**IN THE HIGH COURT OF AUSTRALIA**

**BRISBANE REGISTRY** **No. B24/2019**

**BETWEEN:**

**NERANJAN AGRAJITH KALUBUTH DE SILVA**

(Appellant)

**and**

10 **THE QUEEN**

(Respondent)



RESPONDENT'S SUBMISSIONS

## PART I: PUBLICATION ON THE INTERNET

1. These submission are in a form suitable for publication on the internet.

## PART II: RESPONDENT'S STATEMENT OF PRESENTED ISSUES

20 2. Section 620 of the *Criminal Code (Qld)* states that *"it is the duty of the court to instruct the jury as to the law applicable to the case with such observations upon the evidence as the court thinks fit to make."*

3. The extent to which a judge is required to direct a jury in a given trial will necessarily be determined by reference to the issues in the trial, the law that applies, the evidence and the way in which the case it litigated.[1] The overriding principle must always be to ensure a fair trial for the accused.[2] Consequently, where, in a particular trial, there is a perceived risk that the jury may not correctly apply the directions as to the onus and standard of proof, a specific direction may be required to ensure fairness to the accused in the jury's consideration of the case.

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[1] *RPS v R* (2000) 199 CLR 620 at [41]-[42]

[2] see also *Fingleton v R* (2005) 227 CLR 166 at [77] to [80]

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4. What is and what is not required to ensure fairness must always turn on the particular circumstances of the case at hand.

5. The issue in this appeal turned upon a consideration of the sufficiency of the directions in the particular circumstances of this case. The appellant's contention at [44] of his written submissions that the Court of Appeal's conclusion was based upon "*the wrong reason*", fails to recognise the broad consideration of the whole of the directions in the context of the circumstances of this case.

6. The issues on this appeal are:

   i) whether, even if a *Liberato* style direction could have been properly given in the circumstances of this case, did it's absence compel a conclusion that there has been a miscarriage of justice? and;

   ii) whether the Court of Appeal erred in concluding that, on the whole of the summing up, there was no miscarriage of justice in this case.

## PART III: SECTION 78B OF THE JUDICIARY ACT 1903 (CTH)

7. The respondent has considered whether any notice should be given in compliance with section 78B of the *Judiciary Act 1903* (Cth). No notice is required.

## PART IV: CONTESTED MATERIAL FACTS

8. The facts as outlined in paragraphs 10 to 16 of the appellant's submissions are not disputed. The factual summary of the evidence at trial in [5] to [20] of the judgment of Gotterson JA in *R v Da Silva* [2018] QCA 274 is not in contention.

## Part V: STATEMENT OF THE REPSONDENT'S ARGUMENT IN ANSWER

9. Referring to the particular direction now contended for as a '*Liberato Direction*' has the potential to distract from the issue properly under consideration. The particular

circumstances of the case in *Liberato v The Queen*[3] which, in the view of Brennan and Deane JJ, called for specific direction, did not arise in the present case[4]. Strictly speaking, as the present case did not involve starkly opposed sworn evidence and an invitation by the Judge for the jury to consider "*who do you believe*", the circumstances which were thought necessary to avoid a miscarriage of justice by Brennan and Deane JJ, did not give rise to the risk of impermissible reasoning that the suggested direction was designed to overcome. Properly framed, the contention of the appellant is that in the circumstances of this case, a direction was necessary to ensure that the jury correctly applied the law relating to the burden of proof to their consideration of the defence evidence.[5]

10. Consequently, the question was not so much whether a '*Liberato Direction*'[6] was called for, but whether, in the circumstances of this case, a specific direction designed to ensure that the jury properly understood and applied the law as to the onus and standard of proof was necessary. Such a direction was required only if there was a risk that the jury would fail to properly apply the law, as it was explained to them, as to the onus and standard of proof.

11. The direction which it is now said was essential to overcome that risk was not sought at trial. Consequently, it is necessary for the appellant to demonstrate that the absence of the direction occasioned a miscarriage of justice.[7]

12. In response on this appeal, it is submitted that;

    a. the Court of Appeal did not err in finding that in the circumstances of this case, the summing up as a whole conveyed that the jury could not convict if the appellant's exculpatory answers left them with a reasonable doubt about the appellant's guilt. Consequently, there was no miscarriage of justice.[8]

    b. Whilst the Court found that the circumstances of the present case were materially different to those in *Liberato* such that there was no need for the

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[3] (1985) 159 CLR 507
[4] See the summary of the relevant circumstances from *Liberato* at *R v Da Silva* (above) at [36] and [39].
[5] Appellant's Submissions, footnote 2.
[6] adopting the language as explained by the Appellant at footnote 2 of his written submissions
[7] *Mraz v The Queen* (1955) 93 CLR 493 at 514; *TKWJ v The Queen* (2002) 212 CLR 124 at [65]-[73]
[8] *R v Da Silva* (above) at [45] and [46]

jury to have been directed specifically in the terms suggested by Brennan J[9], a proper reading of the decision of the Court of Appeal demonstrates that the court otherwise properly considered the sufficiency of the directions as a whole in the circumstances of the case in concluding that there was no miscarriage of justice.

