HIGH COURT OF AUSTRALIA

FRENCH CJ,
BELL, GAGELER, KEANE AND GORDON JJ

DANIEL JEFFEREY SIO APPELLANT/APPLICANT

AND

THE QUEEN RESPONDENT

Sio v The Queen
[2016] HCA 32
24 August 2016
S83/2016 & S241/2015

ORDER

Matter No S241/2015

Grant special leave to include, as a further ground of appeal in Matter No S83/2016, ground 2.2 of the Draft Notice of Appeal filed on 20 November 2015.

Matter No S83/2016

1. *Appeal allowed.*

2. *Set aside order 2 of the Court of Criminal Appeal of the Supreme Court of New South Wales made on 31 March 2015, and in its place order that:*

    (a) the appeal be allowed;

    (b) the appellant's conviction on count 2 of the indictment be quashed; and

    (c) a new trial be had for the offence of armed robbery.

On appeal from the Supreme Court of New South Wales

Representation

T A Game SC with J L Roy for the appellant/applicant (instructed by Sydney Criminal and Traffic Lawyers)

L A Babb SC with G M O'Rourke SC for the respondent (instructed by Solicitor for Public Prosecutions (NSW))

CATCHWORDS

Sio v The Queen

Criminal law – Criminal liability – Inconsistent verdicts – Where appellant drove person to brothel – Where person intended to commit robbery – Where person fatally stabbed victim and took money – Where appellant charged with murder and armed robbery with wounding – Where jury directions on armed robbery with wounding charge omitted element of foresight of use of knife to wound – Where appellant acquitted of murder and convicted of armed robbery with wounding – Whether conviction and acquittal inconsistent – Whether substituted verdict should be ordered – Whether new trial should be ordered.

Evidence – Hearsay evidence – *Evidence Act* 1995 (NSW), s 65(2)(d) – Where person made representation that appellant gave him knife – Whether representation made in circumstances that made it likely that the representation was reliable.

Words and phrases – "circumstances that make it likely that the representation is reliable", "hearsay evidence", "inconsistent verdicts", "merciful verdict", "misdirection", "new trial", "substituted verdict".

Criminal Appeal Act 1912 (NSW), ss 7, 8.
Evidence Act 1995 (NSW), s 65.

1 FRENCH CJ, BELL, GAGELER, KEANE AND GORDON JJ. On 24 October 2012, the appellant, Mr Daniel Sio, drove Mr Filihia to a brothel in Clyde in New South Wales. Also present in the front seat of the vehicle was a Ms Coffison. Mr Filihia entered the brothel alone, armed with a knife, intending to commit robbery. During an altercation, Mr Filihia stabbed Mr Gaudry, who worked in the brothel. Mr Gaudry later died from his wounds. 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. Both offenders were apprehended by police shortly afterwards.

2 Mr Sio was charged on indictment with the murder of Mr Gaudry contrary to s 18(1)(a) of the *Crimes Act* 1900 (NSW) ("the Crimes Act"), and with armed robbery with wounding contrary to s 98 of the Crimes Act.

3 Following a trial in the Supreme Court of New South Wales before Adamson J and a jury, Mr Sio was acquitted of the murder of Mr Gaudry, but convicted of armed robbery with wounding. Adamson J sentenced Mr Sio to a term of imprisonment of 10 years, with a non-parole period of seven years and six months. An appeal to the Court of Criminal Appeal of the Supreme Court of New South Wales was dismissed[1]. The matter comes to this Court as an appeal and as an application for special leave to appeal referred to the Full Court pursuant to orders made on 11 March 2016[2].

The issues

4 The first issue presented to this Court is whether the conviction of Mr Sio for armed robbery with wounding was unreasonable because it was inconsistent with his acquittal on the charge of murder. If that issue is resolved in Mr Sio's favour, a further issue arises as to how the matter should then be disposed of. In this regard, Mr Sio argued that a verdict of acquittal on the charge of armed robbery with wounding should be entered. The Crown argued that this Court should either substitute a verdict of guilty of armed robbery pursuant to s 7 of the *Criminal Appeal Act* 1912 (NSW) ("the Criminal Appeal Act"), or make an order for a new trial of the offence of armed robbery pursuant to s 8 of the Criminal Appeal Act.

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1 *Sio v The Queen* [2015] NSWCCA 42.

2 [2016] HCATrans 056.

5 Mr Sio has also applied for special leave to appeal in order to agitate a further issue, namely, whether the trial judge and the Court of Criminal Appeal erred in concluding that the conditions for the admissibility of a representation under s 65(2)(d) of the *Evidence Act* 1995 (NSW) ("the Evidence Act") were satisfied in respect of a representation by Mr Filihia to the effect that Mr Sio gave him the knife with which he stabbed Mr Gaudry. This application was referred to the Full Court for consideration[3], and was heard at the same time as the appeal. As will be seen, the determination of this application has such a material bearing on the disposition of the case as to warrant the grant of special leave.

The course of the trial

6 As to the charge of murder, the case for the Crown, as it was left to the jury, was one of constructive murder by way of a joint criminal enterprise to commit armed robbery with foresight on Mr Sio's part of the possibility of a wounding by the use of the knife by Mr Filihia. The prosecution case of armed robbery with wounding was put on the basis of joint criminal enterprise to commit armed robbery with foresight on Mr Sio's part of the possibility of the use of the knife.

7 At trial, there were formal admissions on behalf of Mr Sio that Mr Filihia robbed Mr Gaudry while armed with a knife, that Mr Filihia stabbed and wounded Mr Gaudry, and that, as a result, Mr Gaudry died.

8 Ms Gaudiosi, an employee of the operator of the brothel, gave evidence that Mr Sio asked her to help him "do a robbery" at the brothel. She said that she told Mr Sio that a weapon would not be required to commit the robbery. She produced a drawing that she said Mr Sio made of the brothel layout and a handwritten note that said "keep tabs on money that [Mr Gaudry's] holding", which she recognised as being Mr Sio's writing.

