IN THE HIGH COURT OF AUSTRALIA

SYDNEY OFFICE OF THE REGISTRY **No. S 83 of 2016**

B E T W E E N: **Daniel Jefferey SIO**

Appellant

and

THE QUEEN

Respondent

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RESPONDENT'S SUBMISSIONS

Part I: Publication

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

Part II: Concise statement of issues

1. Whether the test for admission of out of court representations under s 65(2) is confined to an assessment of the circumstances in which the representations were made and the effect of those circumstances on likely reliability or whether it may include other evidence going to reliability generally.

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2. Whether the more adequate remedy in the event of a miscarriage of justice in this case is an order for a retrial or a substituted verdict.

Part III: Section 78B of the Judiciary Act

It is certified that this appeal does not raise any constitutional question. The respondent has considered whether any notice should be given in compliance with s78B of the *Judiciary Act 1903 (Cth)*. No such notice is required.

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Filed on behalf of the Respondent by:
C Hyland
Solicitor for Public Prosecutions
Level 17 175 Liverpool Street
SYDNEY NSW 2000

DX 11525 SYDNEY DOWNTOWN
Tel: (02) 9285 8761
Fax: (02) 9267 6361
Ref: N. Bruni

Part IV: Statement of contested material facts

4. 1 The appellant planned a robbery of a brothel at Clyde. He enlisted Mr Filihia to carry out the robbery, drove him to the brothel and provided him with tracksuit pants and a knife. The appellant waited in the car while Mr Filihia carried out the robbery in the course of which the manager of the brothel was killed.

4. 2 Mr Filihia was arrested later that same day and made four statements giving his account of the offence.

4. 3 The respondent does not contest the appellant's summary of the facts.

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PART V: Applicable Legislative provisions

The appellant's list of legislative provisions is accepted.

PART VI: Statement of Argument

6.1 The appellant submits that the falsehoods in some of Mr Filihia's responses in the ERISP affect its reliability and those falsehoods should have been taken into account in deciding whether to admit the ERISP under s 65(2)(d) of the *Evidence Act*.

6.2 Those falsehoods may be relevant to the reliability of Mr Filihia's ERISP but
20 that is not the test for admission under s 65(2)(d).

6.3 Section 65(2)(d)(ii) requires a determination of whether a previous representation was "made in circumstances that make it likely that the representation is reliable".

6.4 These terms expressly direct attention to the circumstances in which the representation was made. They do not address reliability directly. Instead, they

draw a distinction between the circumstances of the making of the representation and the content of the representation. They also draw a distinction between likely reliability and actual reliability.

6.5 There is an obvious difficulty in characterising a falsehood in the content of a representation as a circumstance in which the representation was made. The content is the representation not a circumstance of its making.

6.6 The focus on the circumstances of the making of the representation and their effect on likely or potential reliability indicates that the determination is concerned with an anterior issue not with the ultimate issue of reliability.

6.7 This applies throughout s 65 where the focus is on specific contexts, such as the timing of the making of the representation or whether it was made under a duty or was made against interest.

6.8 These terms eschew the ultimate issue and reflect the nature of the task being undertaken. Section 65 is a gateway provision. The issue being determined is admissibility. The ultimate issue of whether the representation is reliable is not engaged at that stage.

6.9 In ***R v Mankiota*** (unrep, Sup Ct NSW 27 July 1998) Sperling J referred to the s 65 test as being "narrower" than a test of reliability at large.

6.10 Rather than narrower, it is perhaps better described as different and separate from an enquiry into reliability. That is because the determination that a representation is true or false, accurate or inaccurate, says nothing about the circumstances in which the representation was made. Similarly, the circumstances in which a representation was made do not establish whether it is true or false, accurate or inaccurate.

6.11 The accuracy or inaccuracy of a representation is established by the degree to which it correlates with, and is confirmed by, the other evidence in the case. The circumstances in which the statement happened to be made do not address that other evidence. Whether a representation was made casually in a bar or on the street or formally under caution says nothing about whether it is consistent with and confirmed by the other evidence in the case. Similarly, the

fact that a statement is demonstrably true or false gives no clue as to whether it was made casually in a social setting or under formal caution at a police station.

