HIGH COURT OF AUSTRALIA

GLEESON CJ,
GUMMOW, KIRBY, HAYNE, CALLINAN AND HEYDON JJ

KEVIN PHILIP NUDD APPELLANT

AND

THE QUEEN RESPONDENT

Nudd v The Queen
[2006] HCA 9
9 March 2006
B22/2005

ORDER

Appeal dismissed.

On appeal from the Supreme Court of Queensland

Representation:

M J Byrne QC with C J N Eberhardt for the appellant (instructed by Graham Lawyers)

A J Rafter SC with G R Rice for the respondent (instructed by Director of Public Prosecutions (Commonwealth))

CATCHWORDS

Nudd v The Queen

Criminal Law – Trial – Miscarriage of justice – Competence of counsel – Alleged failure to take instructions – Alleged failure to understand elements of offence and relevant statutory provisions – Alleged failure to be familiar with applicable judicial decisions.

Appeal – Criminal appeal – Miscarriage of justice – Competence of counsel – Application of "proviso" – Whether denial of fair trial may sometimes without more amount to miscarriage of justice.

Legal practitioners – Criminal trial – Competence of counsel and of solicitor – Alleged failures to take instructions, to understand elements of offence and to consider applicable judicial decisions – Extent to which, if at all, alleged incompetence contributed to any miscarriage of justice – Whether in some circumstances miscarriage of justice includes denial of fair trial according to law without more.

Words and phrases – "on any ground whatsoever there was a miscarriage of justice".

Criminal Code (Q), s 668E(1).

1 GLEESON CJ. Following a trial in the Supreme Court of Queensland, before Philippides J and a jury, the appellant was convicted of being knowingly concerned in the importation into Australia of cocaine. He was sentenced to a lengthy term of imprisonment. He says that his conviction involved a miscarriage of justice, and blames his trial counsel.

2 The appellant appealed unsuccessfully to the Court of Appeal of the Supreme Court of Queensland[1]. The jurisdiction invoked was that conferred by s 668E of the *Criminal Code* (Q), which is in a form similar to the statutory provisions governing criminal appeals in the other Australian States and Territories[2]. The statutory ground of appeal was that there was a miscarriage of justice. That, as was said in *R v Birks*[3], *Ignjatic*[4], *TKWJ v The Queen*[5], and *Ali v The Queen*[6], defined the issue to be decided. The appellant's criticisms of the conduct of his trial counsel were relevant to the issue[7], but the issue was whether there was a miscarriage of justice.

3 In this context, the concepts of justice, and miscarriage of justice, bear two aspects: outcome and process. They are different, but related.

4 In *Davies and Cody v The King*[8], this Court said:

> "From the beginning, [the English Court of Criminal Appeal] has acted upon no narrow view of the cases covered by its duty to quash a conviction when it thinks that on any ground there was a miscarriage of justice, a duty also imposed upon the Supreme Court of Victoria ... It has consistently regarded that duty as covering not only cases where there is affirmative reason to suppose that the appellant is innocent, but also cases of quite another description. For it will set aside a conviction whenever it

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1 *R v Nudd* [2004] QCA 154.

2 See *Weiss v The Queen* [2005] HCA 81.

3 (1990) 19 NSWLR 677 at 685.

4 (1993) 68 A Crim R 333.

5 (2002) 212 CLR 124.

6 (2005) 79 ALJR 662; 214 ALR 1.

7 *TKWJ v The Queen* (2002) 212 CLR 124 at 134 [30] per Gaudron J, 147-148 [74]-[76] per McHugh J.

8 (1937) 57 CLR 170 at 180 per Latham CJ, Rich, Dixon, Evatt and McTiernan JJ.

> appears unjust or unsafe to allow the verdict to stand because some failure has occurred in observing the conditions which, in the court's view, are essential to a satisfactory trial, or because there is some feature of the case raising a substantial possibility that, either in the conclusion itself, or in the manner in which it has been reached, the jury may have been mistaken or misled."

5 This emphasis upon outcome and process as requirements of justice according to law is fundamental and familiar. It informed the explanation of miscarriage of justice given by Barwick CJ in *Ratten v The Queen*[9]:

> "Miscarriage is not defined in the legislation but its significance is fairly worked out in the decided cases. There is a miscarriage if on the material before the court of criminal appeal, which where no new evidence is produced will consist of the evidence given at the trial, the appellant is shown to be innocent, or if the court is of the opinion that there exists such a doubt as to his guilt that the verdict of guilty should not be allowed to stand. It is the reasonable doubt in the mind of the court which is the operative factor. It is of no practical consequence whether this is expressed as a doubt entertained by the court itself, or as a doubt which the court decides that any reasonable jury ought to entertain. If the court has a doubt, a reasonable jury should be of a like mind. But I see no need for any circumlocution; as I have said it is the doubt in the court's mind upon its review and assessment of the evidence which is the operative consideration.
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> That is one instance of a miscarriage: another is where the appellant has not had a fair trial. There is no need here to refer to the various circumstances in which a trial may become unfair. Some of these are mentioned in the reasons of the Full Court. But it may be that even where there have been irregularities at the trial there may be no miscarriage of justice if the court forms the opinion that no jury of reasonable men, properly instructed and alive to their responsibilities, would fail on the evidence to convict the accused."

6 The common statutory provision governing criminal appeals, of which s 668E of the Queensland Code is an example, covers matters of both outcome and process, referring to jury verdicts which are unreasonable or cannot be supported having regard to the evidence, to wrong decisions (of a judge) on any question of law, and to any other ground for concluding that there was a miscarriage of justice. These grounds for allowing an appeal are followed by a qualification, often referred to as a proviso, to the effect that, even if a point raised by the appellant has been made out, the appellate court may dismiss the

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9 (1974) 131 CLR 510 at 516.

appeal if it considers that no substantial miscarriage of justice has actually occurred. The proviso was considered recently by this Court in *Weiss v The Queen*[10]. The concluding sentence in the passage from the judgment of Barwick CJ in *Ratten* adopted a formula sometimes used to explain the practical effect of the proviso. What is significant for present purposes is the qualified manner in which Barwick CJ expressed himself. Some irregularities "may" involve no miscarriage of justice if the appellate court forms a certain opinion about the strength of the case against the appellant. The corollary of that proposition is that a defect in process may be of such a nature that its effect cannot be overcome by pointing to the strength of the prosecution case. It is impossible to state exhaustively, or to define categorically, the circumstances in which such a defect will occur. In *Mraz v The Queen*[11], Fullagar J said that "every 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" and that, if there is a failure in any of those respects "and the appellant may thereby have lost a chance which was fairly open to him of being acquitted", then there is a miscarriage of justice. That well-known passage relates the failure of process to the loss of a chance of acquittal. Even though it is impossible and undesirable to attempt to reduce miscarriages of justice to a single formula, there is at least one circumstance in which a failure of process cannot be denied the character of a miscarriage of justice on the ground of the appellate court's view of the strength of the prosecution case. That is where the consequence of the failure of process is to deprive the appellate court of the capacity justly to assess the strength of the case against the appellant. There may be other circumstances in which a departure from the requirements of a fair trial according to law is such that an appellate court will identify what occurred as a miscarriage of justice, without undertaking an assessment of the strength of the prosecution case. If there has been a failure to observe the conditions which are essential to a satisfactory trial and, as a result, it appears unjust or unsafe to allow a conviction to stand, then the appeal will be allowed.

