IN THE HIGH COURT OF AUSTRALIA
BRISBANE REGISTRY

No. B24 of 2019

BETWEEN: NERANJAN AGRAJITH KALUBUTH DE SILVA
Appellant

and

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THE QUEEN
Respondent

RESPONDENT'S OUTLINE OF ORAL ARGUMENT

Part I:

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

Part II:

1. The two grounds of appeal substantially overlap. Ground 1 relates solely to the asserted necessity for a so called *Liberato* direction, with ground 2 focussed on the sufficiency of the directions generally. The state of authority from intermediate appellate courts suggests that the true enquiry focusses not so much on the absence of a *Liberato* style direction, but more on whether the summing up as a whole was deficient in its absence, thereby resulting in a miscarriage of justice (Respondent's submissions [2]-[6], [21])

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2. The direction now said to have been required was not sought at trial, and so it must be demonstrated by the appellant that he has suffered a miscarriage of justice. (Respondent's submissions [11], [14])

3. Notwithstanding the mandatory language used by Brennan J in *Liberato*, intermediate appellate courts have correctly held that the need for the direction will depend on the particular circumstances of the case at hand and the content of the whole of the summing up. (Respondent's submissions [21])

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4. It is helpful to look at the factual allegations and the summing up in *Liberato* to understand what it was that prompted Brennan and Deane JJ to make their respective *obiter* comments in the case. The facts there stand in contrast to the factual allegations, and course of the trial, in the present matter.

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5. The present case did not involve starkly opposing evidence on oath, nor direction from the trial judge for the jury to assess who they believed. Therefore, strictly, a so called *Liberato* direction was not required. (Respondent's submissions [9])

6. One of the concerns that prompted Justice Brennan's *obiter* comments was an observation that "*it is commonplace for a judge to invite a jury to consider the question: who is to be believed?*" – *Liberato v The Queen* (1985) 159 CLR 507 at 515. Some 17 years later, such a direction was clearly disapproved by this Court in *Murray v The Queen* (2002) 211 CLR 193, per Gaudron J at [23] and Gummow and Hayne JJ at [57]. It is submitted that such a direction is now rarely delivered (for judicial support for that submission see the comments of Wheeler JA in *Johnson v Western Australia* (2008) 186 A Crim R 531 at [14]). Accordingly the likelihood of impermissible reasoning by the jury is greatly reduced and the fundamental need for a *Liberato* direction is also reduced. (In response to the appellants reply at [8]-[11].)

7. The jury in this trial was correctly directed as to the onus and standard of proof on a number of occasions. The impugned passage at AB 11 lines 14-22 did not detract from the correctness of those directions, and there is no reason to suspect that the jury did not follow the directions consistently with the strongly held presumption that juries will do so. (Respondent's submissions [22])

8. In particular, the use of the word "*innocence*" has not caused, nor compounded, any miscarriage of justice. The respondent effectively relies on the reasoning of Gotterson JA below to demonstrate that the use of the word was innocuous. (Respondent's submissions at [26])

9. Similarly, the use of the words "*if you accept them*" in reference to exculpatory portions of the appellant's interview with police has not caused, nor compounded, a miscarriage of justice. Contrary to the appellant's submissions both at first instance and in reply, if those words meant "*accept them to be possibly true and accurate*" the words that immediately follow them in the direction would be redundant. For that reason they did not mean what the appellant contends, nor could they have been understood in that manner. (Respondent's submissions [24])

10. Should this Court consider that the words bore the meaning attributed by the appellant, they are nonetheless innocuous, particularly where the jury was directed to attribute whatever weight they considered appropriate to the evidence.

11. Finally, a consideration of the differing verdicts in the trial is strongly suggestive that the jury did in fact reject the defendant's account as possibly being true and accurate and also considered the strength of the prosecution case in the absence of that account. It demonstrates that the jury understood the directions, and hence the task at hand and that there has been no miscarriage of justice. (Respondents submissions [20])

12. The respondent does not press the submission that this is a suitable case for the application of the proviso in section 668E of the *Criminal Code*. (Respondent's submissions [26])

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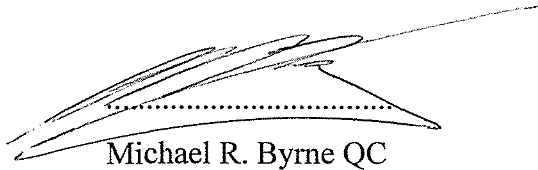
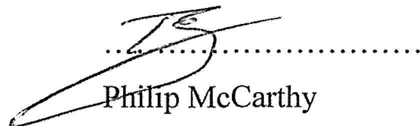
Dated: 4 September 2019



Michael R. Byrne QC



Philip McCarthy