IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No. S83 of 2016

BETWEEN:

DANIEL JEFFEREY SIO
Appellant

and

THE QUEEN
Respondent

APPELLANT'S SUBMISSIONS IN REPLY

Part I: Certification

1. This submission is in a form suitable for publication on the internet.

Part II: Section 65(2) referred special leave

2. The starting point in the *Evidence Act 1995* (NSW) (**the Act**) is that hearsay evidence of a previous representation made by an unavailable witness will not be admissible; *a fortiori* where the representation is sought to be admitted against a criminal accused and was made by a co-accused: Appellant's Amended Submissions (**AS**) [34]-[35] citing *R v Suteski* (2002) 56 NSWLR 182 (***Suteski***). Subsection 65(2) creates exceptions to this rule where hallmarks of reliability attend the representation, thereby ameliorating concerns about unreliability and unfairness to the party who cannot test the evidence in the ordinary way. Demonstrable unreliability is both a circumstance relevant to a proximate representation sought to be relied upon, and direct evidence of the fact that the circumstances were not such as to make it likely that the representation was reliable: cf RS [6.4]-[6.8]. There is no basis in the text of the Act to treat the s 65(2)(d) test as "different and separate from an enquiry into reliability": RS [6.10]. Indeed, it is one of the few places in the Uniform Evidence Acts in which reliability is taken into account in connection with admissibility: see *IMM v The Queen* (2016) 90 ALJR 529 at [17].

3. The respondent does not appear to take issue with the appellant's submissions that the CCA misapplied *Suteski* (at AS [50]-[53]), *R v Ambrosoli* (2002) 55 NSWLR 603 (***Ambrosoli***) (at AS [48]-[49]) and *R v Shamouil* (2006) 66 NSWLR 228 (***Shamouil***) (at AS [45]-[47]). Rather, the respondent defends the CCA's and trial judge's reasons on the basis of *R v Mankotia* (unreported, Sperling J, Supreme Court NSW, 27 July 1998) and *R v Jang* [1999] NSWSC 1040 per Bell J. Both cases provide a test narrower than that in *Ambrosoli*, and both pre-date *Suteski* and the amendments to s 65(2)(d). Indeed, the respondent does not address at all the fact that s 65(2)(d) was amended precisely to prevent the circumstances that arose in *Suteski* and which recurred in this case, namely that a criminally accused is faced with the highly prejudicial hearsay representations of a co-accused which he cannot test by cross-examination. The respondent also does not address the reliance on *Shamouil* by the trial judge and the CCA, nor the appellant's submission that the trial judge and CCA also erred in failing to exclude, pursuant to s 137, the representations of Mr Filihia, particularly those affected by demonstrable unreliability relating to the knife.

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4. The appellant does not submit that the s 65(2) tests are or should require final determinations of reliability: cf RS [6.13]. However, where such determinations are plainly available, they can bear directly on whether the circumstances are such that it was likely the representations were reliable. A party need not prove that a representation is unreliable to argue against its admissibility under s 65(2)(d). However, a determination that the representation was unreliable renders superfluous an artificially divorced assessment of the circumstances for the purposes of determining likely reliability. Where such determination can be made *prima facie*, such as in the present case where unreliability is demonstrable, there is no reason in the text of the Act, nor any reason of pragmatic concern, to prevent such a determination from resulting in or at least contributing to a finding on admissibility under s 65(2)(d).

5. There is certainly no basis in the text of s 65(2)(d) to read "circumstances" as restricted only to circumstances *other than* those which directly disprove reliability: cf RS [6.10]. Yet this is the effect of the respondent's submissions, and of the judgments of the CCA and trial judge. If regard is truly not to be had to anything other than the actual temporal and physical circumstances in which the representations were made, then no regard should be had to the representations themselves nor external factors which suggest they were reliable. (On this view, the demeanor of the maker might also be excluded, not being circumstances *in which* the representation was made.) However, the respondent (as did the trial judge and the CCA to varying degrees) relied upon:

   a. The "truthful" identification of the driver (apart from his name), being his dark skin, part Aboriginal identity, mobile phone number and identification of the car (RS [6.23]; the last of which Mr Filihia could readily have surmised the police were aware of from captured CCTV footage);
   b. That the driver was the man who gave him the knife (RS [6.24]; this of course is squarely in issue and so reliance upon it to demonstrate reliability effectively reverses the burden of proof; indeed, this is precisely the sort of "reliability" argument that might legitimately be excluded from an assessment of whether the circumstances are such that the representation is likely to be reliable, as it depends upon a finding of disputed fact in issue in the case);
   c. Explanations for various inconsistencies in Mr Filihia's account, including that his account should not be taken too literally (RS [6.27]), or explaining inconsistencies by positing explanations Mr Filihia did not proffer himself and that were contrary to his account. For example, that he may have discussed the robbery with the appellant before he got into the car (RS [6.28]);
   d. The fact that Mr Filihia said that he was intending to rob the brothel but also intended to pay for sex was not "indicative of likely unreliability" as he may have "thought to take the opportunity to have sex and then rob the brothel" or else "asked to see the girls so as not to aggravate the manager" (RS [6.29]). (This incidentally reverses the test and the onus by asking whether the evidence establishes "likely unreliability" rather than likely reliability. This is not an insignificant slip of language, and the error is repeated at RS [6.24] (set out at (b.) above) and at RS [6.36] where the respondent submits that the "relatively minor lies" in Mr Filihia's account provide no basis to "exclude all of Mr Filihia's responses". It is not for the party opposing the tender to establish "likely unreliability", it is for the tendering party to establish likely reliability);
   e. That Mr Filihia's answers appeared "forthcoming" and not "rehearsed or thought through" (RS [6.32]; notwithstanding the untruthful answers and omissions);

f. That the evidence was said to establish "that Mr Filihia's account was in fact reliable" (RS [6.33]); and
g. That Mr Filihia did not attempt to shift blame, admitted at all times that he alone stabbed the deceased and said it was supposed to be a robbery in which no one got hurt (RS [6.51]).

6. Setting aside the respective difficulties identified within the list immediately above, according to the respondent's own construction of s 65(2) these factors should have been excluded from consideration as being external to the circumstances of the making of the representation. Once all such external factors are removed (whether they favour reliability or not), all that is left as to the "circumstances" is the fact that a co-accused, whom the trial judge held was no longer affected by the $600 worth of ice he had earlier ingested, had been caught red-handed and was giving his account to police: RS [6.31]-[6.32]. No amount of apparent forthrightness or regret in his demeanor (assuming these fall within the narrow meaning of "circumstances") can overcome the inherent and overwhelming unreliability of representations in such circumstances. Thus it must be recognised that the respondent's (and CCA's and trial judge's) approach in practice is not that matters other than the immediate, temporal and physical circumstances cannot be taken into account; rather it is that external matters which tend to suggest *unreliability* cannot be taken into account. This may be the result of a misapplication of the principles in *Shamouil*, causing the Crown case in relation to reliability to be taken "at its highest". This is not the statutory task.

7. If the appellant's construction is not accepted, if the respondent is correct in his narrow interpretation of "circumstances", and if it is correct that the "circumstances" in this case were such that the representations were likely reliable, it is difficult to conceive of any circumstances in which representations against interest would not be held to make reliability likely. In other words, on the respondent's construction, s 65(2)(d)(ii), introduced following *Suteski*, appears not to have any practical work to do. One might ask, rhetorically, what "circumstances" suggestive of unreliability would look like, if not a red-handed co-accused in police custody?

8. The respondent appears (implicitly) to accept that it is not correct to categorise a series of interviews and statements (or even a single interview or statement) as a single representation: RS [6.46]-[6.47], [6.50]. The respondent focuses on the extent to which the circumstances might have differed between representations within an ERISP or statement. If "circumstances" are to be understood so narrowly, then the same circumstances indicative of unreliability do persist in respect of all of the representations made by Mr Filihia during his ERISPs and statements: cf RS [6.38]. However, if "circumstances" is not construed so narrowly, such that the matters the respondent relied upon to demonstrate reliability (at [4] above), and matters of a similar kind relied upon by the appellant, are to be taken into account, then, contrary to RS [6.38]-[6.49], the relevant "circumstances" of the making of the representations do vary from representation to representation within the ERISPs and statements in this case.

9. Differences exist between the content of individual representations, as well as the manner in which they are expressed. For example, different circumstances subsist when Mr Filihia is referring to or omitting the involvement of a co-offender, compared to when he is referring to facts or information only capable of inculpating himself. Although self-serving statements are capable of being against interest for the purposes

of s 65(2)(d)(i), they nevertheless also bear upon the likelihood of reliability for the purposes of s 65(2)(d)(ii). The likelihood of reliability is also enhanced where Mr Filihia volunteers information unprompted, and is decreased when it is prompted or suggested by police and he acquiesces.