7 The concept of miscarriage of justice is as wide as the potential for error. Indeed, it is wider; for not all miscarriages involve error. Process is related to outcome, in that the object of due process is to secure a just result. Justice, however, means justice according to law, and the observance of the requirements of law according to which a criminal trial is to be conducted has a public as well as a private purpose. An unjust conviction is one form of miscarriage. Another is a failure of process of such a kind that it is impossible for an appellate court to decide whether a conviction is just. Another is a failure of process which departs from the essential requirements of a fair trial.

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10 [2005] HCA 81.

11 (1955) 93 CLR 493 at 514.

8 Where it is claimed that a miscarriage of justice of the second kind referred to in *Davies and Cody* and *Ratten* has occurred, the appellate court is *primarily* concerned with what happened at, or in relation to, the trial of the appellant; an investigation of why it happened is ordinarily irrelevant, and often impractical. It is natural for a person aggrieved by the outcome of a criminal trial to seek to assign blame, but where a miscarriage of justice is said to arise from a failure of process, it is the process itself that is judged, not the individual performance of the participants in the process. If a trial judge fails to instruct a jury on an essential point of law, the explanation might be that the judge was inexperienced, or ill, or absent-minded, or temporarily distracted by other concerns. That would be irrelevant. It is the acts and omissions of the judge that matter; not personal failings or problems that might account for those acts or omissions. Similarly, where the conduct of counsel, as a participant in the trial process, is said to give rise to, or to be involved in, a miscarriage of justice, ordinarily it was what was done or omitted that is of significance, rather than why that occurred.

9 Sometimes, however, a decision as to whether something that happened at, or in connection with, a criminal trial involved a miscarriage of justice requires an understanding of the circumstances, and such an understanding might involve knowledge of why it happened. A criminal trial is conducted as adversarial litigation. A cardinal principle of such litigation is that, subject to carefully controlled qualifications, parties are bound by the conduct of their counsel, who exercise a wide discretion in deciding what issues to contest, what witnesses to call, what evidence to lead or to seek to have excluded, and what lines of argument to pursue. The law does not pursue that principle at all costs. It recognises the possibility that justice may demand exceptions. Nevertheless, the nature of adversarial litigation, with its principles concerning the role of counsel, sets the context in which these issues arise. Considerations of fairness often turn upon the choices made by counsel at a trial. In *TKWJ v The Queen*[12], the appellant complained that evidence of his good character was not led. This, it was said, was unfair. In rejecting that argument, this Court said that the failure to call the evidence was the result of a decision by counsel, and that, viewed objectively, it was a rational decision[13]. That, in the circumstances of the case, was conclusive. It is the fairness of the process that is in question; not the wisdom of counsel. As a general rule, counsel's decisions bind the client. If it were otherwise, the adversarial system could not function. The fairness of the process is to be judged in that light. The nature of the adversarial system, and the assumptions on which it operates, will lead to the conclusion, in most cases, that

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12 (2002) 212 CLR 124.

13 (2002) 212 CLR 214 at 130-131 [16] per Gleeson CJ, 133 [26]-[27] per Gaudron J, 155 [95] per McHugh J, 158 [107] per Hayne J.

a complaint that counsel's conduct has resulted in an unfair trial will be considered by reference to an objective standard, and without an investigation of the subjective reasons for that conduct.

10 It is convenient to make a digression concerning a point of appellate practice in one Australian jurisdiction. It would be unfortunate if this particular matter, otherwise irrelevant to the present appeal, were permitted to obscure the general principle discussed in the preceding paragraph. In New South Wales, r 4 of the Criminal Appeal Rules provides that no direction, omission to direct, or decision as to the admission or rejection of evidence, given by the judge presiding at the trial, shall, without the leave of the Court of Criminal Appeal, be allowed as a ground for appeal or an application for leave to appeal unless objection was taken at the trial to the direction, omission or decision. Applications for leave under the rule sometimes require consideration of the circumstances of a failure to take objection at the trial. In particular, where it appears that there may have been some tactical advantage sought by not taking the objection, the appellant, in applying for leave, may be concerned to rebut that inference. On some occasions, the Court of Criminal Appeal receives evidence from trial counsel to explain the circumstances of the failure to object. This, in turn, may raise issues of legal professional privilege, and express or implied waiver of privilege. On relatively rare occasions, an argument about the application of r 4 can widen into an argument about miscarriage of justice resulting from the conduct of trial counsel. More often than not, any such evidence is confined to a brief, unchallenged, assertion by trial counsel that the failure to object was not for a tactical purpose. Where, however, a substantial issue of fact arises concerning the conduct of counsel, the procedure sometimes reveals the difficulties inherent in the resolution of such an issue. A full explanation, and understanding, of why decisions are taken in the conduct of a trial will often require knowledge of information held, and opinions formed, by counsel, the revelation of which could be invidious, and contrary to the interests of an appellant. Furthermore, counsel whose conduct is in question is not a party to the appellate proceedings, is unrepresented, and may be in a position of conflict of interest with his or her erstwhile client. While there may be circumstances in which it is unavoidable, this can be an awkward procedure. A court of criminal appeal is an unsatisfactory forum for assessing the performance of trial counsel, and appellate courts, recognising that difficulty, seek to avoid such assessment unless it is unavoidable. I mention the practical problems that arise in the application of r 4, because the existence of such problems is of wider significance, and bears upon the principles to be applied in resolving a question of miscarriage of justice. To the extent to which it is reasonably possible, the focus of attention should be the objective features of the trial process. Nevertheless, there may be circumstances where it is relevant to ask why some act or omission occurred. In some cases, for example, it may be material to know that counsel took a certain course upon the instructions of the client. There could be circumstances in which it is material to know that a course was taken contrary to instructions. The possibility of a need to know the reason for conduct

cannot altogether be eliminated. In general, however, as far as justice permits, the enquiry should be objective. As a matter of principle, such objectivity is consistent with the assumptions on which the adversarial system operates. As a matter of practicality, it avoids the difficulties inherent in turning a criminal appeal into an investigation of the performance of trial counsel.

