

SIO v THE QUEEN (S83/2016)

Court appealed from: New South Wales Court of Criminal Appeal [2015] NSWCCA 42

Date of judgment: 31 March 2015

Special leave granted & ground referred: 11 March 2016

On 24 October 2012 Mr Richard Filihia, armed with a bowie knife, entered a brothel to which he had been driven by a second man. Sitting in the car's front passenger seat at the time was Ms Sarah Coffison. Inside the brothel Mr Filihia stabbed its receptionist, Mr Brian Gaudry, before running away with cash he had taken from Mr Gaudry's back pocket. Mr Filihia was then picked up by the car in which he had arrived. Mr Gaudry died from his wounds.

On the evening of 24 October 2012 police recorded electronically an interview with Mr Filihia ("the Interview"). During the Interview Mr Filihia admitted to having stabbed Mr Gaudry. He said that he had been driven to the brothel by someone named "Jacob". At one point Mr Filihia referred to "Dan", though he then said that was a mistaken reference. Mr Filihia also said that after the stabbing he had put the knife on to the front passenger seat of the car. Later that night, Mr Filihia gave a written statement ("the Statement") in which he said that someone known as "Danny" or "Dan" had given him the knife, driven him to the brothel and told him where to find cash inside, and that the men had agreed to "split the money fifty fifty" after Mr Filihia had taken it. From a photo array on 25 October 2012, Mr Filihia identified Mr Daniel Sio as the man "who took me to the brothel and put me up to rob it". At no stage however did Mr Filihia mention the presence of Ms Coffison in the car. In August 2013 Mr Filihia pleaded guilty to the armed robbery (with wounding) and murder of Mr Gaudry.

Mr Sio was later tried on charges of murder and armed robbery with wounding, on the basis that he had participated in a joint criminal enterprise with Mr Filihia to rob the brothel armed with a knife. Mr Filihia was a witness for the Crown in Mr Sio's trial. Mr Filihia however refused to take an oath or affirmation or to answer any questions in court. The trial judge, Justice Adamson, then admitted into evidence both the Interview and the Statement. This was as an exception to the hearsay rule, under s 65(2)(d) of the *Evidence Act 1995* (NSW) ("the Act"), on the basis that the Interview and the Statement were against Mr Filihia's interests and were made in circumstances such that they were likely to be reliable. The jury later acquitted Mr Sio of murder but found him guilty of armed robbery with wounding. Justice Adamson then sentenced Mr Sio to imprisonment for 10 years with a non-parole period of 7½ years.

Mr Sio appealed against his conviction, contending that the Interview and the Statement should not have been admitted into evidence and that the jury's verdict was unreasonable and could not be supported by the evidence.

The Court of Criminal Appeal ("CCA") (Leeming JA, Johnson & Schmidt JJ) unanimously dismissed Mr Sio's appeal. Their Honours held that a court's consideration of the reliability of representations under s 65(2)(d) of the Act was

to go no further than the circumstances in which the representations were made. Any unreliability in the representations themselves, such as Mr Filihia's concealment of the presence of Ms Coffison or his reference to "Jacob", was irrelevant. The CCA found that the circumstances indicated likely reliability, as the Interview was made within 24 hours of the incident and Justice Adamson had found that Mr Filihia's answers appeared unrehearsed. Their Honours held that there was sufficient evidence upon which the jury could infer that Mr Sio had been complicit in obtaining the knife that Mr Filihia had used to stab Mr Gaundry. Mr Sio could therefore properly be found guilty of armed robbery.

In his application to this Court for special leave to appeal, Mr Sio proposed two grounds of appeal. On 11 March 2016 Justices Bell and Gordon granted Mr Sio special leave, limited to his first ground of appeal. Their Honours referred Mr Sio's second ground of appeal to an enlarged bench of the Court for argument as on an appeal.

The first ground of appeal is:

- The verdict is unreasonable and cannot be supported by the evidence. The CCA should have:
 - a) held that the verdict of guilty on the charge of armed robbery with wounding was inconsistent with the verdict of not guilty on the charge of constructive murder;
 - b) held that the trial judge erred in her directions on armed robbery with wounding; and
 - c) quashed the conviction and entered a verdict of acquittal.

The second ground of appeal is:

- The CCA erred in failing to find that the trial judge erred in admitting into evidence representations contained in the Interview and the Statement. The CCA should have held that:
 - a) s 65(2) of the Act required the trial judge to assess each of the representations relied upon by the Crown individually;
 - b) s 65(2) of the Act required the trial judge to take into account the "demonstrable unreliability" of individual representations when determining whether a representation was "made in circumstances that make it likely that the representation is reliable";
 - c) *Shamouil v R* (2006) 66 NSWLR 228 does not limit the matters that may be taken into account in assessing the circumstances in which a representation is made for the purposes of s 65(2);
 - d) *Shamouil v R* (2006) 66 NSWLR 228 is wrongly decided in so far as it precludes consideration of factors affecting reliability for the purposes of the mandatory exercise in s 137 of the Act; and
 - e) It was an error to admit the Interview and the Statement, or it was an error to admit the representations concerning the origins of the knife contained in the Interview and the Statement.