Defendant Giving Evidence (The *Liberato* direction)

Commentary

In *R v Rose* [2021] QCA 262, at [49] the Court discussed the "*Liberato*" direction (*Liberato* (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:*
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> > "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 at [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 – which deals with a defendant's interview.

Where the defendant calls but does not give evidence, an *Azzopardi* direction is required.[1]

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

Suggested direction

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. [2]

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;**

   If so, your verdict will be not guilty.

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

or[3]

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. [4] [5]

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

4 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.

5 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.