-350 per Lords Diplock, Hailsham of St Marylebone, Salmon, Edmund-Davies and Keith of Kinkel; *Tsang Ping-nam v The Queen* [1981] 1 WLR 1462 at 1467.

98 *Reid* [1980] AC 343 at 349-350.

99 *Parker* (1997) 186 CLR 494 at 520 per Dawson, Toohey and McHugh JJ.

100 Some such considerations are collected in *Reid* [1980] AC 343 at 349-350.

In determining the present application for special leave, this Court must take all relevant considerations into account, having regard to the new arguments pressed upon it by the parties.

111 In these reasons, I will first list a number of considerations which I recognise support a grant of special leave. I will then identify the competing considerations that ultimately persuade me that special leave to appeal should be refused.

Considerations supporting a grant of special leave

112 *Extended common purpose criminal liability*: In *Clayton v The Queen*[101], six Justices of this Court rejected an application for special leave to appeal brought by three prisoners to challenge their convictions of murder on the basis of extended common purpose liability. The applicants criticised this aspect of the common law of Australia as expressed in earlier decisions of this Court[102]. They submitted that it was inconsistent with basic legal principles governing criminal liability for intended acts; that it was anomalous and asymmetrical in its operation considering other rules governing accessorial liability; that it was disproportionate in its consequences which include criminal punishment for mere possibilities found to have been foreseen by the accused; that it addressed the problem of anti-social group behaviour in an over-inclusive way; that it was needlessly complex for explanation to juries; and that it was destructive of an effective place for manslaughter to reflect varying degrees of moral culpability of individual accused for serious crimes committed incidentally to an unlawful joint purpose[103].

113 These criticisms, or some of them, might arguably be illustrated by the prosecution's accusation of murder against the present respondent. However, the respondent made no such complaint. His counsel accepted the law on extended common purpose liability. Following this Court's recent decision in *Clayton*, that was the correct position to adopt.

114 Whatever doubts or hesitations existed earlier[104] concerning the common law of Australia in this respect, the decision in *Clayton* has to be taken as settling the matter, at least for the present. It upholds the liability of secondary offenders

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101 (2006) 231 ALR 500.

102 *McAuliffe v The Queen* (1995) 183 CLR 108; *Gillard v The Queen* (2003) 219 CLR 1.

103 *Clayton* (2006) 231 ALR 500 at 522-528 [87]-[117].

104 See *Gillard* (2003) 219 CLR 1 at 18-22 [46]-[54].

in those jurisdictions of Australia where the common law applies. Such liability exists where a primary offender has committed a crime within the contemplation of the secondary offender as a possible incident in the execution of their agreed joint criminal enterprise and thus within the scope of an unlawful extended common purpose.

115 Since the present appeal was argued, the Court of Criminal Appeal of New South Wales has quashed the murder conviction of Mr John Taufahema and ordered a new trial of that charge[105]. This was done, in part, because that Court found a misdirection by Wood CJ at CL in respect of the elements of extended common purpose liability[106]. In *Clayton*[107], one of the considerations that persuaded me to favour a re-expression of the common law on this subject was its needless complexity both for trial judges explaining the law to a jury and for juries comprehending and applying it.

116 If two such able and experienced judges as Sully J and Wood CJ at CL, both undoubted experts in the criminal law, could err in their directions to the jury on this subject, something appears to be needed to render the law simpler and more comprehensible. The majority in *Clayton*[108] rejected the opportunity. I must accept that decision. But this Court will see many more cases of this kind until the underlying law is re-expressed either by the Court or by Parliament in a way that addresses the present defects and uncertainties.

117 In the present matter, the reaffirmation by the Court of extended common purpose liability was accepted by the Court of Criminal Appeal as the starting point for its analysis[109]. Leaving aside the way that, at trial and on appeal, the prosecution elected to present its case, and to identify there the "extended common purpose" of which it accused the respondent, there was evidence before the jury upon which the jury could potentially conclude, contrary to the respondent's sworn testimony, that he was more than a temporary driver relieving until Mr Cackau took over the driving to fulfil the alleged plan to commit armed robberies in Melbourne. The respondent's jury might have concluded that there was *some* joint criminal purpose, anterior to the incidental shooting of the deceased by Mr Penisini, that preceded any decision to use the weapons in the vehicle so as to escape apprehension.

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105 *Taufahema* [2007] NSWCCA 33.

106 See *Taufahema* [2007] NSWCCA 33 at [27]-[36].

107 (2006) 231 ALR 500 at 527-528 [113]-[117].

108 (2006) 231 ALR 500 at 502 [2]-[3].

109 (2006) 162 A Crim R 152 at 158-160 [18].

118 Evidence supporting such an inference, as called in the respondent's trial, included: the prior arrangements between the several accused; the four occupants of the car; the four guns that were carried in the car; and the mask and the ammunition found in the car. These facts might arguably combine to give rise to an inference of an anterior foundational crime long before the four participants turned their attention (if they did) to the risk of police apprehension and what they would do if it ever materialised.

119 On the face of things, it would seem unlikely that so many guns would be carried in the vehicle to defend the occupants' right to have a suburban joy ride without police or other interruption. On this footing, there is merit in the prosecution's present complaint that, by focussing on any extended common purpose that the occupants of the vehicle (including the respondent) had concerning escape from the deceased police officer, the courts below subverted the operation of the extended common purpose doctrine by the overly narrow approach they took to defining the "foundational offence". In effect, they concentrated on the incidental, rather than the foundational, offence.

120 On this reasoning, it would follow that the killing of the deceased was incidental to *whatever* purpose the occupants of the vehicle shared in setting out in the first place with so many weapons and with the disguises and additional ammunition they had. By focussing on the incidental crime, and any agreement that existed in respect of it, the trial of the respondent squandered the very substantial advantage that extended common purpose liability affords to the prosecution. Searching for the "lowest common denominator" foundational crime permits the prosecution to rope participants to any anterior agreement to commit that foundational crime into liability for incidental crimes committed by other participants in the course of the joint enterprise, foreseen as a possible consequence of its execution. This makes the clear specification of the foundational crime a matter of great importance.

