IN THE HIGH COURT OF AUSTRALIA
BRISBANE REGISTRY

No. B24 of 2019

BETWEEN: NERANJAN AGRAJITH KALUBUTH DE SILVA

Appellant

and

THE QUEEN

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Respondent

APPELLANT'S REPLY

Part I: Certification

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

Part II: Reply

Terminology:

2. The respondent submits that reference to the concept of a "*Liberato* direction" has the
20 potential to distract.[1] Certainly that would be the case if it was thought that, in order for a jury to receive the directions for which the appellant contends, it was necessary for the circumstances of his case to mirror, with any sort of precision, those which were present in *Liberato*. The appellation has been used as a term of convenience.[2]

The "source" of the evidence:

3. Howsoever described, the Court of Appeal held that such a direction was not required in this case. There were two reasons for this. One was that the evidence which gave rise to the need

[1] Respondent's Submissions, at [9] and footnote 5.
[2] Appellant's Submissions at [2] and footnote 2.

Robertson O'Gorman
19/179 Turbot St, Brisbane Q 4000
Ph (07) 3034 0000 Fax (07) 3034 0099
Email: mail@robertsonogorman.com.au
Ref: Emma Higgins

for the direction was not in the form of sworn testimony. This was more than a "question of interest only".[3] So far as the Court of Appeal was concerned, it was decisive of the issue.[4]

4. The respondent allows that there is "some force" in the contention that the source of the "starkly opposed evidence" does "not necessarily" determine the question as to whether or not the direction should have been given.[5] If, by this, it is meant that an unsworn version of events[6] may give rise to the need for a *Liberato* direction, then of course the appellant respectfully agrees - and would add that, given the divergence in authority on this point,[7] this aspect of the law might easily be clarified.

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5. However, whilst perhaps allowing that point, the respondent does seek to maintain the conviction on the basis that, in effect, the directions given were adequate. This submission rests on the proposition that the appellant has "assume(d), without basis, that jurors either do not comprehend or will defy the clear directions as to the presumption of innocence, and the standard and burden of proof...".[8]

The need for a direction:

6. That proposition warrants scrutiny. Indeed, it invites analysis of the essential reasons why juries are given instructions in criminal trials.

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7. The starting point is acceptance of the principle that someone in the appellant's position has an absolute right 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 reasonable doubt. The directions to the jury must reflect the "extreme importance" of maintaining that right.[9]

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[3] Respondent's Submissions, at [18].
[4] Core Appeal Book p 46, at [41] – [42].
[5] Respondent's Submissions, at [18].
[6] So long as it is admissible and received into evidence.
[7] See Appellant's Submissions at [50] – [53].
[8] Respondent's Submissions, at [20].
[9] *Thomas v R* (1960) 102 CLR 584 at 596 per Kitto J. That principle was cited by Gibbs CJ in *Van Leeuwen v R* (1981) 36 ALR 591 at 596 when noting that "the unsatisfactory nature of the direction as to the burden and standard of proof assumed particular importance in the present case, where the evidence of the Crown was so weak that a jury, properly directed, might well have had a reasonable doubt". The Supreme Court of Canada has also considered the functional imperative behind the jury being properly instructed on the onus and standard of proof. The essential

8. The method by which this is achieved may vary from case to case, but the appellant's case was one of an instantly recognisable and recurrent kind. It presented a choice between two "irreconcilable versions of events".[10] Far from being a "baseless assumption", it is a matter of logic that the whole case may, in spite of formal recitations about onus and burden, have "seemed an either/or" proposition.[11]

9. Given that the case may have appeared to be one which involved that sort of choice, the manner in which the actual choices were presented was critical. The choice to be made was inevitably going to be affected by the variety of choices offered. Again, this is not a "baseless

10 assumption": it is, as Callinan J once reflected, "contrary to human experience" to suggest otherwise.[12]

10. It follows that there was a need for a direction that made it clear to the jury that their choice involved three options. Two of them required the jury to acquit: first, if they believed the appellant, and second, if they did not believe the appellant but still had a reasonable doubt as to his guilt after considering the evidence as a whole.[13]

11. It is impossible to demonstrate any way in which such a direction[14] could "undermine the clarity" of other directions.[15]

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<u>The need to "accept" the appellant's account:</u>

12. Such a demonstration is, however, afforded by reference to the learned trial judge's suggestion that the jury might look in the evidence for "indications" of the innocence that his Honour had already told them should be presumed.[16]

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premise observed in *R v Avetysan* [2000] 2 S.C.R. 745 at [25], similar to the tenets expressed in this Court, is that "*there cannot be a fair trial if jurors do not clearly understand the basic and fundamentally important concept of the standard of proof that the Crown must meet in order to obtain a conviction*".

