

## 26. Defendant Giving Evidence (The *Liberato* direction)

---

### 26.1 Legislation

[Last reviewed: January 2025]

*Nil.*

### 26.2 Commentary

[Last reviewed: January 2025]

In *R v Rose* [\[2021\] QCA 262](#), [49] the Court discussed the '*Liberato*' direction (*Liberato v The Queen* [\(1985\) 159 CLR 507](#)):

*The Liberato direction is commonly given in cases described as 'word against word' where a Complainant and a Defendant give evidence, and it is important to ensure that the jury understand that the giving of evidence by a Defendant does not alter the prosecution's onus of proof. As Brennan J observed in Liberato [at 515]: '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.'*

In *De Silva v The Queen* [\(2019\) 268 CLR 57](#); [\[2019\] HCA 48](#), [11], the majority said that a *Liberato* direction may be appropriate in circumstances other than where there is conflicting sworn evidence. Their Honours said:

*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 avoid a perceptible risk of miscarriage of justice.*

A *Liberato* direction may also be required where the Crown has tendered a pretext call in which the Defendant sets out his or her version of events. See also the commentary to **Chapter 36 – Defendant's out-of-court admissions or self-serving statements – including police interviews and pre-text calls.**

Where the Defendant calls but does not give evidence, an *Azzopardi* direction is required (*Azzopardi v The Queen* [\(2001\) 205 CLR 50](#); [\[2001\] HCA 25](#); see also *R v Hartfiel* [\[2014\] QCA 132](#)).

As to the dangers of conveying to the jury the impression that it is for them ‘to decide where the truth lies’ where there are opposing bodies of evidence on central matters, see *R v Calides* [\(1983\) 34 SASR 355](#), 358 and *R v G* [\[1994\] 1 Qd R 540](#), 543.

The content of the suggested direction below has been referred to with approval in *R v Armstrong* [\[2006\] QCA 158](#) and in *R v McBride* [\[2008\] QCA 412](#). The content of the second paragraph is drawn from the judgment of Hunt CJ in *R v E* (1995) 89 A Crim R 325, 330.

### 26.3 Suggested direction

[Last reviewed: January 2025]

**I have already said that the Defendant does not have to give evidence or call other people to give evidence on [his/her] behalf, or otherwise produce evidence. That the Defendant has done so does not mean that [he/she] assumed a responsibility of proving [his/her] innocence. The burden of proof has not shifted to [him/her]. The Defendant’s evidence [and that of the other witnesses called for the defence] is added to the evidence called for the prosecution. As I have said, the prosecution has the burden of proving each of the elements of the offence beyond reasonable doubt, and it is upon the whole of the evidence that you must be satisfied beyond reasonable doubt that the prosecution has proved the case before the Defendant may be convicted.**

**Often enough cases are described as ones of ‘word against word’. You should understand that in a criminal trial it is not a question of your making a choice between the evidence of the prosecution’s principal witness or witnesses, and the evidence of the Defendant [and/or his/her witnesses]. The proper approach is to understand that the prosecution case depends upon you the jury accepting that the evidence of the prosecution’s principal witness [or witnesses] was true and accurate beyond reasonable doubt, despite the [sworn] evidence by the Defendant [and/or his/her witnesses]. You do not have to believe that the Defendant is telling the truth before [he/she] is entitled to be found not guilty.**

**Where, as here, there is defence evidence, usually one of three possible results will follow:**

- 1. You may think the defence evidence is credible and reliable, and that it provides a satisfying answer to the prosecution’s case.**

**If so, your verdict would be not guilty.**

**or**

- 2. You might be uncertain about that evidence but consider that it *might* be true. In that case your verdict would be not guilty;**

or

3. You may not accept the Defendant's evidence – in which case you put it to one side.

You must not jump from deciding not to accept the Defendant's evidence to an automatic conclusion of guilt. Go back to *the evidence you do accept*, and ask yourself if, on the basis of that evidence, the prosecution has proved that the Defendant is guilty beyond a reasonable doubt.