11 There is a further reason for caution in setting out to measure the performance of counsel. Criminal trials are conducted as a contest, but the adversarial system does not require that the adversaries be of equal ability. The system does its best to provide a level playing field, but it cannot alter the fact that some players are faster, or stronger, or more experienced than others. Opposing counsel may be mismatched, but this does not make the process relevantly unfair. Judges can do their best to minimise the effects of differences between the abilities of opposing counsel, but their capacity to intervene is limited by their own obligations of neutrality. Accreditation requirements impose basic standards of professional competence, but beyond those there are large differences in individual levels of competence. The practical effect of a certain level of performance by a defence counsel might depend upon the level of performance of the prosecutor. Any experienced advocate knows that what might amount to a minor slip against one opponent could be a fatal mistake against another.

12 The reluctance of courts of criminal appeal to enter upon an assessment of the performance of trial counsel is well-founded in considerations both of principle and of pragmatism. That reluctance is reflected in the way in which courts respond to an argument that there has been a miscarriage of justice arising from the incompetence of counsel. Such arguments are becoming increasingly common. Nowadays, when most criminal trials and appeals are funded by legal aid, appellants are often represented by counsel who did not appear at the trial. By hypothesis, trial counsel lost; an appellant supported by legal aid will often want new counsel to conduct the appeal. The client may well be dissatisfied with the performance of trial counsel. Appeal counsel will have his or her own ideas about the way the defence case should have been conducted. Inevitably, in some cases, trial counsel will be blamed for failure. Such blame is pointless unless it can be related to a legal rubric of relevance to the jurisdiction being exercised by the court of criminal appeal. The relevant rubric is miscarriage of justice.

13 In the United States, and Canada, accused persons have a constitutional, or quasi-constitutional, right to *effective* assistance from counsel. Yet even in those jurisdictions, the courts have been concerned to stress the objective nature of the standard to be applied, and the significance for the concept of miscarriage of justice of the adversarial context. In *Strickland v Washington*[14], the Supreme

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14 466 US 668 at 669 (1984).

Court of the United States held that, when a complaint is made of counsel's ineffectiveness, the appellant must show both that counsel's conduct fell below an objective standard of reasonableness and that prejudice resulted. O'Connor J, writing for the majority, described prejudice thus[15]:

> "This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable ... a breakdown in the adversary process that renders the result unreliable."

Later, her Honour said, in the context of error resulting in the absence of certain evidence[16]:

> "The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome."

14 In Canada, the right to effective assistance of counsel has been held to be derived from certain provisions of the *Criminal Code* and the *Canadian Charter of Rights and Freedoms*. In *R v GDB*[17], the Supreme Court of Canada followed the approach in *Strickland*. A significant feature of the North American cases is that, although they turn upon a legal right to effective assistance from counsel, and complaints are expressed in terms of a denial of the right, the complaints are dealt with by asking a question which, upon analysis, is similar to the question whether there has been a miscarriage of justice.

15 Because of the impossibility of predicting every form of misfortune or error that may result in a miscarriage of justice; because there are cases where an understanding of why something happened, or did not happen, may be material to a conclusion as to whether there was unfairness; and because such an understanding may reveal that there is no explanation for what occurred other than counsel's ineptitude or inexperience, courts of criminal appeal do not overlook the possibility that the conduct of counsel may result in such a failure of process that there is a miscarriage.

16 In the late 1980s, there were a number of cases in the Criminal Division of the English Court of Appeal where tactical decisions made by counsel without instructions from the client were claimed to have given rise to miscarriages of

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15 466 US 668 at 687 (1984).

16 466 US 668 at 694 (1984).

17 [2000] 1 SCR 520.

justice. In 1989, in *R v Ensor*[18], Lord Lane CJ, reviewing earlier decisions, reaffirmed the general rule that a client is bound by counsel's conduct, but approved a qualification, expressed in an earlier decision, to the effect that where an appellant "might have suffered some injustice as a result of flagrantly incompetent advocacy by his advocate" the conviction would be quashed. This was not an invitation to substitute a standard of competence of counsel for the statutory test of miscarriage of justice. It was stated, as a qualification to a general rule, in recognition of the possibility of exceptional circumstances. Nor was it an attempt to define those exceptional circumstances with precision. Flagrant incompetence may be contrasted with conduct for which there is a rational explanation. If, instead of "flagrant incompetence", the English judge had spoken of "conduct incapable of rational explanation on forensic grounds", the meaning might not have been much different.

17 There will be some cases in which it is not possible to decide whether injustice has occurred without knowing why a particular course was taken at trial. To take an extreme example, if an accused person failed to give evidence because counsel wrongly advised that an accused is not entitled to give evidence, it is difficult to imagine that a court of criminal appeal would not intervene. The example shows that, although, as a general rule, the test of whether a forensic decision has resulted in an unfair trial is objective, one cannot eliminate the possibility of exceptional cases in which it is relevant to know why a certain course was or was not taken.

18 In 1990, the New South Wales Court of Criminal Appeal decided *R v Birks*[19]. A miscarriage of justice was held to have resulted from the "combined effect of ... various errors"[20]. The errors were errors of trial counsel, and of the trial judge. The explanation of counsel's errors was inexperience, but it was the errors (of counsel *and* the judge) that were said to give rise to the miscarriage of justice. It is important to note the significance of the combination of the errors, for the case provides a good example of a failure of the trial process, or what O'Connor J called "a breakdown in the adversary process"[21]. The accused was charged with rape. He admitted having sex with the complainant, but said she consented. A problem for the defence was that, following the incident, the complainant's face was found to be bruised and cut, in a manner consistent with her account of violence. The accused, before trial, instructed his lawyers that the damage to the complainant's face was the result of a mishap with a torch. When

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18 [1989] 1 WLR 497 at 502; [1989] 2 All ER 586 at 590.

19 (1990) 19 NSWLR 677.

20 (1990) 19 NSWLR 677 at 692.

