



HIGH COURT OF AUSTRALIA

24 August 2016

SIO v THE QUEEN
[2016] HCA 32

Today the High Court unanimously allowed an appeal from the Court of Criminal Appeal of the Supreme Court of New South Wales. The High Court quashed the conviction of the appellant ("Mr Sio") for armed robbery with wounding because the trial judge omitted an element of the offence in directing the jury. The Court also held that the trial judge erred in admitting hearsay evidence, given by the person who stabbed the victim, that Mr Sio gave him the knife.

On 24 October 2012, Mr Sio drove Mr Filihia to a brothel in Clyde in New South Wales. Mr Filihia entered the brothel alone, armed with a knife, intending to commit robbery. During an altercation, Mr Filihia fatally stabbed Mr Gaudry, who worked at the brothel. Mr Filihia removed from Mr Gaudry's back pocket a pencil case which contained cash and left the brothel, running past Mr Sio's car. Mr Sio caught up with and collected Mr Filihia, and accelerated away from the scene.

Mr Sio was charged with the murder of Mr Gaudry and with armed robbery with wounding. Mr Filihia refused to give evidence at Mr Sio's trial. The prosecution tendered two electronically recorded interviews, and two supplementary statements, given by Mr Filihia in which he named Mr Sio as the driver of the car and as the person who had given him the knife. The trial judge admitted this evidence under s 65 of the *Evidence Act 1995* (NSW), which provides an exception to the hearsay rule where the maker of the representation is unavailable, and where the representation was against the interests of the person who made it at the time it was made and was made in circumstances that make it likely that the representation was reliable. In directions to the jury, the trial judge instructed them that they must be satisfied that Mr Sio foresaw the possibility of the use of the knife by Mr Filihia to wound Mr Gaudry in relation to the murder charge, but omitted this element in relation to the armed robbery with wounding charge. Mr Sio was acquitted of murder, but convicted of armed robbery with wounding.

The Court of Criminal Appeal granted leave to appeal to Mr Sio, but dismissed the appeal, holding that the trial judge did not err in admitting Mr Filihia's evidence, and that the verdict on the armed robbery with wounding charge was not unreasonable.

The High Court held that the conviction of armed robbery with wounding must be quashed because of the trial judge's misdirection and because the trial judge erred in admitting the hearsay evidence. With respect to the evidence of the representation that Mr Sio gave Mr Filihia the knife, the Court held that it was not open to the trial judge to be satisfied positively that the representation was made in circumstances that made it likely that it was reliable. A new trial on the charge of armed robbery with wounding was not possible, as that would traverse the jury's verdict on the murder charge. It was also not open to substitute a conviction for armed robbery because of the wrongful admission of the hearsay evidence. The Court ordered that there be a new trial on the charge of armed robbery.

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