[10] *R v Avetysan* [2000] 2 S.C.R. 745 at [21].

[11] *R v Avetysan* [2000] 2 S.C.R. 745 at [21].

[12] *Gilbert v The Queen* (2000) 201 CLR 414 at [101].

[13] *R v W (D)* [1991] 1 S.C.R. 742 at [27] and [28].

[14] Authoritatively formulated; frequently, in one form or another, applied and approved; and codified in so many model directions. See Appellant's Submissions at [27] et seq.

[15] Respondent's Submissions, at [21].

[16] Core Appeal Book p11, at line 14.

13. And the directions should not even have hinted at the possibility that there was a need for the appellant's version to be "accepted".[17] The respondent defends this on the basis that when his Honour used the word "accept", he meant only that the jury had to accept that the appellant had spoken the relevant words. This is because, so the argument runs, were it otherwise, there would be "no issue about weight or what might be made of them".[18]

14. With respect, that does not follow. His Honour introduced this portion of the summing up by telling the jury that it concerned evidence of a kind which the jury *might* view as *indicating* the appellant's innocence. Whether it did *in fact* have that effect was thereby presented as a threshold question, posed in the abstract and without reference to any specific assertion made by the appellant.

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15. After resolving that threshold issue – as to whether any given answer *might indicate* innocence – the question remained: did it?

16. That question could only be answered by first considering whether the evidence was "accepted"[19] as truthful, which in turn related to – was, in fact, dependent upon – the question of the weight to be given to it. The fact that his Honour made reference to "weight" does not, therefore, preclude interpretation of the word "accept" as raising a requirement for acceptance of the truth of the word spoken.

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17. But even as the appellant presents this refutation of the respondent's argument, it should be acknowledged that there is an air of unreality about the whole debate. Had his Honour actually meant "accept that he said those things", then, so the jury might have thought, he would surely have said so. He had just done that, in a fashion that dismissed[20] any further consideration of the issue as to whether the words were actually spoken.[21] For current purposes, what matters is that there was at least a reasonable possibility that the jury, hearing

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[17] Core Appeal Book p11, at line 16.
[18] Respondent's Submissions, at [24].
[19] More properly, where there was a reasonable possibility that it was truthful.
[20] With respect correctly, given that there was a recording about which no issue was raised.
[21] Core Appeal Book p10, at line 40.

the direction only once, would give to the word "accept" a meaning that involved concepts such as agreement and approval.

18. And sight should not be lost of the place this point has in the appeal. The use of the word "accept" is not being pleaded as a freestanding ground. Its use is just one of the reasons which preclude the summing up from being certified as adequate. Primarily, the Court is confronted with a case in which reference to the functional part of the defence case was reduced by his Honour to directions that were confined in two spare paragraphs and divorced from notions of the onus of proof. This occurred in a case which was most in need of a
10 specific, accessible and well understood direction that should have been given but was not. By reason of that omission a miscarriage of justice occurred.

"Proviso":

19. The respondent has invoked the word "proviso",[22] but has made no reference to section 668E(1A) of the *Criminal Code*. Nor has any reference been made to *Weiss v The Queen*,[23] nor to other authority that might be applicable to this provision.

20. It would not be realistic to do so. If an error has occurred, in a case that turned so completely on an assessment of credibility, it would not be open for an appellate court to apply the
20 proviso. The "natural limitations"[24] which present in such a situation would prevent it from doing so.

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Dated: 19 July 2019

Senior legal practitioner representing the case in Court
Name: Peter Callaghan S.C.
Tel: (07) 3369 7900
Fax: (07) 3369 7098
30 Email: pcsc@8pt.com.au

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[22] Respondent's Submissions, at p7.
[23] (2005) 224 CLR 300.
[24] *Collins v The Queen* (2018) 355 ALR 203 at [37]; *Dearman v Dearman* (1908) 7 CLR 549, 561.