9 The knife used by Mr Filihia to kill Mr Gaudry belonged to Mr O'Hare, who was a friend of Ms Coffison. The knife had been kept at her home. Mr O'Hare gave evidence that he had heard Mr Sio and Ms Coffison discussing plans to rob a brothel, and noticed his knife missing from its place in Ms Coffison's lounge room about two weeks before the robbery. Mr Sio had visited Ms Coffison's house previously.

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3 [2016] HCATrans 056.

10 Ms Coffison gave evidence that, on the morning of the robbery, after she had smoked ice with Mr Filihia and Mr Sio, Mr Filihia asked if he could come with them and if he could commit the robbery. She said that after the robbery, she was removing a plastic bag from Mr Sio's car when Mr Sio asked if he could put a few things in the bag. She agreed. She said she later put the bag in her closet without looking into it. She said that one week after the robbery, after she had given a statement to the police, she discovered the knife in the plastic bag and handed it over to police.

The admission of hearsay evidence

11 Parts of the scene at the brothel at the time of the murder of Mr Gaudry were captured on CCTV footage, which was distributed to police stations throughout Sydney. Mr Filihia reported to the police station at Hurstville in the early evening of the day of the murder, in obedience to a condition of his bail for an unrelated offence. Mr Filihia had shaved his head between the time of the offence and his attendance at the police station, but police recognised him from the CCTV footage and arrested him.

12 Police then conducted an Electronically Recorded Interview of a Suspected Person ("ERISP") with him. During the interview, Mr Filihia said that only he and another man were in the car at the scene of the robbery. It later emerged that this was untrue: Ms Coffison was sitting in the front passenger's seat. Mr Filihia said that the other man's name was "Jacob", except once when he referred to the man as "Dan". Importantly for present purposes, he said that "[Mr Sio] already had [the knife] in his car" in answer to a question as to where he got the knife. Later, he said that, after the robbery, he threw the knife onto the front passenger's seat of the car.

13 On 25 October 2012, Mr Filihia participated in an identification parade from a photo array in which he identified Mr Sio as the man, Dan or Danny, who was the driver of the car. This procedure was also conducted as an ERISP[4].

14 On the same day, Mr Filihia prepared two supplementary statements in which he corrected his earlier statement. He said that the real name of the man he referred to as "Jacob" was "Danny or Dan". More importantly, he reiterated:

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4 *Sio v The Queen* [2015] NSWCCA 42 at [6].

"[I]t was Danny who put me up to robbing the brothel. He gave me the knife and drove me there."[5]

15 At trial, Mr Filihia was called to give evidence on a voir dire but refused to answer any questions. The Crown tendered as evidence the two ERISPs of Mr Filihia dated 24 and 25 October 2012, as well as the two statements of Mr Filihia dated 25 October 2012. Objection was taken to the tender of the two ERISPs and the two statements on the basis that the evidence was hearsay evidence and therefore inadmissible by virtue of s 59 of the Evidence Act.

16 Section 65 of the Evidence Act provides for an exception to the exclusion of hearsay evidence. Section 65 relevantly provides:

> "(1) This section applies in a criminal proceeding if a person who made a previous representation is not available to give evidence about an asserted fact.
>
> (2) The hearsay rule does not apply to evidence of a previous representation that is given by a person who saw, heard or otherwise perceived the representation being made, if the representation:
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> ...
>
> (d) was:
>
> (i) against the interests of the person who made it at the time it was made, and
>
> (ii) made in circumstances that make it likely that the representation is reliable."

17 Section 65(2)(d) should be read with s 65(7), which provides:

> "Without limiting subsection (2)(d), a representation is taken for the purposes of that subsection to be against the interests of the person who made it if it tends:
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> (a) to damage the person's reputation, or

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5 *Sio v The Queen* [2015] NSWCCA 42 at [7].

(b) to show that the person has committed an offence for which the person has not been convicted, or

(c) to show that the person is liable in an action for damages."

18 The trial judge held that Mr Filihia was "not available to give evidence"[6] because her Honour was satisfied that all reasonable steps had been taken by the Crown to compel him to give evidence, but without success[7].

19 Her Honour also held that the representations in the ERISPs and statements sought to be tendered were made against Mr Filihia's interests, noting that the Crown had the benefit of the deeming provision in s 65(7) of the Evidence Act as the representations made tended to show that Mr Filihia committed an offence for which he had not, at that time, been convicted[8]. These conclusions by the trial judge were not challenged, either in the Court of Criminal Appeal or in this Court.

20 In assessing whether a representation was made in circumstances that made it likely that the representation was reliable within the meaning of s 65(2)(d)(ii), her Honour noted that she was not assessing the credibility of Mr Filihia's evidence[9], as this was the province of the jury[10]. Notwithstanding that disclaimer, her Honour went on to say[11]:

> "The representations were made on the same day of the incident at a time when Mr Filihia was not necessarily expecting to be apprehended and interviewed, although he must have appreciated that there was a substantial risk of apprehension. His answers were, in the main,

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6 Clause 4 of Pt 2 of the Dictionary to the Evidence Act explains when a person is not available to give evidence.

7 *R v Sio* (2013) 234 A Crim R 508 at 515 [44].

8 *R v Sio* (2013) 234 A Crim R 508 at 516 [52].

9 *R v Sio* (2013) 234 A Crim R 508 at 516 [54].

10 *R v Shamouil* (2006) 66 NSWLR 228 at 236-237 [56], referring to *R v Cook* [2004] NSWCCA 52 at [43]; see also *R v XY* (2013) 84 NSWLR 363.

11 *R v Sio* (2013) 234 A Crim R 508 at 516-517 [55].

> forthcoming. I did not detect any indication that he had rehearsed, or thought out, how best to present the facts in order to advance his interests by minimising his involvement. His recollection can be taken to be fresh by reason of the short time between the events and the interview."