121 In order to fulfil the ambit of the doctrine of extended common purpose liability, as explained in *McAuliffe v The Queen*[110] and confirmed in *Clayton*[111], the prosecution now seeks the opportunity to re-express its argument as to the respondent's liability for murder of the deceased. It attempts to do so in a way apparently more harmonious with a correct understanding of that doctrine and a correct appreciation of the inferences available as to the anterior joint purpose of the occupants of the motor vehicle which the deceased police officer intercepted. Given that the present proceedings are still alive before the Judicature, in the

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110 (1995) 183 CLR 108 at 113-114. See also joint reasons at [6]-[7].

111 (2006) 231 ALR 500 at 502 [2]-[3].

form of the application for special leave to appeal to this Court, should the prosecution not now be given the chance, at last, to present its case against the respondent as the recently reaffirmed law of extended common purpose liability permits?

122 *Death of a police officer*: Unlawful homicide is a serious challenge to the social order. But unlawful homicide of a police officer is a specially serious affront. As the evidence of this case shows, Senior Constable McEnallay was performing his duties in a proper and professional way when he was killed. His death imposes on those responsible for the prosecution of criminal offences arising from that happening a high duty to bring all those liable for related criminal wrongdoing to justice, in accordance with the full letter of the law.

123 In *R v Benz*[112], explaining the circumstances in which this Court would grant special leave against the decision of a court of criminal appeal quashing a conviction and entering a judgment and verdict of acquittal (or ordering a new trial), Dawson J observed[113]:

> "The circumstances available to the Crown to support an application for special leave to appeal will necessarily be limited to matters of public importance and will, for that reason, ordinarily be more confined than those available to support an application by a convicted person. It is in that sense that the grant of special leave to the Crown is said to be exceptional."

124 The killing of a police officer in the course of discharging his lawful duties is self-evidently an event of public importance. To that extent, the prosecution of those who may be responsible for it in law affords a consideration in favour of the grant of special leave to ensure that such can take place.

125 *The proper function of a jury*: The respondent's acquittal was ordered by the Court of Criminal Appeal. However, the jury had earlier returned a guilty verdict against the respondent, although on a basis which the prosecution does not now seek to support.

126 The reasoning of the jury is unknown. However, it would not be surprising if the jury had rejected the evidence of Mr Cackau and of the respondent and reached a conclusion that the respondent was part and parcel of whatever joint purpose took the four offenders into their heavily armed journey on the day of the deceased's death. Whether this is so or not, it is not irrelevant

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112 (1989) 168 CLR 110.

113 (1989) 168 CLR 110 at 131-132.

that when the jury, the constitutional tribunal of fact, considered all of the evidence, they reached a conclusion adverse to the respondent. By inference, therefore, they dismissed his evidence that he was no more than a temporary driver of the vehicle intended for further criminal use by others[114].

127 In *Reid v The Queen*[115], the Privy Council, enumerating some of the many factors deserving of consideration when deciding between entry of a verdict of acquittal and of an order for a new trial, endorsed observations of the Full Court of Hong Kong in *Ng Yuk Kin v The Crown*[116]. That Court had said that, even where an acquittal on a fresh trial is on balance more likely than a conviction:

> "It is in the interest of the public, the complainant, and the [accused] himself that the question of guilt or otherwise be determined finally by the verdict of a Jury, and not left as something which must remain undecided by reason of a defect in legal machinery."

Those remarks were made in a case involving a charge of rape. However, the Privy Council observed that they stated "a consideration that may be of wider application than to that crime alone"[117].

128 *An occasion of judicial error*: It is for the prosecutor, within wide boundaries set by the law[118], to determine how the prosecution's accusation will be presented against the accused. Once that determination is made, the prosecution is bound by the manner in which its counsel elects to present the case[119]. At the trial of the respondent, the prosecutor opened the prosecution case on the basis that there had been a joint criminal enterprise to "fire a weapon at Senior Constable McEnallay in order to avoid ... lawful apprehension". This was allegedly done with the contemplation of the possibility of death or serious injury being occasioned to the deceased. It is clear, from a later exchange between the prosecutor and the trial judge, that the framing of the prosecution case in this way entailed a considered decision on the prosecutor's part.

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114 See also joint reasons at [15]-[22].

115 [1980] AC 343 at 350-351.

116 (1955) 39 HKLR 49 at 60 per Gould, Gregg and Wicks JJ.

117 [1980] AC 343 at 350.

118 Note *Mallard v The Queen* (2005) 224 CLR 125 at 133 [17] referring to *Grey v The Queen* (2001) 75 ALJR 1708; 184 ALR 593. See also at 150-151 [64]-[67].

119 *Malvaso v The Queen* (1989) 168 CLR 227 at 233; *Everett v The Queen* (1994) 181 CLR 295 at 303.

129 At the conclusion of the evidence, the prosecutor stated that the alternative charge had been incorrectly framed as based on s 33A of the *Crimes Act* whereas the prosecution had actually intended to use the offence against s 33B as the foundational offence. That alternative charge was thus withdrawn by the prosecutor. That step led the respondent, through his counsel, to admit to his guilt of the third count on the basis of his possession of an unauthorised firearm *after* the shooting of the deceased. This, in turn, led to the respondent's conviction of that offence. This left only the single count of murder on the basis of extended common purpose to be tried by the jury.

130 It was after the close of the evidence in the trial, and before the addresses, that the trial judge proposed an alternative foundational offence to the prosecutor as the basis for the invocation of the doctrine of joint criminal enterprise and extended common purpose responsibility. This was the offence of "avoiding lawful apprehension". The trial judge suggested that this could be attractive to the prosecution as it would permit the prosecutor, in his closing address, to "start off with a virtual no contest".

131 It was in this way, on the following day in the trial, in his closing address to the jury, that the prosecutor proceeded to alter his case to assert a joint criminal enterprise of escaping from lawful apprehension. It was put to the jury that the respondent contemplated, in company with the other occupants of the vehicle, that a firearm might be used to effect escape from apprehension and that there was a risk of death or serious injury resulting, even if without specific intention on the part of the respondent or even the principal offender to kill the deceased or cause really serious injury[120].

