HIGH COURT OF AUSTRALIA

KIEFEL CJ,
BELL, GAGELER, NETTLE AND GORDON JJ

NERANJAN AGRAJITH KALUBUTH DE SILVA APPELLANT

AND

THE QUEEN RESPONDENT

De Silva v The Queen
[2019] HCA 48
Date of Hearing: 4 September 2019
Date of Judgment: 13 December 2019
B24/2019

ORDER

1. Leave is granted to amend the Notice of Appeal.

2. Special leave to appeal is granted in relation to ground 2 in the Amended Notice of Appeal.

3. Appeal dismissed.

On appeal from the Supreme Court of Queensland

Representation

P J Callaghan SC with P Morreau and B P Dighton for the appellant (instructed by Robertson O'Gorman Solicitors)

M R Byrne QC with P J McCarthy for the respondent (instructed by Office of the Director of Public Prosecutions (Qld))

CATCHWORDS

De Silva v The Queen

Criminal practice – Trial – Directions to jury – *Liberato v The Queen* (1985) 159 CLR 507 ("*Liberato*") – Where appellant convicted by jury of rape – Where appellant did not give sworn evidence at trial – Where appellant made exculpatory statements in recorded police interview – Where record of interview admitted into evidence – Where appellant did not seek *Liberato* direction at trial – Where trial judge did not give *Liberato* direction – Whether *Liberato* direction required where accused does not give sworn evidence – Whether *Liberato* direction required where record of interview containing exculpatory statements admitted into evidence.

Words and phrases – "beyond reasonable doubt", "choice between witnesses", "conflicting version of events", "criminal standard", "evidence on oath", "exculpatory answers", "interview with the police", "jury directions", "*Liberato* direction", "onus and standard of proof", "out-of-court statement", "recorded interview", "summing-up as a whole", "sworn evidence", "who do you believe", "word-on-word".

1 KIEFEL CJ, BELL, GAGELER AND GORDON JJ. The appellant was arraigned in the District Court of Queensland (Judge Farr SC and a jury) on an indictment that charged him with two counts of rape[1]. Each offence was alleged to have been committed on the same occasion against the same complainant. In each case the allegation was of digital penetration of the complainant's vagina without her consent. The prosecution case on each count was dependent upon acceptance of the complainant's evidence. The appellant did not give, or call, evidence. A recorded interview between the appellant and the police was in evidence in the prosecution case ("the interview"). In the interview, the appellant denied any act of digital penetration.

2 The trial judge gave conventional directions, which are not the subject of complaint, as to the onus and standard of proof. His Honour was not asked to give, and did not give, a direction along the lines of the direction proposed by Brennan J in *Liberato v The Queen*[2] (a "*Liberato* direction"). The jury returned verdicts of not guilty on the first count and guilty on the second count.

3 The appellant appealed against his conviction to the Court of Appeal of the Supreme Court of Queensland (Fraser, Gotterson and Morrison JJA), contending that a "miscarriage of justice occurred by reason of the directions given as to how the jury should approach the evidence contained in the appellant's interview with police". The principal deficiency in the directions was said to be the omission of a *Liberato* direction. Gotterson JA, giving the leading judgment, noted that the jury had not been presented with conflicting oral testimony from the appellant. His Honour said that there had been no need for a *Liberato* direction[3]. The appeal was dismissed.

4 On 12 April 2019, Bell, Keane and Nettle JJ granted the appellant special leave to appeal on a single ground: "[t]he Court of Appeal erred in finding that a *Liberato* direction is not required if the defendant does not give evidence". On the hearing, the appellant acknowledged that a *Liberato* direction is not required as a matter of law[4]. He sought leave to amend his Notice of Appeal to add a

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1 *Criminal Code* (Qld), s 349.

2 (1985) 159 CLR 507 at 515.

3 *R v De Silva* [2018] QCA 274 at [40]-[42].