6.12 The assessment of the circumstances of the making of the representation and the assessment of the truth of the representation are separate assessments. A consideration of the making of the representation and its effect on likely reliability does not address actual reliability. If it did, there would be no need to consider the circumstances of the making of the representation. A determination that the representation was reliable renders a consideration of the circumstances of its making superfluous.

6.13 The purpose of the focus on the circumstances in which the representation was made is to provide some filter for all the possible out of court utterances which this broad hearsay exception renders potentially admissible. The criteria adopted are the previously accepted common law criteria, such as contemporaneity, whether the representation was made under a duty or made against interest. None of these specific criteria involve an assessment of actual reliability.

6.14 There has been some conflict in the authorities as to the construction of s 65(d) but the "narrower" test focussed on the circumstances of the making of the representation has been generally accepted. In ***R v Ambrosoli*** (2002) 55 NSWLR 603 [18] – [52] Mason P reviewed the conflict in the authorities but preferred the approach of Sperling J in ***Mankiota*** (***Ambrosoli*** at [28], [34] – [35]).

6.15 The ***Ambrosoli*** test has been accepted in Victoria; ***Azizi v R*** (2012) 224 A Crim R 325 at [51], Queensland; ***R v Robertson*** [2015] QCA 11 at [59] and the Northern Territory; ***R v Ryan*** (2013) 33 NTLR 123.

6.16 The contentious aspect of the decision in ***Ambrosoli*** was the extent to which evidence of events other than the circumstances of the making of the representation could be taken into account as "circumstances" affecting likely reliability under s 65. Mason P considered that a later genuine retraction by the maker of the representation or evidence that the maker could not have seen or

heard the subject matter of the previous representation may "throw light" on the circumstances and the reliability of the representation (***Ambrosoli*** at [29]).

6.17 Although Mason P purported to adopt the ***Mankiota*** approach, the acceptance of these examples as relevant considerations entirely subverted the distinction between the circumstances and reliability. In ***Mankiota*** Sperling J had expressly excluded examples such as a later retraction because a later retraction addressed the actual reliability of the original representation not the circumstances in which it was made. Similarly, in ***R v Jang*** [1999] NSWSC 1040 Bell J put to one side evidence which supported the reliability of the out of court statements.

6.18 ***Jang*** was a sentence matter for two charges of murder where the prosecution sought to tender a number of statements by the deceased where she had reported that her husband had threatened to kill her and her children (***Jang*** at [4]). The prosecution sought to rely on these previous threats to show that the murders were not an isolated burst of rage (***Jang*** [7]). The Crown also sought to rely on the fact that the offender had carried out the threats and killed the deceased and one of her children as confirming the reliability of the deceased's reports of the threats. Adopting the ***Mankiota*** approach, Bell J held that the fact that consistent reports of threats had been made to social workers and others, and the fact that the threats were actually carried out, had to be put aside in determining whether the circumstances in which the representations were made rendered it likely that they were reliable (***Jang*** at [11]). Her Honour ruled that the circumstances in which the reports were made did not confer on them the high probability of reliability required (***Jang*** [6]).

6.19 Mason P doubted the "complete accuracy" of Bell J's approach (***Ambrosoli*** at [29]). Perhaps recognising that taking into account later retractions or other evidence going to reliability was contrary to the ***Mankiota*** approach, Mason P "emphasised" that evidence of such other events or statements was "only" to be considered to the extent that they touch on the reliability of the circumstances of the making of the representation (***Ambrosoli*** at [36]).

6.20 That appeared to preserve the distinction between the making of the representation and the reliability of the representation, although Mason P also held that reference to events outside the time and place of the making the representation was not excluded from the "circumstances" to be considered (***Ambrosoli*** at [37]). Thus later retractions of the representation could be taken into account (***Ambrosoli*** at [39] – [40]). This rendered the distinction meaningless and the decision in ***Ambrosoli*** has sometimes been interpreted broadly as meaning that regard may be had to all the circumstances that bear upon reliability: ***R v Bond*** (Ruling No 4) [2011] VSC 536.

6.21 In the present case, the appellant submits that the fact that Mr Filihia said the man who gave him the knife was named "Jacob" when he later admitted he was named "Danny" should have led to the exclusion of all his statements about the knife, if not the "entirety" of the ERISP (AWS [32], [49] – [53]).

6.22 On the ***Mankiota*** approach, the inaccuracy of this detail was not relevant to the assessment of the circumstances in which the representation was made.

