



HIGH COURT OF AUSTRALIA

13 December 2019

DE SILVA v THE QUEEN
[2019] HCA 48

Today the High Court, by majority, dismissed an appeal from the Court of Appeal of the Supreme Court of Queensland. The appeal concerned whether the trial judge should have given the jury a direction of the type proposed in *Liberato v The Queen* (1985) 159 CLR 507, known as a "*Liberato* direction". A *Liberato* direction is a direction typically given in cases which turn on the conflicting evidence of a prosecution witness and a defence witness. It is to the effect that, even if the jury does not positively believe the defence witness and prefers the evidence of the prosecution witness, they should not convict unless satisfied that the prosecution has proved the defendant's guilt beyond reasonable doubt.

The appellant was convicted by a jury of one count of rape. The prosecution case at trial was dependent upon acceptance of the complainant's evidence. The appellant did not give, or call, evidence. A recorded interview between the appellant and the police, in which the appellant denied the offending, was in evidence in the prosecution case. The trial judge was not asked to give, and did not give, a *Liberato* direction.

The appellant appealed against his conviction to the Court of Appeal, arguing that a miscarriage of justice occurred by reason of the trial judge's failure to give a *Liberato* direction. The Court of Appeal held that, as the appellant had not given sworn evidence before the jury, there was no need for the trial judge to give a *Liberato* direction.

By grant of special leave, the appellant appealed to the High Court. A majority of the Court observed that in some cases it may be appropriate to give a *Liberato* direction, notwithstanding that the accused's conflicting version of events is not before the jury on oath. The majority explained that a *Liberato* direction serves to clarify and reinforce directions on the onus and standard of proof in cases in which there is a risk that the jury may be left with the impression that the evidence upon which the accused relies will only give rise to a reasonable doubt if they believe it to be truthful, or that a preference for the evidence of the complainant suffices to establish guilt. As such, a *Liberato* direction should be given in cases in which the trial judge perceives that there is a real risk that the jury might view their role in this way, whether or not the accused's version of events is on oath or in the form of answers given in a record of police interview.

In dismissing the appeal, the majority of the High Court found that a *Liberato* direction was not needed in the circumstances of this case. The trial judge had given repeated, correct directions as to the onus and standard of proof. Nothing in the summing-up suggested that the jury might have been left with the impression that its verdict turned on a choice between the complainant's evidence and the appellant's account in the interview. In the result, the trial did not miscarry by reason of the omission of a *Liberato* direction.

- *This statement is not intended to be a substitute for the reasons of the High Court or to be used in any later consideration of the Court's reasons.*