# DE SILVA v THE QUEEN (B24/2019)

Court appealed from: Court of Appeal of the Supreme Court of Queensland [2018] QCA 274

Date of judgment: 16 October 2018

Special leave granted: 12 April 2019

The Appellant was found guilty by a jury of having raped a woman ("the Complainant") by digital penetration of her vagina in the early hours of a certain morning after a night out.

At the trial, the Complainant gave evidence but the Appellant did not. In evidence however was an audio-visual recording of an interview of the Appellant conducted by police on the day after the alleged offence ("the police interview"). On the Appellant's version of events, the Complainant was naked from the waist down, she asked him to cuddle her and if he would date her, and she became upset when the Appellant then said that he had a girlfriend. The Appellant also denied that he had touched the Complainant's vagina. On the Complainant's account, she was wearing a shirt and underwear, she had fallen asleep after talking with the Appellant (who also had hugged her), and she later awoke to feel the Appellant committing the alleged offence after he had removed her underwear. Evidence was also given by friends of the Complainant, who were in a nearby bedroom at the time. They testified that the Complainant had burst into the bedroom, upset and yelling, and that she said what the Appellant had just done to her.

In an appeal against conviction, the Appellant contended that a miscarriage of justice had occurred due to the directions given by the trial judge, Judge Farr, in relation to how the jury should approach the evidence contained in the police interview. The Appellant submitted that Judge Farr had improperly used the word "innocence" twice while summing up in respect of how the jury might assess answers given by the Appellant during the police interview. The Appellant also submitted that, since the evidence in relation to the charged offence made the case essentially one of "word against word", Judge Farr should have warned the jury that even if they did not believe the answers given in the police interview, they ought not to find the Appellant guilty if a reasonable doubt remained. (Such a direction is known as a "*Liberato* direction", being based on the observations of Brennan J in *Liberato v The Queen* (1985) 159 CLR 507 at 515.)

The Court of Appeal (Fraser, Gotterson and Morrison JJA) unanimously dismissed the Appellant's appeal against conviction. Their Honours held that there was no need for Judge Farr to have given a *Liberato* direction, since there was no oral testimony of the Appellant's to directly conflict with the Complainant's oral testimony. The Court of Appeal also found that Judge Farr's statements in relation to the jury potentially viewing some answers given in the police interview as pointing to the Appellant's "innocence" would not have conveyed to the jury that their task was to determine innocence or otherwise. The summing up as a whole had properly conveyed that the jury could not

convict the Appellant if exculpatory answers given by him had left the jury with a reasonable doubt as to his guilt.

The ground of appeal is:

- The Court of Appeal erred in finding that a *Liberato* direction is not required if the defendant does not give evidence.

The Appellant seeks leave to rely also on the following proposed ground of appeal:

- The Court of Appeal erred in failing to find that the directions given to the jury were inadequate and that as a result there was a miscarriage of justice.