LEGAL AID NEW SOUTH WALES

CRIMINAL LAW CONFERENCE 2022

"WHEN AN ACCUSED GOES INTO EVIDENCE"

The Honourable A S Bell

Chief Justice of New South Wales*

Introduction

1 I begin by acknowledging the traditional custodians of the land on which we meet today, the Gadigal of the Eora Nation, and pay my respects to their Elders, past and present.

2 I also offer my full support for the Uluru Statement from the Heart, as I did at my swearing in ceremony in March of this year. It is a profound and dignified statement which all lawyers should champion and support. Those in this audience know better than most how important it is that the aspirations of the Uluru Statement are realised.

3 It is a great pleasure to have been invited to deliver this morning's keynote address. In so doing, I am acutely conscious that I am a relative newcomer to the area of criminal law, having principally practised in commercial law whilst at the Bar.

4 I was just beginning to accept some criminal briefs, albeit with a commercial flavour, at the time of my appointment to the Bench in 2019 and one of my few regrets in relation to being a barrister is that I did virtually no criminal law work. I did, however, have the benefit of getting to know some senior criminal lawyers during my various incarnations on Bar Council. When I was a very junior member of Bar Council, the late great Ian Barker QC was President. When I

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returned to Bar Council many years later, Philip Boulten SC was in the Chair and was an outstanding President, as more recently still was Tim Game SC, that deeply respected criminal lawyer. Tim steered the Bar through the worst of the pandemic with great fortitude and skill. Most recently, the Bar has been led by Michael McHugh SC and Gaby Bashir SC, both senior and experienced criminal law practitioners.

5 I have now also had three and a half years sitting regularly on the Court of Criminal Appeal where I have found the quality of advocacy to be almost universally excellent on both sides of the record. And it is not only the barristers who stand out for praise. In his swearing in speech, Justice Mark Ierace went out of his way to "acknowledge the professionalism of the solicitors of Legal Aid New South Wales, some of whom instructed me for periods of more than ten years". His Honour said that "[t]hey are without peer in their skill and dedication." I have no doubt that that observation was well made.

6 The work of criminal lawyers, both as solicitors, solicitor advocates and at the Bar, is demanding and, on the defence side, where resources are scarce, I am acutely aware of how hard defence lawyers work for remuneration, which is a far cry from that received by those in commercial practice. That is a measure of your dedication, commitment to the administration of justice and principled belief that people charged with criminal offences are entitled to a fair trial and competent representation. This often results in what is in effect and substance hours of unpaid additional work in aid of an accused. That work is a testament both to professionalism and, in many cases, great compassion and sensitivity since, as we all know, whilst some criminal activity is driven by greed and selfishness, much criminal conduct is at least contributed to by systemic societal problems, cycles of disadvantage (often severe) and mental health issues.

An important preliminary observation

7 Before turning to my topic, I wish to take this opportunity to say something on the public record about the late Judge Peter Zahra SC, whom many of you will have known or at the very least known of, and who tragically died only a couple of weeks ago mid-trial and in his 16th year on the District Court Bench. Apart

from the personal tragedy for his family and friends, the loss of a senior, vastly experienced judge is a very significant loss to the community. Wisdom and judgment of the kind he personified cannot just be plucked from the shelf and instantly replaced.

8 Peter Zahra was one of many senior judges in this State who have come up through Legal Aid and the Public Defenders. In delivering her eulogy, Judge Leonie Flannery SC recorded that, in his late 20s, Judge Zahra commenced a six- or seven-year period "managing a punishing workload at Blacktown Local Court single-handedly" before moving to the Inner City Local Courts and becoming the Senior Solicitor at Central, the Custody Court. After a period with the DPP, he moved to the Public Defenders, and was appointed Deputy Senior Public Defender in 1999 and Senior Public Defender two years later, taking silk after only 11 years at the Bar.

9 Peter Zahra's career exemplified Legal Aid's rich tradition of producing accomplished lawyers that go on to lead in the profession. It is important to put on the record aspects of that tradition, not just for the sake of it but also to illustrate how the valuable work of legal aid lawyers and the skills honed in its undertaking have long term benefits for the wider administration of justice in New South Wales.

10 For example, in the Supreme Court, Justice Peter Johnson, who will shortly retire to take up the important position of Law Enforcement Conduct Commissioner, and Justice RA Hulme, who together have been the mainstay of the Court of Criminal Appeal for many years and undertaken some of the heaviest lifting in the Common Law Division of the Supreme Court, both commenced their careers in the forerunners to Legal Aid.

11 Justice Johnson's work as a legal aid solicitor between 1976 and 1982 provided a grounding in the real world of criminal law. For him, the colour of the courts added to the black letters found in law books. Notably, although his work in this area was a long time ago, his Honour maintains that his memories and experiences of those times have had a significant and ongoing influence upon his life and practice of the law, including years spent in the Hurstville Legal Aid office with the late, great criminal barrister, Paul Byrne SC. His Honour holds

the strong belief that working at Legal Aid exposed him to opportunities that would never have been available to him at a private firm.

