HIGH COURT OF AUSTRALIA

GLEESON CJ,
GAUDRON, McHUGH, GUMMOW AND HAYNE JJ

TKWJ APPELLANT

AND

THE QUEEN RESPONDENT

TKWJ v The Queen
[2002] HCA 46
10 October 2002
S176/2001

ORDER

Appeal dismissed.

On appeal from Supreme Court of New South Wales

Representation:

T A Game SC with M Buscombe for the appellant (instructed by Legal Aid Commission of New South Wales)

A M Blackmore SC with D M L Woodburne for the respondent (instructed by S E O'Connor, Solicitor for Public Prosecutions (New South Wales))

CATCHWORDS

TKWJ v The Queen

Criminal law – Conviction – Aggravated indecent assault – Aggravated indecency – Matters connected with conduct of defence – Failure of defence counsel to call character evidence – No application for voir dire – Whether tactical decision of defence counsel not to call character evidence constituted a miscarriage of justice where that evidence may have been excluded – Chance of acquittal "fairly open" not lost.

Criminal law – Appeal – Practice and procedure – "On any other ground whatsoever" – Allegation defendant not competently or adequately represented – Tactical decision at trial – Whether forensic advantage – Informed and deliberate decision – No miscarriage of justice.

Criminal law – Appeal – Circumstances in which conduct of legal practitioners can provide grounds for appeal – Relevant principles.

Criminal law – Jurisdiction – Trial judge – "Advance ruling" – Whether required by *Evidence Act* 1995 (NSW) – Whether within implied powers of District Court – Power to conduct voir dire to make "advance ruling".

Words and Phrases – "fairly open", "on any other ground whatsoever", "advance ruling".

Criminal Appeal Act 1912 (NSW), s 6(1).
Evidence Act 1995 (NSW), ss 55, 110, 135, 136, 137, 189, 192.
Crimes Act 1900 (NSW), ss 61M(1), 61O(1).
District Court Rules 1973 (NSW), Pt 53 rr 10, 11(1).

1 GLEESON CJ. Following a trial in the District Court of New South Wales, before Judge Viney QC and a jury, the appellant was convicted of two offences of aggravated indecent assault, and one offence of aggravated indecency, against C, the son of the woman with whom he was living at the time of the offences. The appellant received non-custodial sentences, involving orders for community service. One reason for the apparent leniency in sentence was the medical condition he suffered as a result of a serious accident. The judge took account of evidence of good character, adduced at the sentencing proceedings.

2 The appellant had also been the subject of allegations made by K, C's younger sister. It had originally been intended that the appellant would be charged with offences against C and K, and that the charges would be heard together. Later, the indictment was amended to omit the charges concerning K. There was evidence before the Court of Criminal Appeal that this amendment was made following warnings given by the Court of Criminal Appeal, in another case, of the dangers in trying together charges involving more than one complainant.

3 The appellant appealed against his convictions to the Court of Criminal Appeal. There was only one ground of appeal. It was as follows:

> "The appellant's convictions constitute a miscarriage of justice in that the trial was unfair."

4 Written particulars of that ground were provided. They stated:

> "(1) The appellant was the subject of allegations by two siblings of sexual offences committed contemporaneously.
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> (2) The statements of the complainants squarely raised the issue whether there had been dishonest collusion between them.
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> (3) The appellant sought a joint trial in order to assert:
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> (a) that the allegations were untrue and
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> (b) that the siblings had jointly fabricated the allegations.
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> (4) The Crown refused to present an indictment charging all matters.
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> (5) Counsel for the appellant informed the Crown that the appellant intended to raise his character for the jury's consideration as to his credibility and guilt.
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> (6) The Crown asserted that, if character was raised, the Crown would lead evidence in reply as to the allegations made by the complainant's sister.

> (7) Accordingly, as a consequence of (a) the Crown's reliance upon its right as to the content of the indictment, and (b) its insistence upon calling evidence as to the outstanding allegations in the event of raising of character, the appellant was unfairly denied the benefit of his good character in the jury's consideration of his credibility and as to his guilt."

5 In order to establish in the Court of Criminal Appeal the facts asserted in particulars (3), (4), (5) and (6), affidavits were sworn by the solicitor and the barrister who had represented the appellant at the trial.

6 It will be observed that, as the ground of appeal, and the particulars, were framed, the miscarriage of justice was said to have arisen from the fact that the appellant did not have a fair trial because he was "unfairly denied the benefit of [evidence of] his good character". The absence of such evidence was attributed to the conduct of the prosecution in exercising its right to frame the indictment so as to confine the charges to those involving C, and then in its "insistence" upon calling evidence from K if the appellant raised character as an issue. In truth, however, the direct cause of the absence of evidence of the appellant's good character was the decision of his counsel not to call such evidence. The prosecution did not and could not, prevent the appellant's counsel from calling character evidence, or any other evidence. The Crown prosecutor, in response to an inquiry made by defence counsel, indicated that if the defence called character evidence, the prosecution would seek to lead evidence from K. Whether it would be permitted to do so would, of course, be a matter for the decision of the trial judge, assuming objection was taken to her evidence.

7 The Court of Criminal Appeal rightly concluded that no criticism of the prosecution could be made in relation to either of the matters referred to in particulars (4) or (6). It was within the discretion of the prosecution to proceed with the indictment as ultimately framed. The amendment to the indictment was not made with the object of confronting the appellant with the tactical problem that later arose. As to (6), it was to be expected that, if the appellant adduced evidence of good character, in order to show, among other things, that he was unlikely to have engaged in the conduct attributed to him by C, the prosecution might seek to adduce evidence that he had engaged in similar conduct towards K[1]. Such evidence would not necessarily have been received. It might have been excluded on discretionary or other grounds[2]. But, in the events that occurred, that question never arose. The indication referred to in (6) was sufficient to lead trial counsel to decide not to call witnesses as to the appellant's character.

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1 cf *Evidence Act* 1995 (NSW), s 110.

2 eg *Evidence Act* 1995 (NSW), ss 135, 137.

8 On the face of it, that was an understandable decision. It was certainly not self-evidently unreasonable, or inexplicable. It was the kind of tactical decision routinely made by trial counsel, by which their clients are bound[3]. And it was the kind of decision that a Court of Criminal Appeal would ordinarily have neither the duty nor the capacity to go behind. Decisions by trial counsel as to what evidence to call, or not to call, might later be regretted, but the wisdom of such decisions can rarely be the proper concern of appeal courts. It is only in exceptional cases that the adversarial system of justice will either require or permit counsel to explain decisions of that kind. A full explanation will normally involve revelation of matters that are confidential. A partial explanation will often be misleading. The appellate court will rarely be in as good a position as counsel to assess the relevant considerations. And, most importantly, the adversarial system proceeds upon the assumption that parties are bound by the conduct of their legal representatives.

9 Much of the argument advanced on behalf of the appellant in this Court was based upon a brief concluding paragraph in the affidavit of trial counsel, following evidence which proved the matters set out in particulars (1) to (6). Having established those facts, the affidavit continued:

> "13. It did not occur to me at the time of the trial to seek a ruling from the trial judge on the question of whether the Crown would be permitted to call evidence in reply, should the character evidence be adduced in the appellant's case."

10 That paragraph was admitted in the Court of Criminal Appeal without objection. It was not tested, or elaborated. It went beyond the particulars of the ground of appeal, and it raised what was, in the circumstances of the case, a false issue.

11 The reference to seeking a ruling was a reference to a procedure in the District Court under which trial judges, in the absence of the jury, and often before a jury is empanelled, "rule" on various matters, including the admissibility of evidence. For purposes of the present argument, I am prepared to accept, as did the Court of Criminal Appeal, that it would have been open to the trial judge to give such a ruling. I would not accept that there was an obligation to do so, bearing in mind the discretionary considerations involved, which could have been influenced by the course of the trial. And I would not accept that such a ruling would necessarily, or even probably, have been favourable to the appellant, and resulted in the exclusion of K's evidence. In undertaking the artificial exercise, required by the appellant's argument, of considering, after the

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3 *R v Birks* (1990) 19 NSWLR 677.

event, whether the trial judge would have given a ruling in advance, and what that ruling might have been, it is necessary to bear in mind that much might have turned upon exactly what the character evidence was going to be. Without knowing what the witnesses to be called on behalf of the appellant were going to say about his disposition or behaviour, a judge would presumably find it difficult to anticipate the potential significance of the evidence of K. Furthermore, bearing in mind the allegation of collusion between C and K, any ruling may well have required an extensive investigation, on the voir dire, of the evidence of C, and K, and their mother. Indeed, it could have required a rehearsal of a substantial part of the evidence that would be given in front of the jury; something that would not necessarily have been to the appellant's ultimate advantage. And it would have required the assumption that the evidence before the jury would not be materially different from the evidence on the voir dire. That serves to underline the tentative nature of any possible ruling.

12 In the Court of Criminal Appeal, James J, with whom Sheller JA agreed, said:

> "In my opinion, it is not possible for this Court to say any more than that, if an application for a ruling had been made, the trial judge might have made, but might not have made, a ruling favourable to the appellant."

13 Counsel, in his affidavit, did not seek to give a comprehensive explanation of his reasoning process in deciding not to pursue the matter further, after he received the indication from the prosecution set out in particular (6). He referred to something that did not occur to him. He did not give an account of the considerations that weighed with him. Nor would it have been appropriate for him to have been required, or permitted, to do so.

14 Let it be assumed that it would have been possible for trial counsel to have sought a ruling in advance. It is possible that the trial judge might have agreed to give such a ruling. It is possible that any such ruling might have been to the effect that, subject to the course of evidence at the trial, the trial judge would be disposed to exclude the evidence of K if the prosecution called her as a witness. These layers of speculation demonstrate nothing more than that the trial could have been conducted differently.

15 In *Dietrich v The Queen*[4], Mason CJ and McHugh J said:

> "There has been no judicial attempt to list exhaustively the attributes of a fair trial. That is because, in the ordinary course of the criminal appellate process, an appellate court is generally called upon to

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4 (1992) 177 CLR 292 at 300.

> determine, as here, whether something that was done or said in the course of the trial, or less usually before trial, resulted in the accused being deprived of a fair trial and led to a miscarriage of justice. However, various international instruments and express declarations of rights in other countries have attempted to define, albeit broadly, some of the attributes of a fair trial. Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms ('the ECHR') enshrines such basic minimum rights of an accused as the right to have adequate time and facilities for the preparation of his or her defence and the right to the free assistance of an interpreter when required. Article 14 of the International Covenant on Civil and Political Rights ('the ICCPR'), to which instrument Australia is a party, contains similar minimum rights, as does s 11 of the Canadian Charter of Rights and Freedoms. Similar rights have been discerned in the 'due process' clauses of the Fifth and Fourteenth Amendments to the United States Constitution."