21 *Strickland v Washington* 466 US 668 at 687 (1984).

cross-examining the complainant, defence counsel failed to put this to the complainant. When the accused gave evidence, and explained the facial injuries by reference to the torch, his credibility was attacked on the ground that, since his lawyer had not put this version of events to the complainant, it must have been something the accused invented on the spot. His lawyers knew that this was no recent invention, but that it was consistent with what he had said to them from the beginning. Counsel had simply forgotten to cross-examine on the point. There were various ways in which counsel could have dealt with the problem, but he had no idea what to do. In final address, the prosecutor told the jury about the rule in *Browne v Dunn*[22], and invited the jury to infer, from counsel's failure to put it in cross-examination to the complainant, that the explanation about the torch had previously been unknown to the accused's lawyers, and was fabricated by the accused in the witness box. The trial judge took the matter even further. He told the jury they could infer, both from counsel's failure to put the innocent explanation of the facial injuries to the complainant in cross-examination at the trial, and from an earlier failure to raise the matter in cross-examination at the committal proceedings, that the accused had not instructed his lawyers about the incident involving the torch, but had made it up in the witness box. The first part of that direction was risky; the second part (concerning the committal proceedings) was wrong. There is no obligation on defence counsel at committal proceedings to put the defence case in cross-examination or, for that matter, to cross-examine at all. After all this had happened, and the jurors had retired to consider their verdict, counsel told the judge, in court, that his failure to cross-examine was an oversight, and that his instructions from the accused had included information about the torch. The report of the case, with some understatement, records that "confusion resulted"[23]. Before anything was done to resolve the confusion, the jury came back with a verdict of guilty. The Court of Criminal Appeal quashed the conviction and ordered a new trial. In some respects, what happened in *Birks* bears a resemblance to what had happened in *Tuckiar v The King*[24]. The trial went off the rails as a result of a combination of errors of counsel and the trial judge. The inexperience of counsel was part of the explanation of what happened, but it was the effect of the errors that was held to constitute the miscarriage of justice.

19 The description of conduct as an "error", and the characterisation of something that happened as "unfair", could in some circumstances turn upon knowledge of why something was done or omitted, and this, in turn, might reveal a departure from standards of professional duty. As Lord Carswell said in

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22 (1893) 6 R 67.

23 *R v Birks* (1990) 19 NSWLR 677 at 682-683.

24 (1934) 52 CLR 335.

Teeluck v Trinidad[25], there may be rare cases in which counsel's misbehaviour or ineptitude is so extreme as to constitute a denial of due process to the client. McHugh J gave two examples in *TKWJ v The Queen*[26]: cases where, for no valid reason, counsel fails to cross-examine material witnesses, or does not address the jury. (I take his Honour to have been referring to cases where there is no rational explanation of counsel's decision; not to cases where an appellate court simply thinks it was unwise to fail to cross-examine. That is indicated by his Honour's treatment of failure to cross-examine and failure to address as like cases). In *Teeluck v Trinidad*, Lord Carswell went on to say that, normally, "the focus of the appellate court ought to be on the impact which the errors of counsel have had on the trial and the verdict"[27].

20 In the present case, the Queensland Court of Appeal, which had before it evidence in addition to the evidence at the trial, was correct to conclude that there was no miscarriage of justice. The facts are set out in the reasons of Callinan and Heydon JJ. The case against the appellant was overwhelming. Like other counsel in other cases, trial counsel put some hopeless arguments; but he understood that the appellant's only real prospect of success lay in seeking to persuade the jury that there was a doubt about whether the extent of the appellant's demonstrated knowledge of, and connection with, the cocaine importation was sufficient to amount to being knowingly concerned in the importation. He had an erroneous view of the law on that point; but, again, that does not make the case unique. Nothing in the material before the Court of Appeal suggested there was any real doubt about the appellant's guilt. The Court of Appeal was in a good position to determine that the conviction was not unjust. There was no failure of process that departed from the essential requirements of a fair trial. There was no miscarriage of justice.

21 The appeal should be dismissed.

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25 [2005] 1 WLR 2421 at 2433.

26 (2002) 212 CLR 124 at 148 [76].

27 [2005] 1 WLR 2421 at 2433.

22 GUMMOW AND HAYNE JJ. The appellant contends that he was incompetently represented at his trial. He does not contend 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"[28]. He does not contend that "the judgment of the court of trial should be set aside on the ground of the wrong decision of any question of law"[29]. He does not dispute that, at his trial, "the relevant law [was] correctly explained to the jury and the rules of procedure and evidence [were] strictly followed"[30]. He does contend that there was "on any ground … a miscarriage of justice"[31]. He assigns as the ground for that contention: the incompetence of his representation at his trial.

23 The facts of the matter and the course of events in the courts below are described in the reasons of Callinan and Heydon JJ. We need not repeat that description.

24 As four members of this Court explained in *TKWJ v The Queen*[32], describing trial counsel's conduct of a trial as "incompetent" (with or without some emphatic term like "flagrantly") must not be permitted to distract attention from the question presented by the relevant criminal appeal statute, here s 668E of the *Criminal Code* (Q). "Miscarriage of justice", as a ground on which a court of appeal is required by the common form of criminal appeal statute to allow an appeal against conviction, may encompass any of a very wide variety of departures from the proper conduct of a trial. Alleging that trial counsel was incompetent does not reveal what is said to be the miscarriage of justice. That requires consideration of what did or did not occur at the trial[33], of whether there was a material irregularity in the trial[34], and whether there was a significant

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28 *Criminal Code* (Q), s 668E(1).

29 *Criminal Code*, s 668E(1).

30 *Mraz v The Queen* (1955) 93 CLR 493 at 514.

31 *Criminal Code*, s 668E(1).

32 (2002) 212 CLR 124 at 134 [31] per Gaudron J, 148 [75], 156 [97] per McHugh J, 157 [101] per Gummow J, 157 [103] per Hayne J.

33 *TKWJ v The Queen* (2002) 212 CLR 124 at 134 [31] per Gaudron J.

34 (2002) 212 CLR 124 at 149-150 [79] per McHugh J.

possibility that the acts or omissions of which complaint is made affected the outcome of the trial[35].

25 Pointing to the fact that trial counsel did not take proper instructions from the accused, did not properly understand the statutory provisions under which the accused was charged, or had not read the cases that construed those statutory provisions, would reveal that counsel was incompetent. Showing all three of these errors would reveal very serious incompetence. But an appeal against conviction must ultimately focus upon the trial and conviction of the accused person not the professional standards of the accused's counsel. Was what happened, or did not happen, at trial a miscarriage of justice?

26 In *TKWJ* there was said to be a miscarriage because evidence of the accused's character was not led at trial. In *R v Birks*[36] the miscarriage lay in the accused's counsel not cross-examining the complainant about some aspects of her evidence. Both *TKWJ* and *Birks* were, then, cases of omissions by trial counsel for an accused: omissions in adducing or testing evidence at trial. In the present matter, there were said to be both acts and omissions of trial counsel which caused or contributed to a miscarriage of justice.