132 As the Court of Criminal Appeal demonstrated (and is not now in dispute in this application), there was no such offence, as suggested by the trial judge, known to the law of the State[121]. It was not a common law offence. Nor was it an offence within the terms of ss 33B, 58 or 546C of the *Crimes Act*. To the extent that the prosecution belatedly advanced that theory, in the course of the trial and in the closing address to the jury, it erred.

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120 The joint reasons note at [18] that this characterisation of extended common purpose liability invites error in so far as it disclaims the need to contemplate the requisite degree of intention on the part of the principal offender. See also *Taufahema* [2007] NSWCCA 33 at [27]-[36].

121 (2006) 162 A Crim R 152 at 160-161 [20]-[24], 162 [27]. See also majority reasons at [48(b)].

133 Nevertheless, the error was one that arose as a result of the suggestion of the trial judge[122]. Of course, his Honour was attempting to narrow the issues and facilitate and simplify the trial, always a proper endeavour in itself. But the result was the introduction of an erroneous complication, not originally of the prosecution's own making. As it derived from a judicial initiative, the mistake that followed arguably attracts the further remarks of the Privy Council in *Reid*[123]:

> "[T]he interest of justice that is served by the power to order a new trial is the interest of the public ... that those persons who are guilty of serious crimes should be brought to justice and not escape it merely because of some technical blunder by the judge in the conduct of the trial or in his summing up to the jury."

134 A retrial involves various burdens including expense and anxiety to the participants and inconvenience to the public[124]. However, in so far as the ultimately erroneous way by which the prosecution advanced the respondent's liability as a party to a joint criminal enterprise arose out of a judicial intervention, that consideration must be taken into account in deciding what should follow when assessing the prosecutor's own responsibility for the erroneous course that then followed at the trial. On the other hand the prosecutor had a full opportunity to criticise and reject the judicial suggestion. To the contrary, he embraced it with alacrity, endorsed it and adopted it as his own.

135 *Same evidence – arguable case*: In presenting the different propositions which the applicant wishes to advance at a fresh trial, namely identification of the "foundational offence" as being participation with the other occupants of the motor vehicle in a joint criminal enterprise of armed robbery, the applicant disclaimed an endeavour to rely on fresh or new evidence at a second trial[125].

136 The applicant did not deny that, at the trial of the respondent, it had not formulated the foundational offence as that of participation in armed robbery. Nevertheless, in so far as the disinclination to order a new trial derives from a concern that the opportunity will be used to tender different *evidence* and to seek the conviction of the accused on the basis of an entirely new *case*, the applicant denied that this was its aim. In fact, the applicant was critical of the failure of those involved in the subject trial for failing to separate "the antecedent joint

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122 See also majority reasons at [51].

123 [1980] AC 343 at 349.

124 *Reid* [1980] AC 343 at 350.

125 See majority reasons at [68].

enterprise on which the men were embarked" from the "incidental offence" that then arose, namely the shooting of the deceased.

137 On the face of things, there would arguably have been evidence in the testimony called before the jury in the subject trial, on the basis of which the jury might have concluded that the respondent was a party to whatever joint enterprise the occupants of the motor vehicle had when they organised the guns, extra ammunition, mask and other implements, long before the deceased came on the scene.

138 The jury were not bound to accept the testimony either of the respondent or of Mr Cackau. Indeed, they may have rejected that evidence. Given that there were four persons in the vehicle and four guns (and given also the earlier arrangements by which the respondent went to some trouble to join the other occupants and also to drive the vehicle and attempt to evade a police car), the jury might have been persuaded to the requisite standard that whatever joint criminal purposes the other occupants had in mind, the respondent fully shared them.

139 In short, it could not be concluded that, presenting the foundational offence as an agreement of the four occupants to engage in the same armed robbery or robberies, a conviction of the respondent on such a basis was unlikely. To the contrary, the alternative foundational offence now propounded seems entirely arguable and sensible. The only surprising consideration is that it did not so appear to the prosecution either in the subject trial of the respondent (or in the earlier trial involving his brother and Mr Lagi) or in the presentation of the appeal before the Court of Criminal Appeal.

140 This is not, therefore, a case where the application should be approached on the basis that, at a second trial, the respondent would likely not be convicted[126]. Nor was it suggested, during argument, that any "evidence which tended to support the defence at the first trial would not be available at the new trial", concededly a powerful factor against an appellate court ordering a new trial[127].

141 This is not to say that the respondent's conviction would be a foregone conclusion at a new trial. Far from it. There was some evidence supporting the respondent's contention that he was no more than an accidental, temporary driver, and an imperfect and incompetent one, who became involved for a short but fateful journey, at the behest of his brother. Although the new presentation of the

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126 cf majority reasons at [69].

127 *Reid* [1980] AC 343 at 350.

prosecution's case is not unpersuasive, whether it is of "substantial plausibility" is "far from clear"[128]. Ultimately, however, the prosecution merely sought the opportunity to present it for the verdict of a jury.

142 *Manslaughter and retrial*: At the hearing before the Court of Criminal Appeal, the respondent sought to add a ground of appeal complaining about the failure of the trial judge to "leave the offence of manslaughter as an alternative verdict for the jury's consideration"[129]. The prosecution agreed to the addition of a ground of appeal raising that issue. The Court declared that it was "fairly arguable"[130]. It proceeded to deal with it in accordance with the observations of this Court in *Gillard v The Queen*[131]. The Court concluded that, in certain specified circumstances, the respondent would "only be guilty of manslaughter" and accordingly that "the alternative verdict of manslaughter must have been left to the jury and it would have been an error of law not to do so"[132].

143 The applicant argued in this Court[133] that the only basis upon which manslaughter could properly be left to the jury would be if there were evidence to support the count of the indictment charging the respondent with murder. If the trial judge was mistaken in failing to direct the jury on manslaughter, the remedy for that omission would be not acquittal but a direction for a new trial in which a proper direction on manslaughter was given[134]. On this basis, the applicant suggested an inconsistency between the conclusion on the manslaughter ground of appeal and the ultimate disposition of acquittal entered by the Court of Criminal Appeal.

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128 Joint reasons at [39].

129 (2006) 162 A Crim R 152 at 163 [33].

130 (2006) 162 A Crim R 152 at 163 [33].