16 It is undesirable to attempt to be categorical about what might make unfair an otherwise regularly conducted trial. But, in the context of the adversarial system of justice, unfairness does not exist simply because an apparently rational decision by trial counsel, as to what evidence to call or not to call, is regarded by an appellate court as having worked to the possible, or even probable, disadvantage of the accused. For a trial to be fair, it is not necessary that every tactical decision of counsel be carefully considered, or wise. And it is not the role of a Court of Criminal Appeal to investigate such decisions in order to decide whether they were made after the fullest possible examination of all material considerations. Many decisions as to the conduct of a trial are made almost instinctively, and on the basis of experience and impression rather than analysis of every possible alternative. That does not make them wrong or imprudent, or expose them to judicial scrutiny. Even if they are later regretted, that does not make the client a victim of unfairness. It is the responsibility of counsel to make tactical decisions, and assess risks. In the present case, the decision not to adduce character evidence was made for an obvious reason: to avoid the risk that the prosecution might lead evidence from K.

17 Trial counsel made a decision not to call certain evidence. Viewed objectively, it was a rational tactical decision, made in order to avoid a forensic risk. It did not make the trial unfair, or produce a miscarriage of justice.

18 The appeal should be dismissed.

19 GAUDRON J. Following a trial in the District Court of New South Wales, the appellant was convicted on two counts of aggravated indecent assault[5] and one count of aggravated indecency[6]. An appeal to the Court of Criminal Appeal of the Supreme Court of New South Wales was, by majority, dismissed (Sheller JA and James J, Adams J dissenting). The appellant now appeals to this Court, it being argued, as it was in the Court of Criminal Appeal, that there was a miscarriage of justice by reason of the course taken by defence counsel at trial. In order to understand the argument, it is necessary to say something not only of the trial but, also, of events prior to trial.

20 The prosecution originally intended to present an indictment alleging sexual offences against the complainant, C, and, also against K. The complainant and K were, respectively, the son and younger daughter of the woman with whom the appellant had been living in a domestic relationship. Later, prosecuting counsel formed the view that there should be a separate trial of the offences relating to K and the indictment upon which the appellant was eventually tried alleged sexual offences only against the complainant, C.

21 Before or during the course of the trial, defence counsel informed prosecuting counsel that he intended to call evidence of good character. Prosecuting counsel then indicated that, in that event, he would call K as a witness to give evidence of the matters which were the subject of the outstanding charges relating to her. As a result, defence counsel decided not to call character evidence. That decision, it is argued, was "wrong" in the circumstances because counsel should have sought an "advance ruling" from the trial judge on the question whether K's evidence would be excluded. That, it is said, resulted in a miscarriage of justice. Alternatively, it is put that K's evidence would inevitably have been excluded by the trial judge and, thus, there was a miscarriage of justice by reason of the failure to call character evidence in the defence case.

22 Before turning to the question whether defence counsel could or should have sought an "advance ruling", it is convenient to say something about s 6(1) of the *Criminal Appeal Act* 1912 (NSW). That sub-section relevantly provides:

> " The court on any appeal ... against conviction shall allow the appeal if it is of opinion that the verdict of the jury should be set aside on the ground that it is unreasonable, or cannot be supported, having regard to the evidence, or that the judgment of the court of trial should be set aside on the ground of the wrong decision of any question of law, or that on any

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5 Section 61M(1) of the *Crimes Act* 1900 (NSW).

6 Section 61O(1) of the *Crimes Act* 1900 (NSW).

> other ground whatsoever there was a miscarriage of justice, and in any other case shall dismiss the appeal".

The proviso to s 6 allows that:

> "the court may, notwithstanding that it is of opinion that the point or points raised by the appeal might be decided in favour of the appellant, dismiss the appeal if it considers that no substantial miscarriage of justice has actually occurred."

23 It is not suggested in this case that the jury's verdicts of guilty are unreasonable or cannot be supported by the evidence. Nor is it suggested that there was any wrong decision on a question of law. Rather, it is put that the phrase "on any other ground whatsoever" extends to the situation in which an accused person is not competently or adequately represented. Certainly, there are decisions, notably in *R v Birks*[7], that allow that that is so. However, the question whether a person has been competently or adequately represented is one that poses particular difficulties for an appellate court.

24 There are two reasons why the question whether an accused was competently represented poses difficulties for an appellate court. First, the conduct of a criminal trial frequently involves defence counsel in making tactical decisions designed to obtain a forensic advantage or, perhaps, to avoid a forensic disadvantage. Those decisions may contribute to a defect or irregularity in the trial. Thus, for example, defence counsel may decide not to seek directions with respect to the need for corroboration lest the directions serve to emphasise the strength of the corroborative evidence with the result that there is a defect in the trial because no such directions are given[8]. The second reason is that, ordinarily, it is not possible to know what was in defence counsel's brief.

25 Where decisions taken by counsel contribute to a defect or irregularity in the trial, the tendency is not to inquire into counsel's conduct, as such, but, rather, to inquire whether there has been a miscarriage of justice, or, if the proviso to the criminal appeal provisions is engaged, whether "no substantial miscarriage of justice has actually occurred". In that exercise, the question whether the course

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7 (1990) 19 NSWLR 677. See also *Strickland v Washington* 466 US 668 (1984); *R v Joanisse* (1995) 102 CCC (3d) 35; *R v Peeris* [1998] EWCA (Crim) 597; *R v Martin* [2002] 2 WLR 1. Note that in *R v Birks* the issue was said to be whether there was "flagrant incompetence".

8 See, for example, *Doggett v The Queen* (2001) 75 ALJR 1290; 182 ALR 1.

taken by counsel is explicable on a basis that has or could have resulted in a forensic advantage is a relevant, but not necessarily a decisive, consideration[9].

26 The question whether there has been a miscarriage of justice is usually answered by asking whether the act or omission in question "deprived the accused of a chance of acquittal that was fairly open"[10]. The word "fairly" should not be overlooked. A decision to take or refrain from taking a particular course which is explicable on the basis that it has or could have led to a forensic advantage may well have the consequence that a chance of acquittal that might otherwise have been open was not, in the circumstances, fairly open[11].

27 One matter should be noted with respect to the question whether counsel's conduct is explicable on the basis that it resulted or could have resulted in a forensic advantage. That is an objective test. An appellate court does not inquire whether the course taken by counsel was, in fact, taken for the purpose of obtaining a forensic advantage, but only whether it is capable of explanation on that basis.

28 As already indicated, if there is a defect or irregularity in the trial, the fact that counsel's conduct is explicable on the basis that it resulted or could have resulted in a forensic advantage is not necessarily determinative of the question whether there has been a miscarriage of justice. It may be that, in the circumstances, the forensic advantage is slight in comparison with the importance to be attached to the defect or irregularity in question. If so, the fact that counsel's conduct is explicable on the basis of forensic advantage will not preclude a court from holding that, nevertheless, there was a miscarriage of justice[12].

29 Even though there is no defect or irregularity in a trial, a question may arise whether there was a miscarriage of justice. Such is the case, for example, when it is argued that a verdict should be set aside because of the discovery of

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9 See, for example, *BRS v The Queen* (1997) 191 CLR 275; *Gipp v The Queen* (1998) 194 CLR 106; *Suresh v The Queen* (1998) 72 ALJR 769; 153 ALR 145; *Doggett v The Queen* (2001) 75 ALJR 1290; 182 ALR 1; *Harwood v The Queen* (2002) 188 ALR 296.

10 *Mraz v The Queen* (1955) 93 CLR 493 at 514 per Fullagar J.

11 See *Doggett v The Queen* (2001) 75 ALJR 1290 at 1298 [55] per Gaudron and Gummow JJ; 182 ALR 1 at 12; *Suresh v The Queen* (1998) 72 ALJR 769 at 771 [6] per Gaudron and Gummow JJ; 153 ALR 145 at 147.

12 See *Gipp v The Queen* (1998) 194 CLR 106; *Doggett v The Queen* (2001) 75 ALJR 1290; 182 ALR 1.

evidence that was not available or, with reasonable diligence, could not have been made available at the trial – "fresh evidence", as it is usually called[13]. The question may also arise if counsel fails to call evidence that was available or fails to elicit evidence in cross-examination. In that situation, it has been customary to focus on the competence of defence counsel, it being said that there must be "flagrant incompetence"[14], an "egregious error"[15], "extreme conduct"[16] or "significant fault"[17]. Thus it was that the argument in the present case was premised on counsel having made a "wrong" decision.

30 Apart from the difficulties involved in an appellate court reviewing the conduct of counsel to determine whether it justifies one or other of the above descriptions or, even, whether it involved error, that is not an exercise that is directly required by s 6(1) of the *Criminal Appeal Act.* Relevantly, the question posed by s 6(1) is whether "on any other ground ... there was a miscarriage of justice". The words "on any other ground" do not postulate the demonstration of error. Rather, they simply require that "something occurred or did not occur" in the trial[18].

31 As in the case where there is a defect or irregularity in the trial, the reason why something occurred or did not occur is relevant to the question whether, in the circumstances, there was a miscarriage of justice. But the relevant question that must ultimately be answered, is whether the act or omission resulted in a miscarriage of justice, not whether, if it is referable to the course taken by defence counsel, it was the result of "flagrant incompetence", "egregious error" or the like.

32 An accused will not ordinarily be deprived of a chance of acquittal that is fairly open if that chance is foreclosed by an informed and deliberate decision to pursue or not to pursue a particular course at trial. As was said by Barwick CJ in relation to fresh evidence in *Ratten v The Queen*:

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13 See *Ratten v The Queen* (1974) 131 CLR 510 at 516 per Barwick CJ; *Gallagher v The Queen* (1986) 160 CLR 392; *Mickelberg v The Queen* (1989) 167 CLR 259.

14 See *R v Birks* (1990) 19 NSWLR 677; *R v Miletic* [1997] 1 VR 593; *R v Peeris* [1998] EWCA (Crim) 597.

15 *R v Miletic* [1997] 1 VR 593.

16 *Boodram v State of Trinidad and Tobago* [2001] UKPC 18.

17 *R v Martin* [2002] 2 WLR 1 at 12 [47] per Lord Woolf CJ delivering the judgment of the Court.