4 *Salmon v The Queen* [2001] WASCA 270 at [99]-[103]; *Chen* (2002) 130 A Crim R 300 at 328-329 [78]-[79]; *R v Burt* (2003) 140 A Crim R 555 at 564 [61]-[63]; *R v Niass* [2005] NSWCCA 120 at [28]; *R v KDY* (2008) 185 A Crim R

Footnote continues

second ground: "[t]he Court of Appeal erred in failing to find that the directions given to the jury were inadequate and that as a result there was a miscarriage of justice". The Court heard full argument on the proposed second ground and reserved consideration of whether special leave to appeal would be granted to rely on it. For the reasons to be given, while it may, in some cases, be appropriate to give a *Liberato* direction notwithstanding that the accused's conflicting version of events is not before the jury on oath, this was not such a case. The Court of Appeal was correct to find that the summing-up as a whole conveyed that the jury could not convict if the appellant's exculpatory answers in the interview left them with a reasonable doubt as to his guilt[5]. In circumstances in which the proposed second ground of appeal is bound up with consideration of the first, it is appropriate to grant special leave to rely on the appellant's Amended Notice of Appeal but the appeal must be dismissed.

Liberato

5 Before turning to the terms of the *Liberato* direction, there should be some reference to the circumstances that gave rise to it. In *Liberato*, several accused were jointly tried for the rape of the complainant. Each accused admitted to having engaged in the act, or acts, of sexual intercourse with which he was charged, but claimed to have believed that the complainant was consenting[6]. The summing-up contained defects: the jury were directed that an accused was entitled to be acquitted if they were satisfied that he had an exculpatory belief as to consent, and if that "[gave] rise to a doubt" as to the accused's guilt[7]. In addition to this serious misdirection, on three occasions the trial judge identified the issue for the jury's determination as "who do you believe"[8].

6 After full argument, special leave to appeal was refused in *Liberato*. In the view of the majority, it had been open to the Court of Criminal Appeal to find

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270 at 278 [26]; *RMD v Western Australia* (2017) 266 A Crim R 67 at 103 [165]; *Ruthsalz v Western Australia* [2018] WASCA 178 at [191].

5 *R v De Silva* [2018] QCA 274 at [45].

6 (1985) 159 CLR 507 at 511.

7 (1985) 159 CLR 507 at 514.

8 (1985) 159 CLR 507 at 519.

that, notwithstanding the acknowledged defects in the summing-up, no substantial miscarriage of justice had actually occurred[9].

7 It is Brennan J's dissenting reasons which are the source of the *Liberato* direction[10]:

> "When a case turns on a conflict between the evidence of a prosecution witness and the evidence of a defence witness, it is commonplace for a judge to invite a jury to consider the question: who is to be believed? But it is essential to ensure, by suitable direction, that the answer to that question (which the jury would doubtless ask themselves in any event) if adverse to the defence, is not taken as concluding the issue whether the prosecution has proved beyond reasonable doubt the issues which it bears the onus of proving. The jury must be told that, even if they prefer the evidence for the prosecution, they should not convict unless they are satisfied beyond reasonable doubt of the truth of that evidence. The jury must be told that, even if they do not positively believe the evidence for the defence, they cannot find an issue against the accused contrary to that evidence if that evidence gives rise to a reasonable doubt as to that issue."

8 Deane J agreed with Brennan J that the directions in *Liberato* were confusing because they left the impression that the jury's task was essentially one of making a choice between the differing prosecution and defence accounts[11]. His Honour also agreed that it was commonplace for judges to invite the jury to consider which of the conflicting accounts they believed. Indeed, his Honour said that express or implied references in a summing-up to a "choice" between witnesses were "sometimes unavoidable and commonly unobjectionable"[12]. His Honour did not consider that this posed difficulty, provided that the reference was accompanied by clear and unequivocal directions about the onus and standard of proof[13].

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9 (1985) 159 CLR 507 at 508-509 per Mason A-CJ, Wilson and Dawson JJ.

10 (1985) 159 CLR 507 at 515.

11 (1985) 159 CLR 507 at 519-520.

12 (1985) 159 CLR 507 at 519.

13 (1985) 159 CLR 507 at 519.

9 Whatever may have been the practice when *Liberato* was decided, in *Murray v The Queen* this Court made clear that it is never appropriate for a trial judge to frame the issue for the jury's determination as involving a choice between conflicting prosecution and defence evidence: in a criminal trial the issue is always whether the prosecution has proved the elements of the offence beyond reasonable doubt[14]. In light of *Murray*, the occasions on which a jury will be invited to approach their task as involving a choice between prosecution and defence evidence should be few.

10 This is not to say that the occasions calling for a *Liberato* direction should be few. The *Liberato* direction serves to clarify and reinforce directions on the onus and standard of proof in a case in which there is a risk that the jury may be left with the impression that the evidence on which the accused relies will only give rise to a reasonable doubt if they believe it to be truthful, or that a preference for the evidence of the complainant suffices to establish guilt. Subject to statute[15], a *Liberato* direction should be given in a case in which the trial judge perceives that there is a real risk that the jury might view their role in this way.