6.23 Mr Filihia's account was overwhelmingly correct. Other than the name, he was otherwise truthful in respect of his identification of the driver, the man who gave him the knife. He said he did not know his surname, but he said he was dark skinned, part Aboriginal, gave the correct phone number for his mobile phone and correctly described his car as a late model red Commodore. There was no dispute that, apart from the first name, he correctly identified the appellant. The one detail which was incorrect was the first name was "Jacob". A few hours later Mr Filihia said the first name was in fact "Danny", he did not know the surname but the other details were correct.

6.24 That representation was accurate. It was not disputed that the appellant was the driver.

6.25 The other falsehood was that Mr Filihia also said no one else was in the car (ERISP Q & A 179). He did not correct that falsehood. Ms Coffison gave evidence of being in the car during the robbery from which it was evident that Mr Filihia had lied in his response.

6.26 The appellant points to other matters said to false or inconsistent with the evidence (AWS [40]), namely, that Mr Filihia had only met the appellant twice before, that he did not know where he was going when the appellant picked him up that morning and that it was his intention to pay for sexual services when he got to the brothel.

6.27 The accuracy or inaccuracy of these details largely depends on an interpretation of his answers. The appellant noted that Mr Filihia said he had met the appellant twice before (Q & A 67) but he also said he had met him two weeks before from the time he and his wife had moved into the Carrs Park Motor Inn and the appellant "was just popping in" (Q & A 78). He said he did not know him well (Q & A 348, 379, 540). He confirmed in the first statement that he had met the appellant two weeks before (First Statement [4]). It is not clear that his answer of the number of times he had seen him could be taken too literally.

6.28 Mr Filihia's answer that he did not know where he was going when he first got in the car should also not be taken out of context (Q & A 149). Mr Filihia said the appellant showed him the layout of the brothel while they were in the car (Q & A 160). He also said he was on crystal meth and was nodding off (Q & A 151 – 158). He said he and the appellant smoked about $600 worth of ice or crystal meth on the way to the brothel. He said he smoked it to help him with his nerves as this was his first robbery (Q & A 507 - 526). Those responses suggested that they had discussed the robbery before they got to the brothel.

6.29 Mr Filhia's responses about his intention when he got to the brothel should also not be taken out of context. It is true that he said at times that he intended to have sex at the brothel (Q & A 209, 530 – 531). However, he was also clear that the plan was always that he would rob the brothel. He entered it armed with the knife (Q & A 532 – 533). He said the first thing he did when he entered was to ask to see the girls. He spoke briefly with a dark haired girl, she left, and he then demanded money from the manager (Q & A 206 - 215). It is not clear whether he thought to take the opportunity to have sex and then rob the brothel or whether he asked to see the girls so as not to aggravate the manager on

first entering (Q & A 532). Either way his responses were not a circumstance indicative of likely unreliability.

6.30 The trial judge Honour regarded the two central falsehoods as an ineffectual attempt to protect the appellant and Ms Coffison from detection (Judgment on admissibility [48]), which he soon abandoned, at least in respect of the appellant (Judgment on admissibility [57]). In these circumstances, Her Honour held that the lies did not taint the whole ERISP (Judgment on admissibility [48]). Her Honour considered it arguable that the ERISP was made in circumstances that made it unlikely that it was a fabrication (under s 65(2)(b)) but expressed no concluded view on that issue because her Honour held it was admissible under s 65(2)(d) (Judgment on admissibility [51]).

6.31 Given the breadth of possible circumstances in which out of court utterances could be made, the representations in this case occurred in a formal context. Mr Filihia was under arrest for murder. He was cautioned that his ERISP was being recorded and he was aware that it could be used in evidence against him. Mr Filihia gave an account of the commission of a very serious offence in which he admitted killing the deceased.

6.32 These circumstances, together with the fact that his answers appeared "forth coming", without signs of being "rehearsed or thought out" to minimise his involvement (Judgment on admissibility [55], [57]), made relatively soon after the event (Judgment on admissibility [55]), with no signs that he was intoxicated (Judgment on admissibility [50]) all indicated that it was likely that his account was reliable.

6.33 The evidence established that Mr Filihia's account was in fact reliable.

6.34 Mr Filihia's account was that the appellant suggested the robbery and told him the layout of the brothel and where the money was. The appellant drove him to the brothel in a late model red Commodore. Mr Filihia entered the brothel alone armed with the knife, struggled with the manager, stabbed him, took the money from his back pocket and left the scene in the appellant's car.