131 See (2006) 162 A Crim R 152 at 164 [35], citing *Gillard* (2003) 219 CLR 1 at 13-14 [25].

132 (2006) 162 A Crim R 152 at 164-165 [35]-[37].

133 See [2006] HCATrans 662 at 10-75, 515-615.

134 *Gilbert v The Queen* (2000) 201 CLR 414 at 423 [22], 442 [104]; *Gillard* (2003) 219 CLR 1 at 15 [30], 16 [35], 30 [85], 42 [134]. An exception arises where, for example, the prosecution does not seek an order for retrial: *Griffiths v The Queen* (1994) 69 ALJR 77; 125 ALR 545, noted by Corns, "The discretion of a Court of Appeal to order a new trial or a verdict of acquittal", (2006) 30 *Criminal Law Journal* 343 at 353.

144 *The prosecutor's proper function*: Whilst not denying the availability of an order of acquittal in the present case, as a matter of law, the applicant also correctly pointed to a number of recent decisions of this Court in which the Court has emphasised the normal primacy of the prosecution authorities, within the Executive Government, in determining whether or not to put an accused person, whose first trial had miscarried, up for retrial. This deference to the prosecutorial discretion has been explained by reference to considerations derived from the separation of powers inherent in Australia's constitutional arrangements. That is to say, the prosecution operates within the Executive Government and is conventionally entrusted with the power and responsibility of deciding whether a new trial should be had after the failure of a first trial[135]. Various exceptions to this rule have been acknowledged in the cases including, relevantly, where "it would be wrong by making an order for a new trial to give the prosecution an opportunity to supplement a defective case"[136]. Another exception is where the evidence adduced at a first trial did not, and could not as a matter of law, prove the offence charged against the accused[137].

145 Observing this principle of restraint, in instances where an appellate court has concluded that a miscarriage of justice has occurred, even one probably involving the conviction of an innocent person, this Court in the exercise of its powers has generally left it to the prosecution authorities to decide whether or not to elect to have a retrial to renew its accusation of criminal wrongdoing[138]. Occasionally, in particular cases, the Court has specifically drawn to notice the possibility that, although a retrial is ordered, it might not in fact follow[139]. Nevertheless, ordinarily, this Court has left it to prosecuting authorities. The substitution of orders of acquittal has been rare; orders for retrial, on the other hand, are common[140].

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135 *Dyers v The Queen* (2002) 210 CLR 285 at 314 [81]; cf *Crampton* (2000) 206 CLR 161 at 173 [18]-[19]; *Mallard* (2005) 224 CLR 125 at 141-142 [43], 157-158 [90]-[93].

136 *Dyers* (2002) 210 CLR 285 at 314-315 [82], quoting *Director of Public Prosecutions (Nauru) v Fowler* (1984) 154 CLR 627 at 630.

137 *Crampton* (2000) 206 CLR 161 at 187-188 [64]-[65].

138 See eg *Mallard* (2005) 224 CLR 125 at 142 [44], 158 [91]-[94].

139 As in *Stanoevski v The Queen* (2001) 202 CLR 115 at 130 [61]; *Dyers* (2002) 210 CLR 285 at 297 [23]; *Mallard* (2005) 224 CLR 125 at 141-142 [43]. See also Corns, "The discretion of a Court of Appeal to order a new trial or a verdict of acquittal", (2006) 30 *Criminal Law Journal* 343 at 353-354.

140 Corns, "The discretion of a Court of Appeal to order a new trial or a verdict of acquittal", (2006) 30 *Criminal Law Journal* 343 at 355 (Tables 2 and 3).

146 The applicant complained that, in this case, the Court of Criminal Appeal's order of acquittal had deprived the prosecuting authorities of the opportunity to consider and, if so decided, to propound a new case against the respondent to replace the defective theories of his liability for murder successively propounded by the original prosecutor[141]. If it could properly do so within the evidence called at the first trial, the applicant submitted that it should not be denied its normal entitlement to so decide.

147 *Other considerations*: The applicant relied on a number of further considerations. Above all, it emphasised the submission that there was evidence to go to the jury and that the irregularity that had occurred in the first trial had been one of failing to present the case properly, rather than one involving a lack of evidence against the respondent[142]. It was also pointed out that, although the respondent had been acquitted of murder by order of the Court of Criminal Appeal, he had remained in custody, serving sentences for other crimes, including the firearm offence in the third count of the subject indictment to which he had eventually pleaded guilty. Accordingly, were this Court to set aside his acquittal and order a retrial, such an order would not involve his return to custody[143]. This is a specially burdensome attribute of interference with an order of acquittal where restoration of imprisonment may be the immediate consequence[144].

148 I acknowledge the force of the foregoing submissions. They were advanced with the usual skill and fairness of the Director of Public Prosecutions for New South Wales. However, I must now state the considerations that lead me to reject them. I do so acknowledging, as Latham CJ did in *Wilkes*[145], that decisions on such matters will sometimes involve relatively small matters of difference – nowhere more so than where the legal issue that is addressed is whether this Court should grant or refuse special leave to appeal to challenge an order of acquittal in a criminal case.

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141 cf *Tran v The Queen* (2000) 105 FCR 182.

142 cf *Peacock v The King* (1911) 13 CLR 619 at 641 per Griffith CJ.

143 cf majority reasons at [55].

144 *Everett* (1994) 181 CLR 295 at 305.

145 (1948) 77 CLR 511 at 514-515.

Special leave to appeal should be refused

149 *Discretionary order: no error*: Because, under the Constitution, this Court's appellate jurisdiction is only enlivened by a demonstration of error, it is important to start with a recognition (which the applicant did not contest) that the Court of Criminal Appeal enjoyed the undoubted power and discretion to enter an order of acquittal in the respondent's appeal to it. Indeed, the premises upon which the prosecution argued its case in the intermediate court (now abandoned) ensured that the entry of an acquittal was strongly supportable, if not ultimately inevitable.

150 For this Court to interfere with an order of such a discretionary kind, the applicant must not only secure special leave to appeal, itself "exceptional" or "very exceptional" where an order of acquittal has been made by the State's most senior judges[146]. It must do so in a case where what is demonstrated is not, as such, that the Court of Criminal Appeal erred in deciding the appeal before it on the basis then propounded, but that, retrospectively, for new grounds submitted for the first time in this Court, error can be shown on quite a new and different footing.