13. It is submitted that there is no error in the approach that the Court of Appeal took in the consideration of the issue raised on this appeal nor in the finding by the Court.

**Discussion**

14. The power of an appellate court to intervene is derived from s.668E of the *Criminal Code (Qld)*. Relevantly, the test is 'miscarriage of justice'. What is a 'miscarriage of justice' is not defined in the legislation but the decided cases demonstrate that a miscarriage of justice can result in a variety of ways.[10]

15. The applicant contends in Ground 1 that the Court of Appeal erred in finding that a *Liberato* direction was not required if the defendant does not give evidence.

16. The statements of Brennan and Deane JJ in dissent in *Liberato* have been generally adopted and have influenced summings-up throughout Australia. Whilst they were expressed in mandatory terms, the requirement for a *Liberato* style direction will necessarily depend upon the nature of the evidence and the issues in the trial. Indeed, the omission to direct in the way Brennan and Deane JJ advocated for did not apparently trouble the majority on the facts of *Liberato.* At intermediate appellate level, the jurisprudence has properly focussed upon the question whether, in the particular circumstances of the case under consideration, a miscarriage of justice resulted from the failure to give a direction in the terms suggested in ***Liberato***.[11] The decision of the Court of Appeal in the present case is no more than a further example.

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[9] *R v Da Silva* (above) at [42]

[10] *Mraz v The Queen* (1955) 93 CLR 493 at 514 per Fullagar J; *R v Storey* (1978) 140 CLR 364 at 376 per Barwick CJ; *TKWJ v The Queen* (2002) 212 CLR 124 at [26] per Gaudron J; [65]-[73] per McHugh J; *Simic v The Queen* (1980) 144 CLR 319 at 332 per Gibbs, Stephen, Mason, Murphy and Wilson JJ.

[11] See for example *Salmon v The Queen* [2001] WASCA 270; *Miles v The Queen* [2000] WASCA 364; *R v Chen* (2002) 130 A Crim R 300; *R v Booth* [2005] QCA 30 at [6]-[8]; *R v McBride* [2008] QCA 412 at [30];

17. The subject directions are designed to overcome a risk of impermissible reasoning resulting in a miscarriage of justice. Consequently, the question in a case in which a verdict is challenged on appeal because of the failure to direct according to the statements in *Liberato* will always be whether, in the circumstances of any given case, there is a risk of a miscarriage of justice. This was the approach of the Court of Appeal in the present case and there was nothing in the material before it which compelled a finding of a miscarriage of justice.

18. Whilst there is some force in the contention of the appellant in relation to Ground 1 that the source of the starkly opposed evidence is not necessarily determinative of the need or otherwise for appropriate directions, in the circumstances of this case, it is beside the point. It is a question of interest only. Ultimately, the question remains whether in the circumstances of the particular case, the directions left open the risk of impermissible reasoning resulting in a miscarriage of justice.

19. Contrary to the absolute terms of the applicant's contention in this ground of appeal, the decision of the Court of Appeal in this case amounts to no more than a conclusion that a '*Liberato*' direction was not required in the circumstances of this particular case. Those circumstances included that there was no sworn evidence which contradicted the complaint's sworn evidence[12], and, in summing up to the jury, it was never put to them that they had to decide who to believe[13], nor that the case was one of '*word against word*'. These features, absent in the case of *Da Silva* but present in the case of *Liberato*, were important to the conclusion of both Brennan and Deane JJ as to the soundness of the verdict then in contemplation.

20. The appellant's contention is founded upon the presumption that even in the absence of an invitation to consider a case which is in essence a '*word on word*' case, a jury will naturally think "*who do I believe?*" or "*whose version do I prefer?*" The contentions of the applicant at [19] and [20] of his Written Submissions assumes, without basis, that jurors either do not comprehend or will defy the clear directions as to the presumption of innocence, and the standard and

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*R v Lavery* (2013) 116 SASR 242; *R v Johnson & Honeysett* [2013] QCA 91; *RMD v Western Australia* [2017] WASCA 70; *R v SDE* [2018] QCA 286.