21 Her Honour concluded that Mr Filihia's answers showed that he had "decided to be as forthcoming as possible in order to assist him on sentence."[12] Her Honour said[13]:

> "His preparedness to answer questions thoughtfully and apparently without regard to self-incrimination is evident from the ERISP. He was quietly spoken and courteous throughout and appeared to answer willingly. Although he gave a false name, Jacob, for Mr Sio, his dissembling was neither clever nor, apparently, pre-meditated, since he gave Mr Sio's mobile phone number, which he had memorised. He described the colour and make of the car Mr Sio was driving."

22 In the result, the trial judge concluded that the representations were made in circumstances that made it likely that they were reliable and so were admissible under s 65(2)(d) of the Evidence Act[14].

23 It is convenient to note here that, in this Court, Senior Counsel for Mr Sio mounted a spirited challenge to her Honour's view that Mr Filihia did not appear to have "thought out … how best to present the facts in order to advance his interests". In this regard, it was said that, in the first ERISP, Mr Filihia attempted initially to assert that he stabbed Mr Gaudry in self-defence, and that he ceased being "forthcoming" when confronted by CCTV film which contradicted that account. It was argued on Mr Sio's behalf that Mr Filihia's response to material which falsified the account which he sought to advance demonstrated the unreliability of his statements generally, and specifically in relation to his representation that Mr Sio gave him the knife.

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12 *R v Sio* (2013) 234 A Crim R 508 at 517 [56].

13 *R v Sio* (2013) 234 A Crim R 508 at 517 [57].

14 *R v Sio* (2013) 234 A Crim R 508 at 517 [61].

The trial judge's directions to the jury

24 The trial judge provided the jury with written directions and oral directions during her Honour's summing up of the case on 18 September 2013. In relation to the charge of murder, the trial judge directed the jury that it was essential that the Crown prove beyond reasonable doubt that Mr Sio participated with Mr Filihia in a joint criminal enterprise of armed robbery while foreseeing the possibility that the victim of the armed robbery might be wounded by the use of the knife.

25 The written directions on the charge of murder included the following "ingredients":

> "1. The crime of murder has been committed by **[Mr] Sio** if
>
> **A.** the Crown has established beyond reasonable doubt each of the following elements:
>
> (a) On 24 October 2012 at Clyde [Mr] Filihia robbed [Mr] Gaudry. (**Admitted**)
>
> (b) At the time or immediately before [Mr] Filihia robbed [Mr] Gaudry he was armed with an offensive weapon, namely a knife. (**Admitted**)
>
> (c) At the time or immediately before [Mr] Filihia robbed [Mr] Gaudry he stabbed and wounded [Mr] Gaudry. (**Admitted**)
>
> (d) As a result of being stabbed and wounded by [Mr] Filihia [Mr] Gaudry died. (**Admitted**)
>
> (e) Mr Sio participated in a joint criminal enterprise of armed robbery with Mr Filihia.
>
> (f) Mr Sio foresaw the possibility that the victim might be wounded by the use of a knife."

26 In relation to the charge of armed robbery with wounding, the trial judge provided the following written direction to the jury:

"8. The crime of armed robbery with wounding has been committed by **[Mr] Sio** if the Crown has established beyond reasonable doubt each of the following elements:

(a) On 24 October 2012 at Clyde [Mr] Filihia robbed [Mr] Gaudry. (**Admitted**)

(b) At the time or immediately before [Mr] Filihia robbed [Mr] Gaudry he was armed with an offensive weapon, namely a knife. (**Admitted**)

(c) At the time or immediately before [Mr] Filihia robbed [Mr] Gaudry he stabbed and wounded [Mr] Gaudry. (**Admitted**)

(d) Mr Sio participated in a joint criminal enterprise of armed robbery with Mr Filihia.

9. Element **(d)** requires the Crown to prove Mr Sio did a positive act that signified his agreement to the joint criminal enterprise to commit armed robbery. His mere presence is not enough."

27 As is apparent, in relation to both charges, whether "Mr Sio participated in a joint criminal enterprise of armed robbery with Mr Filihia" was in issue before the jury. However, the written directions did not refer to the need for the Crown to prove the foresight of wounding element for the armed robbery with wounding charge but did refer to that element in relation to the murder charge. The oral directions also omitted reference to the foresight of wounding element of the armed robbery with wounding charge. Had such a direction been given, there would have been a complete coincidence of the elements in issue for the jury in relation to both charges.

28 No objection was taken in relation to the trial judge's directions by the parties at trial. Nor was any question as to the sufficiency of her Honour's directions raised as a ground of appeal when the matter proceeded to the Court of Criminal Appeal.

The Court of Criminal Appeal

29 Mr Sio sought leave to appeal against his conviction on two grounds: first, the admission of Mr Filihia's first ERISP and his supplementary statements was not authorised by s 65 of the Evidence Act; and, secondly, the verdict was unreasonable.

30 The Court of Criminal Appeal (Leeming JA, Johnson and Schmidt JJ agreeing) granted leave to appeal on both grounds, but dismissed the appeal.

The hearsay evidence

31 Leeming JA held that the following circumstances pointed towards the likely reliability of Mr Filihia's statements: Mr Filihia did not appreciate that Mr Gaudry had died until well into the interview; Mr Filihia's answers appeared "unrehearsed and sincere and forthcoming"; and the interview was conducted within 24 hours of the events in question[15]. The circumstance that Mr Filihia tried initially to conceal the presence of Ms Coffison or the repeated references to "Jacob" did not bear materially on the question posed by the statute[16]. His Honour explained[17]:

> "The question posed by statute is *not* whether the actual statements made are themselves accurate or likely reliable, but whether the *circumstances* in which they were made are such that they are likely to be reliable."

32 Leeming JA held that it was not relevant to distinguish between representations made by Mr Filihia which were exclusively against his own interest and representations relevant to Mr Sio[18]. His Honour held that while it is possible that Mr Filihia was motivated by animosity towards Mr Sio, the possibility did not preclude the conclusion that the circumstances made it likely that the evidence was reliable[19].

Unreasonable verdict

33 The Court of Criminal Appeal approached Mr Sio's second ground of appeal as if it were a submission that the jury were wrong to find Mr Sio guilty of "*armed* robbery" rather than robbery simpliciter[20]. It is apparent that the Court of

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15 *Sio v The Queen* [2015] NSWCCA 42 at [32].

