

# Supreme Court

## New South Wales

<b>Medium Neutral Citation:</b>	<b>R v Sio (No. 4) [2013] NSWSC 1415</b>
<b>Hearing dates:</b>	23 September 2013
<b>Decision date:</b>	23 September 2013
<b>Jurisdiction:</b>	Common Law - Criminal
<b>Before:</b>	Adamson J
<b>Decision:</b>	(1) The trial continue with the remaining eleven jurors.
<b>Catchwords:</b>	CRIMINAL LAW - juries - application to discharge whole jury - whether research of discharged juror contaminated whole jury - no risk of substantial miscarriage of justice
<b>Legislation Cited:</b>	- Jury Act 1977, s 22, s 53A, s 53C, s 53C(1), s 53C(1)(b)
<b>Cases Cited:</b>	- R v K [2003] NSWCCA 406; 59 NSWLR 431 - R v Sio (No. 3) [2013] NSWSC 1414 - Wu v The Queen [1999] HCA 52; 199 CLR 99
<b>Category:</b>	Interlocutory applications
<b>Parties:</b>	Regina Daniel Jefferey Sio (Accused)
<b>Representation:</b>	Counsel: PE Barrett (Crown) CJ Watson (Accused) Solicitors: Director of Public Prosecutions (Crown) Sydney Criminal & Traffic Lawyers (Accused)
<b>File Number(s):</b>	2012/334972
<b>Publication restriction:</b>	Nil

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## EX TEMPORE JUDGMENT

### Introduction

- 1 I discharged a juror for misconduct pursuant to s 53A of the *Jury Act 1977* (**the Act**): *R v Sio (No. 3)*[2013] NSWSC 1414 (**R v Sio (No. 3)**). It remains for me to consider the next question: whether the discharge of a single juror ought lead to a discharge of the whole of the jury or whether I should order that the trial continue pursuant to s 53C of the Act. The questions whether a single juror ought be discharged and whether the whole jury ought be discharged are separate questions and must be addressed distinctly: *Wu v The Queen* [1999] HCA 52; 199 CLR 99 at [6] per Gleeson CJ and Hayne J, [28]-[30] per McHugh J and [67] per Kirby J.

## Relevant legislation

- 2 Section 53C(1) relevantly provides:

### **Discretion to continue trial or coronial inquest or discharge whole jury**

(1) If ... the court ... discharges a juror in the course of a trial ..., the court ... must:

(a) discharge the jury if the court ... is of the opinion that to continue the trial ... with the remaining jurors would give rise to the risk of a substantial miscarriage of justice, or

(b) if of the opinion that there is no such risk and subject to section 22, order that the trial ... continue with a reduced number of jurors.

- 3 Section 22 of the Act relevantly provides:

### **Continuation of trial or inquest on death or discharge of juror**

Where in the course of any trial ... any member of the jury ... is discharged by the court ... under Part 7A, the jury shall be considered as remaining for all the purposes of that trial ... properly constituted if:

(a) in the case of criminal proceedings, the number of its members:

(i) is not reduced below 10,

...

and if the court ... orders that the trial ... continue with a reduced number of jurors under Part 7A.

## The Facts

- 4 As referred to in *R v Sio (No. 3)*, I examined the relevant juror (whom I discharged), the foreperson and another juror to ascertain the circumstances of the relevant juror's misconduct. The foreperson and the other juror informed me that when the jurors had discovered that the relevant juror had conducted Internet research, they were shocked and told her not to tell them what she had discovered because they knew that jurors were not supposed to conduct their own inquiries.
- 5 On examination under oath the foreperson gave the following answers to questions about what had occurred:

Q. And do you recall what she said just as long as you don't reveal anything about deliberations about what research she had done?

A. My understanding is she'd been studying points of law relating to - I am just trying to think of the exact words - relating to reasonable doubt and also she'd been investigating her responsibilities, but that was what I heard. Others might have heard differently but that's the part that I heard, your Honour.

Q. All right. And did she say anything to you about when that research had been conducted?

A. Yes, your Honour, the night before at her home.

Q. So that's Thursday night?

A. Yes, your Honour.

Q. You said late Friday afternoon; was that after the Court had been adjourned for the sick juror to go home?

A. Yes, your Honour, that was.

Q. Although she told you a couple of topics of her research, did she tell you what she had found out or just that she had been doing research?