6.35 Whether that account is considered as one representation or a series of separate representations it was accurate and confirmed by the other evidence in the case. By the time of the appeal, the only part of that account still disputed was that the appellant gave Mr Filihia the knife or knew about the knife.

6.36 If admissibility depended on accuracy and balancing accurate responses indicative of reliability against false responses indicative of unreliability, Mr Filihia's ERISP would have been admitted as almost all of his account was accurate. The relatively minor lies in an account that was otherwise correct were no basis to exclude all of Mr Filihia's responses about the knife, or his entire ERISP, especially where there was no issue as to the identity of the driver and he corrected the false answer so soon afterwards.

6.37 The appellant contends that Mr Filihia's account should be divided into separate representations, in particular, the representations as to the appellant providing the knife should be separated and considered apart from the rest of the ERISP (AWS [51]), [53]). These representations are said to be especially affected by the lie that the man who gave him the knife was named "Jacob" and that there was no one else in the car.

6.38 There is no reason to separate those statements from the rest of the account as they were made in the same circumstances as the rest of the ERISP. The same circumstances which applied to the making of the ERISP applied to the making of the first statement, the second ERISP and the second statement during the course of that night and into the next day.

6.39 The appellant seeks to distinguish the circumstances in which the responses about the knife were given from the other responses by suggesting that there were "changing circumstances", an "escalation" over the course of the first ERISP in the extent to which Mr Filihia was prepared to implicate the appellant and it was only in the first statement, hours after the ERISP had ended that Mr Filihia said that the man who gave him the knife was named "Danny". The change in circumstances between the end of the ERISP and the making of the

first statement a few hours later was said to be that Mr Filihia learned that there was CCTV footage and that he was facing liability for murder (AWS [51]).

6.40 There were no changed circumstances, and certainly no changed circumstances indicating likely unreliability. Mr Filihia did not learn that he was facing liability for murder after the end of ERISP, he knew that before the ERISP started. Mr Filihia had already confessed to the murder before the ERISP.

6.41 Mr Filihia was arrested when he attended the police station in relation to bail. Detective Inspector Hallinan approached him at about 7 pm and told him that he was under arrest for the murder of Mr Gaudry who had been stabbed to death at about 5.40 that morning (T 80.20). Mr Filhia was thus aware that he was facing a murder charge for stabbing the deceased. Mr Filihia said "Fuck, it all just got out of hand"... ... "I didn't mean it to happen, I had been using, fuck"... ...I didn't mean to kill him, it was a robbery, that's all" (T80.30).

6.42 The detectives then arrived and the ERISP began about an hour and half later (at about 8.20 pm) and Mr Filihia confirmed the conversation with Det Inspector Hallinan at the start of the ERISP (Q & A 22 – 28).

6.43 The structure of the questioning in the ERISP was that Mr Filihia was taken through the events of that day chronologically and in some detail. It began with meeting the appellant and planning the robbery (Q & A 160 – 170), the arrival at the brothel (Q & A 190) and the initial conversation inside the brothel (Q & A 206). Mr Filihai said he demanded the money (Q & A 215 - 221), there was a struggle with the deceased (Q & A 230) and ...."I just had, I had a knife." (Q & A 233).

6.44 At that point Mr Filihia was asked to describe the knife and where he got it from. He said "Jacob already had it in his car."(Q & A 236). Mr Filihia said he "panicked" (Q & A 258) and stabbed the manager; "And the knife just went into him." ..... "But fuck it wasn't meant to."... ... ... "Oh, I don't know, I'm not, I don't really, like it just happened."... ... "Just fuck, honestly it just happened." (Q & A 260 – 263).

6.45 This was essentially what he had said before the ERISP started. There was no escalation during the ERISP, no changed circumstances. He was told about the CCTV footage during the ERISP (Q & A 616). He had already described the driver as part Aboriginal (Q & A 322) provided the phone number (Q & A 375 – 378) and the model of car he owned (Q & A 66) well before he was shown the CCTV photographs.

6.46 The responses about the knife were not separate to the other representations. They were details integral to his account. He had already admitted stabbing the deceased before the ERISP began. The responses about the type of knife used and where he got it were an elaboration of his account of the offence given in response to questions seeking further detail.