151 In *Crampton v The Queen*[147], following observations in the earlier decision in *Gipp v The Queen*[148], this Court held that such a new ground could be raised (and was not incompatible with the Court's constitutional function as an appellate court of error). However, it also emphasised that special leave to appeal on such new ground would be granted only in "exceptional circumstances"[149]. In a sense, this is a manifestation of the deep-rooted principle of the law against double jeopardy in its various forms[150].

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146 *Wilkes* (1948) 77 CLR 511 at 516-517; *Benz* (1989) 168 CLR 110 at 111-112, 119-120, 127-128, 146. See also *R v Lee* (1950) 82 CLR 133 at 138; *R v Glennon* (1992) 173 CLR 592 at 595, 617, 618; *R v Rogerson* (1992) 174 CLR 268 at 289, 290-292, 311-312.

147 (2000) 206 CLR 161.

148 (1998) 194 CLR 106 at 154-155 [138].

149 (2000) 206 CLR 161 at 173-174 [20]-[21], 206-207 [122], 216-217 [156], 219 [165]; cf *Giannarelli v The Queen* (1983) 154 CLR 212 at 221.

150 *Everett* (1994) 181 CLR 295 at 305. See also *Pearce v The Queen* (1998) 194 CLR 610 at 636 [90] citing *Green v United States* 355 US 184 at 187-188 (1957); *R v Tait and Bartley* (1979) 24 ALR 473 at 476-477.

152 It follows that the case which the applicant now propounds must be thrice exceptional. It seeks "special" leave which, without more, is exceptional. It seeks to overturn a judicial order of acquittal, also exceptional. And it seeks to do so by relying on a ground, and issues, not presented below, which this Court has said will only be permitted in "exceptional circumstances". Procedurally and substantively, therefore, the applicant must establish a most exceptional case to succeed. No argument was suggested by the applicant to the effect that insistence on such considerations of exceptionality was inconsistent with this Court's constitutional function or with the statutory provisions for the grant of special leave[151]. On the basis of the established authority of this Court, the foregoing statements of the law mark out the very exceptional relief that the applicant is seeking from the Court.

153 *Statutory power for the order made*: The powers granted to courts of criminal appeal vary, as between different jurisdictions in Australia. Presumably for this reason, a disparity has been observed in the practice of different courts of criminal appeal in entering verdicts of acquittal upon a demonstration of error in the conduct of criminal trials[152].

154 In New South Wales, the language of s 8(1) of the *Criminal Appeal Act* appears to require the appellate court to reach an affirmative conclusion that a demonstrated miscarriage of justice "can be *more adequately remedied* by an order for a new trial than by any other order" before a retrial may be ordered (emphasis added). This language affords some support to the remark of Griffith CJ in 1911, by reference to the then applicable Victorian statute, that the power to grant a new trial, following a successful criminal appeal resulting in the quashing of a conviction, was one to "be used with great caution" and not to "be granted as of course in every case"[153].

155 The terms of s 8(1) of the *Criminal Appeal Act* are doubtless also the source of the opinion expressed by Murphy J in *King v The Queen*, that where a criminal appeal succeeds, and a conviction is quashed, the prosecution bears the onus of demonstrating "that a new trial is the most appropriate remedy"[154]. However that may be, the discretion afforded by the legislation to the Court of

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151 cf *Rogerson* (1992) 174 CLR 268 at 311-312.

152 The disparity is noted in Corns, "The discretion of a Court of Appeal to order a new trial or a verdict of acquittal", (2006) 30 *Criminal Law Journal* 343 at 355. At common law no power existed to permit the setting aside by a court of a jury verdict of acquittal once entered: see *Everett* (1994) 181 CLR 295 at 306.

153 *Peacock* (1911) 13 CLR 619 at 641.

154 (1986) 161 CLR 423 at 426.

Criminal Appeal of the Supreme Court of New South Wales is undoubtedly a very broad one[155].

156 According to conventional principles of appellate review, such a discretionary disposition is not one that this Court would disturb simply because its judges might have reached a different conclusion or because intuitive feelings suggest to them a different outcome in the particular case. Here, the applicant has not identified any of the well-known bases for disturbance of the discretionary order of the Court of Criminal Appeal[156]. Nor has the applicant suggested that this Court was obliged in law or fact to exercise the discretion in favour of a retrial, still less for a party which did not now challenge the fact that the miscarriage of justice found on appeal was one which the prosecution's own conduct of the trial below had helped to bring about.

157 Unless, therefore, the retrospective force of the new way that the prosecution wishes now to present the charge of murder against the respondent is sufficient to warrant that course, the conventional approach in this Court to respect discretionary orders made within the power of the court below would ordinarily restrain this Court from granting special leave or disturbing the order made.

158 *Rule forbidding a new case*: It is important, in approaching the present application, to appreciate the strength and persistence of this Court's repeated statements that the prosecution should not be given an opportunity to make a new case which it had not made at the first trial.

159 One of the reasons why the Court of Criminal Appeal entered the verdict of acquittal in the present matter, and not an order for a new trial, was the fact that, as presented to it, the case for the prosecution could not be sustained at any such retrial[157]:

> "As the [respondent] could not be convicted of murder or manslaughter on the cases as formulated by the Crown both at trial and in this Court … it is not appropriate to order a new trial."

There was no error in this conclusion, given its premises. To the contrary, it complied with the repeated instruction of this Court.

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155 *King* (1986) 161 CLR 423 at 433 per Dawson J; cf *Gerakiteys v The Queen* (1984) 153 CLR 317 at 321.

156 As stated, for example, in *House v The King* (1936) 55 CLR 499 at 504-505 per Dixon, Evatt and McTiernan JJ.

157 (2006) 162 A Crim R 152 at 165 [39].