A. She attempted to tell us, your Honour, and we refused to listen and asked her to cease and desist.

Q. Okay, and after you said that, was there any further discussion of that concerning her?

A. Not while I was present, your Honour.

Q. All right. So when you told her to cease and desist, did she cease and desist?

A. In my presence, yes, she did. As far as I know no one heard anything else from her. We were a little taken aback.

6 The second juror (not the foreperson) answered my questions in the course of my examination of him as follows:

Q. And did she tell you that she had conducted any research to do with those documents [the indictment and written directions]?

A. She said that when she had that information at home she did some research.

Q. All right. And what then happened?

A. We all dropped our mouths and said, "What?", and we ceased any conversation with that juror at that point.

Q. All right. And I think you then, or some of you, told the Sheriff's Officer about that and I was then told about that?

A. There's a little bit different - we all were, as we would each afternoon, just be packed up ready to go, some of us had left and this was eating at the back of our minds as to what we should do about it and that's when we decided to speak to the Sheriff.

. . .

Q. And after the juror had been told "stop", did she actually stop or did she tell you--

A. She stopped.

Q. All right. So did you hear at all what the content of her research was as distinct from the fact that she had carried out research?

A. No, no, there was nothing there - the result of her research--

Q. When you say "no, there was nothing there"--

A. There was nothing there in what she'd said which - at that particular time, but the result of her making the statement we considered was the list of questions that she came in with early in the morning.

- 7 When I had finished the examination I asked counsel if they wished me to ask any further questions but neither suggested any.
- 8 Mr Crown submitted that because there was no contamination of the rest of the jury there was no risk of a substantial miscarriage of justice. The Crown submitted that I should not discharge the whole jury and that I should order that the trial continue with the balance of 11 jurors pursuant to s 22 and s 53C of the Act.
- 9 Mr Watson, who appears on behalf of the accused, submitted that I ought discharge the whole of the jury because of the risk of substantial miscarriage of justice. He submitted that, although the other jurors only became aware of the fact that Internet research had been conducted late Friday afternoon, the second juror referred in his examination to questions asked by the individual juror which he considered might have been informed by the Internet research. Mr Watson submitted that the jury as a whole had been contaminated by the research undertaken by the juror, although the other jurors did not appreciate either that it had occurred or its provenance until late on Friday afternoon. Mr Watson submitted that, in those circumstances, the research may have contaminated not only the particular juror's thinking but the jury generally in the course of their deliberations.
- 10 I took the second juror's evidence about the "list of questions" to be a reference to questions that been reflected in jury notes which were asked of me in the course of the trial, including the meaning of "positive act", "participation" and "beyond reasonable doubt". I did not, however, explore this matter further lest I transgress into the area of the jury's deliberations: see generally *R v K* [2003] NSWCCA 406; 59 NSWLR 431 and the authorities referred to. I note that Mr Watson did not suggest that I explore the matter further with the second juror. I understood the remarks made by the second juror to be speculation by hindsight that questions asked earlier may well have arisen by reason of the research undertaken by the juror who was subsequently discharged.
- 11 I consider that, in light of the evidence given by the foreperson and the second juror, that there has been no contamination of the jury notwithstanding that the discharged juror's questions may have been brought about by her concern about certain terms which may have arisen by reason of her research.
- 12 The timely actions of the foreperson and other jurors who were present to stop the discharged juror from divulging the contents of her research were sufficient to prevent any potential contamination. Although it may be that the

questions about the meaning of terms that I used in the written directions had their genesis in the unauthorised research, there was nothing in the questions that revealed either that research had been undertaken, or the contents of that unauthorised research.

- 13 In these circumstances, I do not consider that there to be any risk of a substantial miscarriage of justice. Given that I am of the opinion that there is no such risk, and since there are still 11 members of the jury, I order, pursuant to section 53C(1)(b), that the trial continue with the reduced number of jurors.

## **Order**

- (1) The trial continue with the remaining eleven jurors.

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Decision last updated: 24 September 2013