6.47 Similarly, each of the 4 statements made to police; the first ERISP, first statement, second ERISP and second statement, could be regarded as separate representations to the extent that they added a further piece of information to the account given in the first ERISP but the basic account given in that ERISP, namely, that Mr Filihia committed the armed robbery at the brothel with the appellant was repeated in the 3 following brief statements.

6.48 The first statement added the detail that the man who was with him was named "Danny" not "Jacob" but that the other details were correct. It repeated the account from the first ERISP, in concise form, that he had robbed the brothel and stabbed the manager (First Statement [3]) and that the appellant had put him up to it (First Statement [6]). The second ERISP recorded his photo identification procedure of the man who was with him and the second statement put that identification procedure in statement form. The second statement added no new information. The second ERISP and second statement were made separately but they were the same representation in different form.

6.49 Aside from the fact that the 4 statements were made successively within a 24 hour period, there was no difference in the circumstances in which they were made. For the purposes of assessing admissibility under s 65(2), the

circumstances which indicated likely reliability in respect of the first ERISP continued to operate in relation to each of the successive statements.

6.50 There may be a basis to differentiate individual responses within an account, for example, where the particular responses are not based on the maker's firsthand experience. There were such responses in Mr Filihia's ERISP where Mr Filihia said the appellant dumped the clothes he had worn in the robbery for him (Q & A 397 – 413). Mr Filihia explained that he did not actually see the appellant dump the clothes, he just assumed that he had, so those responses were not based on his firsthand experience.

6.51 Aside from the impugned responses, Mr Filihia's account was indicative of likely reliability. Mr Filhia did not attempt to shift blame. He admitted at all times that he alone had stabbed the deceased. He said it was supposed to be a robbery in which no one got hurt: "It was just meant to be an easy job and then out." (Q & A 204). He said he only took the knife into the brothel to scare the manager: "Oh, that was just to scare him." .... "Just to stand over him." (Q & A 313 -314). He stabbed him because he panicked. When he went back out to the car the appellant did not know what had happened: "Jacob did not know that the manager had been stabbed" (Q & A 395).

6.52 In the circumstances of the present case, the CCA was correct to regard Mr Filihia's account as a whole and to confine the question of admissibility to the circumstances of the making of the representation (CCA [27]).

6.53 The determination to be made under s 65(2)(d)(ii) is not about whether the representations are accurate or reliable but about the circumstances in which they were made and their effect on likely reliability (CCA [33] – [34]). That determination is separate to a consideration of reliability and that approach is consistent with ***Mankiota*** and ***Jang***.

Misdirection

6.54 The appellant submits that the directions on the armed robbery with wounding offence omitted an essential element, namely, foresight of the possibility of wounding.

6.55 It is clear that the written directions did not include foresight of the possibility of wounding as an element of the alternative offence.

6.56 It had been included when setting out the elements of that offence in relation to constructive murder but it was not repeated in the elements of the alternative offence.

6.57 The trial judge gave oral directions about the elements of the offences consistent with the written directions when providing the written directions to the jury just before closing addresses (T 426 – 7) but her Honour did not refer to the elements of the alternative offence in the summing up itself. The summing up focussed on the elements of the appellant's complicity in the armed robbery as that had been the crucial issue in the trial (SU [28] – 38]).

6.58 The omission of the element of foresight was not detected at trial or in the CCA. The trial seemed to proceed on the basis that if the jury found the appellant was party to the armed robbery of the brothel that entailed use of the knife and it seems to have been accepted by all concerned that that raised a distinct possibility that there might be a wounding, or at least that it was not an issue. The issue was whether the appellant was involved in the armed robbery at all.

6.59 By the time of the appeal it was accepted by the appellant that there was strong evidence of his complicity in the robbery but not an armed robbery. That was why the admission of Mr Filihia's second ERISP and second statement where he referred to the appellant's role in the robbery, but not to the knife, was not disputed (CCA [11], [47] – [48]). It was also conceded in relation to the unreasonableness of the verdict that there was "significant evidence" that the appellant was involved in a robbery, but not an armed robbery (CCA [38]).

Determination of the Appeal

6.60 Despite conceding that there was significant evidence of robbery the appellant submits that the only available result is an acquittal (AWS [28]).