11 The *Liberato* direction is addressed, in terms, to a trial at which there is conflicting sworn evidence. Intermediate appellate courts have expressed differing views as to whether a *Liberato* direction is appropriate in a case in which the conflicting defence version of events is not given on oath, but is before the jury, typically in the accused's answers in a record of interview[16]. If the trial judge perceives that there is a real risk that the jury will reason that the accused's answers in his or her record of interview can only give rise to a reasonable doubt if they believe them, or that a preference for the evidence of the complainant over the accused's account in a record of interview suffices to establish guilt, a *Liberato* direction should be given. Where the risk of reasoning to guilt in either of these ways is present, whether the accused's version is on oath or in the form of answers given in a record of interview, the *Liberato* direction is necessary to

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14 (2002) 211 CLR 193 at 213 [57] per Gummow and Hayne JJ; see also at 201-202 [23] per Gaudron J. See also *Douglass v The Queen* (2012) 86 ALJR 1086 at 1089 [12] per French CJ, Hayne, Crennan, Kiefel and Bell JJ; 290 ALR 699 at 702-703.

15 See, eg, *Jury Directions Act 2015* (Vic).

16 *Whitsed v The Queen* [2005] WASCA 208; *R v Cordell* [2009] VSCA 128; *RMD v Western Australia* (2017) 266 A Crim R 67; *Monforte v The Queen* [2018] VSCA 277.

avoid a perceptible risk of miscarriage of justice[17]. When an accused gives, or calls, evidence there is a natural tendency for the focus to shift from the assessment of the capacity of the prosecution case to establish guilt to an assessment of the perceived strengths or weaknesses of the defence case. Recognition of this forensic reality suggests that the risk that the jury will reason in either of these ways is more likely to arise in a trial in which the conflicting defence account is on oath.

12 In *Johnson v Western Australia*, Wheeler JA identified one possible shortcoming in using Brennan J's statement in *Liberato* as a template for the direction: a jury may completely reject the accused's evidence and thus find it confusing to be told that they cannot find an issue against the accused if his or her evidence gives rise to a "reasonable doubt" on that issue[18]. For that reason, it is preferable that a *Liberato* direction be framed along the following lines[19]: (i) if you believe the accused's evidence (if you believe the accused's account in his or her interview with the police) you must acquit; (ii) if you do not accept that evidence (account) but you consider that it might be true, you must acquit; and (iii) if you do not believe the accused's evidence (if you do not believe the accused's account in his or her interview with the police) you should put that evidence (account) to one side. The question will remain: has the prosecution, on the basis of evidence that you do accept, proved the guilt of the accused beyond reasonable doubt?

13 Whether a *Liberato* direction is required will depend upon the issues and the conduct of the trial. At a trial where there has been no suggestion, whether express or implied, that the jury's determination turns on which of conflicting prosecution and defence versions is to be believed, there may be no need to expand on conventional directions as to the onus and standard of proof. As Wheeler JA also observed in *Johnson*, the expression "reasonable doubt" is apt to convey that a juror who is left in a state of uncertainty as to the evidence should not convict[20].

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17 *Bromley v The Queen* (1986) 161 CLR 315; *Carr v The Queen* (1988) 165 CLR 314; *Longman v The Queen* (1989) 168 CLR 79; *Filippou v The Queen* (2015) 256 CLR 47.

18 (2008) 186 A Crim R 531 at 535 [14]-[15].

19 *Anderson* (2001) 127 A Crim R 116 at 121 [26].

20 (2008) 186 A Crim R 531 at 535 [14].

The facts

14 On the evening of the subject events, the appellant and the complainant, who were acquaintances, made independent arrangements to stay overnight at a mutual friend's unit. Both had attended bars and nightclubs earlier in the evening. By the time they, and their mutual friend, Neil, returned to his unit, the complainant appeared to be intoxicated. The appellant had consumed some alcohol but he did not show signs of intoxication.

15 Neil's girlfriend, Olivia, was present at the unit when the three arrived. It was arranged that the complainant would sleep on the couch in the lounge room and the appellant would sleep in the guest room. Olivia and Neil slept in his bedroom. The complainant got ready for bed, taking off her white t-shirt and putting on a black long-sleeved t-shirt. She removed her skirt but kept on her underwear. She was upset over the breakup of a relationship. The appellant sat on the couch with her and gave her a hug in a comforting manner. She then lay down to go to sleep.