16 *Sio v The Queen* [2015] NSWCCA 42 at [33].

17 *Sio v The Queen* [2015] NSWCCA 42 at [33] (emphasis in original).

18 *Sio v The Queen* [2015] NSWCCA 42 at [34].

19 *Sio v The Queen* [2015] NSWCCA 42 at [35].

20 *Sio v The Queen* [2015] NSWCCA 42 at [38] (emphasis in original).

Criminal Appeal's attention was focused upon whether Mr Sio was reasonably convicted of armed robbery. In this regard, the necessary understanding between Mr Sio and Mr Filihia to commit an *armed* robbery "could readily be inferred from Mr Sio providing Mr Filihia with the knife used in the robbery."[21] The Court of Criminal Appeal did not address the specific question whether the conviction of armed robbery with wounding was unreasonable, which would have directed attention to the issue whether Mr Sio foresaw the possibility that Mr Filihia would use the knife to wound someone in the brothel while carrying out the robbery.

34 It has been seen that, apart from Mr Filihia's representation that Mr Sio gave him the knife, there was evidence supporting the inference that Mr Sio took the knife from Ms Coffison's townhouse and gave it to Mr Filihia. The weight of that evidence, as summarised by Leeming JA[22], depended largely upon the credibility of Ms Coffison and Mr O'Hare.

35 Leeming JA concluded[23]:

> "I consider that it was undoubtedly open to the jury to be satisfied of Mr Sio's guilt in participating in a joint criminal enterprise (namely *armed* robbery) beyond reasonable doubt. I cannot conclude that they *must*, as distinct from *might*, have entertained a reasonable doubt about Mr Sio's agreement or understanding with Mr Filihia to commit an *armed* robbery, and thus Mr Sio's guilt in respect of the charge of armed robbery by way of joint criminal enterprise."

The appeal to this Court

Misdirection

36 Mr Sio submitted that the trial judge's directions given in respect of armed robbery with wounding were erroneous because they were directions which were not addressed to a charge of armed robbery with wounding. It was said that a sufficient direction on the elements of armed robbery with wounding would have

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21 *Sio v The Queen* [2015] NSWCCA 42 at [39].

22 *Sio v The Queen* [2015] NSWCCA 42 at [49].

23 *Sio v The Queen* [2015] NSWCCA 42 at [54] (emphasis in original).

included an instruction on the need for proof of foresight by Mr Sio of the possibility of the use of the knife by Mr Filihia to wound the victim.

37 The Crown acknowledged that the trial judge's directions to the jury failed to refer to foresight of the possibility of wounding with the knife as a necessary element of the offence of armed robbery with wounding. The Crown also accepted that this misdirection, uncorrected in the Court of Criminal Appeal, meant that the appeal must be allowed and the conviction for armed robbery with wounding quashed.

Unreasonable verdict

38 Mr Sio submitted that, because the Court of Criminal Appeal failed to consider the offence actually charged, it failed to conclude that the conviction was unreasonable notwithstanding that the acquittal on the charge of murder necessarily encompassed a verdict of not guilty of armed robbery with wounding. The acquittal on the charge of murder meant that the jury were not satisfied beyond reasonable doubt that Mr Sio foresaw the possibility that the victim might be wounded by use of a knife by Mr Filihia. But the jury had to be satisfied beyond reasonable doubt that Mr Sio foresaw that very possibility in order to convict him of armed robbery with wounding. Because the jury were evidently not satisfied beyond reasonable doubt that Mr Sio had foresight of the possibility of wounding with the knife, the only reasonable verdict in respect of the charge of armed robbery with wounding was not guilty.

39 Mr Sio submitted that the conviction should be quashed and a verdict of acquittal entered. Having regard to the complete coincidence of elements in issue on the constructive murder and armed robbery with wounding charges, it was said that any retrial on armed robbery with wounding 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"[24].

40 The Crown submitted that the basis of the jury's acquittal is unknown. The Crown argued that Mr Sio's submission that the jury's acquittal on the charge of murder was based on a finding about foresight of the use of the knife by Mr Filihia was not the only possible explanation of how the jury arrived at their verdict; it was possible that the jury had reached a "merciful verdict". Mr Sio

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24 *R v Wilkes* (1948) 77 CLR 511 at 518; [1948] HCA 22.

responded that the jury's verdict cannot be explained on the basis that the jury were satisfied that he was guilty of murder but decided to be "merciful". This aspect of Mr Sio's argument must be accepted.

41 The possibility of a "merciful verdict" may be available as a reasonable explanation for inconsistent verdicts where the jury can be taken to have ignored the directions of the trial judge[25]. Here, there is no reason to think that this occurred. In light of the directions which the jury were given, there is no inconsistency between the verdicts which the jury returned: the two verdicts are readily explicable on the basis that the jury applied the directions which they were given. Foresight of the use of the knife was identified by the trial judge's directions as an element in issue on the charge of murder, whereas the jury were not directed that it was an element of the charge of armed robbery with wounding. The jury's verdict of guilty on the charge of armed robbery with wounding was consistent with the conscientious discharge by the jury of their duty in conformity with the directions they were given. In *Gilbert v The Queen*[26], Gleeson CJ and Gummow J said:

> "The system of criminal justice, as administered by appellate courts, requires the assumption, that, as a general rule, juries understand, and follow, the directions they are given by trial judges."

42 On the basis that a retrial on the charge of armed robbery with wounding was precluded by the acquittal on the charge of murder, the Crown argued that, if it were determined that a miscarriage of justice had occurred, the appropriate options would be a substituted verdict of guilty of armed robbery pursuant to s 7(2) of the Criminal Appeal Act; or an order for a new trial for the offence of armed robbery pursuant to s 8(1) of the Criminal Appeal Act.