12 When my Research Director asked Justice Hulme how his experience at Legal Aid shaped him as a lawyer, his Honour identified three lessons. The major lesson, as he put it, is that every accused, every offender, every prisoner has a unique life experience that needs to be understood to best advance or protect their interest in the case at hand. The significant lesson is that it is your duty to every client to put the time and effort into preparation. The third and final lesson, the enduring lesson, is to not compound your mistakes by failing to learn and improve from them. Justice Hulme reflects that what boosted his self-development and self-assurance as an advocate was the support and guidance of great criminal lawyers who were not only his colleagues at Legal Aid, but mentors, tutors and role models. I am sure, and certainly hope, that that degree of professional camaraderie and collegiality continues to this day. Conferences such as this are an important part of that.

13 Other Supreme Court judges who have had a direct or indirect association with Legal Aid and the Public Defenders Office include Justices Button, Ierace and Dhanji. Let me also say a few things about them.

14 In 1979 with the passing of the *Legal Aid Commission Act 1979* (NSW), the New South Wales government established the Legal Services Commission, the forerunner of today's Legal Aid NSW. A few years afterwards, in 1986, a 25-year-old Richard Button secured a position with the Commission, a striking change from his previous job in the legal department of the then State Bank (although he had volunteered at the Redfern Legal Centre). His Honour began with the Prisoners Legal Service, running parole board hearings and Visiting Justice hearings where the work was emotionally demanding. He recalls that his colleagues were tirelessly committed to getting justice for their clients, without "beg-pardons", without self-doubt, armed with sheer toughness alongside an enduring sense of fun.

15 He also reflected that "without a doubt, working at Legal Aid was the key that unlocked the door of my career, and really, my entire life", and refers to the

sheer quantity and quality of the work Legal Aid offered him, and the great variety and opportunity to move across different practices in the criminal law, from bails to trials to appeals. That is what, in his Honour's words and I quote, makes "Legal Aid the leading criminal law firm in New South Wales". That accords with Justice Ierace's view to which I have already referred.

16 For Justice Dhanji, the most recent appointment to the Common Law Division of the Supreme Court, Legal Aid gave him the opportunity to specialise in criminal law from the outset. Like Justice Button, he started in the Prisoners Legal Service. In his words he was a "shiny know-nothing graduate, dealing with a client base that knew a lot more about the criminal law than me". Aside from getting on his feet early, Justice Dhanji's time in the Prisoners Legal Service exposed him to some brilliant advocates, including John Basten and Peter Hidden, later of course to have been senior judges of the Supreme Court.

17 It was in the vast jurisdiction of the Local Court that Justice Dhanji spent the rest of his time working at Legal Aid before going to the Bar. Having never entertained the prospect of doing so before his time at Legal Aid, his Honour credits doing all of his own advocacy at the Local Court with giving him the confidence and skillset to see himself as a barrister. In that environment, he discovered that the facts were not often on his side, as a result of which he learnt the importance of a close grasp of legal principle as part of the defence lawyer's armoury. Certainly, whilst a senior counsel, his Honour brought his encyclopaedic knowledge of criminal law to the fore in his more than 300 appearances in the CCA. It is now being deployed from the other side of the Bar table.

18 Other Supreme Court judges have had briefer but still formative periods at Legal Aid NSW. These include Justice Wilson and Justice Natalie Adams, who I went to Law School with, also spent some time early in her career at Legal Aid, initially as the duty solicitor at Hurstville and then in indictments at Parramatta. In her Honour's swearing in speech, she reflected upon having "worked with an exceptional group of hardworking lawyers [at both the DPP and Legal Aid] who embody the meaning of the phrase, 'public service'", and spoke of the

challenges faced by criminal lawyers at the coalface and the dedication brought to their work by lawyers on both sides of the record.

19 In the District Court, there are a significant number of judges, including many female judges, who have similarly strong connections with Legal Aid NSW. These include Judges Flannery SC, Yehia SC, Mottley and Beckett and Judge Skinner, who is now the President of the Children's Court of New South Wales. Outside the criminal law, Judge Kylie Beckhouse was appointed directly from Legal Aid to the Federal Circuit and Family Court of Australia. And there are also of course a very large number of magistrates with strong connections to Legal Aid.

20 Members of this audience will also have noted the recent appointment to the United States Supreme Court of Ketanji Brown Jackson – the first Black woman to sit on the highest bench in America and the modern Court's first justice with experience as a public defender.

21 These biographical diversions underline that you are all, through your connection with Legal Aid, part of an extraordinarily rich and honourable tradition. It is a tradition which puts flesh on the bones of part of what we mean by the rule of law. Speaking on my own behalf and that of the Supreme Court, your work is greatly valued.

Going into evidence

22 I turn now to the "advertised" topic, "when an accused goes into evidence".

23 For any barrister or solicitor advocate, whether to call a particular witness is a matter requiring careful forensic choice, involving assessments of the matters in issue, the course of the evidence and trial to the point at which the witness might be called, and, of course, one's perception as to how the witness, if called, may fare under cross examination. This forensic choice is probably at its most acute when the decision is whether to call an accused in criminal proceedings.