16 The complainant said that she woke to feel fingers being inserted into her vagina. She explained that she "wasn't completely coherent just yet". She had tried to "bring [herself] completely conscious to comprehend what was going on". It stopped and the complainant said she was "very still, trying to comprehend what I thought I had just felt". This was the incident charged in the first count, on which the jury returned a verdict of not guilty. Then the complainant said she felt fingers penetrating her vagina again. This was the incident charged in the second count, on which the jury returned a verdict of guilty. The complainant jumped off the couch and started yelling.

17 Neil had died before the trial. A statement that he gave to the police was in evidence. In this he described the complainant bursting through the door of his bedroom saying "[g]et him out. Get him out". He said that he had walked out of the bedroom and seen the appellant mumbling, "[s]he's crazy. I'm leaving". The complainant was crying and she said "[h]e fingered me. What sort of person does that whilst someone is asleep".

18 Olivia gave evidence of walking into the lounge room, where she saw the complainant yelling and shouting and telling the appellant to "get out". The complainant was wearing a loose shirt and black underwear. The appellant said "I've got to go" and left the unit. Olivia endeavoured to calm the complainant down. The complainant said that the appellant "tried to finger her".

19 In the appellant's interview, he gave an account that the complainant had talked to him about breaking up with her boyfriend. She was naked and crying

and complaining that there was no one in her life. He cuddled her to comfort her. She had asked him if he found her attractive and whether he would date her. He replied that he had a girlfriend and at this point, the complainant "sort of freaked out".

The summing-up

20 The trial judge gave clear, correct directions on the onus and standard of proof. These included the instruction that:

> "It is for you to decide whether you are satisfied, beyond reasonable doubt, that the prosecution has proved the elements of the offence. If you are left with a reasonable doubt about guilt in respect of either charge, your duty is to acquit in respect of that charge. That is, to find the defendant not guilty. If you are not left with any such doubt, then your duty is to convict. That is, to find him guilty."

21 His Honour observed that matters which would concern the jury no doubt would include the credibility and reliability of evidence, particularly that of the complainant. In directing the jury with respect to the fact that the appellant had not given or called evidence, his Honour twice reminded them that the onus was on the prosecution to establish guilt to the criminal standard.

22 The instruction respecting the need for separate consideration of each count was accompanied by a direction of the kind discussed in *R v Markuleski*[21], namely, that a reasonable doubt as to the truthfulness or reliability of the complainant's evidence in relation to one count may be taken into account in assessing the truthfulness and reliability of the complainant's evidence of another count.

23 The focus of the appeal is on the directions concerning the interview. It is necessary to set them out at some length:

> "You have also before you the evidence of the defendant's interview with the police officers and the prosecution relies on some of the answers said to have been given by the defendant in that interview as supporting its case against him. …

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21 (2001) 52 NSWLR 82.

> There are two issues, I suppose, that arise from that recording, insofar as those statements that the prosecution rely upon as suggesting it is in some way supportive of its case against him …
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> *The first thing, of course, is that you must accept that the defendant said such things*. … Well, this is a recording. You can listen to that recording and that is a matter that you can work out for yourselves by simply listening to the tape.
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> The second part of that is that you would have to, of course, conclude that what he said in those statements were accurate and true. So it is up to you to decide whether you are satisfied that those things said by the defendant, which the prosecution says – or submits to you are supportive of its case against him – were said by the defendant, and secondly, whether they were accurate and true. And, of course, it is a matter for you as to whether you – as to what weight you give to them. That is, whether they do support the prosecution case in any way, whether they do not, that is entirely a question of fact for yourselves.
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> ...
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> Now, in that interview he also gave answers which *you might view as indicating his innocence*. You should know, ladies and gentlemen, that you are entitled to have regard to those answers, *if you accept them*, and to give them whatever weight you think appropriate. Bearing in mind, of course, that they have not been tested by cross-examination.
>
> So in relation to both the answers which the prosecution relies upon as being supportive of its case against him, and those which point to innocence, it is entirely up to you what use you make of them and what weight you give to them." (emphasis added)

24 The trial judge reminded the jury that defence counsel had suggested a possible motive for the complainant to lie in her account of the alleged offences. His Honour directed that if the jury rejected the suggested motive, it did not follow that the complainant was necessarily telling the truth. His Honour again reminded the jury that it was for the prosecution to satisfy them that the complainant was telling the truth because the prosecution bore the burden of establishing guilt beyond reasonable doubt.