Section 7(2) of the Criminal Appeal Act

43 Section 7(2) of the Criminal Appeal Act authorises the Court of Criminal Appeal to substitute for the verdict found by the jury a verdict of guilty of some other offence where the jury "could on the indictment" have found the appellant guilty of that other offence and "on the finding of the jury it appears to the court

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25 *Gammage v The Queen* (1969) 122 CLR 444 at 450-451, 452-453, 457-458, 463; [1969] HCA 68.

26 (2000) 201 CLR 414 at 420 [13]; [2000] HCA 15. See also to similar effect at 425-426 [31]-[32] per McHugh J, 431 [51]-[52] per Hayne J.

that the jury must have been satisfied of facts which proved the appellant guilty of that other offence".

Another offence on the indictment?

44 Initially, Mr Sio was disposed to contend that there is no basis to enter a substituted verdict in this case, because s 7(2) provides that an appeal court may do so only where the substituted verdict is for an offence expressly alleged on the indictment, and there was no offence of armed robbery alleged on the indictment in this case of which the jury could be taken to be satisfied. In the end, however, that argument was not pressed because it was recognised that it was foreclosed by this Court's decisions in *Calabria v The Queen*[27] and *Spies v The Queen*[28]. These decisions establish that the power of the court under s 7(2) is not confined to offences actually alleged on the indictment, but applies to offences of which Mr Sio "could" have been found guilty on the basis that the elements were necessarily subsumed within the offence of which he was found guilty, as is the case with armed robbery with wounding and armed robbery[29].

Section 65(2)(d) of the Evidence Act

45 Mr Sio argued that a substituted verdict should not be entered in this case. It was submitted that, if s 65(2)(d)(ii) of the Evidence Act had been properly applied in the courts below, Mr Filihia's statements that Mr Sio had given him the knife would not have been in evidence against him. On that basis, it was said that this Court cannot conclude, in conformity with s 7(2), that the jury "must have been satisfied" that Mr Sio gave Mr Filihia the knife, or was otherwise aware that Mr Filihia was in possession of the knife when he entered the brothel.

46 As has been seen, the evidence of Ms Gaudiosi, if accepted, tends to support the inference that Mr Sio would not have needed to include the knife in his plans for the robbery; and Ms Coffison's evidence, if accepted, supports the inference that Mr Filihia became a participant in the robbery only after the plans had been made. The Court of Criminal Appeal was of the view that the jury might have entertained a reasonable doubt about whether Mr Sio was aware of

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27 (1983) 151 CLR 670 at 675-677; [1983] HCA 33.

28 (2000) 201 CLR 603 at 611-613 [22]-[27]; [2000] HCA 43.

29 *R v Cameron* [1983] 2 NSWLR 66 at 67; *Browne* (1987) 30 A Crim R 278 at 307.

the knife even if Mr Filihia's statements were in evidence[30]. This Court cannot conclude that the jury must have been satisfied beyond reasonable doubt of Mr Sio's guilt of armed robbery if the evidence of Mr Filihia's representation were excluded.

47 Mr Sio submitted that if special leave is granted, and the appeal allowed, on the s 65(2)(d) ground, the evidentiary foundation for any findings in respect of armed robbery implicit in the jury's verdict is undermined, and no substituted verdict of guilty of armed robbery or order for a new trial for the offence of armed robbery is appropriate. It is, therefore, necessary to determine the issue which Mr Sio raised on his application for special leave in order to resolve the question whether it is open to this Court to proceed pursuant to s 7(2) of the Criminal Appeal Act.

48 In support of the application for special leave to appeal, Mr Sio submitted that the trial judge and the Court of Criminal Appeal erred in failing to exclude from the evidence Mr Filihia's representation that Mr Sio gave him the knife used to stab Mr Gaudry.

49 Mr Sio submitted that the Court of Criminal Appeal misapplied s 65(2)(d)(ii) of the Evidence Act by viewing all the statements made by Mr Filihia together, and concluding from his demeanour and the freshness of his recollection that these were circumstances which made it likely that Mr Filihia's representations were reliable[31].

50 The Crown submitted that the Court of Criminal Appeal was correct to regard Mr Filihia's account as a whole. The Crown submitted that the lies told by Mr Filihia in an otherwise correct account were no basis to exclude Mr Filihia's representation about the source of the knife. The Crown reiterated the circumstances identified by the trial judge and the Court of Criminal Appeal that were said to make it likely that Mr Filihia's account was reliable.

51 The Crown submitted that there was no difference in the circumstances in which all of Mr Filihia's statements were made, aside from the fact that the statements were made successively within a 24 hour period. But to say this is to take a compendious approach to the admissibility of those statements without

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30 *Sio v The Queen* [2015] NSWCCA 42 at [54].

31 *Sio v The Queen* [2015] NSWCCA 42 at [12].

focusing upon the representation of the particular fact sought to be proved. That approach is not permitted by s 65(2)(d).

A compendious approach to s 65(2)(d)

52 The Court of Criminal Appeal did not focus upon the particular representation by Mr Filihia which was material to the issue as to Mr Sio's foresight of the possibility of the use of the knife by Mr Filihia. Rather, as noted above, Leeming JA considered the question of likely reliability by reference to the overall impression to be gained from a consideration of the totality of Mr Filihia's statements.

53 As noted above, s 65 creates an exception to the exclusion of hearsay evidence as a means of proving a fact in issue. Section 59(1) of the Evidence Act provides that:

> "Evidence of a previous representation made by a person is not admissible to prove the existence of a fact that it can reasonably be supposed that the person intended to assert by the representation."

54 For the purposes of s 65, s 62(1) provides that a reference "to a previous representation is a reference to a previous representation that was made by a person who had personal knowledge of an asserted fact."

55 Section 65(1) provides that the section applies "in a criminal proceeding if a person who made a previous representation is not available to give evidence about an asserted fact." It is evident that ss 62 and 65(1) are concerned to relax the exclusionary effect of the hearsay rule in relation to an assertion of a fact by a person who had personal knowledge of that fact. These provisions proceed on the assumption that the asserted fact is relevant to the case of the party seeking to adduce evidence of the representation asserting the fact. Together with the provisions of s 65(2) other than par (d), they direct attention to the particular representation which asserts the relevant fact. Thus, s 65(2)(a) is concerned with whether the representation "was made under a duty to make that representation or to make representations of that kind". Section 65(2)(b) is concerned with whether the representation "was made when or shortly after the asserted fact occurred and in circumstances that make it unlikely that the representation is a fabrication". Section 65(2)(c) is concerned with whether the representation "was made in circumstances that make it highly probable that the representation is reliable".