18 See *R v Scott* (1996) 137 ALR 347 at 362-363 per Doyle CJ.

> "[A trial] will not become an unfair trial because the accused of his own volition has not called evidence which was available to him at the time of his trial, or of which, bearing in mind his circumstances as an accused, he could reasonably have been expected to have become aware and which he could have been able to produce at the trial."[19]

33 Where it is claimed that a miscarriage of justice was the result of a course taken at the trial, it is for the appellant to establish that the course was not the result of an informed and deliberate decision. This he or she will fail to do if the course taken is explicable on the basis that it could have resulted in a forensic advantage unless, in the circumstances, the advantage is slight in comparison with the disadvantage resulting from the course in question. It should be added, moreover, that where the course in question is the failure to call evidence, an appellant will not establish a miscarriage of justice unless, as with fresh evidence, the evidence is such that "when viewed in combination with the evidence given at trial ... the jury would have been likely to entertain a reasonable doubt about the guilt of the accused"[20].

34 As already indicated, the primary case put on behalf of the appellant in this Court is not that the failure to call character evidence, of itself, resulted in a miscarriage of justice. The act or omission which, on the primary argument, was said to have resulted in a miscarriage of justice was the failure to obtain an advance ruling from the trial judge as to whether the evidence of K would be admitted in the event that character evidence were to be led in the defence case. That argument requires consideration of certain provisions of the *Evidence Act* 1995 (NSW).

35 Evidence of good character is not merely evidence as to credit. It is, in terms used in s 55 of the *Evidence Act*, evidence that "could rationally affect (directly or indirectly) the assessment of the probability" that the accused committed the offence or offences charged[21]. And by s 110(1) of the *Evidence Act*, character evidence may be led on behalf of a defendant in criminal proceedings notwithstanding the hearsay rule, the opinion rule, the tendency rule and the credibility rule. However, that section further provides:

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19 (1974) 131 CLR 510 at 517.

20 *Mickelberg v The Queen* (1989) 167 CLR 259 at 301 per Toohey and Gaudron JJ. See also at 273 per Mason CJ, 275 per Brennan J.

21 See generally with respect to character evidence, *Melbourne v The Queen* (1999) 198 CLR 1. See also *Stanoevski v The Queen* (2001) 202 CLR 115 at 124 [31] per Gaudron, Kirby and Callinan JJ.

" (2) If evidence adduced to prove (directly or by implication) that a defendant is generally a person of good character has been admitted, the hearsay rule, the opinion rule, the tendency rule and the credibility rule do not apply to evidence adduced to prove (directly or by implication) that the defendant is not generally a person of good character.

(3) If evidence adduced to prove (directly or by implication) that a defendant is a person of good character in a particular respect has been admitted, the hearsay rule, the opinion rule, the tendency rule and the credibility rule do not apply to evidence adduced to prove (directly or by implication) that the defendant is not a person of good character in that respect."

36 It is not in issue that, had evidence of good character been led on behalf of the appellant at his trial, the evidence of K with respect to the matters which were the subject of outstanding charges would have been admissible under either sub-ss (2) or (3) of s 110 of the *Evidence Act*. However, those sub-sections do not entail the result that her evidence would have been admitted. Her evidence might have been excluded under either s 135 or s 137 of the *Evidence Act.*

37 Section 135 of the *Evidence Act* relevantly provides:

" 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".

Section 137 provides:

" In a criminal proceeding, the court must refuse to admit evidence adduced by the prosecutor if its probative value is outweighed by the danger of unfair prejudice to the defendant".

38 The argument in this Court was that counsel should have asked the trial judge for an "advance ruling" on the question whether, if character evidence were called in the defence case, the evidence of K would, nonetheless, be excluded pursuant either to s 135 or s 137 of the *Evidence Act*. In support of that argument, reference was made to *Robinson*, a decision of the New South Wales Court of Criminal Appeal where, on the same issue as this presently under consideration, it was said:

" If defence counsel had put forward a properly formulated proposal to raise good character in general or in the particular respect, for example that the appellant was not guilty of sexual misconduct against young children, and the Crown had been required to make available or make known what material it would wish to bring forward, the trial judge would

> have been obliged to indicate what evidence if any the Crown might be permitted to adduce"[22].

39 Before it can be said that a trial judge is obliged to give an advance ruling, it is necessary to ascertain whether or not there is power to do so. Part 53 r 10 of the District Court Rules 1973 (NSW) ("The Criminal Procedure Rules") makes provision for pre-trial applications with respect to various matters, including for "directions generally". Additionally, r 11(1) provides:

> " The Court may order that an enquiry by way of a voir dire into the admissibility of any evidence or as to the capacity of a witness to give evidence be had, before the trial Judge, at any stage of any proceedings whether before or after the jury is empanelled."

40 To say that a trial judge has power, in pre-trial proceedings, to give directions or to conduct a voir dire for the purpose of making an advance determination as to the admissibility of evidence is not to say that a trial judge has power to give an advance ruling as to the way in which he or she will exercise a discretion if and when a party seeks to have that discretion exercised. And assuming s 189 of the *Evidence Act* is an independent grant of power to conduct a voir dire for the purpose of determining whether a discretion should be exercised to exclude evidence, there is nothing in the terms of that section which confers power to make an "advance ruling" as to how the discretion will be exercised if and when its exercise is called for. So to say, is not to deny that a court has power to conduct a voir dire examination to determine whether evidence should be excluded in the exercise of a discretion. It is simply to say that a discretion can only be exercised if and when it is invoked.

41 In addition to The Criminal Procedure Rules and s 189 of the *Evidence Act*, it was put that s 192 of the latter Act authorises the making of "advance rulings" of the kind presently in issue. Various provisions of the *Evidence Act* either enable or require a trial judge to give leave, permission or directions before cross-examination can be undertaken or a particular course pursued[23]. In that context, s 192 of the *Evidence Act* provides, in sub-s (1), that "the leave, permission or direction may be given on such terms as the court thinks fit" and specifies, in sub-s (2) the matters that may be taken into account in deciding whether the leave, permission or direction should be given.

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22 (2000) 111 A Crim R 388 at 393 per Barr J. See also *R v PKS* unreported, New South Wales Court of Criminal Appeal, 1 October 1998.

23 See, for example, s 112 considered in *Stanoevski v The Queen* (2001) 202 CLR 115 and s 38 considered in *Adam v The Queen* (2001) 75 ALJR 1537; 183 ALR 625.

42 The provisions of the *Evidence Act* requiring the giving of leave, permission or direction require a ruling to be made and, unless the particular provision in question directs otherwise, there is no reason why they should be read as precluding an "advance ruling" if that course is appropriate. It may, for example, be appropriate to give an "advance ruling" if all matters relevant to the issue have been or can then be ascertained and if it is clear that a ruling will inevitably be required.

43 Although it may be appropriate in some cases to give an "advance ruling" as to a matter in respect of which the *Evidence Act* requires leave, permission or direction, it is to be remembered that counsel ultimately bears the responsibility of deciding how the prosecution and defence cases will be run[24]. Thus, it is that "advance rulings", even if permitted by a provision of the *Evidence Act* requiring leave or permission, may give rise to a risk that the trial judge will be seen as other than impartial[25]. Particularly is that so in the case of advance rulings that serve only to enable prosecuting or defence counsel to make tactical decisions. If there is a risk that an "advance ruling" will give rise to the appearance that the trial judge is other than impartial, it should not be given.

44 It was put on behalf of the appellant that, if no provision of The Criminal Procedure Rules or the *Evidence Act* authorises the making of an "advance ruling" as to how a discretion will be exercised, if and when its exercise is called for, the District Court, nonetheless, has an implied power to do so. In the case of a court whose powers are defined by statute, as is the District Court[26], there is an implied power to do that which is required for the effective exercise of its jurisdiction[27]. It cannot be said that it is necessary for the effective exercise of jurisdiction for a trial judge to give an "advance ruling" as to how a discretion, which may not fall for exercise, will be exercised in the event that its exercise is sought.

45 The "advance ruling" which, it is said, should have been sought in the present case was not a ruling as to the giving of leave, permission or a direction required by the *Evidence Act* and, thus, was not one authorised by a provision of

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24 See *Giannarelli v Wraith* (1988) 165 CLR 543 at 556 per Mason CJ. See also *Pantorno v The Queen* (1989) 166 CLR 466 at 472-473 per Mason CJ and Brennan J.

25 See *Adam v The Queen* (2001) 75 ALJR 1537 at 1546 [52]-[54] per Gaudron J; 183 ALR 625 at 637-638.

26 See *Pelechowski v The Registrar, Court of Appeal (NSW)* (1999) 198 CLR 435.

27 See *Grassby v The Queen* (1989) 168 CLR 1; *Jago v District Court (NSW)* (1989) 168 CLR 23.

the Act requiring the giving of leave, permission or direction. Nor was it authorised either by s 189 of that Act or by The Criminal Procedure Rules. Further, it did not fall within the implied power of the District Court. There being no power to make such a ruling, no miscarriage of justice was occasioned by counsel not seeking it.

46 It remains to consider the argument that the trial judge was bound to exclude the evidence of K and, thus, the failure to call character evidence in the defence case resulted in a miscarriage of justice. The argument is premised on the probative value of K's evidence being outweighed by the danger of unfair prejudice. On that premise, s 137 of the *Evidence Act* would necessitate its exclusion.

47 It was put that the prejudicial effect of K's evidence would necessarily outweigh its probative value because of the possibility that she and C concocted their allegations[28]. The argument overlooks the possibility that the prejudicial effect, if any, of her evidence might well have been limited by a direction pursuant to s 136 of the *Evidence Act*[29] restricting its use to the question whether or not the appellant was a person of good character with the consequence that its prejudicial effect might not outweigh its probative value.

48 More fundamentally, it cannot be assumed that, were counsel to have turned his mind to the question, a voir dire examination would have been held. Counsel might well have concluded that that course was not in the appellant's best interests because it would result in K having a chance to rehearse her evidence prior to the trial of the charges relating to her.

49 The appellant has failed to demonstrate either that counsel would have sought to have K examined on the voir dire or that, if she had been so examined, her evidence would inevitably have been excluded. It follows that it has not been established that the failure to call character evidence in the defence case resulted in the loss of a chance of acquittal that was fairly open.

50 The appeal should be dismissed.

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28 See *Hoch v The Queen* (1988) 165 CLR 292.

29 Section 136 relevantly provides:

> " The court may limit the use to be made of evidence if there is a danger that a particular use of the evidence might:
>
> (a) be unfairly prejudicial to a party".