24 My choice of the topic "when an accused goes into evidence" was prompted by a recent appeal on which I sat, *Haile v R* [2022] NSWCCA 71,[1] and to which I

[1] ("*Haile*").

shall turn in due course concerning the so-called *Liberato* direction. As I shall explain, the role of *Liberato* directions is likely to assume increased importance in view of the affirmative consent reforms in New South Wales which, as fate would have it, in fact come into effect today and form the basis of the next session at this Conference.

25 In addition to the *Liberato* direction, I propose to address an interesting issue which can arise in a joint trial when both accused go into evidence, with each seeking to blame the other, the so-called "cut-throat" scenario. I will focus on one particular issue which arose in the notorious *Rogerson/McNamara* case,[2] a conviction appeal from which was heard by Justices Beech-Jones (as he then was), RA Hulme and myself in 2020, in relation to which an application for special leave to appeal has been filed.

The Liberato *direction*

26 *Liberato v The Queen*[3] involved several accused being jointly tried for the rape of the complainant. Each accused admitted to having engaged in the act, or acts, of sexual intercourse with which he was charged, but claimed to have believed that the complainant was consenting and gave evidence to that effect.[4]

27 The so-called *Liberato* direction derives from observations made in the1985 High Court decision of the same name and, in particular, the following passage

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[2] *Rogerson v R; McNamara v R* [2021] NSWCCA 160 ("*Rogerson/McNamara*").

[3] *Liberato v The Queen* (1985) 159 CLR 507 ("*Liberato*").

[4] The short facts were as follows: In January 1984, MK, a 23-year-old woman visiting Australia from Germany, met one of the applicants, Rooney, and other members of a group as they were crossing the Nullarbor Plain on their way to Adelaide. On 16 January, Rooney contacted MK and they caught up at a suburban hotel where they met Rooney's friends, including another of the applicants, Liberato. The party stayed at the hotel drinking until closing time, about midnight. MK then accompanied Rooney to his friends' house in an Adelaide suburb. MK and some of the men in the party stayed up all night, drinking beer and playing cards. At about 5:00am, another applicant, Egan, grabbed MK and pressed her to him, but she rejected his embrace. At about 6:00am, Egan seized MK, carried her into the loungeroom and engaged in the first of eleven acts of sexual intercourse which founded the counts of rape charged against the respective applicants.

MK and each of the applicants gave evidence at the trial. MK denied that she had consented to any act of intercourse, and she described events from which the jury could infer that the applicants must have had a guilty state of mind. The applicants each denied that he had either of the guilty states of mind – knowledge or reckless indifference – and their description of the events was such that the jury could infer that MK might have been consenting to the several acts of sexual intercourse.

from the judgment of Brennan J:[5]

> "When a case turns on a conflict between the evidence of a prosecution witness and the evidence of a defence witness, it is commonplace for a judge to invite a jury to consider the question: who is to be believed? But it is essential to ensure, by suitable direction, that the answer to that question (which the jury would doubtless ask themselves in any event) if adverse to the defence, is not taken as concluding the issue whether the prosecution has proved beyond reasonable doubt the issues which it bears the onus of proving. The jury must be told that, even if they prefer the evidence for the prosecution, they should not convict unless they are satisfied beyond reasonable doubt of the truth of that evidence. 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. His Honour did not make that clear to the jury, and the omission was hardly remedied by acknowledging that the question whom to believe is 'a gross simplification'."

28 In the same case, Deane J (who agreed with Brennan J) observed that the trial judge's correct directions and explanations to the jury about the requirements of the criminal onus and standard of proof:

> "[…] must, however, also be considered against a background where, on a number of occasions, his Honour directed the jury in terms which indicated that the overall question for them essentially involved the making of a 'choice' between prosecution and defence evidence: 'in many ways this case boils down to who do you believe'; 'You may well think that the attitudes are so far apart that you have to make a choice'; 'The case may well be one as I have put to you before, where the real question is who do you believe on the whole of the evidence, (the complainant) or the accused?' Provided that they are accompanied by clear and unequivocal directions about the criminal onus and standard of proof, express or implied references in a summing up to a 'choice' between particular witnesses are, no doubt, sometimes unavoidable and commonly unobjectionable. The main significance of the directions about having to make a 'choice' lies, in the present cases, in their clear suggestion that the 'real question' in the cases turned upon a *mere* 'choice' between the evidence of the complainant and that of the accused and in the possible contribution of that suggestion to the overall effect of the misdirections about onus of proof." (Emphasis added.) [6]

29 Justice Deane's conclusion was that:[7]

> "It is true that, as the Court of Criminal Appeal pointed out, the members of the jury in the present case 'obviously believed' the complainant. That is however, in my view, simply beside the point on the question of the effect of the misdirections about onus of proof and choice between witnesses. What would be in point on that question would be if it appeared that the members of the jury were satisfied not only that, as a matter of choice, they accepted the evidence of the complainant in preference to the evidence of the accused but that it was plain beyond reasonable doubt that the evidence of the complainant should be

[5] *Liberato* 515.
[6] Ibid 519.
[7] Ibid 520-521.