10. The forces and considerations operating upon Mr Filihia also appear to change over the course of his ERISPs and statements. Until Mr Filihia was shown the CCTV footage towards the very end of the interview, he had maintained that he stabbed the deceased following a "struggle", in which he had been fearful of the deceased "coming back at me": Q616, 628-638. After being shown the CCTV footage, he accepted that the deceased was retreating backwards from him the entire time and that he pushed the deceased down: Q639-646. Immediately following this revelation to him, he asked if police could "wrap it up": Q648. The officers then told him "as you're aware this gentleman has passed away and he's died. O.K. And it's as a result of being stabbed... Are you responsible for stabbing that gentleman?", and Mr Filihia replied "No comment": Q655-6. He had also always maintained that he had had no intention to use the knife: Q606-610. Thus, while it is true that Mr Filihia had been arrested for murder and confessed to the stabbing at the outset of his interview, he maintained a self-defence type account until he was shown, at the end of his first ERISP, that this account was refuted by the CCTV footage. It is reasonable to suppose that it was at this point that the weight of the case against him and his need to be "help[ed] out in court" (Q673) and assisted on sentence (SC [56]) settled in his mind: and see AS [51]-[52]. It should also be born in mind that he was, at the least, coming down from the effects of $600 worth of ice during the course of the first ERISP, even if it was open to hold that he was no longer intoxicated at the time: cf SC [49]-[50].

11. Special leave should be granted on this ground and the appeal upheld. The question of consequential orders is addressed further below.

Part III: Appeal on misdirection

12. The respondent appears to accept that the directions did not include an essential element of the offence of which the appellant was convicted: RS [6.55]. It is difficult to conceive of a case in which the basis for the acquittal can be more clearly known: cf RS [6.63], [6.67]-[6.68] and [6.71], see AS [24]-[25]. The only element that differed between the extended joint criminal enterprise/felony murder charge and the extended joint criminal enterprise armed robbery with wounding charge as left to the jury, apart from foresight of wounding, was the death of the deceased, which was not in issue: cf RS [6.64]. The appellant is entitled to a verdict of acquittal for armed robbery with wounding.

13. To suggest that the jury's verdict can be explained (and, implicitly, that a conviction appeal could be dismissed) on the basis that the jury really must have been satisfied that he was guilty of murder but decided to be "merciful", traverses a clear and explicable verdict: cf. *Mraz v The Queen [No 2]* (1956) 96 CLR 62 and *Garrett v The Queen* (1977) 139 CLR 437 (***Garrett***). This is not an inconsistent verdict case in which the explanation of mercy might have work to do: cf *MacKenzie v The Queen* (1996) 190 CLR 348. The notion of "merciful verdict" works only where the elements of the acquitted count should have been wholly satisfied by the convicted count, such that the jury can be taken to have ignored directions of law: see eg *Gammage v The Queen* (1969) 122 CLR 444 at 450 per Barwick CJ. This is precisely the opposite situation;

the acquittal is explicable because, as left to the jury, there was an identifiable element in issue that they were not satisfied of. The jury were only satisfied on the charge in respect of which the trial judge had erroneously omitted the same reasoning.

14. The Crown built its case in such a way as to remove the need to prove accessorial liability to murder or that death or serious harm was even foreseen as a possibility (extended joint criminal enterprise to murder). Rather, it put its case on the basis of extended joint criminal enterprise to establish a felony, to then establish felony murder. On that basis, the joint criminal enterprise was to commit armed robbery with foresight of a possible wounding – a mental state even less than that required for extended joint criminal enterprise to murder. It is inimical to notions of justice that the jury should have attributed to them as an explanation of their acquittal the very thing proof of which the charges were deliberately framed to avoid: cf RS [6.70].

15. If this ground of appeal is upheld, the appellant is entitled to an acquittal of armed robbery with wounding. Retrial on this charge would require evidence that would tend to overturn the verdict of acquittal in respect of the murder charges: *Garrett* at 445 and see *The Queen v Carroll* (2002) 213 CLR 635 at [37]-[40] per Gleeson CJ and Hayne J. If the appellant's special leave application in respect of s 65(2)(d) is granted and that appeal ground is upheld, the evidentiary foundation for any findings in respect of robbery or armed robbery implicit in the jury's verdict are fatally undermined, and no substituted verdict or order for retrial is appropriate.

16. If the appellant's appeal is allowed but the special leave application is not successful, a substituted verdict of armed robbery or robbery would be within the Court's power under s 7(2) of the *Criminal Appeal Act 1912* (NSW): *Spies v The Queen* (2000) 201 CLR 603. However, it is submitted that a substituted verdict should not be entered in this case. The substituted verdict would be a common law alternative to what was already an alternative charge on the indictment. The trial was directed to murder and a serious alternative to murder. At the least, the appellant should be afforded the opportunity to respond to a fresh indictment in those terms if the DPP determines to proceed against him again. The utility of a retrial for a lesser charge of robbery or armed robbery should also be weighed against the fact that the appellant has already served more than 3 years of a non-parole period of 7 years and 6 months for the more serious offence of armed robbery with wounding.

Dated: 20 May 2016

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