160 Thus, in *Jiminez v The Queen*[158], McHugh J stated:

> "[T]he sufficiency of evidence to support the charge is not the only factor to be considered. Other factors lead to the conclusion that, despite there being evidence which, if accepted, would make out a charge of culpable driving, a new trial should not be ordered. First, as a general rule, a new trial should not be ordered to enable the Crown to make a new case at a second trial. In the present case, a second trial would allow the Crown to make a case different from that which it put to the jury at the first trial. … When all the circumstances are taken into account, the interests of justice do not require that the [accused] should be put to the expense, stress and inconvenience of a new trial so that the Crown can put a case which it did not put at the first trial. The general rule that a new trial will not be ordered so that the Crown can put a different case at a second trial must prevail."

161 It should be noted that the application of these remarks has not been confined to cases where, at any second trial, the prosecution might wish to adduce fresh evidence not presented at the first trial. Whilst that possibility would certainly reinforce the reluctance to order a retrial, it is by no means essential. What is decisive is the impermissible course of allowing the prosecution, having once failed, to enjoy a further opportunity to succeed on a different case, even within the same evidence. Essentially, this is what the applicant is now seeking to do in a retrial of the respondent.

162 *Rationale for the rule*: The reasons for the reluctance of appellate courts to permit the prosecution a second chance to make its accusation good, are bound up, as the Privy Council put it in *Reid*[159], with established features of the "common law system of criminal procedure". Those features are numerous but four of them are immediately applicable. They are all relevant to the determination that must now be made by this Court. They are:

- Under the Australian system of criminal justice the prosecution, whether the Crown or the State[160], is a special party. By long-established convention and practice, the prosecution acts as a model litigant, exhibiting fairness in prosecutorial decisions and thereby contributing,

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158 (1992) 173 CLR 572 at 590-591 (footnote omitted).

159 [1980] AC 343 at 349-350.

160 In Western Australia, prosecutions are now brought in the name of the State. See *Acts Amendment and Repeal (Courts and Legal Practice) Act* 2003 (WA), Pt 8, with operation from 1 January 2004.

with the courts, to the observance of high standards of justice in criminal trials[161];

- The accusatorial form of criminal prosecution, observed in Australia[162], requires the prosecution to establish the criminal accusations made by it against an accused and to make good the precise offence charged in the indictment. Ordinarily, it is not for the accused to demonstrate innocence. If the prosecution, having framed and presented the indictment and the evidence in the way that it selects, fails, it should not normally "have a second chance"[163];

- Involved in such restrictions is "an aspect of the principle of double jeopardy"[164]. This requires that normally, where a conviction has been quashed as a result of some defect in the prosecution at trial and where to order a retrial would permit the prosecution to make a new or different case before another jury, that facility will be withheld. Doing so protects the accused, safeguards the court's judicial processes and properly disciplines the prosecution; and

- A further feature of the common law system is that litigants, as a general rule, are bound by the conduct of trials, as much in criminal as in civil litigation, by their legal representatives[165]. It is this consideration that in criminal appeals has put a limitation on the entitlement of accused persons to blame their trial counsel for what they claim, after conviction, were errors of law, fact, tactics or judgment resulting in a miscarriage of justice[166]. The corollary to this rule is that courts must be cautious in expanding the circumstances in which the prosecution will be permitted to blame its own original trial counsel for what is said to be a miscarriage of

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161 *Lawless v The Queen* (1979) 142 CLR 659 at 677-678; *Mallard* (2005) 224 CLR 125 at 150-151 [64]-[67].

162 *RPS v The Queen* (2000) 199 CLR 620 at 630 [22].

163 *Parker* (1997) 186 CLR 494 at 539.

164 *Chekeri* (2001) 122 A Crim R 422 at 434 [58].

165 See *Rondel v Worsley* [1969] 1 AC 191 at 241; *R v Birks* (1990) 19 NSWLR 677 at 683-684; *Crampton* (2000) 206 CLR 161 at 173 [18], 217-218 [159]-[162].

166 *Crampton* (2000) 206 CLR 161 at 218-219 [163] per Hayne J citing *Giannarelli v Wraith* (1988) 165 CLR 543 at 555-556. See also *TKWJ v The Queen* (2002) 212 CLR 124; *Ali v The Queen* (2005) 79 ALJR 662; 214 ALR 1; *Nudd v The Queen* (2006) 80 ALJR 614; 225 ALR 161.

> justice occasioned by a mistake by the prosecution in presenting the case in a defective way, resulting in an order of acquittal[167].

163 *Burden of criminal prosecution*: In *Reid*, the Privy Council acknowledged the special burden of repeated criminal prosecutions on an accused[168]:

> "[A]ny criminal trial is to some extent an ordeal for the defendant, which the defendant ought not to be condemned to undergo for a second time through no fault of his own unless the interests of justice require that he should do so."

164 In this Court, similar, and still stronger, remarks have been made in many cases, particularly by Deane J. Thus, in *Davern v Messel*[169], his Honour said[170]:

> "[W]hat is involved is essentially a choice between two competing points of view in support of each of which decisions and statements of authority can be called in aid. Ultimately, I have come to the conclusion that the preferable view is that, for the purposes of the application of the relevant principle, an acquittal on the merits includes an acquittal by the order of an appellate court of competent jurisdiction on an appeal instituted by an accused against his conviction. In reaching that conclusion, I am influenced by what I see as the rationale of the common law principle precluding appeals from acquittals and by the weight, as distinct from quantity, of authority.
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> The 'universal maxim of the common law' that no person is to be brought into jeopardy more than once for the same offence … has been correctly described by Black J as 'one of the oldest ideas found in western civilization' with roots running deep into Greek and Roman times: *Bartkus v Illinois*[171]. It is reflected in the patristic maxim that 'not even God judges twice for the same act'. … In its extended application, it operates to preclude at least some appeals from verdicts of acquittal. The 'underlying idea' of the rule was said by Black J (*Green v United States*[172])

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167 See joint reasons at [37].

168 [1980] AC 343 at 350.

169 (1984) 155 CLR 21.

170 (1984) 155 CLR 21 at 67.

171 359 US 121 at 151-152 (1959).

172 355 US 184 at 187-188 (1957).

> to be that 'the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offence' thereby subjecting him to embarrassment, expense, continuing anxiety and insecurity and 'enhancing the possibility that even though innocent he may be found guilty'."

