

BETWEEN: NERANJAN AGRAJITH KALUBUTH DE SILVA
Appellant
and
THE QUEEN
Respondent

APPELLANT'S OUTLINE OF ORAL ARGUMENT

Part I: Certification

1. I certify that this submission is in a form suitable for publication on the internet.

Part II: Outline

2. There was a requirement, at the appellant's trial, for specific directions to be given on the "*real issues in the particular case*"¹; that is, directions which were tailored to the evidence.² In particular, there was a requirement for a direction about the significance of the appellant's version of events, which was introduced in the prosecution case. The admission of this evidence had the effect of converting the case into one which can conveniently be described as 'word against word'.³ Accordingly, the jury needed instructions about the way in which the criminal burden of proof applied to the appellant's version.⁴
3. The label '*Liberato* direction' is a term of convenience. Its provenance might be traced, but is not limited, to the injunction made by Brennan J in *Liberato*.⁵ However, the need for such a direction in any particular case arises from the fundamental requirements of the criminal trial,

¹ *Alford v Magee* (1952) 85 CLR 437, 466.

² Par [22]-[23] Appellant's Submissions.

³ Par [2] footnote 1, Appellant's Submissions.

⁴ Par [24]-[25], [28]-[36], and [43] Appellant's Submissions.

⁵ *Liberato v The Queen* (1985) 159 CLR 507, 515. Par [2] footnote 2, Appellant's Submissions.

and in particular “*the extreme importance of maintaining the absolute right of an accused person to have his case decided by a jury which has been given certainly to understand that he is to be acquitted if the Crown case has not been proved beyond a reasonable doubt*”.⁶

4. To that end, it is of “*little use*” to explain the law in general terms and leave the jury to apply it. Rather, the law should be given to the jury “*not merely with reference to the facts of the particular case but with an explanation of how it applied to the facts of the particular case.*” This requires the trial judge to decide upon the real issues in the case and tell the jury what those issues are, in light of the law.⁷
5. For a jury to be “*given certainly to understand*” the manner in which the burden of proof operates in a ‘word against word’ case, the features of the appellant’s trial which left scope for uncertainty had to be addressed.⁸ It can be accepted that the system of criminal justice in Australia operates on the assumption that, as a general rule, juries understand, and follow, the directions that are given. But the system does not assume that the jury’s decision-making is unaffected by human tendencies.⁹ One such tendency is reflected in the proposition that a jury’s verdict will be affected by the choices that are made available to it.¹⁰
6. In *Liberato*, Brennan J considered a jury would “*doubtless*” ask themselves, when confronted with a ‘word against word’ case, who is to be believed, that is, whose version is to be preferred.¹¹ The judicial aspiration must be to achieve as much certainty as possible that the case will not be resolved this way. As ever, this is to be satisfied by directions that warn the jury against particular processes of reasoning¹² and which ensure that the jury correctly considers particular aspects of the evidence.¹³ This is exactly what a *Liberato* direction – set

⁶ *Thomas v R* (1960) 102 CLR 584, 596, *Van Leeuwen v The Queen* (1981) 36 ALR 591, 596. See also *Sorby v Commonwealth* (1983) 152 CLR 281, 294. Par [21], Appellant’s Submissions, Par [7], Appellant’s Reply.

⁷ *Alford v McGee* (supra n1), par [22]-[23] Appellant’s Submissions.

⁸ Par [9]-[10], Appellant’s Reply.

⁹ *Gilbert v The Queen* (2000) 201 CLR 414, 420 [13], 421 [16], 440 [96] and 441 [101].

¹⁰ *Ibid*, at 420-421 [14]-[17]. See also at 441 [101].

¹¹ Par [19] Appellant’s Submissions, par [8] Appellant’s Reply.

¹² *RPS v The Queen* (2000) 199 CLR 620, 637 [41] and the authorities cited at footnote 53 of that decision.

¹³ For example, *Melbourne v The Queen* (1999) 198 CLR 1, 14 [31], 20-21 [50]-[51], 29 [79] and 56-7 [156].

out in model directions throughout the country or as recommended by Kirby J in *Anderson*¹⁴ – achieves.

7. The Court of Appeal was wrong to hold this direction was not required in the appellant's case. First, there is no basis to distinguish, as a matter of law, between sworn and unsworn versions by a defendant when framing directions that address the real issues for the jury's determination.¹⁵ Questions of weight had no impact upon the way in which the jury should have been directed about the burden of proof.¹⁶ Second, the directions given on the burden of proof were generic and were not adapted to the circumstances in which a sole, uncorroborated complainant's account was going to be compared with a competing account from the appellant.¹⁷ Third, the directions suggested to the jury that they might consider whether they "accept(ed)" the appellant's version.¹⁸ This compounded rather than absolved the failure to give a *Liberato* direction.

8. The errors (of commission and omission) were located within that very part of the summing up which was crucial for the appellant; the very part at which the jury might have been instructed as to how they should consider the defence case. There were two competing, detailed versions before the jury - it was essential that they receive specific and accurate directions about the way in which they were to resolve that conflict consistently with the burden of proof resting upon the Crown. The failure to do so gave rise to a miscarriage of justice.¹⁹



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case in Court

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¹⁴ *Anderson* (2000) 127 A Crim R 116, 121 [26].

¹⁵ Cf. *R v De Silva* [2018] QCA 271 at [41]-[42].

¹⁶ Par [46]-[53] Appellant's Submissions.

¹⁷ Par [39]-[40] Appellant's Submissions.

¹⁸ Core Appeal Book P11 L16. Par [13] and [16]-[18] Appellant's Reply.

¹⁹ Par [54] Appellant's Submissions, Par [18] Appellant's Reply.