> so accepted. It is, however, impossible to say that the members of the jury were so satisfied in the present cases unless one first assumes against the accused that the learned trial judge's misdirections did not have the result that some or all of the jury failed properly to appreciate the nature and function of the criminal onus and standard of proof."

30 Justices Brennan and Deane dissented as to the outcome in that case, but this was on overall miscarriage of justice grounds. Criticisms of the trial judge's directions to the jury in terms of choice had been made in the South Australian Court of Criminal Appeal and the majority in the High Court agreed with those criticisms as, obviously, did Brennan and Deane JJ.

31 You will have noticed that in the passage from Deane J's decision, his Honour observed that, "[p]rovided that they are accompanied by clear and unequivocal directions about the criminal onus and standard of proof, express or implied references in a summing up to a 'choice' between particular witnesses are, no doubt, sometimes unavoidable and commonly unobjectionable." [8] This observation did not survive the High Court's 2002 decision in *Murray v The Queen*,[9] where Gummow and Hayne JJ made it plain that:[10]

> "The choice for the jury was not to prefer one version of events over another. The question was whether the prosecution had proved the relevant elements of the offence beyond reasonable doubt. This required no comparison between alternatives other than being persuaded and not being persuaded beyond reasonable doubt of the guilt of the appellant."

32 In *Douglass v The Queen*, [11] a unanimous High Court held that the characterisation of a case as "word against word" fails to recognise that the resolution of a criminal case does not depend on whether the evidence of one witness is preferred to that of another but, rather, upon whether the evidence taken as a whole proves the elements of the offence beyond reasonable doubt.

33 *Liberato* was most recently considered by the High Court in *De Silva v The Queen*.[12] That was not a case where the accused had gone into evidence at the trial, although his account of events was in evidence through the admission he made in his police interview. In *De Silva*, the plurality concluded that "while it may, in some cases, be appropriate to give a *Liberato* direction

[8] Ibid 519.
[9] (2002) 211 CLR 193 ("*Murray*").
[10] Ibid 213 [57].
[11] (2012) 86 ALJR 1086, 1089 [12].
[12] (2019) 268 CLR 57 ("*De Silva*").

notwithstanding that the accused's conflicting version of events is not before the jury on oath, this was not such a case".[13] There is, however, a valuable discussion of both the history and evolution of the *Liberato* direction in *De Silva*.

34 One of the important "take-outs" from *De Silva* was the majority's observation that subject to statute, a *Liberato* direction should be given in a case in which the trial judge perceives that there is a real risk that the jury might view their role as involving a matter of preferring the evidence of a complainant over that of the accused, or where the jury is left with the impression that the evidence on which the accused relies will only give rise to a reasonable doubt if the jury believes it to be truthful.[14]

35 The majority also said that the occasions on which a jury will be invited to approach their task as involving a choice between prosecution and defence evidence should be few.[15] Unfortunately, the High Court gave no guidance as to what those few occasions were when the presentation of the issue to the jury in terms of a "choice" would be acceptable. As I recently said in *Haile*, the recent decision of the Court of Criminal Appeal to which I referred earlier, "a positive direction or series of directions in terms of 'choice' of competing versions renders it highly likely that the jury will be misguided in its deliberations, and the trial miscarry".[16]

36 In *Haile,* the trial judge employed in his directions to the jury the inappropriate language of "choice" as between "competing" versions, such that his Honour wrongly and misleadingly suggested a binary inquiry was required in circumstances where the inculpatory "version" of events may have been quite inadequate to satisfy the standard of proof beyond reasonable doubt.[17]

37 *Haile* was not a sexual assault case but was one where the accused went into evidence and his testimony was at odds with that of a Crown witness, Ms Archbold. The problematic directions included the following:[18]

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[13] Ibid 61 [4] (Kiefel CJ, Bell, Gageler and Gordon JJ).
[14] Ibid 63 [10] (Kiefel CJ, Bell, Gageler and Gordon JJ).
[15] Ibid 63 [9] (Kiefel CJ, Bell, Gageler and Gordon JJ).
[16] *Haile* [2].
[17] Ibid (Bell CJ).
[18] See ibid [42] (Bellew J).

> "Now the position of the wounds and the trajectory of the bullet are matters not in dispute and you may think they give you a good idea of where the gun was relative to the deceased when it was discharged. That may also help you to reach some view as to where the gunman was *and help you in making a decision between the quite different accounts of Miss Archbold and [the appellant].*" (Emphasis added.)

38 In the context of dealing with that topic, the trial judge also said:[19]

> "Although absolute positions might be unable to be determined, nevertheless, *the matters to which I have referred are not in issue and I have said may help you to decide between the different accounts of Ms Archbold and [the appellant].*" (Emphasis added.)