The Court of Appeal

25 In the Court of Appeal, the appellant complained that the directions concerning the interview were misleading in two respects, each of which had the

tendency to undermine the directions on the onus and standard of proof. First, the instruction that the appellant's answers might be viewed as "indicating his innocence" was apt to suggest that the jury's inquiry was directed to innocence as distinct from proof of guilt. Secondly, the instruction respecting the answers in the interview on which the appellant relied that "you are entitled to have regard to those answers, *if you accept them*, and to give them whatever weight you think appropriate" was apt to reverse the onus. These deficiencies, it was submitted, underscored the necessity that the jury be given a *Liberato* direction.

26 Gotterson JA noted that Brennan J's statement in *Liberato* was addressed to circumstances in which the trial judge had summed up the case "as one of choice between prosecution and defence evidence"[22]. Such a suggestion had not been made at the appellant's trial. While the appellant's exculpatory answers in the interview were evidence in the case, the appellant had not become a witness and the jury had not been presented with a conflict in oral testimony such as to characterise the case as a "word-on-word" case[23]. In the circumstances, his Honour said that there was no requirement for a *Liberato* direction[24].

27 Gotterson JA did not consider that the directions concerning the record of interview were misleading. The reference to answers as "indicating his innocence" was descriptive of the answers as exculpatory, and did not convey that the jury's task was to determine innocence[25]. The instruction "if you accept them" with respect to those exculpatory answers echoed the instruction at the commencement of the directions concerning the record of interview, which, consistently with *Burns v The Queen*[26], directed the jury to consider first whether to accept that the answers were given and, secondly, to consider whether they were truthful[27].

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22 *R v De Silva* [2018] QCA 274 at [39].

23 *R v De Silva* [2018] QCA 274 at [41].

24 *R v De Silva* [2018] QCA 274 at [42].

25 *R v De Silva* [2018] QCA 274 at [43].

26 (1975) 132 CLR 258.

27 *R v De Silva* [2018] QCA 274 at [44].

28 Gotterson JA considered that the trial judge's concluding direction concerning the record of interview – that it was entirely up to the jury what use they made of the appellant's answers and what weight they gave to them – aligned with the general directions on the onus and standard of proof[28]. His Honour concluded that 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[29].

The submissions

29 The appellant's case in this Court is that it is prudent to give a *Liberato* direction in most, if not all, cases in which there is evidence of the conflicting defence account of material events. He complains that the instructions given to the jury at his trial were generic and not adapted to the circumstances of the case. Specifically, they did not ensure that the jury understood that a preference for the evidence of the complainant did not preclude a verdict of not guilty. Nor did the directions make clear that disbelieving the appellant's version was no bar to a verdict of not guilty. The appellant maintains that the directions should not have invoked the concept of "innocence", or been expressed in terms that contemplated "acceptance" as a prerequisite to the use of the evidence of his answers given in the interview.

30 The respondent did not take issue below or in this Court with the proposition that a *Liberato* direction could have been given in a case, such as this, in which the accused did not give evidence. The issue, however, in the respondent's submission, is 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. The respondent points to the absence at the appellant's trial of the circumstances that Brennan and Deane JJ suggested called for a specific direction in *Liberato*: the trial did not involve starkly opposed sworn evidence, nor did the judge invite the jury to consider "who do you believe".

Consideration

31 This was a short trial in which the evidence, counsel's addresses and the summing-up were completed by lunchtime on the second day. The trial judge

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28 *R v De Silva* [2018] QCA 274 at [45].

29 *R v De Silva* [2018] QCA 274 at [45].

addressed some preliminary remarks to the jury after they were empanelled. These included the instruction that:

> "A defendant in a criminal trial is presumed to be innocent. So before you may return a verdict of guilty on either charge, the prosecution must satisfy you that the defendant is guilty of the charge in question and must satisfy you of that beyond reasonable doubt."