51 McHUGH J. In a trial in which the appellant was charged with sexual offences against a minor, his counsel did not call evidence of the appellant's good character because, if he did, the Crown intended to rebut that evidence with evidence that the appellant had sexually assaulted the complainant's sister. Counsel for the appellant did not seek an "advance ruling" from the trial judge as to whether the evidence in rebuttal was admissible or ought to be excluded in the exercise of the judge's discretion. The appellant was convicted of the offences. The question in this appeal is whether the failure to obtain the ruling or the failure to call the good character evidence constituted a "miscarriage of justice" within the meaning of s 6(1) of the *Criminal Appeal Act* 1912 (NSW).

52 In my opinion, no miscarriage of justice occurred. There is no significant possibility that the trial judge would have exercised his discretion to exclude the sister's evidence, if an advance ruling had been sought. The decision not to call the good character evidence was a matter falling within the discretion of counsel as to how he would conduct the defence and did not constitute a material irregularity that led to a miscarriage of justice. Furthermore, if the appellant had called good character evidence, the sister's evidence would have been admissible in rebuttal and there was no significant possibility that calling the character evidence would have led to the appellant's acquittal. I would dismiss the appeal.

Statement of the case

53 After a trial by a jury in the District Court of New South Wales, the appellant, TKWJ, was convicted on charges of aggravated indecency and aggravated indecent assault. An appeal against this conviction to the Court of Criminal Appeal (Sheller JA, James J, Adams J dissenting) was dismissed. This Court granted special leave to appeal against the order of the Court of Criminal Appeal on the ground that his conviction was a miscarriage of justice because at the trial his counsel failed to lead evidence of the appellant's good character. During the hearing of the appeal, the appellant was given leave to add a further ground of appeal – that counsel's failure to seek an "advance ruling" from the trial judge as to the admissibility of the sister's evidence led to a miscarriage of justice.

Evidence of the offences

54 The complainant was a boy aged about 12 at the time of the offences. At the time, the appellant had an intimate relationship with the complainant's mother. The complainant gave evidence that on one occasion the appellant untied the string of his shorts and put his hand on the complainant's penis and "started playing with it". This conduct was the subject of the first offence in the indictment. The appellant then took down his own pants, placed the complainant's hand on his penis and asked him to stimulate him until he ejaculated, which he did. This conduct was the subject of the second offence. The third offence was committed a few weeks later. The complainant gave

evidence that, on an occasion when his mother was asleep, he asked the appellant, who was in the shower, whether he could have a drink of cordial. The appellant asked the complainant to join him in the shower and then rubbed the complainant's penis.

55 The complainant and his mother gave evidence that the complainant had complained to her more than once about the appellant's conduct[30]. The mother said that she had not believed the complainant. On or about 23 January 1996, she "reported it anyway". The complainant, his mother and his sister, K, who had also alleged that the appellant had sexually interfered with her, went to a police station accompanied by two social workers.

56 At the station, K made a statement consisting of her responses to questions asked by the interviewing officer. K alleged that the appellant pulled down her pants and rubbed her "[o]n [her] bum and bajina" in her bedroom and that the appellant had made her "play with him". She was about seven and a half at the time of the two offences.

Counsel's decision to not call character evidence

57 In the Court of Criminal Appeal, three affidavits were tendered concerning counsel's decision not to call evidence at the trial of the appellant's good character. The affidavits proved that the appellant was originally arraigned on an indictment that included charges of sexual misconduct arising from the allegations of both the complainant and K. Before the matter came on for trial, the Crown amended the indictment by excluding all counts relating to K's allegations. Some time before or during the trial, defence counsel informed the prosecutor that he intended to call evidence of the good character of the appellant. The Crown prosecutor said that, if he did, the Crown would call K to give evidence relating to the charges involving her. For this reason, defence counsel said that he decided not to call the good character evidence. He also said that it did not occur to him to seek an advance ruling. If the Crown had proceeded on the original indictment, he would have alleged collusion between the complainant and K.

Court of Criminal Appeal

58 The appellant appealed on the ground that his conviction was a "miscarriage of justice". He claimed that he had been subjected to an unfair trial

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30 On an occasion when the appellant was fishing, the complainant complained to his mother, in the presence of his sister. His mother did not believe him. He complained again in the presence of his sister and his mother still disbelieved him. He told a welfare officer and, ultimately, the police.

because evidence of his good character, which was available, had not been adduced. James J, with whom Sheller JA agreed, dismissed the appellant's appeal. Adams J dissented. Adams J held that, if the character evidence had been led, *R v Wheeler*[31] would have required the trial judge to exercise his discretion under s 135 of the *Evidence Act* 1995 (NSW) to reject K's evidence tendered in rebuttal. The reasonable possibility of collusion between the complainant and K would have been a relevant and, perhaps, decisive consideration in exercising the discretion. His Honour characterised the failure to call good character evidence as incompetence. The incompetence had led to a miscarriage of justice that necessitated a new trial of the charges.

The appellant's case in this Court

59 The appellant claims that a miscarriage of justice occurred because his counsel failed to obtain an advance ruling from the trial judge as to whether the evidence of K would be admitted if the appellant called evidence of good character. The appellant contends that Pt 53 r 10 of the District Court Rules 1973 (NSW) permits such a ruling. That rule permits pre-trial applications to be made in respect of a number of matters including "directions generally". Rule 11 provides for the Court to order a *voir dire* into "the admissibility of any evidence or as to the capacity of a witness to give evidence … before the trial Judge, at any stage of any proceedings whether before or after the jury is empanelled". The appellant submits that s 189 of the *Evidence Act* also supports the power to make an "advance ruling". It provides for the conduct of a *voir dire* for the purpose of determining whether the judge should exercise his or her discretion to exclude evidence. Additionally, s 192 of the *Evidence Act* permits a trial judge to give any "leave, permission or direction … on such terms as the court thinks fit".

60 The appellant then contends that, if a ruling had been sought, the trial judge would have refused to admit the evidence of K under s 135 or s 137 of the *Evidence Act*. Section 135 provides that the court may refuse to admit evidence if its probative value is substantially outweighed by the danger that the evidence might be (a) unfairly prejudicial to a party; (b) be misleading or confusing; or (c) cause or result in an undue waste of time. Section 137 applies only to criminal proceedings and directs that the court must refuse to admit evidence if its probative value is outweighed by the danger of unfair prejudice to the defendant.

Miscarriage of justice as a ground of appeal

61 The appeal is brought under s 6(1) of the *Criminal Appeal Act*. Section 6 contains the grounds upon which a person may appeal against a conviction for an indictable offence. It provides:

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31 Unreported, New South Wales Court of Criminal Appeal, 16 November 1989.

> "(1) The court on any appeal under section 5(1) against conviction shall allow the appeal if it is of opinion that the verdict of the jury should be set aside on the ground that it is unreasonable, or cannot be supported, having regard to the evidence, or that the judgment of the court of trial should be set aside on the ground of the wrong decision of any question of law, or that on any other ground whatsoever there was a miscarriage of justice, and in any other case shall dismiss the appeal; provided that the court may, notwithstanding that it is of opinion that the point or points raised by the appeal might be decided in favour of the appellant, dismiss the appeal if it considers that no substantial miscarriage of justice has actually occurred".

62 Thus, the New South Wales Court of Criminal Appeal, like courts of criminal appeal in all Australian states, may set aside a jury verdict if, "on any ground whatsoever there was a miscarriage of justice"[32] ("the miscarriage of justice ground"). Australian criminal appeal statutes generally follow the form of s 4(1) of the *Criminal Appeal Act* 1907 (UK) which established the Court of Criminal Appeal in England[33]. The statutes require the Court of Criminal Appeal to allow an appeal if one or more of the various grounds is made out[34]. All the common form statutes also contain a proviso that, notwithstanding that the Court is of the opinion that an error has occurred in the course of the trial, it may dismiss the appeal if it considers that no "substantial miscarriage of justice" has occurred. The present case is primarily concerned with miscarriage of justice as

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32 In addition to s 6(1) *Criminal Appeal Act* 1912 (NSW) see also *Crimes Act* 1958 (Vic), s 568(1); *Criminal Code* (Q), s 668E(1); *Criminal Code* (WA), s 689(1); *Criminal Law Consolidation Act* 1935 (SA), s 353(1); *Criminal Code* (Tas), s 402(1); *Criminal Code* (NT), s 411(1).

33 The English provision was amended by the *Criminal Appeal Act* 1966 (UK), which substituted for "on any ground there was a miscarriage of justice" the words "there was a material irregularity in the course of the trial" and repealed the word "substantial" in the proviso. The English Act of 1907 was repealed by the *Criminal Appeal Act* 1968 (UK) (which retained the proviso in the terms "dismiss the appeal if they consider that no miscarriage of justice has actually occurred"). The *Criminal Appeal Act* 1995 (UK) (considered in *Graham* [1997] 1 Cr App R 302), which repealed the 1968 Act, introduced a very different provision which required the court to allow the appeal if it thinks the conviction is unsafe and otherwise dismiss it.

34 The provision that the Court of Criminal Appeal "shall" allow an appeal in the stated circumstances is mandatory: *Pattinson and Laws* (1973) 58 Cr App R 417 at 426.

a ground of appeal, not with the operation of the proviso. It will be necessary to consider, however, whether the proviso can apply to a case like the present.

63 When miscarriage of justice is a ground of appeal, the burden of proof and the nature of the issues determined are different from those issues in a case where the proviso is being considered. Cases on the proviso operate on the hypothesis that there has been a legal error that *prima facie* requires the conviction to be set aside. The issue then becomes whether the Crown has shown that no substantial miscarriage of justice occurred because the error could not have affected the result of the trial. When the appellant seeks to make miscarriage of justice a ground of appeal, however, he or she has the burden of proving that there has been a miscarriage of justice. But does miscarriage of justice have the same meaning in the miscarriage of justice ground in s 6(1) as it does in the proviso? Is there a difference between a miscarriage of justice and a substantial miscarriage of justice? Does the proviso have any application to a case falling within the miscarriage of justice ground in s 6(1)?

64 "Miscarriage of justice" has been a phrase familiar to lawyers for over two centuries. Despite the familiarity of the phrase and the uniformity of its use in criminal appeal statutes, the meaning of the phrase in s 6(1) and its equivalents has been the subject of much uncertainty[35]. In the context of the proviso to the appeal grounds in the common form criminal appeal statute, courts of criminal appeal have given the phrase a meaning different from which it has outside that context. In *Robins v National Trust Co*[36] – a Privy Council appeal concerned with civil proceedings – Viscount Dunedin, giving the judgment of the Judicial Committee, said it meant "such departure from the rules which permeate all judicial procedure as to make that which happened not in the proper use of the word judicial procedure at all"[37]. In considering the proviso to the common form criminal appeal statute, however, Australian courts have given the term a wider definition than that formulated by Viscount Dunedin[38].