39 In addressing another topic, defined as "[d]etails of events in the car park", the trial judge referred to Ms Archbold's account on the one hand, and the appellant's account on the other, in terms of what each had said had occurred at or about the time the deceased was shot. On a number of occasions his Honour stated that in light of inconsistencies between the two witness accounts, both accounts cannot be right.[20] The trial judge then posed the following question to the jury, "*[i]s there anything to help you decide between these two versions?*", after which his Honour suggested matters of evidence for consideration and concluded, "*[t]hat is the sort of thing I suggested you have a look at when you are trying to make a judgment between competing versions*."[21]

40 Following these directions, defence counsel sought a *Liberato* direction from the trial judge, noting that his Honour had incorrectly, in effect, directed the jury to choose between the two witnesses.[22] The trial judge refused to give a *Liberato* direction, noting his initial instructions to the jury included "considerable reference to the obligation on the Crown to prove beyond reasonable doubt" and that "nothing I said thereafter was to be regarded as a qualification to those remarks".[23]

41 Towards the end of the summing-up, counsel for the appellant renewed his application for a *Liberato* direction and in doing so, referred the trial judge to the

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[19] See ibid [43] (Bellew J).
[20] See ibid [45]-[47] (Bellew J).
[21] See ibid [48] (Bellew J) (emphasis added).
[22] See ibid [49] (Bellew J).
[23] See ibid.

relevant section of the Bench Book.[24] His Honour considered that section and then stated the following:[25]

> "[…] I did have a look at the Bench Book where [counsel for the appellant] suggested that I look and the notations there in the case of the Liberato direction where the jury is given clear directions regarding the onus and standard of proof, Liberato-type direction may be unnecessary. I believe I gave them clear directions in that respect.
>
> The passage goes on, 'If there's no suggestion of a choice between conflicting cases, a Liberato direction is not required'. There is a conflict here. I accept that."

42 In rejecting the re-application for a *Liberato* direction, the trial judge said in his ex-tempore reasons that he considered the fundamental directions he gave to the jury at the beginning of his summing-up "were clear, were emphasised and some of them, particularly dealing with the onus and burden of proof were included on every page of my written directions to the jury".[26] His Honour also reasoned that this was not a case where there was "one witness against the accused", noting the Crown case depended on "at least four strands or witnesses in it".[27]

43 Having determined that a *Liberato* direction should not be given, the trial judge concluded his summing-up with the following final directions:[28]

> "Now, during the course of my address, *I said that the accounts of Ms Archbold and [the appellant] as to what occurred in the car park, were very substantially different and you had to choose between them; you do*.
>
> *I also suggested, on one or two occasions, I think in relation to parts of Ms Archbold's evidence, that you ask yourself: Why would she lie about that? That remains a proper question for you to ask yourselves*. However, in respect of both of these matters, choosing, why did she lie and, indeed, all issues in the case, do not allow yourselves to lose sight of the fact that, at the end of the day, the onus of proof remains on the Crown to prove the cases it brings beyond reasonable doubt.
>
> As I said, you can use any piece of evidence you think is reliable enough to rely on in trying to reach your ultimate conclusion. But, at the end of the day, you have got to ask yourself, accepting all that: Am I persuaded to the requisite standard?" (Emphasis added.)

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[24] See ibid [50] (Bellew J).
[25] See ibid [52] (Bellew J).
[26] See ibid [53] (Bellew J).
[27] See ibid [53] (Bellew J).
[28] See ibid [54] (Bellew J).

44 The leading judgment in *Haile* was delivered by Bellew J with whom Ierace J and I agreed. His Honour distilled, with his customary clarity, the following propositions:[29]

> "[72] First, it is never appropriate for a trial judge to frame the issue for a jury's determination as one which involves the making of a choice between conflicting Crown and defence evidence. In a criminal trial, the issue is always whether the Crown has proved its case beyond reasonable doubt.
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> [73] Secondly, a [*Liberato* direction] will be appropriate for the purposes of reinforcing directions as to the onus and standard of proof in any case where, absent such a direction there is a risk that the jury may be left with an impression that:
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> (a) the evidence upon which the accused relies will only give rise to a reasonable doubt if that evidence is believed as truthful; or
>
> (b) a preference for the evidence led by the prosecution is sufficient to establish guilt.
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> [74] Thirdly, if such a direction is considered appropriate, it should be given in terms which make it clear that:
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> (i) a preference for the evidence led by the Crown is not a sufficient basis for a finding of guilt;
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> (ii) the jury must not convict the accused unless satisfied, beyond reasonable doubt, of the truth of the evidence relied upon by the Crown;
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> (iii) if the accused's account is accepted, a verdict of not guilty must follow;
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> (iv) if the accused's account is not accepted, but the jury consider that it might be true, a verdict of not guilty must follow;
>
> (v) if the accused's account is not accepted, it should be put to one side, and the question will remain whether the Crown, on the basis of the evidence that is accepted, has proved the guilt of the accused beyond reasonable doubt; and
>
> (vi) even if evidence given by an accused is not positively believed, the jury must nevertheless acquit the accused if that evidence gives rise to a reasonable doubt about his or her guilt."

[29] Ibid [72]-[74].