27 Ten acts and omissions were specified in the appellant's notice of appeal to the Court of Appeal. Several focused upon what was said to be the ignorance of counsel about the elements of the offence with which the appellant was charged and a consequent failure to give proper advice to the appellant. Others focused upon what were said to be other failures of trial counsel to give proper advice to the appellant, both for want of proper instructions and otherwise. But a failure to give proper advice to the appellant would be significant only if, as a result of that failure, something was done or not done at trial that was, or occasioned, a miscarriage of justice. For the reasons given in *TKWJ*[37], the inquiry about miscarriage must be an objective inquiry, not an examination of what trial counsel for an accused did or did not know or think about. The critical question is what did or did not happen at trial, not why that came about.

28 The appellant's trial counsel, building upon something said in the prosecution's opening address to the jury, misstated in his address to the jury what had to be shown to demonstrate the appellant's knowing involvement in the

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35 (2002) 212 CLR 124 at 135 [33] per Gaudron J, 149 [79] per McHugh J, 157 [101] per Gummow J, 157 [104] per Hayne J.

36 (1990) 19 NSWLR 677.

37 (2002) 212 CLR 124 at 158 [107]-[108] per Hayne J.

alleged importation. He spoke of a need to demonstrate some form of "practical assistance". In her charge to the jury, the trial judge corrected that error and it is not contended that the jury was given insufficient or incorrect directions about what the prosecution had to prove. But nor was it contended that the submissions made at trial about the need for "practical assistance" meant that other, more substantial, and legally supportable arguments were not put. Rather, because the appellant, on the evidence led at trial, could do no more than assert that the prosecution had failed to prove its case, the trial judge's instructions on what had to be shown sufficed to put the appellant's case as well as it could be put. And the appellant's contention that there was a miscarriage of justice is revealed to be a case about the evidence that was or was not available to the jury at the appellant's trial.

29 As Callinan and Heydon JJ explain in their reasons, the material led in evidence in the appeal to the Court of Appeal showed that the appellant had had little or no positive case to make against the charge brought against him. What the appellant said, in his evidence to the Court of Appeal, was that:

> "In relation to the charge I say as follows:
>
> (a) I was not aware that Peter Jackson was intending to bring cocaine into Australia.
>
> (b) I had some knowledge through Jorge Velarde that Peter Jackson was taking some chemicals, possibly Ephedra or Pseudoephedrine for a person whom I believe to be Jorge Velarde's cousin, whom I also believe resides in New Zealand.
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> (c) I had no financial interest in that importation and did not stand to benefit from it in any way.
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> (d) After my meeting with Peter Jackson at the Los Angeles Airport on March 7, 2001 I had no further contact with Peter Jackson and no further involvement in any aspect of Peter Jackson's activities. In the course of the meeting at Los Angeles Airport on March 7, 2001 I told Peter Jackson I was not going to have anything more to do with him and the matter as I did not want to have any further involvement in the matter. I did not assist Peter Jackson obtain a passport in the name of [Geschke]."

This evidence may properly be described as being, at best, equivocal, but it is convenient to treat it, as the appellant's submissions did, as showing that the appellant may have wished to contend:

(a) that he did not know that Australia was the intended destination for whatever was being imported; and

(b) that he had sought to dissociate himself from the enterprise.

(His contention that he had no financial or other interest in the importation would seem to have been a point in aid of an argument that the prosecution had failed to prove its case.)

30 All of this was material that, if it was to be advanced with any effect, would have required the appellant to give evidence at his trial. A decision to call the appellant was fraught with danger. If called he would, presumably, have admitted that it was his voice in the recordings of intercepted telephone conversations. (On appeal he did not seek to say that the admission made at trial, that it was his voice, was a false admission; he said only that it should not have been made.) Further, and no less importantly, the prosecution would have been able to cross-examine him about what were alleged to be coded aspects of the conversations with their references, for example, to "contamination" of cargo, "your new bible" and the like. But above all, it would have exposed the appellant to cross-examination that reinforced that the recorded conversations tendered in evidence revealed the continued close involvement of the appellant in dealings with Mr Peter Jackson who was aboard the "Sparkles Plenty" when intercepted in Australian waters with a large cargo of water damaged cocaine.

31 It would have been well open to competent counsel to conclude that the very slight gains that might be obtained by putting forward a positive defence, of the kind that the appellant said he had, were well and truly outweighed by the disadvantages that would likely be suffered were the appellant to give evidence. It would, then, have been well open to competent counsel to conclude that the appellant should be advised against giving evidence in his defence. That being so, the fact that the appellant did not give evidence at his trial has brought about no miscarriage.

32 There then remains the admission made at trial (that it was the appellant's voice in the recorded telephone conversations) and the allegation of failure to object to reception in evidence of some aspects of the taped conversations. Neither can be said to have brought about any miscarriage. The identity of the appellant as a speaker in the recorded conversations was not open to real dispute. In one critical conversation he was observed using a public telephone, with Mr Velarde, at the time that Mr Jackson was recorded as having a telephone conversation, first with one man, and then with another. Absent explanation by the appellant, the jury could not have concluded otherwise than that he had been observed speaking to Mr Jackson. Without evidence to the contrary from the appellant, the conclusion that it was the appellant who participated in the other conversations was likewise inevitable.

33 The Court of Appeal concluded[38] that there was one aspect of the recorded conversations to which some objection might have been taken. It concerned the appellant having been stopped and searched at an airport. If objection could have been taken to that part of the recording it was a part of little moment when judged against the whole of the taped conversations. The Court of Appeal rightly concluded that its reception occasioned no miscarriage.

34 None of the matters on which the appellant relied has led to any miscarriage of justice in this matter.

35 There remains for consideration the proposition advanced by the appellant that the incompetence of counsel went to the root of his representation at trial. This contention was evidently founded in what was said about the proviso to the common form of provision for appeal against conviction, by Brennan, Dawson and Toohey JJ, in *Wilde v The Queen*[39]:

> "The proviso has no application where an irregularity has occurred which is such a departure from the essential requirements of the law that it goes to the root of the proceedings. If that has occurred, then it can be said, without considering the effect of the irregularity upon the jury's verdict, that the accused has not had a proper trial and that there has been a substantial miscarriage of justice."

36 It is not necessary to explore the boundaries of this proposition or to attempt to identify circumstances in which it could find application. To do so would require close attention to what is meant by "essential requirements of the law" and "the root of the proceedings". These notions may reflect what has been said by some members of the Court respecting aspects of "due process" discerned from Ch III of the Constitution[40]. However that may be, in the context of a criminal trial it may be open to doubt whether some requirements of the law are properly to be dismissed as inessential or whether some requirements are to be classified as radical and others not.