165 In his reasons in *Davern*, Deane J went on to describe the superior position typically enjoyed by the prosecution and the lasting burden which being prosecuted for a criminal offence represents for the accused[173]:

> "[I]n common law countries … both the prosecutor and the court in a criminal case are essentially emanations of the same entity. Regardless of whether it be seen or described in terms of the sovereign or the people, that entity is the State. It is the State that establishes and maintains the judicial system. It is the State that brings an accused person before that judicial system on a charge of an offence against the law of the State. It is in the State's favour that the overwhelming balance of power and resources will ordinarily lie. If, in that context, a competent court in the State's own system rules that the State's charge should be dismissed and makes an order that the person against whom the State has brought proceedings is acquitted and discharged, there is plainly much to be said for the view that, as a matter of ordinary fairness, that person should be entitled to be released both from custody and jeopardy on that charge. Put another way, the citizen who is told by a competent court of the State that the State's proceedings against him are resolved in his favour should not awake on the morrow to be told he faces renewed jeopardy on that charge either by reason of the institution by the State of new proceedings against him or by reason of an appeal by the State against its own court's decision."

166 In *R v Rogerson*[174], Deane J returned to give these words special emphasis in the context of a prosecution application for special leave to appeal to this Court against an acquittal of an accused person:

> "Inevitably, an accused person whose acquittal by a Court of Criminal Appeal is singled out for a comparatively rare grant of special leave to appeal to this Court is likely to feel, with some justification, that he or she has been singled out for adverse treatment."[175]

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173 (1984) 155 CLR 21 at 67-68.

174 (1992) 174 CLR 268 at 291.

175 See also *Walton v Gardiner* (1993) 177 CLR 378 at 396-398 and *Gill v Walton* (1991) 25 NSWLR 190 at 200, 207, 217.

The proper place at which a criminal accusation should normally conclude is at the trial[176]. As Deane J pointed out in *Jago v District Court (NSW)*[177], "where an allegation of serious crime is involved, the burden of criminal proceedings first falls upon an accused at the time when [such an accusation is] threatened. ... [L]iberty is either destroyed by imprisonment or compromised by the restraints involved in release upon bail." Indeed, it remains at peril until final disposition. Deane J then remarked[178]:

> "In *Mills v The Queen*[179], Lamer J identified some of the other 'vexations and vicissitudes' of pending criminal proceedings, namely, 'stigmatization of the accused, loss of privacy, stress and anxiety resulting from a multitude of factors, including possible disruption of family, social life and work, legal costs, uncertainty as to the outcome and sanction'. If none but the guilty were accused of crime, the harshness of the burden would be alleviated by the consideration that the accused had brought it upon himself by his criminal conduct and subsequent denial of guilt and by the fact that account could be taken of pre-trial incarceration in the ultimate sentencing process. In truth, of course, the innocent as well as the guilty are accused of crime and the notions of fairness and decency which sustain our society dictate that an accused is presumed to be innocent unless and until he is convicted. For a person who is innocent of wrong-doing, the burden involves undeserved mental, social and often financial damage. And that damage will not be erased by ultimate acquittal. Life may be resumed but the mental, social and financial scars will ordinarily endure."

167 As the applicant pointed out, the respondent may not have been released to liberty following the Court of Criminal Appeal's order for his acquittal. Yet following the order of the Court of Criminal Appeal he was entitled, under ordinary circumstances, to consider that his ordeal on the charge of murdering the deceased police officer was at an end. Something truly "exceptional" is required for this Court now to revive it.

168 *Tactical decisions and even-handedness*: A particular consequence of the "common law system of criminal procedure", and of its consequence that accused persons are ordinarily bound by the conduct of their legal representatives, has been a reluctance of courts of criminal appeal to permit an accused, having

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176 *Crampton* (2000) 206 CLR 161 at 217 [157] per Hayne J.

177 (1989) 168 CLR 23 at 55.

178 (1989) 168 CLR 23 at 55.

179 [1986] 1 SCR 863 at 919-920.

second thoughts on appeal, to challenge miscarriages of justice said to have arisen from tactical decisions made by trial counsel in the course of the trial. This reluctance has a very practical foundation. Such decisions are made in trials on countless occasions every day. If they were susceptible to being reopened on appeal, few forensic choices could be treated as final. Trials, and appeals, might never conclude. For this reason, in very many cases, this Court has declined to permit accused persons to reopen decisions made by counsel at trial, characterised as those made for tactical reasons[180].

169 There is no reason of principle why the same rule, holding the accused to the tactical decisions of legal representatives, should not apply with equal force to tactical decisions made at trial by prosecuting counsel[181]. Indeed, because defence counsel more frequently have less experience, expertise and resources, any principle of equality would require that the rule holding a party to the tactical choices made by trial representatives should apply with even greater rigour in the case of a prosecutor. For the present application, this Court should apply the same principle.

170 There can be no doubt that, in this case, the framing of the indictment and the identification of the initial "foundational offence", propounded before the jury by the prosecutor, were carefully considered prosecutorial decisions. Inferentially, they were taken in a way that it was believed at the time best advanced the prosecution case against the respondent[182]. They were tactical decisions. Many such decisions are "technical"[183]. The prosecution should be held to them. If the prosecution is not, it will give rise to a justifiable conclusion that this Court does not hold the scales evenly but applies a different standard and a different rule to accused persons and their legal representatives from that which it applies to the prosecution. This is not a course that I would adopt.

171 The rule holding parties to their trial tactics applies to a decision to alter course during the trial. In the present case such a decision was reached at the conclusion of the evidence, following the dialogue already described between the

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180 Recent examples include *Stanoevski* (2001) 202 CLR 115 at 121-122 [21]; *TKWJ* (2002) 212 CLR 124 at 128 [8], 130-131 [16]-[17] per Gleeson CJ; cf at 132-135 [24]-[33], 137-138 [43], 139 [49] per Gaudron J, 157 [102]-[104] per Hayne J; cf my reasons in *Gipp* (1998) 194 CLR 106 at 151-155 [130]-[138] and *Suresh v The Queen* (1998) 72 ALJR 769 at 780 [56]-[58]; 153 ALR 145 at 160-161. See also *Birks* (1990) 19 NSWLR 677 at 686.