45 Bearing these principles in mind, his Honour determined that the trial judge had erred in a number of respects during his summing-up. While the trial judge had appropriately directed the jury, both at the commencement of his summing-up and at its conclusion, that the Crown bore the onus of proof, on a series of occasions in the course of his summing-up, which extended over a number of days, the trial judge directed the jury in terms which, expressly or by implication, framed the issue in terms of the requirement for a choice between the evidence of one witness and the evidence of the appellant.[30] Those directions, Bellew J concluded, were erroneous, noting that the authorities make it clear that framing the issue in such terms is never appropriate, for the simple reason that doing so has the tendency to obscure the fundamental fact that in any criminal trial, the issue for the jury is whether the Crown has established its case beyond reasonable doubt.[31]

46 As the facts of *Liberato* and *De Silva* illustrate, questions about *Liberato* directions will often arise in the context of sexual offending, where the outcome of a trial may hinge on competing versions of events as to whether consent was given. In this context, as already noted, today marks the day that amendments to the *Crimes Act* concerning sexual consent – often referred to as the affirmative consent reforms – come into force.[32] These reforms were introduced following a review by the NSW Law Reform Commission into laws governing consent in relation to sexual offences, led by the Honourable Acting Justice Simpson.

47 The subsequent amendments, passed in November last year, introduce a number of changes to Division 10 of the *Crimes Act,* affecting both the physical and fault elements of sexual offences. Two amendments are particularly noteworthy for present purposes: first, the introduction of a provision to clarify that a person does not consent to sexual activity unless they *say or do* something to communicate consent, and second, an amendment to the effect that the belief of an accused that there was consent will not be reasonable unless the *accused* said or did something to ascertain whether the other person consented.

[30] Ibid [76].
[31] Ibid.
[32] See *Crimes Legislation Amendment (Sexual Consent Reforms) Act 2021* (NSW).

48 In the second reading speech, the Attorney-General said:[33]

> "The law of consent reflects community standards of respectful sexual relations. This means that, where there is consent that continues to be reciprocated by each participant—for example, through body language—a person will not need to say expressly at each step, 'Do you consent now?' Consent can be imparted through non-verbal cues and encouragement. While consent to one sexual activity is not a substitute for consent to a different sexual activity, a person can, through their words or actions, indicate their consent to a range of sexual activities. The reforms ensure that consent can also be withdrawn by words or conduct—see proposed section 61HI (2). This requirement serves to provide fairness to an accused because it precludes an internal—that is, in their own mind—withdrawal of consent to, for example, penetration when that withdrawal is not communicated."

49 I suspect that the introduction of the affirmative consent reforms will lead to a greater number of accused making the decision to go into evidence in sexual assault cases, with juries being presented with competing versions of events as to both initial consent or absence thereof, and/or the withdrawal of consent. In such cases, the perhaps natural human tendency for a jury to reach a conclusion as to whose account they prefer in what are frequently styled "he said: she said" cases will need to be carefully countered by defence counsel and trial judges to ensure that the vital insistence on proof beyond reasonable doubt, a cardinal principle of our criminal justice system, is not undermined or emasculated. That is why the *Liberato* direction is so important and why Justice Bellew's recent and clear exposition of it so valuable.

Co-accused giving evidence

50 I now turn to speak about an aspect of the appeal brought by Mr Glen McNamara (**McNamara**) against his conviction, with the co-accused Mr Roger Rogerson (**Rogerson**), of the shooting murder of Mr Jamie Gao in a storage unit in Padstow on 20 May 2014,[34] for which he was sentenced to life imprisonment.

51 The facts of Rogerson and McNamara's offending are notorious and do not bear recital beyond that brief introduction. The trial before Bellew J and a jury was heard over 78 days from February–May 2016. At trial, both Rogerson and McNamara ran "cut-throat" defences, with each of the accused arguing that the

[33] New South Wales Legislative Assembly, *Parliamentary Debates* (Hansard), 20 October 2021, 52.
[34] *Rogerson v The Queen; McNamara v The Queen* (2021) 290 A Crim R 239; [2021] NSWCCA 160 (**McNamara v R**).

other had arranged to meet with the deceased in the storage unit and had subsequently discharged the gun to kill the deceased. It followed that both men denied the existence of a joint criminal enterprise to kill the deceased and steal drugs from him. On McNamara's case, his co-operation with Rogerson to conceal the death of the deceased in the ensuing days, including to dispose of the deceased's body, was compelled by duress, out of fear that Rogerson would engage in violent retributive conduct against him and his family.

52 Crucially, for the purposes of the present topic, McNamara elected to give evidence in his defence. On the 49th day of the trial, immediately following the close of the case for the Crown, McNamara was called as the first witness in his defence. During McNamara's examination-in-chief, his counsel properly foreshadowed that he would adduce evidence from McNamara of two conversations which allegedly occurred between him and Rogerson. It was not in dispute that the evidence of those conversations was relevant for the purposes of s 55 of the *Evidence Act 1995* (NSW), as, in the words of McNamara's senior counsel on appeal, it would "provide an innocent explanation for what would otherwise be highly incriminating conduct" after the death of the deceased.[35]

53 The first of the conversations in question was said to have occurred during February 2014, approximately three months prior to the murder, in the context of McNamara having agreed to write a book concerning Rogerson's life and career as a police officer. In that exchange, Rogerson is alleged to have admitted to McNamara that he had killed or conspired to kill some six people, including Michael Drury, Alan Williams, Christopher Flannery, Warren Lanfranchi, Sallie-Anne Huckstepp and Luton Chu. To give some hint of the "flavour" of the conversation as recalled by McNamara, as outlined by his counsel at trial:[36]

> "Rogerson said to the accused, 'When I was charged with conspiracy to murder Drury … Clive Small, got Alan Williams to give me up. Williams only did three years for pleading guilty to conspiracy with Flannery and me to murder Drury. Williams is dead now. It looked like suicide but it wasn't. I never let anyone get away with giving me up. I couldn't let Williams get away with that …

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[35] *McNamara v R* at [479].
[36] *McNamara v R* at [481].