65 In *Mraz v The Queen*[39], Fullagar J said:

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35 *R v Gallagher* [1998] 2 VR 671 at 673-674.

36 [1927] AC 515 at 518.

37 That was also the way that the Judicial Committee understood the term "miscarriage of justice" in *Srimati Bibhabati Devi v Kumar Ramendra Narayan Roy* [1946] AC 508 at 517-521.

38 *Hembury v Chief of General Staff* (1998) 193 CLR 641 at 648 [14].

39 (1955) 93 CLR 493 at 514.

> "[E]very accused person is entitled to a trial in which the relevant law is correctly explained to the jury and the rules of procedure and evidence are strictly followed. If there is any failure in any of these respects, and the appellant may thereby have lost a chance which was fairly open to him of being acquitted, there is, in the eye of the law, a miscarriage of justice. Justice has miscarried in such cases, because the appellant has not had what the law says that he shall have, and justice is justice according to law."

66 This passage – which is frequently cited – focuses the attention of the appeal court on the result of the trial. No miscarriage of justice has occurred if the error did not deprive the accused of a real chance of acquittal[40]. In *R v Storey*[41], Barwick CJ said:

> "[T]he question before a Court of Criminal Appeal is not disposed of by the discovery of error in the trial. If error be present, whether it be by admission or rejection of evidence, or of law or fact in direction to the jury, there remains the question whether none the less the accused has really through that error or those errors lost a real chance of acquittal. Put another way, the question remains whether a jury … would have failed to convict the accused: or were the errors such that if they were removed a reasonable jury might well have acquitted."

67 In *Driscoll v The Queen*[42], Barwick CJ noted that the important words in Fullagar J's reasons in *Mraz* were "may thereby have lost a chance which was fairly open to him of being acquitted". His Honour said that passage should not be read as if every departure from the relevant law or procedure meant that there has been a miscarriage of justice[43]. In *Wilde v The Queen*[44], Deane J accepted that there might be error, impropriety or unfairness in a trial but these may not "prejudice or colour the overall trial" so as to affect the verdict.

68 In *Festa v The Queen*[45], I said that the views of Barwick CJ in *Storey* and *Driscoll* contained the correct principles to apply in determining whether there

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40 *Festa v The Queen* (2001) 76 ALJR 291 at 311-312 [115]; 185 ALR 394 at 422.

41 (1978) 140 CLR 364 at 376.

42 (1977) 137 CLR 517 at 525.

43 *R v Driscoll* (1977) 137 CLR 517 at 525.

44 (1988) 164 CLR 365 at 375-376.

45 (2001) 76 ALJR 291 at 313 [120]; 185 ALR 394 at 423.

had been a substantial miscarriage of justice for the purpose of the proviso. In that case, I also noted that the issue of miscarriage of justice is different depending on whether the proviso is being applied or the appellant relies on a miscarriage of justice as a substantive ground of appeal[46]. If the issue of miscarriage arises under the proviso, the Crown must establish that, despite an error coming within s 6(1), the jury must still have convicted the accused. If the appellant makes out a case under the miscarriage of justice ground, however, there seems little scope for the operation of the proviso. If the proviso can operate in a case established under the miscarriage of justice ground in s 6(1), it can only be on the issue of whether the miscarriage is "substantial".

69 In s 6(1), "miscarriage of justice" as a ground of appeal includes a conviction that is based on unsafe or unsatisfactory evidence[47] as well as deviations from the rules and conduct that govern criminal trials[48]. If the alleged miscarriage lies in the unsafe or unsatisfactory nature of the prosecution evidence, it is well established that the burden is on the appellant to establish that the jury should have had a reasonable doubt about his or her guilt[49]. In such a case, there appears no room for the proviso to operate. If the alleged miscarriage lies in some departure from the proper conduct of a criminal trial, the appellant must establish that the departure occurred. But although the departure may constitute a "miscarriage of justice", it may be that it has not been a "substantial" miscarriage of justice. On that hypothesis, the proviso can apply. But that is not the way that the case law has developed.

70 If the term "miscarriage of justice" in s 6(1) had been given the meaning that the Judicial Committee had given to it in *Robins v National Trust Co*[50], no difficulty would arise in reconciling the "dragnet"[51] miscarriage of justice ground in s 6(1) with the proviso. On that view as to the meaning of the term, the ground would be made out on proof of a material irregularity. And a material irregularity must be a miscarriage of justice, for the appellant has not had a trial according to law. The onus would then be on the Crown to establish that the irregularity did not "actually" result in a "substantial miscarriage of justice" within the meaning of the proviso. But the present state of authority precludes this solution.

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46 *Festa v The Queen* (2001) 76 ALJR 291 at 313 [123]; 185 ALR 394 at 424.

47 *Ratten v The Queen* (1974) 131 CLR 510 at 515.

48 cf *Hembury v Chief of General Staff* (1998) 193 CLR 641 at 652-653 [28].

49 *Ratten v The Queen* (1974) 131 CLR 510 at 516.

50 [1927] AC 515 at 518.

51 [1998] 2 VR 671 at 676.

71 Current authority indicates that the proviso has no application in many cases falling within the miscarriage of justice ground in s 6(1). It indicates that the appellant must show that the irregularity affected or may have affected the result of the trial. It also suggests that in many cases there is no difference between a miscarriage of justice and the "substantial miscarriage of justice" to which the proviso refers. The cases are fully discussed by Brooking JA in *R v Gallagher* where his Honour commented[52] that "[i]t is extraordinary that, 90 years after the legislation providing for appeals in criminal cases was first enacted, doubt should exist about its effect."

72 In some cases falling within the miscarriage of justice ground in s 6(1) – unsafe or unsatisfactory convictions or an unfair trial, for example – there is no scope for applying the proviso. Moreover, in other cases, falling within that paragraph – failure to grant an adjournment[53], misstating the evidence[54] or its effect, omitting to refer to evidence[55] or erroneously exercising a discretion to order separate trials[56] – the courts have required the appellant to show that the irregularity might have affected the result. This appears to make the proviso irrelevant when the dragnet ground contained in s 6(1) and its equivalents is the ground of appeal. If the appellant must show that the irregularity affected the result, there can be no onus on the prosecution to show that it did not. However, the problem is complicated by statements in this Court's decision in *Simic v The Queen*[57].

73 In *Simic*, the issue was whether there had been a miscarriage of justice because the trial judge had made "a misstatement of an important matter of fact"[58]. In one passage, the Court said "the fact that the case has not been properly presented to the jury will *in some circumstances* be enough to show that a miscarriage has occurred"[59] (my emphasis). That was because "an accused

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52 [1998] 2 VR 671 at 673-674.

53 *McInnis v The Queen* (1979) 143 CLR 575 at 580-583.

54 *R v Brookes and McGrory* [1940] VLR 330.

55 *Cohen and Bateman* (1909) 2 Cr App R 197 at 207-208.

56 *R v Demirok* [1976] VR 244 at 251, 255-256.

57 (1980) 144 CLR 319 at 331.

58 (1980) 144 CLR 319 at 326.

59 (1980) 144 CLR 319 at 331.

person has a fundamental right to a fair trial, conducted in accordance with law"[60]. This *dictum* suggests that in some cases a material irregularity will itself constitute a miscarriage of justice. Moreover, the context of the *dictum* suggests that in this class of case there is no question of applying the proviso. In *Simic*, however, the Court expressly held[61] that the onus was on Simic to show that "the misdirection which occurred in the instant case amounted to a miscarriage of justice". Their Honours said that it was putting the onus too high to require the appellant to show that the misdirection probably affected the verdict. They went on to say that "if it is considered reasonably possible that the misstatement may have affected the verdict and if the jury might reasonably have acquitted the appellant if the misstatement had not been made, there will have been a miscarriage of justice, and a substantial one"[62]. Thus, *Simic* holds that, in most cases of misdirection on facts, the appellant has the onus of establishing a misdirection, that it might have affected the verdict and that, if it had not been made, the jury might have acquitted the appellant. In some undefined categories of cases, however, the irregularity may be so material that of itself it constitutes a miscarriage of justice without the need to consider its effect on the verdict.

Miscarriage of justice by reason of counsel's conduct

74 The role of counsel in a criminal trial is so important that it hardly needs argument to conclude that his or her conduct of the trial can bring about a miscarriage of justice[63]. *Tuckiar v The King*[64] – where counsel's statement and conduct in front of the jury reinforced the presumption of guilt arising from the judge's charge – is a well-known, if extreme, example. Where an appellant contends that the conduct of his or her counsel has caused a criminal trial to miscarry, however, the appellant carries a heavy burden[65]. This is a consequence of the adversarial nature of our legal system and the role and function of counsel. Criminal trials are not inquisitions. They are contests "in which the protagonists are the Crown on the one hand and the accused on the other"[66]. Ordinarily, a

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60 (1980) 144 CLR 319 at 331.

61 (1980) 144 CLR 319 at 332.

62 (1980) 144 CLR 319 at 332.

63 *Tuckiar v The King* (1934) 52 CLR 335; *Ignjatic* (1993) 68 A Crim R 333 at 338; *HG v The Queen* (1999) 197 CLR 414; see also *Taylor on Appeals*, (2000) at 8-073.

64 (1934) 52 CLR 335 at 344-345.

65 *R v Miletic* [1997] 1 VR 593 at 597.

66 *Ratten v The Queen* (1974) 131 CLR 510 at 517 per Barwick CJ.

party is held to the way in which his or her counsel has presented the party's case[67]. That is because counsel is in effect the party's agent. Counsel is "ordinarily instructed on the implied understanding that he is to have complete control over the way in which the case is conducted"[68]. The discretion retained by counsel in the running of a case is very wide[69]. Counsel may even settle a case without seeking the client's consent[70]. Blackburn J noted in *Strauss v Francis*[71] that "the apparent authority with which [counsel] is clothed when he appears to conduct the cause is to do everything which, in the exercise of his discretion, he may think best for the interests of his client in the conduct of the cause"[72]. In *Strauss* – where the issue was whether counsel had authority to consent to the withdrawal of a juror, notwithstanding the client's dissent – Mellor J added[73]:

> "No counsel, certainly no counsel who values his character, would condescend to accept a brief in a cause … without being allowed any discretion as to the mode of conducting the cause. And if a client were to attempt thus to fetter counsel, the only course is to return the brief."

