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SIO V THE QUEEN

[2016] HCA 32; (2016) ALR 57

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***SIO v THE QUEEN* [2016] HCA 32; (2016) ALR 57**

(French CJ, Bell, Gageler, Keane and Gordon JJ)

An important judgment with regard to the admissibility of hearsay representations and the unreliability of the evidence of co-accused.

A. Facts

1. S drove C and F to a brothel in Clyde, NSW.
2. F entered the brothel with a knife intending to commit a robbery.
3. During an altercation F stabbed D (an employee of the brothel), who died from the wounds.
4. F removed cash from D's back pocket, and exited the brothel, running past the car.
5. S then collected F and left the scene. Both S and F were apprehended by police.
6. On the basis of joint criminal enterprise, S was charged with constructive (felony) murder of D, and with armed robbery with wounding.
7. G, an employee of the brothel, gave evidence that S had asked her to help him do a robbery at the brothel. G told S that a weapon would not be necessary. G produced a map and a note purportedly made by S.
8. The knife belonged to O, a friend of C. O gave evidence he had heard S and C discussing the robbery. O's knife went missing from C's lounge room about two weeks prior to the robbery. S had visited C's house previously.
9. C gave evidence that together with S and F she had smoked ice on the morning of the robbery. After the robbery, C removed a plastic bag from S's car, and S placed a few things in the bag. C placed the bag in her closet without looking into it. The knife was later found in the bag.

10. F pleaded guilty to the offences of murder and armed robbery with wounding, and his sentence was deferred until the end of S's trial.

11. At trial (NSWSC), F was called to give evidence but refused.

12. The Crown sought to tender two electronically recorded interviews of F, and two written statements.

13. F had identified S from a photoboard, and stated "[i]t was [S] who put me up to robbing the brothel. He gave me the knife and drove me there".

14. The trial judge ruled that the evidence of F was admissible in the trial of S pursuant to s 65(2)(d) of the *Evidence Act 1995* (NSW) ('*EA*'):

    (i) F was "not available to give evidence", the Crown having taken all reasonable steps to compel him to give evidence;

    (ii) F's representations were against his interests because they tended to show that he had committed an offence for which at the time he had not been convicted; and

    (iii) The representations were made in circumstances that made it likely that they were reliable because it was found F had been as forthcoming as possible in order to assist him on sentence.

15. In written and oral directions the learned trial judge failed to refer to the fact that the Crown needed to prove S had foreseen the risk of the wounding element of the armed robbery charge.

16. S was acquitted of murder, but convicted of armed robbery with wounding. He was sentenced to 10 years' imprisonment with a non-parole period of 7.5 years.

17. The NSWCCA dismissed an appeal.

18. S was granted special leave to appeal to the High Court of Australia.

B. Issues

19. It was accepted by the Crown that the misdirection meant that the appeal must be allowed and the conviction on armed robbery with wounding quashed (even though the misdirection was not raised at trial or in NSWCCA proceeding).

20. However, there were two additional issues:

    (i) Was the conviction on armed robbery with wounding inconsistent with the acquittal on murder? and

    (ii) Did the NSWCCA err in concluding that the evidence of F was admissible pursuant to s 65(2)(d) of the *EA*?

C. Reasons (*Per Curiam*)

21. In light of the directions from the trial judge, the verdicts were not inconsistent, but rather the jury applied the directions they were given [41]. The need for S to have foreseen the possibility that a person might be wounded by the use of the knife had been directed on for the murder charge, but not the armed robbery with wounding charge.

22. The High Court observed:

> 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. Here, there is no reason to think that this occurred.

23. The Court had the power to substitute a verdict of guilty to the offence of armed robbery [44]. However, on the other evidence at trial the Court could not be satisfied of S's guilt of armed robbery if F's evidence was excluded [46]. That issue became the focus of the appeal.

The Admissibility of F's Evidence

24. With regard to the admissibility of F's evidence, the Court observed that s 65 of the *EA* provides [this is the same as the *Evidence Act 2008* (Vic)]:

65 Exception: criminal proceedings if maker not available

(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:

(a) was made under a duty to make that representation or to make representations of that kind, or

(b) was made when or shortly after the asserted fact occurred and in circumstances that make it unlikely that the representation is a fabrication, or

(c) was made in circumstances that make it highly probable that the representation is reliable, or

(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.

…

(7) 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:

(a) to damage the person's reputation, or

(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.

25. The High Court rejected what was described as a "compendious" approach the admissibility of statements pursuant to s 65(2)(d) of the *EA*, where there was no distinction made between the representations of the witness in light of the particular fact sought to be proved.

26. The High Court noted at [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.

27. Further, the High Court observed at [60]-[61]:

> 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.
>
> …
>
> 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.

28. With regard to F's status as a co-accused at [65]-[66]:

> 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. 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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> > "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".
>
> …
>
> As Lord MacDermott said in *Tumahole Bereng*:
>
> > "[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."

29. While most of F's statements were against his own interest, his statement that S 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 S [68].

30. Further, the Court observed at [70]-[74]:

> 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.
>
> 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.
>
> 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*, s 65(2)(c) and (d) and s 85 [reliability of admissions by accused] 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.
>
> It is sufficient for present purposes to say that a question mark necessarily arose over [F's] assertion that [S] gave him the knife and put him up to the robbery, by reason of the circumstance that [F] was [S'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 [F's] assertion that [S] 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.
>
> In light of the conclusion on the admissibility of [F's] evidence, this Court cannot be satisfied that the jury must have convicted [S] of armed robbery. Accordingly, it is not open to this Court to substitute a verdict of guilty of armed robbery in this case.

31. Noting the public interest in the prosecution of persons accused of serious crime, the High Court declined to enter a verdict of acquittal and ordered a retrial [80].

D. Consequences in Victoria

32. The need to guard against a compendious approach to the admissibility of representations under s 65(2) of the *Evidence Act 2008* (Vic). When there is a hearsay notice, each representation should be considered in terms of its reliability having regard to the objective circumstances in which it was made, and the fact sought to be proved.

33. The High Court has emphasised "it is no light thing" to admit a hearsay statement given the inability to cross-examine on its contents. It is important to consider each representation, rather than take a compendious approach, in order to preserve the "... clarity, good order and fairness in the conduct of criminal trials".

34. Will this cause a shift away from the admissibility of hearsay representations as seen in judgments such as *Luna v The Queen* [2016] VSCA 10, *Fletcher v The*

Queen (2015) 45 VR 634, and *Bray v The Queen* (2014) 46 VR 623 (although those judgments were in part concerned with arguments for exclusion under s 137)?

35. It should be remembered that, even though hearsay representations are ruled to be admissible, a conviction may still be found to be unsafe on appeal: *Omot v The Queen* [2016] VSCA 24.

36. It should also be remembered that taking "all reasonable steps" to make a witness available is a high bar: *ZL v The Queen* (2010) 208 A Crim R 325; *Rossi v The Queen* [2012] VSCA 228.