> The rejoinder from McNamara was, 'You arranged his murder?' [To which Rogerson responded], 'Yeah, I'm connected everywhere. He though[t] he was living the quiet life after getting out of gaol; not so'."

54 The second foreshadowed conversation was much shorter and was alleged, by McNamara, to have occurred in the storage unit on 20 May 2014, immediately after McNamara alleged that Rogerson had killed the deceased and in circumstances where McNamara claimed to have taken cover under a table. At that point, according to McNamara, he asked Rogerson "why? why? why?" did he fire a second and fatal shot at the deceased. Rogerson was said subsequently to have "turned and approached [McNamara] pointing the gun directly at his head" and said:[37]

> "I did Drury, I did Drury. I'll do you too. Get up and held me … or I'll leave you on the floor lying next to him … He pulled the [] knife first, get up and help me or you'll be as dead as him, then I'll kill your [daughters]."

55 McNamara evidently was seeking to rely on this material to explain his subsequent co-operation with Rogerson in the disposal of the deceased's body.

56 Counsel for Rogerson at trial objected strongly to the admission of evidence of these two conversations, on the basis that it would occasion "overwhelmingly unfair prejudice to [Rogerson], incapable of being cured by any reasonable direction to the jury".[38]

57 In a ruling given on the following day, the 50th of the trial, Bellew J excluded from admission into evidence the entirety of the first conversation and the repeated words "I did Drury" in the second conversation,[39] on the basis of s 135(a) of the *Evidence Act*, which provides that:

> "**General discretion to exclude evidence**
>
> The court may refuse to admit evidence if its probative value is substantially outweighed by the danger that the evidence might—
>
> (a) be unfairly prejudicial to a party

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[37] *McNamara v R* at [484].
[38] *McNamara v R* at [473].
[39] *R v Rogerson; R v McNamara (No 45)* [2016] NSWSC 452.

…"

58 Rogerson's arguments based on prejudice succeeded.

59 At trial, the point was not taken that Rogerson was not a "party" to McNamara's trial, with the consequence that s 135(a) was not able to be invoked by Rogerson.

60 This point was, however, taken by McNamara's counsel on appeal. The Court said, at [511], that:

> "The question as to whether the term 'party' in s 135(a) of the *Evidence Act* extends to a co-accused in a criminal trial must be considered as one of statutory construction having regard to the text of the section read in context (in the widest sense of the word) and having regard to the purpose of the statute or statutory provision in question.[40] The context may be or include statutory, historical or other context such as the procedural or practical context in which the statute is to operate. The immediate context is of course the other provisions of the *Evidence Act* itself, a point emphasised in *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355; [1998] HCA 28 at [69]".

61 The Court engaged in a close exercise of statutory construction, concluding that the relevant textual and contextual considerations supported a "broader construction" of s 135(a),[41] namely that the reference to "a party" extends to a co-accused in a joint trial.

62 Although "party" is more commonly employed in the parlance of civil, as opposed to criminal, proceedings, the extension of ss 135 and 136 to apply to criminal trials necessarily entails that an accused is a "party" to criminal proceedings, particularly where the definition of "admission" in the Dictionary to the *Evidence Act* specifies that a "party to a proceeding" includes an accused in a criminal trial.[42]

63 That a *co-accused* is also a "party" to a criminal proceeding against an accused was also supported by s 83 of the *Evidence Act*,[43] which preserves the

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[40] *SZTAL v Minister for Immigration and Border Protection* (2017) 262 CLR 362; [2017] HCA 34 at [14].
[41] *R v Qaumi (No 24)* [2016] NSWSC 505; *McNamara v R* at [522].
[42] *McNamara v R* at [515].
[43] *McNamara v R* at [517]–[519].

application of the hearsay rule to evidence of an admission in the case of a "third party", that term being defined in s 83(4) as:

> "a party to the proceeding concerned, other than the party who—
>
> (a) made the admission, or
>
> (b) adduced the evidence."

Thus, the definition in s 83(4) contemplates that there may be multiple parties to a criminal proceeding and that a co-accused is to be treated as a "party to the proceeding concerned".

64 From these "immediate" contextual considerations, the Court held that if the reference to "party" in s 136(a) did not extend to a co-accused in a criminal trial, then that section would be "robbed of much of its practical value in a joint trial where issues of fairness may require the nuanced and differential treatment of evidence", for example, by way of "express and careful" directions to the jury.[44] Where the power to make such directions derives from s 136, the Court of Criminal Appeal held that "the expression 'unfairly prejudicial to a party' must extend to a co-accused". It followed that Rogerson was a "party" to the trial of McNamara for the purposes of s 135(a) of the *Evidence Act*, on the basis that "party" must have the same meaning in s 135 as in s 136.