6.61 The appellant contends that the elements of constructive murder "completely coincided" with the offence of armed robbery with wounding (AWS [28]) which meant that if the jury were satisfied of all the elements of armed robbery with wounding they "must" have convicted of murder. As the jury acquitted of murder that "incontrovertibly" established that they were not satisfied that the appellant foresaw the possibility of wounding (AWS [25]) because that was the only element not included in the direction on the alternative offence.

6.62 This invocation of the principle of incontrovertibility seeks to equate the acquittal for murder with an acquittal for armed robbery with wounding. It also assumes that specific findings of fact can be extrapolated from the acquittal.

6.63 The jury's verdict was that the appellant was guilty of armed robbery with wounding. The omission of the element of foresight from that offence may warrant a quashing of the conviction but it cannot translate the finding of guilt into an acquittal.

6.64 Contrary to the appellant's submission the elements of murder and the robbery offence were not "completely coincidental". The murder offence contained an obvious additional element not included in the robbery offence. The basis of the acquittal is unknown and there are limits on the extent to which positive factual findings can be extrapolated from that verdict.

6.65 The consequences of the acquittal are that a plea of autrefois acquit is available to preclude the appellant being tried again for the homicide of the deceased. That plea in bar does not apply to an offence of armed robbery with wounding for that offence involves different elements.

6.66 The acquittal also engages the principle of incontrovertibility such that the acquittal for murder "may not be questioned or called into question by any evidence which, if accepted would overturn, or tend to overturn the verdict.": ***Garrett v The Queen*** (1997) 139 CLR 437 at 445; ***R v Carroll*** (2002) 213 CLR

635 at [37], [138]. A retrial for armed robbery with wounding would not call into question the acquittal of murder.

6.67 The appellant assumes that the jury's acquittal of murder was based on a finding about foresight of wounding. That is said to be inferable from the fact that the jury acquitted of murder but convicted of armed robbery with wounding where the only contentious element not included on that charge was foresight of wounding. Therefore, the only basis on which the jury could have thought the appellant was guilty of armed robbery with wounding but not murder was that they were not satisfied about foresight of the wounding.

6.68 That is a possible explanation of how the jury arrived at their verdict. However, it is not the only possible explanation and it is far from clear that the jury necessarily adopted that course. The jury may not have attached the significance to the omission of foresight which the appellant assumes they did. None of the parties attached any significance to it. It seems to have been accepted by all concerned that, the elements having been correctly set out when the offence was outlined in the context of constructive murder and where the real issue was complicity in the armed robbery, nothing more was required.

6.69 Another possible explanation was a merciful verdict. That was how the trial judge interpreted the verdicts: "*The jury's "not guilty verdict in respect of the murder counts was a merciful one and can be seen to equate with the jury's innate sense of fairness and justice*" (ROS p 2.9 – 3.1).

6.70 There was strong evidence of the appellant's complicity in the robbery, indeed that was conceded on appeal. The plan for the robbery appears to have been that no one was to be hurt. Mr Filihia said it was supposed to be an easy job. On that evidence, the jury's reluctance to find the appellant liable for the unintended death while he was outside in the car was understandable. The difference in the elements of the two offences allowed the jury to avoid that result.

6.71 The nature of an acquittal is such that the precise basis remains unknown.

6.72 However, the appellant submits that the acquittal of murder precludes all other charges, even robbery, and the only order now available to this Court is acquittal.

6.73 The *Crimes Act* provides an escalating series of offences for robbery commencing with robbery simplciter (s 94), robbery with wounding (s 96), armed robbery (s 97) and armed robbery with wounding (s 98). There are also aggravated forms of robbery (s 95) and armed robbery (s 97(2)). There is no reason for all of these offences to be precluded, particularly armed robbery and robbery, which were obviously outside the elements covered by the acquittal for murder.

6.74 The appellant excludes the possibility of a substituted verdict for armed robbery by misconstruing s 7(2) of the *Criminal Appeal Act* as applying only where the substituted verdict "is for an offence on the indictment" (AWS [29]).

6.75 Section 7(2) provides that a verdict may be substituted where "the jury could on the indictment have found the appellant guilty of some other offence". That power is not confined to offences actually on the indictment but applies to offences of which the appellant "could" have been found guilty.