56 It may also be noted here that s 65(2)(b) makes it clear that when the provisions with which it is collocated speak of "a representation", they are speaking of the particular representation that asserts a relevant fact sought to be proved. That this is so is confirmed by s 65(2)(d)(i), which requires that *the* representation tendered against the other party is able to be seen to be against the interest of the maker of the statement.

57 It can be seen that the application of s 65(2) proceeds upon the assumption that a party is seeking to prove a particular fact relevant to an issue in the case. It then requires the identification of the particular representation to be adduced in evidence as proof of that fact. The circumstances in which that representation was made may then be considered in order to determine whether the conditions of admissibility are met. This process must be observed in relation to each relevant fact sought to be proved by tendering evidence under s 65.

58 It is apparent in the present case that neither the trial judge nor the Court of Criminal Appeal considered any particular representation upon which the Crown sought to rely in this way; rather, the application of the provision was approached on a compendious basis whereby an overall impression was formed of the general reliability of the statements made by Mr Filihia and then all his statements were held to be admissible against Mr Sio. That compendious approach does not conform to the requirements of the Act.

59 The Court of Criminal Appeal[32] seems to have regarded earlier authority, including the observations in *R v Suteski*[33] by Wood CJ at CL, with whom Sully and Howie JJ agreed, as allowing or requiring a compendious inquiry as to the overall reliability of the hearsay statements made by Mr Filihia over the course of 24 and 25 October 2012. In *Suteski*, Wood CJ at CL considered, rightly, that representations relied upon should be considered in context so as to determine whether, when read together, they "constitute an admission or answer against interest". But these observations do not support a compendious approach to the reliability of the whole of a hearsay statement inculpatory of the

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32 *Sio v The Queen* [2015] NSWCCA 42 at [20], [27], [34].

33 (2002) 56 NSWLR 182 at 196 [93]-[94].

accused, nor do the other authorities[34] referred to by the Court of Criminal Appeal[35] in this context.

60 It is no light thing to admit a hearsay statement inculpating an accused. Where s 65 is successfully invoked by the prosecution, the accused will have no opportunity to cross-examine the maker of the statement with a view to undermining the inculpatory assertion. Further in this regard, the present case is a case in which, had Mr Filihia pleaded not guilty, and he and Mr Sio been tried together, Mr Filihia's hearsay statements would not have been admissible in that trial against Mr Sio. That is because s 83 of the Evidence Act preserves the exclusionary operation of the hearsay rule in respect of evidence of an admission by a co-accused.

61 The serious consequences of the successful invocation of s 65(2)(d) emphasise the need for compliance with the conditions of admissibility prescribed by the section. The focus demanded by the language of s 65 is inconsistent with the impressionistic evaluation involved in the compendious approach adopted by the Court of Criminal Appeal. The language of the statute assumes the identification of each material fact to be proved by a hearsay statement tendered in reliance on s 65 and the application of the section to that statement, whereas the compendious approach applied by the trial judge and the Court of Criminal Appeal is not focused in this way. In addition, the approach which is focused upon the particular representation tendered to prove a particular fact in issue has the associated benefit of being conducive to the preservation of clarity, good order and fairness in the conduct of criminal trials.

Circumstances that make reliability likely

62 The compendious approach taken by the Court of Criminal Appeal contributed to a further error. When one focuses squarely upon each of Mr Filihia's assertions that it was Mr Sio who gave him the knife, one brings greater clarity to the identification of the circumstances which bear upon the likely reliability of those particular assertions. The evaluation of the likely reliability of each of those assertions must be made having regard to the circumstance that Mr Filihia's representations were those of an accomplice in the commission of the crimes in question.

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34 *R v Ambrosoli* (2002) 55 NSWLR 603 at 615 [28], 616 [34]-[35]; *R v Robertson* [2015] QCA 11 at [58]-[64].

35 *Sio v The Queen* [2015] NSWCCA 42 at [27].

63 Section 65 gives effect to the view that the circumstances of the making of an out of court statement conveying an assertion of a relevant fact may be such as to indicate that the representation is likely to be reliable – and the asserted fact likely to be true – notwithstanding the hearsay character of the evidence. The section operates on the footing that the circumstances in which the representation was made may be seen to be such that "the dangers which the rule seeks to prevent are not present or are negligible in the circumstances"[36]. In such a case, "there is no basis for a strict application of the rule."[37]

64 Section 65(2)(d)(ii) requires a trial judge to be positively satisfied that the representation which is tendered was made in circumstances that make it likely to be reliable notwithstanding its hearsay character. One category of circumstances that has been recognised as warranting a relaxation of the exclusionary effect of the hearsay rule was identified in *Wigmore on Evidence*[38] as those circumstances that "are such that a sincere and accurate statement would naturally be uttered, and no plan of falsification be formed"; in other words, circumstances that of themselves tend to negative motive and opportunity of the declarant to lie.

65 Evidence by an accomplice against his or her co-offender has long been recognised as less than inherently reliable precisely because of the perceived risk of falsification[39]. Statements by an accomplice afford a classic example of a case where a "plan of falsification" may be expected to be formed, given the obvious interest of one co-offender to shift blame onto his or her accomplice, especially where the circumstances also include the opportunity to seek to curry favour with the authorities. That the evidence of accomplices is evidence apt to be unreliable by reason of a motive to shift blame to the co-offender is recognised by s 165(1)(d) of the Evidence Act, which expressly treats, as "evidence of a kind that may be unreliable", evidence:

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36 *Walton v The Queen* (1989) 166 CLR 283 at 293; [1989] HCA 9.

37 *Walton v The Queen* (1989) 166 CLR 283 at 293.