65 The argument advanced by McNamara, that where there is a joint indictment "[t]here are two trials proceeding together and neither defendant is a 'party' in the trial of the other defendant" was also held to be inconsistent with further aspects of s 135's "immediate context" in the *Evidence Act*,[45] including: s 20;[46] s 27;[47] s 41(4);[48] and s 104(6).[49] It is not necessary to delve into further detail of

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[44] *McNamara v R* at [520], citing *Webb v The Queen* (1994) 181 CLR 41 at 89; [1994] HCA 30.
[45] *McNamara v R* at [521].
[46] Which applies only in a criminal proceeding for an indictable offence and where multiple defendants in such a proceeding are referred to as parties to that single proceeding.
[47] Which provides that "a party may question any witness, except as provided by this Act".
[48] Which provides that "a party may object to a question put to a witness on the ground that it is a disallowable question".
[49] Which provides that leave is not to be given for cross-examination of a defendant by another defendant unless "(a) the evidence that the defendant to be cross-examined has given includes

the Court's reasoning, including its detailed consideration of the position at common law.

66 What the Court of Criminal Appeal's decision makes clear is that s 135(a) of the *Evidence Act* may be relied upon to exclude an accused's relevant, probative evidence if its probative value is substantially outweighed by its prejudicial effect on a co-accused.

67 To take stock, the Court of Criminal Appeal in *McNamara v R* held that an accused is a "party" to the trial of their co-accused. It follows that s 135(a) empowers a judge, presiding over a trial of two or more co-accused, to exclude exculpatory evidence sought to be adduced or led from an accused on the objection of a co-accused that the probative value of the proposed evidence, to the accused seeking to introduce it, is substantially outweighed by the danger that the evidence might be unfairly prejudicial to the *co-accused taking the objection*.

68 This takes us to the special leave application filed by McNamara in the High Court. That application foreshadows an argument that the construction of s 135(a) given by the Court of Criminal Appeal misapprehends the traditional scope of the discretion at common law, which is limited to the exclusion of evidence tendered by the prosecution and not that which is introduced by the defence. It may be said to follow that the "broader construction" impermissibly fetters the duty of defence counsel to put the entire body of relevant evidence before the tribunal of fact, in order to assist the defence of the accused in answer to the prosecution case, irrespective of whether certain evidence is unfairly prejudicial to a co-accused.

69 No doubt the argument rejected by the Court of Criminal Appeal, to the effect that the "broader construction" runs contrary to the principle, rooted in public policy, that a court exercising criminal jurisdiction cannot encumber the process of justice by prohibiting an accused from relying on exculpatory evidence to

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evidence adverse to the defendant seeking leave to cross-examine, and (b) that evidence has been admitted".

defend himself or herself fully, will be re-run.[50] In the Court of Criminal Appeal, reliance was placed upon what was said to be the "English and Commonwealth position" at common law, which has relied heavily upon the statement of Lord Morris in *Lowery v The Queen*, a case in which the applicant sought to adduce expert evidence against his co-accused, that:[51]

> "It would be unjust to prevent either of them from calling any evidence of probative value which could point to the probability that the perpetrator was the one rather than the other."

70 The "broader construction" of s 135(a) favoured by the Court of Criminal Appeal, in its reliance upon textual and contextual considerations, is also argued to rely upon a misapprehension of the concept of an "indictment", it being argued that a single indictment against two or more co-accused properly admits of two or more separate trials accordingly. Reliance is placed upon the observation of Sir Kenneth Street, with whom Owen and Herron JJ agreed, in *R v Fenwick*,[52] that "[i]ndictments are to be read jointly and severally, and th[e] indictment, as is common practise in cases of murder although it is framed against two accused, is to be regarded as a joint and severable indictment of those accused".

71 These arguments, which raise difficult and highly nuanced yet foundational issues of criminal procedure, common law jurisprudence and statutory construction, serve to highlight that where an accused in a joint trial goes into evidence in support of their own "cut-throat" defence, there is necessarily a tension between two important principles. On the one hand, the accused should enjoy an unfettered right to advance his or her case in any way they see fit and, on the other, the trial judge must retain discretionary control of the evidence in order to protect against the danger of unfair prejudice to a party, in the circumstances of the particular trial.

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[50] See, for example, *Alister v The Queen* (1984) 154 CLR 404 at 414 per Gibbs CJ, 434–437 per Wilson and Dawson JJ; [1984] HCA 85.
[51] [1974] AC 85 at 102; see, also, *Murdoch v Taylor* [1965] AC 574 at 593; *Makin v Attorney-General (NSW)* [1894] AC 57 at 65; *R v Miller* (1952) 36 Cr App R 169 at 171; *Murch* at [36]–[39].
[52] (1953) 54 SR (NSW) 147 at 152.

72 In *McNamara v R*, the Court of Criminal Appeal concluded that by s 135(a) of the *Evidence Act*, Parliament afforded primacy to the latter over the former, albeit in very narrow and exceptional circumstances.