37 In the present case, the proposition that the incompetence of the appellant's counsel went to the root of his representation is either self-evident or circular. If all that was meant was that counsel was incompetent, the addition of reference to the root of the appellant's representation is superfluous. If it was

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38 *R v Nudd* [2004] QCA 154 at [74] per McMurdo J.

39 (1988) 164 CLR 365 at 373.

40 Wheeler, "Due Process, Judicial Power and Chapter III in the New High Court", (2004) 32 *Federal Law Review* 205.

intended to convey that the incompetence of representation at trial led to a miscarriage of justice, it is a proposition that does not add to the considerations examined earlier in these reasons.

38 The appeal should be dismissed.

39 KIRBY J. This appeal[41] is one of a trilogy[42]. It concerns the principles of law governing the provision of relief against conviction for a criminal offence where the matter of complaint is incompetence on the part of the legal representatives who appeared for the accused at the trial.

The assumption of competent legal representation

40 In three important decisions of this Court an implicit assumption appears that legal practitioners, representing a person at trial, will exhibit competence in their knowledge of the relevant law, awareness of applicable procedures and judgment in the forensic decisions that have to be made.

41 In *Dietrich v The Queen*[43], this Court affirmed the power of courts to stay criminal proceedings that would otherwise result in an unfair trial where an accused person is charged with a serious offence and, through no fault, is unable to obtain legal representation. Inherent in the need to have legal representation, particularly in criminal trials, is the special difficulty faced by accused persons standing trial, to represent themselves without a qualified lawyer who can provide "effective assistance"[44]. The result of *Dietrich* has been to expand significantly the public provision of legal representation at criminal trials, replacing earlier imperfect arrangements for such assistance[45]. This development has inevitably raised expectations about the standard of representation that will be afforded.

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41 From a judgment of the Supreme Court of Queensland, Court of Appeal ("Court of Appeal"): *R v Nudd* [2004] QCA 154.

42 The other two are *TKWJ v The Queen* (2002) 212 CLR 124 ("*TKWJ*") and *Ali v The Queen* (2005) 79 ALJR 662; 214 ALR 1 ("*Ali*").

43 (1992) 177 CLR 292 ("*Dietrich*") reversing *McInnes v The Queen* (1979) 143 CLR 575.

44 *Dietrich* (1992) 177 CLR 292 at 310 citing *Cuyler v Sullivan* 446 US 335 (1980) and *Evitts v Lucey* 469 US 387 (1985).

45 Provision was earlier made for proceedings *in forma pauperis*. See eg the Judicial Committee Rules (NSW), r 8 in Walker (ed), *The Practice of the Supreme Court of New South Wales at Common Law*, 4th ed (1958) at 636. In criminal trials dock briefs and like assignments were the improvisations tolerated by Australian law before modern publicly funded legal aid appeared. See Disney, *Lawyers*, 2nd ed (1986) at 461-525.

42 In *TKWJ*[46], the Court considered complaints concerning the alleged incompetence of counsel representing an accused person in a criminal trial. There, the failure was said to be the omission of counsel to call evidence before the jury as to the accused's good character. In rejecting that complaint, upon the ground that the failure of counsel to adduce character evidence did not give rise to a miscarriage of justice within the criminal appeal statute[47], this Court implicitly accepted that, had a miscarriage been shown, it would have given rise to relief. Inherent in that conclusion is an affirmation of the relevance of professional competence to the decision. Legal representation, in other words, contemplates effective assistance, not simply having a person present in court in an advocate's garb[48].

43 In *D'Orta-Ekenaike v Victoria Legal Aid*[49], the Court, over my dissent[50], maintained, and even widened[51], the immunity which, it was held, legal practitioners who give advice affecting the conduct of a trial enjoy from subsequently being sued for negligence on account of their advice and conduct as such. The Court declined to follow decisions in England[52], New Zealand[53] and elsewhere[54] that have rejected the immunity, including in criminal trials[55]. Yet

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46 cf *Ali* (2005) 79 ALJR 662; 214 ALR 1.

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

48 Applying *Dietrich* (1992) 177 CLR 292 at 300.

49 (2005) 79 ALJR 755; 214 ALR 92 ("*D'Orta-Ekenaike*").

50 (2005) 79 ALJR 755 at 792 [208]; 214 ALR 92 at 144.

51 As to the expansion of the immunity, see *D'Orta-Ekenaike* (2005) 79 ALJR 755 at 794 [216]; 214 ALR 92 at 146.

52 *Arthur J S Hall & Co v Simons* [2002] 1 AC 615, reversing *Rondel v Worsley* [1969] 1 AC 191.

53 *Lai v Chamberlains* [2005] 3 NZLR 291. See *D'Orta-Ekenaike* (2005) 79 ALJR 755 at 793-794 [215]; 214 ALR 92 at 145-146.

54 See references to the law in the United States, Canada, the European Union, Singapore, India and Malaysia in *D'Orta-Ekenaike* (2005) 79 ALJR 755 at 793 [211]; 214 ALR 92 at 145.

55 *D'Orta-Ekenaike* (2005) 79 ALJR 755 at 813-814 [331]; 214 ALR 92 at 174 citing *Boland v Yates Property Corp Pty Ltd* (1999) 74 ALJR 209 at 241 [148]; 167 ALR 575 at 617-618; *Arthur J S Hall & Co v Simons* [2002] 1 AC 615 at 716 per Lord Hope of Craighead, 730 per Lord Hutton.

implicit in the maintenance of such an immunity is a presumed attainment by the members of the legal profession concerned of a standard of reasonable competence and skill without which administration of justice in the courts would be unattainable.

44 Sometimes the implicit assumption of reasonable competence and skill on the part of legal practitioners is not fulfilled. The default may arise from a lack of experience; a failure to study the applicable law and procedures; or the facts of the case; an unexpected turn of events in the trial that makes demands beyond the experience of the legal practitioner concerned; or, in some cases, personal characteristics that render that practitioner prone to misbehaviour, ineptitude or inattention[56]. What is then to be done?

45 In Australia, in accordance with *D'Orta-Ekenaike*[57], the dissatisfied client has no civil remedy for damages against the lawyer, however incompetent. A complaint to the relevant professional disciplinary body will bring little satisfaction, especially where the incompetence has occurred in a criminal trial and the accused, at the conclusion of it, has been convicted and sentenced to imprisonment. In some Australian States, a convicted person serving a term of imprisonment faces the additional hurdle of being barred by statute from suing for civil remedies[58]. A successful petition for mercy (or its modern statutory equivalent[59]) is a rare bird[60]. Hence the appeal, in the case of criminal convictions, to a court of criminal appeal for relief on the ground of professional incompetence.