38 3rd ed (1940), vol 5, §1422. See also *Ratten v The Queen* [1972] AC 378 at 389, 391; *Walton v The Queen* (1989) 166 CLR 283 at 294-295, 304.

39 *Peacock v The King* (1911) 13 CLR 619 at 635, 670-673; [1911] HCA 66; *Tumahole Bereng v The King* [1949] AC 253 at 265; *Davies v Director of Public Prosecutions* [1954] AC 378 at 391, 399; *Webb v The Queen* (1994) 181 CLR 41 at 93; [1994] HCA 30.

> "given in a criminal proceeding by a witness, being a witness who might reasonably be supposed to have been criminally concerned in the events giving rise to the proceeding".

66 One must look to the circumstances in which Mr Filihia asserted that Mr Sio "gave [him] the knife" and "put [him] up to robbing the brothel" for reasons to reach the positive state of satisfaction as to the likely reliability of the assertion. In this regard, the best that can be said is that near contemporaneity of the statement with the commission of the crimes in question meant that the risk of an honestly mistaken recollection was slight. But the question mark over the reliability of the assertion by reason of the fact that it was made by an accomplice is not answered by pointing to the unlikelihood that Mr Filihia's memory of events had faded. As Lord MacDermott said in *Tumahole Bereng v The King*[40]:

> "[F]alse evidence given by an accomplice is commonly regarded as more likely to take the form of incriminating the wrong person than of imagining the crime charged."

67 In the Court of Criminal Appeal, Leeming JA identified[41] two circumstances which he said "enhance reliability" of Mr Filihia's statements. These were "contemporaneity (or near contemporaneity) and against interest." While the circumstances which satisfy the condition in s 65(2)(d)(i) may in some circumstances also tend to satisfy the requirement of likely reliability in s 65(2)(d)(ii), that will not necessarily be so. So much is readily apparent from the statutory requirement that both conditions in s 65(2)(d) be satisfied. More importantly for present purposes, the requirement that a representation be against interest in order to satisfy s 65(2)(d)(i) directs attention squarely to the particular representation upon which the party tendering the representation seeks to rely to prove the asserted fact.

68 While it is true to say that, generally speaking, the totality of Mr Filihia's statements were against his own interest, his statement that Mr Sio gave him the knife and put him up to the robbery was, given the circumstances in which that statement was made, plainly apt to minimise his culpability by maximising that of Mr Sio. While it may be accepted that s 65(2)(d)(i) was satisfied in respect of that statement, it did not follow that the circumstances in which it was made were such that the statement was likely to be reliable as evidence against Mr Sio.

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40 [1949] AC 253 at 265.

41 *Sio v The Queen* [2015] NSWCCA 42 at [28].

69 In *R v Ambrosoli*[42], Mason P, with whom Hulme and Simpson JJ agreed, while discussing s 65(2)(c) of the Evidence Act, said that the provision seeks to focus attention upon the circumstances of the making of the representation to determine the likelihood of its reliability, but that:

> "evidence of events other than those of the making of the previous representation [can] throw light upon the circumstances of the making of that representation and its reliability as affected thereby."

70 That observation may be accepted. The focus of attention of a trial judge tasked with ruling upon the admissibility of a representation is directed by s 65(2)(d)(ii), not to the apparent truthfulness of the person making it, but to the objective circumstances in which it was made. The issue is whether the trial judge is affirmatively satisfied that, notwithstanding the hearsay character of the evidence, it is likely to be reliable evidence of the fact asserted[43].

71 When one focuses upon the particular representation which conveys the asserted relevant fact, it can be seen that the circumstances in which that representation was made may include other representations which form part of the context in which the relevant representation was made. A representation may be demonstrably unreliable because it is followed by a specific retraction of the assertion of the relevant fact. Statements made by the representor that are demonstrably or inherently incredible, fanciful or preposterous may be circumstances forming part of the context in which a relevant representation is made which tend against a positive evaluation of the likely reliability of that representation. But it is unnecessary to gloss further the statutory language. In particular, it is not profitable to seek to multiply examples of other circumstances which assist the trial judge to conclude that a representation is *unlikely* to be reliable. It is to risk being distracted from the task set by s 65(2)(d)(ii) to be overly concerned with what circumstances may properly be taken into account to determine the *unreliability* of a representation. The true concern of the provision is with the identification of circumstances which of themselves warrant the conclusion that the representation is reliable notwithstanding its hearsay character.

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42 (2002) 55 NSWLR 603 at 615 [28]-[29]. See also *R v Robertson* [2015] QCA 11 at [60].

43 *Williams* (2000) 119 A Crim R 490 at 503-505 [50]-[58].

72 Section 65(2)(d)(ii) requires the making of an evaluation by the trial judge which positively satisfies the trial judge that the representation is likely to be reliable by reason of the circumstances in which it was made. As was noted in *IMM v The Queen*[44], s 65(2)(c) and (d) and s 85 provide "[t]he only occasion for a trial judge to consider the reliability of evidence, in connection with the admissibility of evidence". It is desirable to emphasise, however, that the whole point of s 65(2)(d)(ii) is that, where the circumstances in which the statement is made are likely to ensure, as a practical matter, that the asserted fact truly occurred, the fairness of the trial does not require a positive judgment by the tribunal of fact about the reliability of the maker of the statement. Attention is directed by the language of s 65(2)(d) to an assessment of the circumstances in which the statement was made to establish its likely reliability, rather than to a general assessment of whether or not it is likely that the representor is a reliable witness. This is precisely because the representor will not be a witness at the trial.

73 It is sufficient for present purposes to say that a question mark necessarily arose over Mr Filihia's assertion that Mr Sio gave him the knife and put him up to the robbery, by reason of the circumstance that Mr Filihia was Mr Sio's accomplice. Nothing else in the objective circumstances in which the statement was made was apt to shift the balance in favour of a positive finding of likely reliability in respect of this asserted fact. It was not open to the trial judge to be satisfied positively of the likely reliability of Mr Filihia's assertion that Mr Sio gave him the knife by reference to the circumstances in which that assertion was made; and the Court of Criminal Appeal erred in failing to conclude that the trial judge had erred in this respect. The evidence should not have been admitted.