32 As detailed earlier, the jury were given repeated, correct directions as to the onus and standard of proof in the course of the summing-up. Nothing in the trial judge's summary of the way the respective cases were put, or in the way his Honour summed up, suggests that the jury might have been left with the impression that their verdicts turned on a choice between the complainant's evidence and the appellant's account in the interview. The focus of defence counsel's address was on the suggested incapacity of the prosecution case to support a finding of guilt beyond reasonable doubt in light of the complainant's intoxicated and emotional state.

33 As noted, the directions concerning the use to be made of the appellant's answers in the interview commenced with a direction taken from *Burns*[30] as to the necessity to be satisfied that the appellant gave the answers and, if so, to be satisfied that those answers were accurate and true. The statements in *Burns* were made in the context of a dispute as to the making of a confessional statement. The function of the summing-up is to meaningfully assist the jury to decide the real issues in the case. It should not contain formulaic directions unconnected to the determination of those issues. The instruction, that the jury first satisfy themselves that the answers on which the prosecution relied were given, was superfluous and apt only to distract: no party was suggesting that the appellant had not given the answers attributed to him in the electronically recorded interview.

34 Whether, as the Court of Appeal reasoned, the words "if you accept them", when the trial judge came to the answers in the interview on which the appellant relied, would have been understood by the jury as meaning accepting that the answers were given, the direction was superfluous and potentially confusing. The requirement that jurors first satisfy themselves that the accused made an out-of-court statement is directed to disputed confessional statements and not exculpatory statements. It is, however, to read too much into the

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30 (1975) 132 CLR 258.

impugned passage to take from it, as the appellant submits, that the jury would have understood the direction as meaning "if you accept the truth of" the answers. The further instruction to give them "whatever weight you think appropriate" would make no sense were the jury to understand that a prerequisite to any use of the answers was satisfaction of their truth. Any risk of confusion was overcome by the further, correct, instruction:

> "So in relation to both the answers which the prosecution relies upon as being supportive of its case against him, and those which point to innocence, it is entirely up to you what use you make of them and what weight you give to them."

35 In context, the trial judge's reference to answers in the interview "indicating [the appellant's] innocence" was, as the Court of Appeal held, descriptive of the answers as exculpatory[31]. The submission, that the reference to innocence and the inclusion of the words "if you accept them" in these two sentences of the summing-up undermined the clarity of the directions on the onus and standard of proof, is overly ambitious. Defence counsel appears not to have perceived any such risk. There was no request for any redirection on the use the jury might make of the answers in the interview. Nor did defence counsel seek a *Liberato* direction. The failure of counsel to seek a direction is not determinative against successful challenge in a case in which the direction was required to avoid a perceptible risk of the miscarriage of justice. The absence of an application for a direction may, however, tend against finding that that risk was present.

36 The summing-up made clear the necessity that the jury be satisfied beyond reasonable doubt of the complainant's reliability and credibility. The Court of Appeal did not err in concluding that, when the summing-up is read as a whole, the trial did not miscarry by reason of the omission of a *Liberato* direction.

Orders

37 For these reasons, there should be the following orders:

1. Leave is granted to amend the Notice of Appeal.

2. Special leave to appeal is granted in relation to ground 2 in the Amended Notice of Appeal.

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31 *R v De Silva* [2018] QCA 274 at [43].

3. Appeal dismissed.

38 NETTLE J. As the majority observe, a trial judge's summing up should be tailored to the issues and avoid the recitation of irrelevancies[32]. Presumably in pursuit of that objective, the trial judge gave the jury a *Burns* direction[33] regarding the use that it was open to them to make of what were said to be incriminatory sections of the appellant's record of interview. That direction was as follows:

> "You have also before you the evidence of the defendant's interview with the police officers and the prosecution relies on some of the answers said to have been given by the defendant in that interview as supporting its case against him. The prosecution have referred you specifically to the statements that he made that you can hear on the recording, where he speaks about his close proximity to the complainant in the lead-up to the incident the subject of the charges.
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> As I said, that recording will be with you when you retire to consider your verdicts and you can play it again as often as you wish. There are two issues, I suppose, that arise from that recording, insofar as those statements that the prosecution rely upon as suggesting it is in some way supportive of its case against him on the issue that I have just identified.
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> The first thing, of course, is that you must accept that the defendant said such things. That is, gave answers about his proximity to the complainant in the lead-up to these two alleged events. Well, this is a recording. You can listen to that recording and that is a matter that you can work out for yourselves by simply listening to the tape.
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> The second part of that is that you would have to, of course, conclude that what he said in those statements [was] accurate and true. So it is up to you to decide whether you are satisfied that those things said by the defendant, which the prosecution says – or submits to you are supportive of its case against him – were said by the defendant, and secondly, whether they