46 The issue of incompetent legal representation is not new in Australian criminal appeals. In *Tuckiar v The King*[61], decided 70 years ago, one of the chief grounds that led this Court to uphold the appeal, and to quash the accused's conviction of murder[62], was the incompetent presentation of the defence by

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56 *Teeluck v State of Trinidad and Tobago* [2005] 1 WLR 2421 at 2433 [39] (PC).

57 (2005) 79 ALJR 755; 214 ALR 92.

58 See for instance, *Civil Liability Act* 2002 (NSW), Pt 2A.

59 eg, *Criminal Code* (Q), s 672A ("the Code"); *Sentencing Act* 1995 (WA), Pt 19.

60 *cf Mallard v The Queen* (2005) 80 ALJR 160; 222 ALR 236.

61 (1934) 52 CLR 335 ("*Tuckiar*"). For discussion of this case, see *TKWJ* (2002) 212 CLR 124 at 147 [74] per McHugh J.

62 (1934) 52 CLR 335 at 339. The accused was described as an "uncivilised aboriginal native".

counsel instructed by the Protector of Aboriginals in the Northern Territory. Counsel had failed to make submissions on the law; had wrongly concurred in erroneous judicial directions; had impermissibly volunteered confidential instructions in open court and had made statements to the prejudice of his client which were later published. The conviction was found to be bad and the accused was discharged. Starke J concluded that the accused had been denied the substance of a fair trial[63].

47 However, *Tuckiar* was an extraordinary case. Until recently, generally speaking, appellate consideration of incompetent legal representation of criminal accused was comparatively rare. A proliferation of complaints about incompetent representation in Australia has followed the decision in *Dietrich*, and the changes to the availability of publicly funded legal assistance that occurred after that decision[64]. Those changes have raised expectations of effective representation for the alleged default of which persons convicted have complained to courts of criminal appeal.

48 In this Court, there have been slightly different explanations of the response which the law gives to instances of serious professional incompetence. As I shall show, such variations are also reflected in recent decisions of overseas courts of high authority. They find their foundation in the laws giving rise to relief or in the common presuppositions upon which the text of such laws are expressed and applied.

The facts

49 *The background facts*: The facts are stated in the reasons of Callinan and Heydon JJ[65]. As their Honours point out, it is necessary in cases of this kind, to consider the facts in some detail. Their comprehensive explanation of the prosecution case brought against Mr Kevin Nudd (the appellant) as well as of the defects in his representation at the trial and the appellant's newly propounded defences relieves me of repeating this material.

50 Trial counsel acknowledged that he had not previously conducted a criminal trial in a superior court. Neither he, nor his instructing solicitor, ever obtained a full and thorough proof of evidence from the appellant, containing the appellant's version of events, so far as the appellant was willing to provide this.

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63 (1934) 52 CLR 335 at 354.

64 There were, however, earlier cases such as *Re Knowles* [1984] VR 751 and *R v Birks* (1990) 19 NSWLR 677.

65 Reasons of Callinan and Heydon JJ at [116]-[148].

This omission was found by the Court of Appeal to have occurred because trial counsel believed that obtaining such a statement from the appellant might in some way limit the choice of the arguments that he could advance before the jury[66]. In the hearing before this Court, it became clear that failure to secure a proper statement from a person accused of a serious criminal offence is not an accepted or common practice of the Queensland Bar in criminal or other trials[67]. The omission is clearly fraught with great dangers for the client. This is because only in the detailed understanding of the evidence may a defence, based on fact or law, appear to the trained eye of diligent legal representatives.

51 Unfortunately, the communications revealed in the record between the appellant and the lawyers representing him at his trial mainly concerned legal fees. Similar attention was not lavished on the preparation of the case, either in recording the appellant's version of events or in studying the authority of the courts on the constituent elements of the federal crime with which the appellant had been charged[68].

52 The maximum penalty applicable, upon conviction, was 25 years imprisonment[69]. In the event, upon his conviction, the appellant was sentenced to 22 years imprisonment with a non-parole period of 11 years[70]. Self-evidently, the predicament facing the appellant in his trial was of a very serious order. It demanded professional attention of the most diligent and effective kind.

53 The minimum standard required of such attention was a thorough awareness of the appellant's version of events, so far as he was prepared to disclose it, and careful research into the legal ingredients of the offence. Neither of the lawyers who appeared for the appellant is on trial in these proceedings. Neither is represented before this Court. We have certain testimony given by

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66 *R v Nudd* [2004] QCA 154 at [50], per McMurdo J.

67 [2005] HCATrans 654 at 1072-1090, 3785-3800.

68 Under the *Customs Act* 1901 (Cth) ("*Customs Act*"), s 233B (as it provided then) of being "knowingly concerned" in the bringing into Australia of prohibited imports, being a quantity of cocaine not less than a commercial quantity. The *Law and Justice Legislation Amendment (Serious Drug Offences and Other Measures) Act* 2005 (Cth), repealed ss 233B and 235 of the *Customs Act*. By the amending Act, as from 6 December 2005, the offence of bringing into Australia prohibited imports is provided by s 233(1)(b) of the *Customs Act*. The amendments do not affect offences committed earlier.

69 [2005] HCATrans 654 at 695; *Customs Act*, s 235 (as it provided then).

70 *R v Nudd* [2004] QCA 154 at [9].

those lawyers before the Court of Appeal. However, the appeal before this Court proceeds on the footing that evidence of incompetence in the presentation of the appellant's case by trial counsel is established. I agree in the conclusion expressed by Callinan and Heydon JJ that "on any assessment, whether subjective or objective, counsel's conduct was incompetent to a serious degree"[71].

54 *The professional incompetence*: In summary, the professional incompetence included[72]:

(1) Failing to understand, and properly advise the appellant on the elements of the offence with which he was charged[73];

(2) Conducting the defence case and opening to the jury on the basis of an incorrect understanding of the offence, thereby putting the appellant on the back foot before the jury from the outset of the trial;

(3) Failing to take, or procure, detailed written instructions from the appellant relevant to his version of the facts;

(4) Failing properly to advise the appellant on such version as to his legal liability for the offence charged and to prepare and present the defence case accordingly;

(5) Failing, on the basis of a correct understanding of the offence and like appreciation of the appellant's version of the facts, to give advice to the appellant on whether or not to offer evidence on his own behalf at the trial;

(6) Making a concession before the jury that it was the appellant whose voice could be heard on the telephonic interception tapes without first obtaining specific instructions in that respect and considering the necessity and wisdom of needlessly doing so[74];

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71 Reasons of Callinan and Heydon JJ at [158].