74 In light of the conclusion on the admissibility of Mr Filihia's evidence, this Court cannot be satisfied that the jury must have convicted Mr Sio of armed robbery. Accordingly, it is not open to this Court to substitute a verdict of guilty of armed robbery in this case.

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44 (2016) 90 ALJR 529 at 539 [54], see also at 541-542 [72]; 330 ALR 382 at 393, 396; [2016] HCA 14.

A new trial?

75 In *Spies v The Queen*[45], it was said:

> "Unless the interests of justice require the entry of an acquittal, an appellate court should ordinarily order a new trial of a charge where a conviction in respect of that charge has been set aside but there is evidence to support the charge."

76 It may be accepted that in the present case there cannot be a retrial of the charge of armed robbery with wounding. A retrial on the charge of armed robbery with wounding would impermissibly traverse a clear and explicable verdict of acquittal on the charge of murder[46].

77 Section 8(1) of the Criminal Appeal Act authorises the Court of Criminal Appeal to order a new trial if the Court considers that a miscarriage of justice has occurred and that this miscarriage can be more adequately remedied by such an order than by any other order which the Court is empowered to make.

78 Mr Sio did not contend that the broad power conferred by s 8(1) does not extend to ordering a new trial that is confined to a lesser offence for which he might have been found guilty at the trial[47]. He submitted that discretionary considerations are against the making of such an order. As noted earlier, this is because the order would permit the prosecution to rely on an alternative count which it did not rely upon at trial.

79 It may be accepted that fairness to the accused will often result in a lesser included offence not being left for the jury's consideration in a case in which the prosecution has chosen not to seek a verdict for that offence[48]. Recognition of

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45 (2000) 201 CLR 603 at 638 [104].

46 *Mraz v The Queen [No 2]* (1956) 96 CLR 62 at 67-68; [1956] HCA 54; *Garrett v The Queen* (1977) 139 CLR 437 at 445; [1977] HCA 67; *R v Carroll* (2002) 213 CLR 635 at 648-649 [37]-[40]; [2002] HCA 55.

47 See *Criminal Procedure Act* 1986 (NSW), s 163.

48 *James v The Queen* (2014) 253 CLR 475 at 489 [34]; [2014] HCA 6, citing *R v Cameron* [1983] 2 NSWLR 66 at 71 and *R v Pureau* (1990) 19 NSWLR 372 at 375-377 per Hunt J.

this aspect of adversarial criminal justice in the circumstances of this case is not determinative of the exercise of the power conferred by s 8(1). Here the miscarriage of justice was occasioned by the failure to direct the jury of all of the elements of the offence of armed robbery with wounding. In the result, the case that the trial judge left for the jury's consideration without demur from the prosecution and defence was of armed robbery. Were it not for the wrongful admission of the hearsay evidence, there is no dispute that it would be open to substitute a verdict of guilty of armed robbery under s 7(2) of the Criminal Appeal Act. Only on the most formalistic of analyses could it be said that an order for a new trial will give the prosecution an opportunity to make a new case.

80 An important consideration in determining whether a new trial is an adequate remedy is the public interest in the prosecution of persons accused of serious crime[49]. That interest is not outweighed by the circumstance that Mr Sio has been in custody since his conviction on 23 September 2013 and that there was an earlier period of some five months custody referable to this matter. The only prejudice that Mr Sio identified as arising from an order for a new trial for armed robbery is that had that offence been included as an alternative count in the indictment, he might have entered a plea of guilty and obtained the benefit of that plea on his sentence. As Mr Sio acknowledged, it was open to him to offer a plea to any lesser offence for which he could lawfully have been convicted on the indictment[50].

81 The most adequate remedy for the miscarriage of justice which has occurred would be for there to be a new trial for the offence of armed robbery. Such an order would not be open to the objection that the prosecution would thereby be allowed "to present a fresh case which would require 'a substantial amendment to the indictment'"[51] because Mr Sio could have been found guilty of armed robbery on the original indictment, and he would not be confronted with any new evidence at a new trial.

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49 *R v Taufahema* (2007) 228 CLR 232 at 254 [49] per Gummow, Hayne, Heydon and Crennan JJ; [2007] HCA 11, citing *Reid v The Queen* [1980] AC 343 at 349 per Lord Diplock, Lord Hailsham of St Marylebone, Lord Salmon, Lord Edmund-Davies and Lord Keith of Kinkel.

50 *Criminal Procedure Act* 1986 (NSW), s 153.

51 *R v Taufahema* (2007) 228 CLR 232 at 262 [66].

82 Finally on this point, a new trial for the offence of armed robbery would not traverse the jury's acquittal on the charge of murder. The prosecution case of murder and the prosecution case of armed robbery with wounding each relied on the doctrine of extended joint criminal enterprise enunciated in *McAuliffe v The Queen*[52]. Senior Counsel for Mr Sio did not challenge that doctrine in this matter. He noted that the outcome of challenges to the doctrine in unrelated proceedings then pending in this Court would bear on the permissible scope of any new trial. The fate of the doctrine of extended joint criminal enterprise would have no effect on the proposed new trial for the offence of armed robbery.

Orders

83 Special leave to appeal should be granted in relation to the issue concerning s 65(2)(d)(ii) of the Evidence Act and the appeal allowed. The significance of that order for the further disposition of this matter is not merely that Mr Sio's success on this ground affords an additional basis on which to quash the conviction. Rather, Mr Sio's success on this ground means that this Court cannot be satisfied that it should substitute a verdict of guilty of armed robbery pursuant to s 7(2) of the Criminal Appeal Act because Mr Filihia's representation that Mr Sio provided him with the knife was inadmissible hearsay.

84 The appeal must be allowed and the conviction for armed robbery with wounding quashed. There should be an order for a new trial for the offence of armed robbery.

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52 (1995) 183 CLR 108; [1995] HCA 37.