6.76 It is well established at common law that where there is an escalating range of offences the appellant could be found guilty of any of the lesser offences in the range where the elements of the lesser offence were necessarily included in the charge on the indictment: ***R v Cameron*** [1983] 2 NSWLR 66 at 67G. The charge of armed robbery with wounding necessarily includes the offences of armed robbery and robbery, both of which were available as common law alternatives of which the appellant could have been convicted: ***R v Browne*** (1987) 30 A Crim R 278 at 307.

6.77 The jury's verdict on the armed robbery with wounding offence established, at the very least, that the appellant was a party to the armed robbery of the brothel. There is no challenge to the trial judge's directions in that respect, in fact, the appellant submits that the directions were appropriate to armed robbery but not armed robbery with wounding.

6.78 As was conceded in the CCA, there was ample evidence of robbery. That was so even without the contested evidence of Mr Filihia. There was evidence from 3 witnesses that the appellant had been planning the robbery for weeks. Ms Gaudiosi (T304.45), Mr O'Hare (T253.15) and Ms Coffison (T153.50) gave evidence of conversations with the appellant about robbing the brothel. There was CCTV footage which established his presence at the scene and strong circumstantial evidence linking the appellant to the knife.

6.79 The CCA listed 5 factors which linked the appellant to the knife, even without Mr Filihia's evidence (CCA [49]). The evidence was actually stronger than the CCA found as the list omitted some crucial material.

6.80 The factors listed referred to the fact that the knife used in the robbery belonged to Mr O'Hare, it had been taken from the townhouse he shared with Ms Coffison and that the appellant had visited the townhouse but Mr Filihia had not.

6.81 That evidence established that the knife came from either Ms Coffison, or the appellant, or both.

6.82 It was highly unlikely that Ms Coffison provided the knife without the appellant knowing. Ms Coffison was picked up from work by the appellant the night before the robbery and had not been home (T148.5). She usually worked from 10 am to 10 pm (T146.30). They were together all night until the robbery the next morning. For Ms Coffison to have provided the knife to Mr Filihia she would have had to have taken it to work and provided it secretly to Mr Filihia (CCA [49] – [50]). That was especially unlikely given her immediate reaction when she found the knife after the robbery.

6.83 Ms Coffison found the knife in a white plastic shopping bag in her cupboard 6 days after the robbery. She immediately telephoned the police. The evidence not referred to by the CCA was that Ms Coffison had seen the appellant put things in that white plastic bag after the robbery.

6.84 Ms Coffison had taken the bag with her from work. There were some CD covers in there (T 169.15). After the robbery, she got out of the appellant's car

and took the bag. The appellant asked her if he could put some things in the bag. She was standing about a metre away lighting a cigarette and saw him put things in the bag but did not see what they were: "I'm not sure exactly where each item come from. He was getting things from throughout his car." (T 170.10). When she got home she threw the bag in the bottom of her wardrobe. She took it out 6 days later and found the knife and the balaclava and telephoned the police immediately (T 171.15).

6.85 The clear inference was that the appellant had put the knife and balaclava in the bag after the robbery. That was how it ended up in Ms Coffison's wardrobe 6 days later. That established that the appellant, perhaps with Ms Coffison's knowledge, provided the knife to Mr Filihia.

6.86 When all the other evidence was combined with Mr Filihia's account, the case for the appellant's complicity in the robbery became overwhelming.

6.87 Section 8(1) of the *Criminal Appeal Act* provides that a new trial may be ordered where, "having regard to all the circumstances" any miscarriage "can be more adequately remedied by an order for a new trial than by any other order".

6.88 The circumstances of the present case which demonstrate that a new trial is the more adequate remedy are that there was clear evidence of the appellant's complicity in the armed robbery. It was conceded on appeal that there was significant evidence of robbery. Either were very serious offences. The jury's verdict showed that the evidence of his complicity in the armed robbery was accepted.

6.89 In these circumstances, if it were determined that a miscarriage had occurred, the appropriate options are a substituted verdict of armed robbery or an order for a new trial.

6.90 To substitute a verdict would require a determination of guilt on a specific substituted charge. On the other hand, an order for a new trial could be made in general terms. This Court does not need to specify the particular charge to proceed.

PART VIII: Time Estimate

It is estimated that oral argument will take 1 hour.

Dated: 6 May 2016

L Babb

10

Telephone: (02) 9285 8606
Facsimile: (02) 9285 8600
Email:enquiries@odpp.nsw.gov.au