75 But how does a court of criminal appeal determine whether counsel's conduct of the trial has led to a miscarriage of justice? By what standards is counsel's conduct judged? And, if counsel has failed to present the case properly, must the appellant show that the conduct possibly affected the verdict? The unattractive answer to the latter question must be that it depends on what counsel did or did not do.

76 In some cases, the conduct of counsel may be such that it has deprived the accused of a fair trial according to law. If the conduct of counsel has resulted in an unfair trial, that of itself constitutes a miscarriage of justice. If, for no valid reason, counsel fails to cross-examine material witnesses or does not address the jury, for example, the accused has not had the trial to which he or she was

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67 *R v Birks* (1990) 19 NSWLR 677 at 684 per Gleeson CJ. See also *Re Ratten* [1974] VR 201 at 214; *R v Miletic* [1997] 1 VR 593 at 598.

68 *Halsbury's Laws of England*, 4th ed (reissue), vol 3(1) at §518.

69 *Ignjatic* (1993) 68 A Crim R 333 at 336.

70 *Matthews v Munster* (1887) 20 QB 141.

71 (1866) 1 QB 379 at 381.

72 *Strauss v Francis* (1866) 1 QB 379 at 381 per Blackburn J.

73 *Strauss v Francis* (1866) 1 QB 379 at 383.

entitled. In such a case, the failure of counsel to conduct the defence properly is inconsistent with the notion of a fair trial according to law. It cannot be right to insist that the appeal can succeed only if the court thinks that counsel's conduct might have affected the verdict. To require the accused to persuade the court that the conduct might have affected the verdict comes close to substituting trial by appellate court for trial by jury. No matter how strong the prosecution case appears to be, an accused person is entitled to the trial that the law requires. In principle, therefore, where the trial has been unfair, the accused should not have to show that counsel's conduct might have affected the result[74].

77 But in other cases – perhaps the majority – the conduct of counsel – although irregular – will not necessarily deprive the accused of a fair trial. Not every error makes the trial unfair. Nevertheless, the irregular conduct of counsel may have affected the outcome. And a miscarriage of justice always occurs when there is a significant possibility that a material irregularity at the trial has resulted in the conviction of an accused person[75].

78 I do not think, therefore, that it is always necessary to show that the conduct of counsel resulted in an unfair trial, as Doyle CJ appears to have thought in *R v Scott*[76]. In *Scott*, his Honour said that the issue in cases concerning counsel's conduct was whether "something occurred or did not occur such that the trial became unfair". The learned Chief Justice said that, where the conduct of counsel is alleged to have affected the trial, "the type of miscarriage under consideration is that which falls into the second category identified by Barwick CJ in *Ratten*"[77]. In *Ratten v The Queen*, Barwick CJ described[78] three categories of a miscarriage of justice, the second of which was an accused person not having a fair trial because of irregularities at the trial. *Ratten* was not concerned with the conduct of counsel, and it would be wrong to treat Sir Garfield Barwick's statements in that case, helpful as they undoubtedly are, as exhaustive of what constitutes a miscarriage of justice. In *Re Knowles*[79], the Court of Criminal Appeal of Victoria pointed out that Sir Garfield's second category contains such a wide variety of circumstances that it is not helpful to

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74 cf *Wilde v The Queen* (1988) 164 CLR 365.

75 *Ratten v The Queen* (1974) 131 CLR 510 at 516.

76 (1996) 137 ALR 347 at 362.

77 (1996) 137 ALR 347 at 363. This was also the approach taken by the Victorian Full Court in *Re Knowles* [1984] VR 751 at 761.

78 (1974) 131 CLR 510 at 516.

79 [1984] VR 751.

seek to define them exhaustively. Instead, in each case there are "considerations of degree involving an assessment of the importance of a particular defect or omission in the actual circumstances of the trial [which] are relevant"[80]. In *Re Knowles*, the Court set aside a conviction because counsel had erroneously thought that evidence was neither relevant nor admissible[81]. Although counsel erred, it is difficult to conclude that the accused did not have a fair trial in the sense that that term is ordinarily used.

The standard for determining whether counsel's conduct is a material irregularity

79 The critical issue in an appeal like the present is not whether counsel erred in some way but whether a miscarriage of justice has occurred. However, "whether counsel has been negligent or otherwise remiss … remains relevant as an intermediate or subsidiary issue"[82]. That is because the issue of miscarriage of justice in such cases ordinarily subsumes two issues. First, did counsel's conduct result in a material irregularity in the trial? Second, is there a significant possibility that the irregularity affected the outcome? Whether a material irregularity occurred must be considered in light of the wide discretion that counsel has to conduct the trial as he or she thinks best and the fact that ordinarily the client is bound by the decisions of counsel. Accordingly, "it is not a ground for setting aside a conviction that decisions made by counsel were made without, or contrary to, instructions, or involve errors of judgment or even negligence"[83]. The appellant must show that the failing or error of counsel was a material irregularity and that there is a significant possibility that it affected the outcome of the trial.

80 In what circumstances then, will the appellant be able to discharge the heavy burden of establishing that counsel's conduct constituted a material irregularity amounting to a miscarriage of justice? Where the appellant can show that counsel has conducted the trial with flagrant incompetence, it is likely that the appellant will have established a material irregularity in the conduct of the trial that will provide the stepping stone to a finding of a miscarriage of justice. In *R v Birks*[84] the New South Wales Court of Criminal Appeal held that counsel's conduct constituted "flagrant incompetence"[85] and had brought about a

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80 *Re Knowles* [1984] VR 751 at 761.

81 [1984] VR 751.

82 *R v Scott* (1996) 137 ALR 347 at 362.

83 *R v Birks* (1990) 19 NSWLR 677 at 685.

84 (1990) 19 NSWLR 677.

85 (1990) 19 NSWLR 677 at 685.

miscarriage of justice. His conduct included failing to cross-examine the complainant on a material matter in accordance with his instructions and failing to take steps to minimise the damage flowing from that failure. As a result, the Crown cross-examined the accused to suggest that his evidence was inconsistent with his instructions to his counsel.

81 But as *Ignjatic*[86] shows, an accused will find it difficult to establish a miscarriage of justice when the alleged errors of counsel concerned forensic choices upon which competent counsel could have differing views as to their suitability. In *Ignjatic*[87], the accused alleged that counsel appearing for him at trial was incompetent in five respects. They were: failing to have him psychiatrically examined before the trial, failing to seek an order for separate trials, failing to object to the admission of his record of interview, calling him to give sworn evidence and failing to call his wife as a witness. Hunt CJ at CL, giving the leading judgment of the Court of Criminal Appeal of New South Wales, said that appellate intervention for the errors of counsel is not restricted to cases of "flagrant incompetence". The Court will intervene whenever any error by counsel has led to a miscarriage of justice[88]. His Honour held, however, that neither individually nor in combination had the alleged errors given rise to a miscarriage of justice. In *Ignjatic*[89], the appellant's case was not made easier by reason of the defence having been conducted on the advice of senior counsel, experienced in the criminal law, after a "substantial" conference and on instructions from the accused[90].

82 It will be even harder for the appellant to succeed where counsel has made the choice because of a perceived "forensic advantage"[91]. In *R v Harvey*[92] and *R v Purton*[93], the appeals failed because counsel had decided not to adduce character evidence because of the possibility that it might lead to the introduction

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86 (1993) 68 A Crim R 333.

87 (1993) 68 A Crim R 333.

88 (1993) 68 A Crim R 333 at 337-338.

89 (1993) 68 A Crim R 333.

90 (1993) 68 A Crim R 333 at 338.

91 cf *Suresh v The Queen* (1998) 72 ALJR 769; 153 ALR 145; *Doggett v The Queen* (2001) 75 ALJR 1290; 182 ALR 1.

92 Unreported, New South Wales Court of Criminal Appeal, 11 December 1996.

93 Unreported, New South Wales Court of Criminal Appeal, 26 March 1996.

of evidence of the accused's "bad character". In *Purton*, the Court of Criminal Appeal of New South Wales thought that this could be inferred because trial counsel knew that a school friend of the complainant had stated that the accused had also interfered with her.

83 In England, the Court of Appeal has sometimes sought to prescribe particular tests for the competence of counsel. Those tests have included "flagrant incompetence"[94], "*Wednesbury* reasonableness"[95], and whether the advice given was "within the acceptable exercise of counsel's judgment"[96]. However, ordinarily the Court of Appeal applies the principle that, where counsel's conduct is called into question, the Court must focus on the impact of the faulty conduct, whatever its label[97]. Accordingly, in England the fact that counsel's conduct cannot be described as incompetent does not mean that the appellant must fail.

84 Sometimes the error of counsel may have so plainly affected the result of the trial that a miscarriage of justice will have occurred even though the error involved a forensic choice or judgment and did not constitute "flagrant incompetence". In *Re Knowles*[98], the Full Court of the Supreme Court of Victoria ordered a new trial where counsel failed to call two witnesses because he believed that their evidence was neither relevant nor admissible. On a charge of murdering his de facto wife, the accused claimed that he had accidentally stabbed her when he attempted to take a knife from her after she had become belligerent and abusive while intoxicated. The two witnesses, who had been in relationships with the deceased at earlier times, would have testified that she became aggressive after drinking. I would have thought that counsel's view as to admissibility was arguably right. But the Full Court held that the evidence was admissible[99] and that counsel's error was a "fundamental error"[100] which had

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94 *Bevan* (1993) 98 Cr App R 354. See also *Blackstone's Criminal Practice*, 8th ed (1998) at 1565-1566.

95 *Ullah* [2000] 1 Cr App R 351.

96 *R v Chatroodi* [2001] EWCA (Crim) 585.

97 *Ensor* (1989) 89 Cr App R 139; *Clinton* (1993) 97 Cr App R 320; *Bevan* (1993) 98 Cr App R 354; *Boodram v The State (Trinidad and Tobago)* [2001] UKPC 18.

98 [1984] VR 751.

99 [1984] VR 751 at 762.

100 [1984] VR 751 at 770, 771.

resulted in a miscarriage of justice. *Re Knowles*[101] must be regarded as authority for the proposition that a miscarriage of justice may occur when counsel makes a legal error as to a fundamental point even if counsel's view is arguably correct.