[12] As to the relative weight of sworn and unsworn evidence see *Mule v The Queen* [2005] HCA 49 at [21].

[13] see *R v De Silva* at [39] and [40].

burden of proof and succumb instead to what is said by the appellant to be a 'natural response'.[14]

21. There is considerable jurisprudence supporting the proposition that a *Liberato* direction is not required as a matter of law in cases in which there are starkly opposing versions in evidence (in whatever form)[15]. The appellant's analysis of that jurisprudence demonstrates that each case in which there has been a challenge to the verdict because of the absence of such a direction has turned upon a consideration of the circumstances of the case, the directions given and the risk of impermissible reasoning in the circumstances of that particular case. There is no reason to depart from that long line of authority and impose a requirement upon a judge in summing up to the jury which might, in some cases, work to undermine the clarity that comes from the standard directions as to the onus and standard of proof.[16] *Liberato* itself demonstrates[17] that reasonable minds might reach different conclusions when matters of discretion are called upon.

22. The jury were otherwise properly directed as to the presumption of innocence, and the burden and standard of proof.[18] They were clearly directed that the responsibility to prove the charges against the defendant rested with the Crown. They were reminded about those fundamental principles a number of times throughout the summing up[19] and in relation to the variety of issues that arose for their consideration in the trial. The jury were directed in relation to the contents of the interview conducted between the applicant and the police in the terms set out in the judgment of the Court of Appeal at [28]. Those directions did not undermine the clarity and effectiveness of the directions of law in relation to the burden and standard of proof and the task for the jury in determining the guilt or otherwise of the applicant.

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[14] Appellant's Submissions at [20]
[15] Set out in Appellant's Submissions at [27] to [31], and footnotes thereto.
[16] see for example *Johnson v Western Australia* (20080 186 A Crim R 531 at [14]-[15] per Wheeler JA
[17] in that the majority in *Liberato* (above) were not troubled by the absence of the direction contended for by Brennan and Deane JJ.
[18] See Summing up at AB9(p.3) Ln34-40; AB9(p.3) Ln46 to AB10(p.4) Ln2; AB10(p.4) Ln36-39; AB10(p.4) Ln46 to AB11(p.5) Ln2; AB15(p.9) Ln10-15; AB15(p.9) Ln39-40; AB16(p.10) Ln23-26; AB17(p.11) Ln7-9; and AB18(p.12) Ln1-3.
[19] see footnote 16

23. The use of the term 'innocence' in the context of the jury's consideration of the out of court exculpatory statement by the appellant during the summing up cannot have undermined the clarity of the other directions as to the proper consideration of the onus and burden of proof. It is a descriptive word, and indeed, it accurately describes the effect of the appellant's contentions in his interview with the police. The concept of 'innocence' is not foreign to legal directions, in that the jury were properly directed as to the 'presumption of innocence' in that the appellant was entitled to be presumed innocent unless and until the Crown had proved his guilt to the requisite standard.[20]

10 24. Further, the use of the phrase "*if you accept them*" in reference to the answers of the appellant in his interview with police was correctly regarded by the Court of Appeal[21]as a reference to the direction only three paragraphs earlier that "you must accept that the defendant said those things'. To conclude otherwise would fail to recognise that if it was a reference to '*accept the truth of them'*, then there would be no issue about weight or what might be made of them. If the jury accepted the truth of his statements to police, then he would have been not guilty of any wrong doing.

25. Consequently, the circumstances of this case did not give rise to a risk that the jury failed to properly appreciate and apply the directions as to the burden and standard of proof nor compel the conclusion of a miscarriage of justice. The Court of
20 Appeal did not err in concluding that there was no miscarriage of justice in the circumstances of this case.

**Proviso**

26. Whilst it is not conceded that there is error in the approach of Gotterson JA (with whom the other members of the court agreed) in the Court of Appeal, in the event that this Court did find such error, it is submitted that the Court would nonetheless find that the appellant has not lost the chance of an acquittal that was fairly open, and consequently would find that the conclusion of the Court of Appeal that no miscarriage of justice has been occasioned, was nonetheless correct.

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[20] Summing up at AB9(p.3) Ln34-40.
[21] *Da Silva* (above) at [44]

**Part VI: STATEMENT OF THE RESPONDENT'S ARGUMENT ON THE NOTICE OF CONTENTION OR NOICE OF CROSS-APPEAL**

27. Not applicable.

**Part VII: ESTIMATE OF TIME FOR PRESENTATION OF RESPONDENT'S ARGUMENT**

28. The respondent estimates the presentation of oral submissions will be of 1 hour duration.

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Dated 28 June 2019

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