181 See joint reasons at [37].

182 See above these reasons at [128]-[134].

183 cf majority reasons at [51]. See also joint reasons at [10].

prosecutor and the trial judge[184]. A study of the transcript demonstrates that the prosecutor specifically acknowledged that he embraced the suggestion of the trial judge on the basis of what he described as the "KISS principle … that is keeping it simple"[185].

172 To reinforce the conclusion that this represented a conscious tactical decision on the part of the prosecutor, the transcript indicates that the prosecutor considered the matter over the luncheon adjournment and then still further overnight. It was only then that the alternative count based on s 33B of the *Crimes Act* was withdrawn and the prosecutor's first decision to change the expression of the foundational offence for "joint criminal enterprise" was made. In the course of his closing address on the following day, the prosecutor re-expressed the prosecution case to assert a joint criminal enterprise involving the respondent of "escaping from lawful apprehension".

173 In this case, it cannot, therefore, be denied that it was for the tactical decision of keeping the prosecution case "simple" that the prosecutor elected to abandon the case as originally presented, on which he had earlier relied for the respondent's conviction. Instead, the prosecutor repeatedly told the jury that the prosecution case was that there was a joint criminal enterprise to escape and that the respondent was liable for murder as a result of an incident arising from that precise venture. It is quite wrong to ascribe to the trial judge the primary responsibility for what occurred[186]. He made a suggestion. But it was embraced and endorsed by the prosecutor after due deliberation.

174 In these circumstances, the summary in the reasons of the Court of Criminal Appeal concerning the conduct of trial counsel for the applicant was accurate. So was that Court's description of the still further changes to the formulation of the "foundational offence" by the time the case reached the appeal hearing[187]. Whatever doubts might occasionally arise as to whether the decision of trial counsel for an accused person was truly made for "tactical reasons" (or was simply an ignorant, inexperienced or incompetent choice with which the accused is thereafter to be burdened by the operation of a convenient legal rule), there can be absolutely no doubt in the present proceedings of the conscious election of the prosecutor at the respondent's trial and appeal. An experienced

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184 See above these reasons at [129]-[131].

185 "KISS" for "Keep It Simple, Stupid", an admonition popularly ascribed to the urging of the wife of United States presidential candidate Hubert Humphrey whose failure to observe it deprived him of success in the election.

186 cf majority reasons at [51].

187 (2006) 162 A Crim R 152 at 160-161 [20]-[22], 162 [27].

advocate took considered and deliberate decisions. At trial, he did so for the self-proclaimed tactical reason which he graphically described as motivated by "KISS".

175 Consistently with this Court's repeated insistence (in much less compelling and considered circumstances) that accused persons are bound by tactical decisions made by their legal representatives, so must be the prosecution with its larger body of experience, expertise and resources. Any other approach would be lacking in the even-handedness that is the precious hallmark of equal justice as between the prosecution and the accused before our courts.

176 In many courts, of different legal traditions, the prosecution is a special branch of government which enjoys an enhanced professional status akin to the judiciary. In such countries (as formerly in some of the old police courts in some parts of Australia) the prosecutor has a special and elevated seat in the court, higher than the ordinary Bar table and closer to the judicial bench. In Australia today, the prosecutor and the representatives of the accused appear at the same table and their equality before the law is enforced by the courts. We should not now waver and apply a different and unequal rule as to tactical decisions made by a prosecutor from that which we regularly apply to tactical decisions made by the legal representatives of the accused. Every time in the future that prosecutors argue that the accused cannot rely on a persuasive submission because of tactical decisions taken by their trial counsel, appellate courts will be obliged to remember this case.

177 *Other considerations*: There are other relevant considerations mentioned during the argument that can be noted in passing.

178 The applicant complained that the Court of Criminal Appeal's decision acquitted the respondent of all culpability for the shooting of the deceased police officer and precluded further proceedings in this respect against the respondent. However, it was the prosecution that, at trial, had abandoned the alternative charge against the respondent under s 33B of the *Crimes Act*. This resulted in the respondent's being convicted of the firearm offence for which he was sentenced to five years imprisonment. For his part, the actual perpetrator of the shooting of the police officer, Mr Penisini, pleaded guilty to murder. In consequence, he received a most substantial sentence of imprisonment for that most grievous crime. The respondent is still serving his sentence for the firearm offence, as well as for other unrelated offences[188]. He did not walk away scot-free from his involvement. Nor did the other two offenders.

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188 See above at [84]-[85].

179 When, in all of the foregoing circumstances, I ask myself whether the triple requirement of an exceptional case is established to warrant this Court's granting special leave to the applicant to permit the prosecution to re-express its case in a way not advanced at trial or before the Court of Criminal Appeal in order to subject the respondent, although acquitted, to a new trial for murder on a different basis, I reach the conclusion that the request should fail[189].

180 I arrive at this conclusion without enthusiasm. I say this because it is at least arguable that, had the prosecution at the original trial of the respondent formulated its theory of the case as it now propounds it, and presented that theory clearly and simply throughout, the respondent might have been convicted of murder of the deceased police officer on the basis of liability as a secondary offender for an extended common purpose with the actual perpetrator of the fatal shots, Mr Penisini.

181 Nevertheless, that was not the way the prosecution acted, either at trial or in the intermediate court. Consistently with long-established legal principles, often repeated and frequently applied, the prosecution should not at such a late stage have a new and different opportunity to overturn the respondent's acquittal because it has belatedly arrived at a new and different case which it now wants to present before a new and different jury.

182 The impartial application of basic legal principles is the more important in criminal appeals because the circumstances in which such principles are invoked sometimes make it painful to apply the principles with judicial dispassion and complete even-handedness. Yet these are the features of the rule of law that is the bedrock of Australia's constitutional government and the best assurance of personal liberties[190]. It is the duty of the courts, including this Court, to give them effect.

Order

183 The application for special leave to appeal should be refused.

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189 See also (2006) 162 A Crim R 152 at 165 [39].

190 *Australian Communist Party v The Commonwealth* (1951) 83 CLR 1 at 193 per Dixon J; *Kartinyeri v Commonwealth* (1998) 195 CLR 337 at 381 [89]; *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476 at 513 [103].

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