85 Furthermore, where the alleged error of counsel does not concern a forensic choice, the appellant will usually be in a better position to prove that a miscarriage of justice has occurred than in cases of forensic choice. If counsel omits to call a material witness because of a memory lapse or a breakdown in communication and there is a significant possibility that the omission affected the outcome, the appellant will usually establish that a miscarriage of justice has occurred. In *R v Scott*[102], the Court of Criminal Appeal of South Australia held that the failure to call two witnesses because of a misunderstanding between counsel and the accused had led to a miscarriage of justice. Doyle CJ said that he "might not have reached this conclusion if this point stood alone", but the "treatment in the summing up of [another witness'] evidence was all the more damaging because there was no answer to her evidence"[103].

The conduct of counsel did not result in a miscarriage of justice

(a) Failure to apply for an "advance ruling"

86 The appellant contends that it was open to his counsel to seek a ruling in advance by the trial judge as to whether the Crown would be permitted to call K's evidence in reply or rebuttal to the appellant's character evidence[104].

87 The general rule is that a trial judge decides on the admissibility of evidence when it is tendered in the course of the trial[105]. However, some judges provisionally admit or exclude evidence saying that they will make a final ruling when all the evidence is in[106]. But this is different from an "advance ruling" in which the trial judge indicates how he or she would exercise a discretion to

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101 [1984] VR 751.

102 (1996) 137 ALR 347.

103 (1996) 137 ALR 347 at 366.

104 See *PKS*, unreported, New South Wales Court of Criminal Appeal, 1 October 1998; *Robinson* (2000) 111 A Crim R 388.

105 *International Harvester Company of Australia Pty Ltd v McCorkell* [1962] Qd R 356 at 358 per Philp J.

106 *Wigmore on Evidence*, (Tillers rev) (1983), vol 1 §19 at 846. *Stanoevski v The Queen* (2001) 202 CLR 115.

exclude evidence, if called on to exercise it. Rule 11 of the District Court Rules, however, authorises a judge to determine questions of admissibility before a jury is sworn. Gaudron J has held that the "advance ruling" which the appellant argues should have been sought in this case was not a ruling to which the appellant was entitled. Her Honour holds that neither the *Evidence Act*, nor the Criminal Procedure Rules of the District Court nor the implied power of the District Court authorised such a ruling. It is unnecessary for me to decide this point because in my opinion the appellant has failed to show that there was a significant possibility that the judge would have exercised his discretion and rejected K's evidence.

88 In the Court of Criminal Appeal, Adams J said that, if the character evidence had been led and K's evidence tendered in rebuttal, *R v Wheeler*[107] would have required the trial judge to exercise his discretion under s 135 of the *Evidence Act* and reject the rebuttal evidence. His Honour said that the reasonable possibility of collusion between the complainant and K would have been a relevant and, perhaps, decisive consideration in exercising the discretion. But with great respect, the question of collusion was irrelevant to an issue under s 135. K's evidence did not go to the tendency of the appellant to act in the way alleged by the complainant. K's evidence was relevant because, if believed, it would have rebutted the evidence led to show the appellant's good character. When evidence is tendered as similar fact or tendency evidence, the possibility of collusion between the complainant and the deponent to the similar fact or tendency evidence is a matter that is relevant to the admissibility of the evidence[108]. When the evidence is tendered to rebut evidence of good character, any question of collusion is a matter for the jury. It does not go to the admissibility of or the discretion to reject the evidence. *Wheeler* was wrongly decided on this point.

89 The trial judge of course would have had a discretion to exclude K's evidence concerning the character of the appellant on the ground that its prejudicial effect outweighed its probative value. That would have required the judge to consider a number of matters[109]. Would her evidence be likely to divert the jury from the critical issue at the trial – whether the Crown had proved the charges against the appellant? Would it be likely to induce the jury to believe that, if he had sexually assaulted K, he was the sort of person who was likely to have sexually assaulted the complainant? Would it be likely to create undue suspicion against the appellant and undermine the presumption of innocence?

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107 Unreported, New South Wales Court of Criminal Appeal, 16 November 1989.

108 cf *Hoch v The Queen* (1988) 165 CLR 292.

109 See *Pfennig v The Queen* (1995) 182 CLR 461 at 512.

Given the age of K, would it be likely to cause contempt for, bias or some other form of prejudice against, the appellant? If the judge had made an affirmative answer to any of these questions, he or she would have to have made a value judgment as to whether the prejudicial effect outweighed the importance of the rebuttal evidence to the Crown case and put at risk the fairness of trial.

90 Without seeing or hearing K give evidence and being cross-examined on a *voir dire*, it is impossible to determine whether the trial judge might have excluded her evidence as a matter of discretion. On what we know of K's evidence, however, I would not have excluded her evidence, if I had been the trial judge, no matter how cogent the good character evidence appeared to be. In exercising the discretion the judge would not be required to weigh K's evidence against the good character evidence but only against any prejudice that it might create. In a case that turned on the complainant's word against the appellant's, the good character of the appellant was a factor that might well swing the balance in his favour. To let the appellant go to the jury as a man of good character when K's evidence, if believed, showed the opposite would be contrary to the public interest unless the judge was satisfied that it gave rise to prejudice that outweighed the probative value of the evidence. K's evidence therefore went to a vital issue in the case and, if believed, was cogent evidence concerning that issue. Its probative value was very high. That her evidence damaged – even seriously damaged – the appellant's case did not make it prejudicial. In this context, prejudice means diverting the jury's attention from the issues to be determined in the case to the detriment of the accused. The most likely risk of prejudice in this case was that the jury might think that, if the appellant had sexually assaulted K, he was the sort of person who was likely to assault the complainant. In my opinion, K's evidence would give rise to this risk of prejudice, a risk that almost always arises when evidence is admitted to rebut evidence of good character. But if the evidence of bad character is cogent, it is a risk that must usually be taken unless the accused is to have an advantage that he or she is not entitled to have. In the vast majority of cases, the risk will be eliminated by a strong direction to the jury that the rebuttal evidence can only be used on the issue of good character[110]. Even if the judge thinks that such a direction may not eliminate the *risk* of prejudice, the probative value of the evidence on the character issue may still require its admission. It will do so if its probative value outweighs any prejudice that it creates. In this case, the judge would have been bound to direct the jury that K's evidence was relevant only in determining whether the appellant was a person of good character or not. Such a direction should have been sufficient to eliminate the risk.

91 Nevertheless, if the trial judge had seen and heard K give evidence on the *voir dire*, it is conceivable that he might have excluded her evidence. There is

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110 cf s 136 of the *Evidence Act* 1995 (NSW).

the chance that something may have occurred that would induce the judge to exclude the evidence. However, the existence of this theoretical possibility does not assist the appellant. The onus is on the appellant to prove a material irregularity in the trial. The appellant does not discharge that onus by showing that there is a theoretical possibility that the judge might have excluded the evidence.

92 Accordingly, the appellant has not established that, if counsel had sought an advance ruling, there is a significant possibility that he would have been able to call good character evidence – uncontested by K's evidence – and that the good character evidence might have brought about a verdict of acquittal.

(b) Failure to adduce character evidence

93 The question then remains whether, independently of the failure to seek an advance ruling, the failure to call character evidence in the defence case resulted in a miscarriage of justice.

94 Evidence of good character almost always helps an accused person's defence. Sometimes it is the decisive factor in returning a verdict of not guilty[111]. It may demonstrate that it is unlikely that the accused committed the act charged[112], or it may support the credibility of the evidence of the accused in denying his or her guilt[113]. The argument for the appellant assumed that, if the appellant had called good character evidence, the trial judge, exercising the discretion conferred by s 137 of the *Evidence Act*, would have rejected K's evidence on the basis that its prejudicial effect outweighed its probative value. But for the reasons that I have given, the appellant has failed to establish – even as a significant possibility – that the judge would have excluded K's evidence. The appellant's argument must therefore be examined on the basis that, if he had called good character evidence, the Crown would have called K to rebut that evidence.

95 Some experienced counsel might think that the appellant would have had a better chance of acquittal if he had raised good character even if the Crown

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111 *D* (1996) 86 A Crim R 41.

112 s 55 of the *Evidence Act* 1995 (NSW); *Simic v The Queen* (1980) 144 CLR 319 at 333-334; *Melbourne v The Queen* (1999) 198 CLR 1 at 14 [31], 29-30 [79], 55 [151].

113 *Attwood v The Queen* (1960) 102 CLR 353 at 359; *Melbourne v The Queen* (1999) 198 CLR 1 at 14 [31], 29-30 [79], 55 [151]; *Hamilton* (1993) 68 A Crim R 298 at 302.

called K to rebut the claim of good character. Counsel for the appellant would have claimed that K and the complainant had colluded to convict an innocent man. But trial counsel's decision not to raise character was a proper one. If the jury believed K, then the appellant was a person of bad character. The chance of the jury then acquitting him of any of the charges would be much lower than if the jury had no evidence concerning the appellant's character. The choice that trial counsel made – calling no character evidence – was a legitimate one, a choice that a competent counsel could fairly make. That is enough to dispose of this ground in this case. Not calling good character evidence, as the result of counsel's decision, was not an irregularity – material or otherwise. It resulted in no miscarriage of justice.

96 Even if the conduct of the case is examined without regard to counsel's discretion, the appellant has failed to establish a miscarriage of justice. Although counsel's decision forfeited the advantages of good character evidence, it enabled counsel to defend the case on one front, not two. Once counsel raised good character, he would have had to contend with K's evidence. The complainant's allegations had problems. It is not clear from the material before us that K's evidence suffered from the same or similar or any problem. The jury was convinced beyond a reasonable doubt that the appellant's denials of assaulting the complainant were false. I do not think that the appellant has established a significant possibility that he would have been acquitted if he had called the good character evidence. Maybe he would have. But it is sheer speculation to think so. This Court has not seen and heard the evidence of K and the character witnesses tested in open court. Nor did the Court of Criminal Appeal make any findings concerning the credibility of these witnesses. The bare fact that the appellant could have called character witnesses provides no ground for thinking that the jury would have rejected K's evidence and used the good character evidence to conclude that there was a reasonable doubt about the complainant's evidence. I am not convinced therefore that there is a significant possibility that evidence of his good character would have caused the jury to reject K's evidence and then use the good character evidence to reject the complainant's evidence.

