refoulement obligations any further than the assumption already made in their favour [that personal information may have been accessed by authorities in Bangladesh and China]'.[19] Accordingly, the court found that there had been no breach of procedural fairness in the ITOA process in respect of SZSSJ or SZTZI.

In *obiter*, the court also considered the application of s 197C of the Act[20] which was inserted into the Act after the data breach that relates to the powers of removal of an 'unlawful non-citizen' pursuant to s 198 of the Act.

Endnotes

1. At [39].
2. At [40] and [57].
3. At [5].
4. At [7].
5. At [10]. See also at [22] with regards to SZSSJ and at [26] in respect of SZTZI.
6. (2010) 243 CLR 319; [2010] HCA 41.
7. (2012) 246 CLR 636; [2012] HCA 31.
8. At [33]–[34] and see also [56]–[57].
9. At [56].
10. *Plaintiff M61/2010E v The Commonwealth* (2010) 243 CLR 319; [2010] HCA 41.
11. *Plaintiff S10/2011 v Minister for Immigration and Citizenship* (2012) 246 CLR 636; [2012] HCA 31.
12. Citing *Plaintiff S157/2002 v The Commonwealth* (2003) 211 CLR 476; [2003] HCA 2.
13. At [71]–[73].
14. At [75].
15. Citing *Lam – Re Minister for Immigration and Multicultural and Indigenous Affairs* (2006) 228 CLR 152 at 162 [32].
16. At [83].
17. At [84].
18. See [86]–[92].
19. At [92].
20. At [14]–[16].

Substituted verdicts and admissibility of evidence from an unavailable witness

Helen Roberts reports on *Sio v The Queen* [2016] HCA 32; 90 ALJR 963.

Introduction

This appeal raised two issues:

- Whether the appellant's conviction for armed robbery with wounding was inconsistent with his acquittal on the charge of murder, and if so, whether a substitute verdict should be entered; and
- The proper application of s 65(2)(d) of the *Evidence Act 1995* (NSW) in the circumstances of the case.

The facts and course of the trial

The appellant, Daniel Sio, drove Mr Filihia to a brothel in Clyde, Sydney. Also present in the front seat 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 later died from his wounds. Mr Filihia stole cash from Mr Gaudry 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.

Mr Sio was charged with the murder of Mr Gaudry[1] and, in the alternative, with armed robbery with wounding.[2] The Crown case was one of constructive murder by way of a joint criminal enterprise to commit armed robbery with foresight of the possibility of wounding by use of the knife by Mr Filihia.[3] The Crown case of armed robbery with wounding was put on the basis of joint criminal enterprise to commit armed robbery with foresight of the possibility of the use of the knife. Following a trial by jury, Mr Sio was acquitted of the murder but convicted of armed robbery with wounding.

The admissibility of out-of-court representations of an unavailable accomplice

Mr Filihia participated in an Electronically Recorded Interview with Suspected Person (ERISP). He said that there was another man driving the car, who had provided the knife. Initially he referred to him as 'Jacob' but also 'Dan'. In a later statement, Mr Filihia said the other man's real name was 'Dan' or 'Danny'; that 'Dan' had 'put him up to' robbing the brothel; that 'Dan' had provided the knife; and that 'Dan' had driven him to the brothel. Mr Filihia omitted any reference to Ms Coffison's presence in the car. He selected a photograph of the appellant from a photo array procedure, which was also electronically recorded.

At the trial Mr Filihia was called to give evidence but refused to answer any questions. The Crown then sought to tender his statements pursuant to s 65(2)(d) of the *Evidence Act 1995* (NSW) ('the Evidence Act'), which provides for the admission

of a previous representation of a witness who is not available, if the court is satisfied the representation was:

- against the interests of the person who made it at the time it was made; and
- made in circumstances that make it likely that the representation is reliable.

It was accepted that Mr Filihia was 'unavailable' within the definition provided by the Evidence Act, and that the representations made by Filihia were against his interests. The trial judge held it was likely that the representation was reliable, taking into account the timing of the interview, the forthcoming nature of the answers and the apparently unrehearsed nature of Mr Filihia's responses. The Court of Criminal Appeal upheld the correctness of this ruling.

The High Court[4] held that the Court of Criminal Appeal erred by considering the question of likely reliability by reference to the totality of Mr Filihia's statements, rather than focusing upon the representation of the particular fact sought to be proved.[5] The court said:[6]

> 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 …The court found that Mr Filihia's assertions that Mr Sio gave him the knife and put him up to the robbery were made in circumstances that were plainly apt to minimise his culpability and maximise that of Mr Sio.[7] It was held that it was not open to the trial judge to be positively satisfied 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. Accordingly, the High Court held that the evidence should not have been admitted.[8]

The elements of the offences and substitution of verdicts

The jury was directed that in order to convict on murder, they must be satisfied that Mr Sio participated in a joint criminal enterprise of armed robbery with Mr Filihia, and that Mr Sio foresaw the possibility that the victim might be wounded by the use of a knife. With respect to the armed robbery with wounding, the jury was directed that they must be satisfied that Mr Sio participated in a joint criminal enterprise of armed robbery with Mr Filiha. The respondent accepted that the directions regarding the latter offence erroneously 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.[9]

In the High Court, the respondent accepted that this misdirection meant that the appeal must be allowed and that the conviction for armed robbery with wounding must be quashed. The court held that no new trial for an armed robbery with wounding could be ordered because such a course would impermissibly traverse the verdict of acquittal on the charge of murder.[10]

The court then considered the substitution of a verdict for an offence of armed robbery pursuant to s 7(2) of the *Criminal Appeal Act 1912* (NSW). In dealing with the question of a substituted verdict, the court confirmed the correctness of *Calabria v The Queen*[11] and *Spies v The Queen*[12], establishing that the power of the court to substitute a verdict is not confined to offences alleged on the trial indictment but also applies to offences for which the appellant could have been found guilty on the basis that the elements were necessarily subsumed within the offence of which the appellant was found guilty.[13] Armed robbery was such an offence, however, in view of the conclusion reached by the court as to the admissibility of the evidence of Mr Filihia, a substituted verdict was not available and the court instead ordered a new trial on a charge of armed robbery.[14]

Endnotes

1. *Crimes Act 1900* (NSW), s 18(1)(a).
2. *Crimes Act 1900* (NSW), s 98.
3. Pursuant to the doctrine of extended joint criminal enterprise enunciated in *McAuliffe v The Queen* (1995) 183 CLR 108; [1995] HCA 37.
4. French CJ, Bell, Gageler, Keane and Gordon JJ.
5. At [58]–[59].
6. At [60]–[61].
7. At [68].
8. At [73].
9. At [27].
10. At [76].
11. (1983) 151 CLR 670; [1983] HCA 33.
12. (2000) 201 CLR 603; [2000] HCA 43.
13. At [43]–[44].
14. At [84].