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32 *Alford v Magee* (1952) 85 CLR 437 at 466 per Dixon, Williams, Webb, Fullagar and Kitto JJ. See also *RPS v The Queen* (2000) 199 CLR 620 at 637 [41] per Gaudron A-CJ, Gummow, Kirby and Hayne JJ; *Azzopardi v The Queen* (2001) 205 CLR 50 at 69 [49] per Gaudron, Gummow, Kirby and Hayne JJ; *R v Getachew* (2012) 248 CLR 22 at 34-35 [29] per French CJ, Hayne, Crennan, Kiefel and Bell JJ; *Huynh v The Queen* (2013) 87 ALJR 434 at 441 [31] per French CJ, Crennan, Kiefel, Bell and Gageler JJ; 295 ALR 624 at 631-632.

33 *Burns v The Queen* (1975) 132 CLR 258 at 261 per Barwick CJ, Gibbs and Mason JJ.

> were accurate and true. And, of course, it is a matter for you as to whether you – as to what weight you give them. That is, whether they do support the prosecution case in any way, whether they do not, that is entirely a question of fact for yourselves."

39 That direction was unexceptionable in itself. But there are some aspects of it that should be noted for reasons that will later appear. The first is the expression: "you must accept that the defendant said such things". That would have conveyed to the jury that, in order to have regard to the allegedly incriminatory answers, the jury had to be satisfied that the appellant in fact gave the allegedly incriminating answers. The second aspect is the use of the expression: "[t]he *second part of that* is that you would have to ... conclude that what he said in those statements [was] accurate and true" (emphasis added). That would have conveyed to the jury that the second matter of which they had to be satisfied before they could have regard to the incriminatory answers was that the incriminatory answers were "accurate and true". The third aspect of the direction is the trial judge's explication of the concept of weight, namely: "whether [the allegedly incriminating answers] do support the prosecution case in any way". As so expressed, that would have conveyed to the jury that the concept of weight stands separate and apart from the two conditions earlier explained of accepting that the appellant gave the allegedly inculpatory answers and that those answers were "accurate and true". Hence, as the concept of weight was so explained, the jury would have understood weight in this context to go to probative effect rather than credibility or reliability.

40 Immediately after the *Burns* direction, the trial judge directed the jury in relation to the exculpatory aspects of the record of interview[34]. That direction was as follows:

> "Now, in that interview he also gave answers which you might view as indicating his innocence. You should know, ladies and gentlemen, that you are entitled to have regard to those answers, if you accept them, and to give them whatever weight you think appropriate. Bearing in mind, of course, that they have not been tested by cross-examination.
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> So in relation to both the answers which the prosecution relies upon as being supportive of its case against him, and those which point to innocence, it is entirely up to you what use you make of them and what weight you give to them."

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34 See *Mule v The Queen* (2005) 79 ALJR 1573 at 1577 [14] per Gleeson CJ, McHugh, Gummow, Hayne and Heydon JJ; 221 ALR 85 at 90.

41 There are several aspects of that direction that should also be noted. The first is that it would have conveyed to the jury that they were not entitled to make any use of any exculpatory answers given in the record of interview unless they "accept[ed] them". The second aspect is that, although the judge did not here spell out in terms that, in order to have regard to the exculpatory answers, the jury had to accept that the appellant in fact gave the exculpatory answers and, as a "second part of that", accept that those answers were "accurate and true", it is not unlikely that the jury would have understood the judge's use of the short-hand expression "accept them" as intended to convey exactly the same two conditions as had been outlined in the course of the immediately preceding *Burns* direction. The third aspect of the direction is that, here, as in the *Burns* direction, the judge referred to "weight" separately and apart from the notion of "accepting them" and, although his Honour did not here repeat in terms that weight means "whether they [the exculpatory answers] do support the [defence] case in any way", it is not unlikely that the jury would have taken that to be the judge's meaning, just as it was in the immediately preceding *Burns* direction.

42 Seen, therefore, in the immediate context of the *Burns* direction, the net result of the direction on the exculpatory aspects of the record of interview may well have been to leave the jury with the impression that they were not permitted to have regard to the exculpatory answers unless they accepted both that those answers were given and that those answers were "accurate and true".

