

The Liberato Direction

Liberato v The Queen (1985) 159 CLR 507

In a criminal prosecution, the onus of proof is always on the prosecution and is never shifted to the defence. Three propositions arise from this principle which have been consolidated in the Liberato direction. Every defence lawyer needs to understand this direction to represent their clients effectively. This article aims to assist legal practitioners appearing in the Local Court of NSW.

The Direction

Where the accused person gives an account, whether in court or in a record of interview, he does not have to persuade the jury that it is true. Nor can the jury infer that he is guilty because they reject his or her version. The jury must be instructed how to deal with the accused's evidence as follows:¹

First, if you believe the accused's evidence [the account relied on by the accused in his/her interview with the police], obviously you must acquit.

Second, if you find difficulty in accepting the accused's evidence [the account relied on by the accused in his/her interview with the police], but think it might be true, then you must acquit.

Third, if you do not believe the accused's evidence [if you do not believe the account relied on by the accused in his/her interview with the police], then you should put it to one side. Nevertheless, the question will remain: has the Crown, upon the basis of evidence that you do accept, proved the accused's guilt beyond reasonable doubt?

Fourth Situation

There is a fourth situation analogous to the third. This is where the accused person has exercised their right to silence and declined to give an explanation. No adverse inference can be drawn from this. So, the jury cannot speculate as to why the accused has not denied the charge or given an explanation. Nor can they give more weight to the prosecution evidence because it is uncontradicted.

Submissions

May it please the court, there is golden thread within the fabric of the Common Law that can always be seen. This is the principle that, in a criminal prosecution, the onus proof is always on the prosecutor and is never shifted onto the accused person.

¹ Criminal Trial Courts Bench Book [3-600]

In this case, the Accused has declined to give evidence and no adverse inference can be drawn from that. However, he did give an explanation in a record of interview when he was arrested. That evidence must be dealt with in accordance with the High Court decision in Liberato.

If YH accepts the Accused's explanation, then obviously you must acquit. If YH has difficulties with the Accused's explanation, but think it might be true, then you must acquit. If YH rejects the Accused's explanation, then the court must disregard it and consider whether the prosecution evidence by itself has proved the prosecution case beyond a reasonable doubt.

In my submission, the Accused's explanation is clear, concise and credible. It was given soon after the events concerned, before he took legal advice and before the prosecution case was disclosed to him. He was challenged by the Officer in Charge but was unshaken.

On the other hand, the prosecution case has many deficiencies. It is perfectly natural to desire that the Accused give evidence and plug some of those holes. However, the court cannot give more weight to the prosecution evidence because the Accused has exercised his right to silence. Drawing such an adverse inference would reverse the onus of proof and cast an onus onto the Accused person to prove his innocence. This would violate one of the most sacred principles of our legal system.

In my submission, the Accused's explanation is at the very least 'possible' – it might be true - and it follows that YH must have a reasonable doubt. The Accused is entitled to an acquittal.

I'm available every day if you have any interesting issues.

Chris Nowlan
Barrister-at-Law
Ph: (02) 8251 0066
chris@chrisnowlan.com