Defendant Giving Evidence

I have already said that the defendant does not have to give evidence, or call other people to give evidence on his behalf, or otherwise produce evidence. That he has done so does not mean that he assumed a responsibility of proving his innocence. The burden of proof has not shifted to him. His 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(s) (and/or his/their 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 witnesses); so you do not have to believe that the defendant is telling the truth before he is entitled to be found not guilty. [1]

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 may think that, although the defence evidence was not convincing, it leaves you in a state of reasonable doubt as to what the true position was. If so, your verdict will be not guilty;**

   or[2]

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1 This paragraph is taken from the judgment of Hunt CJ in *R v E* (1995) 89 A Crim R 325 at 330.

2 cf *Middleton* (2000) 114 A Crim R 141 at 145, [13].

3. **you may think that the defence evidence should not be accepted. However, if that is your view, be careful not to jump from that view to an automatic conclusion of guilt. If you find the defence evidence unconvincing, set it to one side, go back to the rest of the evidence, and ask yourself whether, on a consideration of such evidence as you do accept, you are satisfied beyond reasonable doubt that the prosecution has proved each of the elements of the offence in question.** [3];[4]

Where the defendant calls but does not give evidence, an *Azzopardi* direction is required.[5]

3 The Supreme Court of Canada considers that a direction drawing attention to the need to acquit if defence evidence does no more than raise innocence as a reasonable possibility ought to be given routinely: *R v Avetysan* [2000] 2 SCR 745. 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 at 358; *R v G* [1994] 1 Qd R 540 at 543; cf *E* at 330.

4 This suggested direction as to the effect of the evidence a defendant gave was referred to with approval by the Court of Appeal in *R v Armstrong* [2006] QCA 158 and in *R v McBride* [2008] QCA 412.

5 *Azzopardi v The Queen* (2001) 205 CLR 50. See also *R v Hartfiel* [2014] QCA 132.