43 The likelihood of that being so is fortified by the fact that, throughout the summing up, the judge repeatedly used the word "accept" to refer to a substantive acceptance, or non-acceptance, by the jury of particular evidence as being "accurate and true". Thus for example:

- "You are to determine the facts of the case based on the evidence that has been placed before you in this courtroom. That involves deciding what evidence you *accept*." (emphasis added)

- "you are not obliged to *accept* any comment I might make about the evidence". (emphasis added)

- "It is for you to decide whether you *accept* the whole of what a witness says or only part of it or none of it. You may *accept* or reject such parts of the evidence as you think fit. It is for you to judge *whether a witness is telling the truth* and *correctly recalls the facts* about which he or she has testified." (emphasis added)

- "Now, many factors may be considered in deciding what evidence you *accept* ... [Y]ou have seen how the witnesses presented in the witness box when answering questions ... [and] you should consider perhaps the likelihood of the particular witness's account or whether the evidence of a particular witness seemed reliable

when compared with other evidence that you a*ccept*." (emphasis added)

- "the fact that we refer to [some] witnesses as expert does not mean that their evidence has automatically to be *accepted*, although you might think in this matter there is little reason to not *accept* their evidence". (emphasis added)

- "you are entitled to assess and *accept* and reject any such opinion evidence as you see fit". (emphasis added)

- "It is a matter for you, as the sole judges of the facts, whether you *accept* the evidence relating to the complainant's distressed condition". (emphasis added)

44 As has been seen, there was very little in or about the direction on the exculpatory aspects of the record of interview that might have conveyed to the jury that the word "accept" was used in relation to the exculpatory aspects of the record of interview in any sense different from the repeated applications of "accept" throughout the summing up as referring to a substantive acceptance, or non-acceptance, of particular evidence as being "accurate and true".

45 Further, as was earlier noticed, at the conclusion of the direction on the exculpatory aspects of the record of interview the judge directed the jury that, if they did "accept" the exculpatory answers, it was entirely up to them what use they made of them and what weight they gave them. In that context, that direction was misleading. The law is that, if the jury believed the appellant's account of what occurred, they were bound to acquit, and, even if they did not accept his account, but considered it was possible that it might be correct, they were bound to acquit[35]. It was only if they rejected his version of what occurred that they were entitled to ignore it.

46 A properly structured *Liberato* direction delivered in the terms adumbrated in the majority's reasons would have safely conveyed that to the jury and, by doing so, gone far to overcome any misunderstanding, likely to have resulted from the direction on the exculpatory aspects of the record of interview, that the jury were not entitled to have regard to the exculpatory answers unless they accepted them as being "accurate and true". Instead, the admonition that it was entirely up to the jury what use they made of the exculpatory answers, in the context in which it was delivered, very likely compounded the problem.

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35 *Liberato v The Queen* (1985) 159 CLR 507 at 515 per Brennan J.

47 Finally, it might not be without significance that the jury sought a re-direction as to the meaning of beyond reasonable doubt. It is, therefore, a little surprising that, although the judge was aware of this Court's decision in *R v Dookheea*[36], his Honour chose not to adopt the response there recommended[37] of contrasting the standard of proof beyond reasonable doubt with the lower civil standard of proof on the balance of probabilities in order to convey to the jury that being satisfied of guilt beyond reasonable doubt does not simply mean concluding that the accused may have committed the offence charged, or even that it is more likely than not that the accused committed the offence charged; that what is required is a much higher standard of satisfaction, the highest known to the law: proof beyond reasonable doubt. By itself, such a direction would not have saved the situation, but it would have assisted.

48 In the result, I consider that there is a realistic possibility that the jury approached their task on the basis that they were to disregard the appellant's exculpatory answers unless they were persuaded that they were "accurate and true". So to approach their task would have been wrong in law and likely to have resulted in a conviction where, if properly directed, the jury may have acquitted. I consider that the appellant was thus deprived of a realistic chance of acquittal to which he was entitled and so subjected to a substantial miscarriage of justice.

Conclusion

49 It follows, in my view, that the appeal should be allowed. The order of the Court of Appeal should be set aside and in its place it should be ordered that the appeal to the Court of Appeal be allowed, the conviction be quashed and a new trial be had.

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36 (2017) 262 CLR 402.

37 *R v Dookheea* (2017) 262 CLR 402 at 426 [41] per Kiefel CJ, Bell, Gageler, Keane, Nettle and Edelman JJ.