Conclusion

97 In determining whether the conduct of counsel has resulted in a miscarriage of justice, the "semantic exercise of trying to assess the qualitative value of counsel's alleged ineptitude"[114] is not an end in itself. A test such as "flagrant incompetence", while a convenient label that may show that a miscarriage of justice has occurred in a particular case, is unhelpful generally in determining whether there has been a miscarriage of justice within the terms of s 6(1) of the *Criminal Appeal Act*. Whether there has been a miscarriage of

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114 *Clinton* (1993) 97 Cr App R 320 at 326 per Rougier J.

justice is the ultimate issue that the court must decide. Counsel's conduct is a sub-issue. Where counsel's conduct is in issue, the court must examine all the circumstances including the wide discretion that counsel, as an officer of the court, had to conduct the trial in the manner that he or she thought was in the best interests of the accused. If the court concludes that, despite that discretion, a material irregularity has occurred, it must determine whether there is a significant possibility that the irregularity affected the outcome. If it does, a miscarriage of justice will have occurred and the conviction must be quashed. There is no scope for applying the proviso.

98 In the present case, the appellant has not established that the failure to call character evidence or apply for an "advance ruling" was a material irregularity and that there was a significant possibility that, without that irregularity, the appellant would have been acquitted. The appellant's conviction was therefore not a miscarriage of justice.

Order

99 The appeal should be dismissed.

100 GUMMOW J. The appeal should be dismissed.

101 I agree with the reasons of Gaudron J and of Hayne J.

102 HAYNE J. I agree that the appeal should be dismissed. For the reasons given by Gaudron J this was not a case where "on any other ground … there was a miscarriage of justice"[115]. To adopt, and adapt, what was said by Fullagar J in *Mraz v The Queen*[116], the appellant had a trial "in which the relevant law [was] correctly explained to the jury and the rules of procedure and evidence [were] strictly followed". There being no failure in those respects, there was not, on that account, any miscarriage of justice. Nor, on any other ground, can it be said that there was a miscarriage of justice in this case.

103 Although the appellant's argument was cast in terms which invited attention to *why* the appellant's trial took the course it did (for want of his counsel seeking an "advance ruling"), the question which falls for decision in this case is more fundamental than the argument acknowledges. There being no defect in the instructions given to the jury, and no defect in the procedures followed at trial, the question of "miscarriage of justice" must in this case direct attention to the result of the trial. It is not enough to say, as the appellant submitted, that there was some procedure available at trial for deciding a question of admissibility of evidence which was a procedure trial counsel for the appellant did not invoke. That is significant only if it affected the result of the trial. Thus, if there is a miscarriage of justice, it lies in the fact that some evidence could have been, but was not, placed before the jury.

104 The miscarriage being said to lie in the fact that some evidence could have been, but was not, placed before the jury, the ultimate question will be whether the jury would have been likely to entertain a reasonable doubt about guilt if all the evidence had been before it[117]. (I leave aside the debate revealed in *Mickelberg v The Queen* about whether the test is better expressed as "likely to entertain a reasonable doubt" or "significant possibility of acquittal". I adopt the former expression only for ease of reference.)

105 At first sight that question is complicated, in this case, by the fact that the appellant's adducing evidence of his good character may have permitted the prosecution to adduce evidence from the other complainant, K – evidence which was not expected to assist the appellant. This may suggest that it is necessary to examine whether that evidence of K could have been led. But as will later be demonstrated that is not an inquiry that in this case must be pursued to its end.

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115 *Criminal Appeal Act* 1912 (NSW), s 6(1).

116 (1955) 93 CLR 493 at 514.

117 *Mickelberg v The Queen* (1989) 167 CLR 259.

106 The question, about what the jury would, or may, have done if it had had all the evidence before it, does not arise in the abstract and it would be wrong for an appellate court to approach the question as if it did. Account must be taken of the nature of a criminal trial. A criminal trial is not an examination of all the material that exists and bears on the question of an accused's guilt[118]. It is an accusatory and adversarial process in which the prosecution and the defence are responsible for deciding the ground on which the trial will be fought and the evidence that each will lead[119]. That is why the rules about fresh evidence on appeal have developed as they have[120]. And the decisions that are made by the parties about how the trial is to be fought are decisions made on material that may in some respects be incomplete and in other respects turn on questions of professional judgment about which reasonable minds may differ. Very often, too, they are decisions that are much affected by matters revealed to the adviser in confidence and to which the constraints of legal professional privilege apply. Any subsequent inquiry into decisions of this kind has obvious difficulties.

107 No less importantly, however, it follows from the characteristics of a criminal trial which I have identified that, when it is said that a failure to call evidence which was available to the defence at trial has led to a miscarriage of justice, the question presented to an appellate court requires an objective inquiry, not an inquiry into the subjective thought processes of those who appeared for, or advised, the accused at trial. The relevant question is not: why did counsel not lead the evidence, or was counsel competent or incompetent? It is: *could* there be any reasonable explanation for not calling the evidence?

108 If there could not be any such explanation, there may have been a miscarriage of justice. It would then be necessary to go on to ask whether the jury would have been likely to entertain a reasonable doubt about guilt if the evidence had been led. If, however, there *could* be a reasonable explanation for not calling the evidence, that will be the end of the matter. It is not to the point then to inquire whether counsel did or did not think about the point, or acted competently or incompetently, even though the conclusion that there could be no reasonable explanation for the course followed at trial would seem to entail the conclusion that counsel did not act competently.

109 To hold that the inquiry is not an objective inquiry of the kind I have described would require an appellate court to apply inquisitorial methods and standards in determining an appeal from what, at trial, has been an accusatorial

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118 *Re Ratten* [1974] VR 201 at 214; *Ratten v The Queen* (1974) 131 CLR 510 at 517.

119 *Ratten* (1974) 131 CLR 510 at 517.

120 *Mickelberg* (1989) 167 CLR 259.

and adversarial process. It would require the appellate court to examine whether, on *all* the material available, a jury would have been likely to entertain a doubt. That is a very different process from the process undertaken at trial which is predicated upon the parties choosing the field for debate and (subject to the obligations of the prosecution[121]) the evidence that is to be led. The principles which inform the two processes are so radically different that they cannot be applied at successive stages of the judicial process. If they are to be merged in some way, that must occur throughout the system, not by applying one set of principles at trial and another, contrary, set of principles on appeal.

110 Yet that is what would be done if the question were thought to turn on a factual inquiry into why trial counsel acted, or did not act, in a particular way. It would require the appellate court to decide first whether, in all of the circumstances of the case, counsel had acted wisely, and then whether, if a different course had been taken, the outcome of the trial might, or would likely have been different. And if the court were persuaded that trial counsel had not acted with reasonable skill (as, for example, by not weighing the relevant considerations properly, or even not adverting to what now is thought to have been the relevant question), what is the court to do? Would it be enough to conclude that the case *might* have been conducted differently and if it had, there might, or even would likely have been a different outcome? That is, is the question at its base whether, on all the material that *could* have been led at trial, the appellate court concludes that a different outcome was possible or probable?

111 A test of that kind would indeed be undemanding. Trial counsel must often make difficult decisions – both in court and out of court. Often the decision is one about which reasonable minds may differ. It follows that there will be very many trials of which it could be said that the trial *could* have been conducted differently from the way it was. And even if the further test that then is to be applied is whether it is *likely* that the result would have been different if further evidence had been led, there will be many cases in which that conclusion would be reached. That fact alone may suggest that a wrong step has been taken in formulating the relevant principles. But when it is recalled that the premise for the debate is an acceptance of the fact that competent counsel, acting reasonably, *could* have concluded that the evidence in question should not be led, it is obvious that the focus of attention has been shifted away from ensuring that there has been no miscarriage of justice and on to the conduct of counsel.

112 If the relevant question is, as I would hold it to be, whether there could be a reasonable explanation for not calling the evidence, the principal focus of the inquiry remains upon whether the accused had a trial in which the relevant law was correctly explained to the jury and the rules of procedure and evidence were

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121 *R v Apostilides* (1984) 154 CLR 563.

strictly followed. The focus is not shifted from those matters to what trial counsel did, or did not, think about in the course of the trial. Nor would appellate courts be required to form any judgment about what would have been the *better* choice for counsel to make when confronted with one of the many and difficult choices that are presented to counsel at trial. If there could be a reasonable explanation for not calling the evidence, it follows that counsel *could* have chosen to act in that way without criticism. It follows that the outcome of an otherwise regular trial is not to be impeached on the ground that some evidence was not led at trial unless the evidence is fresh, or, if the evidence is not fresh evidence, there could be no reasonable explanation for not calling it and, in either case, the evidence is such that, viewed in combination with the evidence given at trial, the jury would have been likely to entertain a reasonable doubt about guilt.

113 It is not to the point, in this case, to attempt to decide how the trial judge may have exercised a discretion to exclude evidence of K led in answer to evidence of the appellant's good character. It is not to the point to do so because the question is, could counsel reasonably have concluded that there were risks attending the attempt to call evidence of the good character of the appellant? There may have been a risk that the trial judge would allow evidence from K. But there were other, no less important risks inherent in seeking to obtain a decision about what was to be done with K's evidence. There would probably have been a voir dire in which K would give evidence. That would rehearse the evidence she would give, if not on this trial, at any subsequent trial of the indictment alleging offences against her. That fact alone could constitute reason enough to decide not to embark on the course of trying to lead evidence of the appellant's good character – with or without some "advance ruling" on the matter.

114 As to the question of seeking an "advance ruling", I agree with Gaudron J that neither Pt 53 r 10 of the District Court Rules 1973 (NSW) nor the *Evidence Act* 1995 (NSW) permits a trial judge to decide how he or she would exercise a discretion under s 135 of the *Evidence Act* before the occasion for making that decision arises. I would not wish, however, to be understood as seeking to confine the power to hold "an enquiry by way of a voir dire into the admissibility of any evidence"[122]. Nor, at the risk of stating the obvious, am I to be taken as foreclosing the way in which the statutes or rules governing procedures at and before criminal trials in other jurisdictions are to be understood[123].

115 Whether the particular question of admissibility of the evidence at issue in this case could have been determined without the accused first having adduced evidence of good character is a question I need not decide. There are several

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122 District Court Rules 1973 (NSW), Pt 53 r 11.

123 cf, for example, *Crimes Act* 1958 (Vic), ss 391A, 391B.

possible bases on which trial counsel for the appellant could reasonably have concluded that to run any risk of evidence being led from the other complainant would be unwise. As I have already said, it seems probable that, at whatever stage of the trial the issue fell to be debated, it would have been necessary to hold a voir dire in which the other complainant would have been examined. To permit the other complainant to have any opportunity to give the evidence which she may later have given against the appellant in a separate trial may well have been thought to be unwise. In these circumstances, there was no miscarriage of justice in this case.