72 *R v Nudd* [2004] QCA 154 at [49].

73 Trial counsel stated that he did look up relevant authority, including *The Queen v Tannous* (1987) 10 NSWLR 303 ("*Tannous*"). However, in the light of his conduct of the trial, this appears at best to have been first, a superficial and secondly, mistaken reading of the cases. See [2005] HCATrans 654 at 2494.

74 *R v Nudd* [2004] QCA 154 at [58].

(7) Failing to seek appropriate directions from the trial judge concerning the way in which the jury could use the content of discussions between other persons, not had in the presence of the appellant[75];

(8) Failing to object to the tender of parts of telephonic tapes containing arguably inadmissible and prejudicial material irrelevant to the offence charged[76]; and

(9) Introducing immaterial and prejudicial information in the closing address to the jury concerning the appellant's arrest in the United States for visa violations, his deportation to Australia and the loss of property seized from him by the Australian authorities[77].

55 Taken individually, some of the foregoing acts and omissions of counsel were not instances of the most serious professional incompetence. Some may even (as McMurdo J considered in the Court of Appeal[78]) be put to one side as ill-judged, but available, tactical decisions, designed to advance the appellant's case in the context of very strong prosecution evidence. However, in combination, the instances of incompetence are clearly serious. McMurdo J thought that, although the prosecution case was "strong", it went "too far to say that there was no prospect of an acquittal absent evidence from the accused"[79]. The foundation was therefore well and truly laid for invocation of the principles of law governing appeals against criminal conviction by reference to legal professional incompetence occasioning a miscarriage of justice.

The applicable legislation

56 The appeal to this Court complains of error on the part of the Court of Appeal. That Court was obliged to decide the appeal by reference to applicable statutory provisions.

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75 *R v Nudd* [2004] QCA 154 at [73].

76 *R v Nudd* [2004] QCA 154 at [74].

77 *R v Nudd* [2004] QCA 154 at [75].

78 *R v Nudd* [2004] QCA 154 at [72], [73], [75], referring to instances (5), (6), (7), (8) and (9).

79 *R v Nudd* [2004] QCA 154 at [70].

57 In Australia appeal is always a creature of statute[80]. At common law, the powers of courts to disturb criminal convictions that followed a jury verdict, were very limited[81]. It is therefore the common form criminal appeal statute that ordinarily affords the jurisdiction and power to Australian courts[82] to provide relief from a criminal conviction. Unless the preconditions expressed in such statutes are met and, in the particular case, are such as to justify the quashing of the conviction and the ordering of a new trial, the duty of the appellate court is to dismiss the appeal, leaving the criminal conviction and any consequent punishment to stand[83].

58 In the present case, the applicable statutory provision governing the decision of the Court of Appeal, was s 668E of the Code. That section provides, relevantly[84]:

> "668E(1) The Court on any such 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 ground whatsoever there was a miscarriage of justice, and in any other case shall dismiss the appeal.
>
> (1A) However, the Court may, notwithstanding that it is of the opinion that the point or points raised by the appeal might be decided in favour of the appellant, dismiss the appeal if it

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80 Discussed in *Conway v The Queen* (2002) 209 CLR 203 at 228 [68]-[69] ("*Conway*"), citing *State Rail Authority of New South Wales v Earthline Constructions Pty Ltd (In Liq)* (1999) 73 ALJR 306 at 322 [72]; 160 ALR 588 at 609 and authorities there cited.

81 *R v Berger* [1894] 1 QB 823. See O'Connor, "Criminal Appeals in Australia Before 1912", (1983) 7 *Criminal Law Journal* 262.

82 An exception arises in criminal appeals to the Federal Court of Australia, pursuant to *Federal Court of Australia Act* 1976 (Cth), s 28(1)(f). See *Conway* (2002) 209 CLR 203.

83 *Conway* (2002) 209 CLR 203 at 228 [68]. See also *Weiss v The Queen* [2005] HCA 81 at [12]-[15].

84 The section has also been considered by this Court in recent years in *KBT v The Queen* (1997) 191 CLR 417; *Gilbert v The Queen* (2000) 201 CLR 414; and *Festa v The Queen* (2001) 208 CLR 593.

considers that no substantial miscarriage of justice has actually occurred."

59 As Gummow and Hayne JJ point out in their reasons[85], the category into which the appellant's submissions in this case falls is, and is only, the residual case of appeal, namely that brought "on any ground … [of] a miscarriage of justice". The sole basis advanced to engage that provision was the incompetence of the representation of the appellant at his trial. The provisions of s 668E(1A) of the Code, although not stated in the form of a "proviso", are expressed in the same language appearing elsewhere in that form. It follows that the outcome of the appeal to the Court of Appeal (and hence the claim of error agitated in this Court) turns, and turns only, on the application of the foregoing statutory provisions to the evidence disclosed in the record. The question for this Court is whether, in the approach that it took or the conclusion that it reached, the Court of Appeal erred in the performance of its functions so described.

The trial and the appeal

60 The outcome of the trial of the appellant is described by Callinan and Heydon JJ[86]. Their Honours explain the ways in which the trial judge (Philippides J) sought to correct before the jury errors made by trial counsel, both as to the legal ingredients of the offence charged and as to his concession that it was the appellant's voice that the jury had heard on the tapes of the intercepted telephone conversations[87].

61 Whereas the latter concession, although imprudently made, especially without specific instructions, might truly have been a mistake of tactics on the run, the failure of trial counsel to acquaint himself with the basic law on the offence of being "knowingly concerned" in the importation to Australia of the specified prohibited drug, was of a different order. That law was not difficult for a trained lawyer to discover. If access to the Internet was not available, the hard copy index to the *Australian Criminal Reports* for vols 51-100 (1990-1998) contains, under "Drug Offences", numerous references to cases containing judicial explanations of the legal meaning of being "knowingly concerned" and "importation". Understanding the legal components of the offence was the first duty of counsel representing a person accused of it.

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85 Reasons of Gummow and Hayne JJ at [22].

86 Reasons of Callinan and Heydon JJ at [115].

87 Relevant authorities include *Tannous* (1987) 10 NSWLR 303 at 307; *Leff* (1996) 86 A Crim R 212 at 214.

62 The disposition of the appeal by the Court of Appeal is also sufficiently described elsewhere[88]. There is no need for me to repeat that description. Following the then recent decision of this Court in *TKWJ*[89], the Court of Appeal correctly focused its attention on whether, within the language of the Code, a "miscarriage of justice" had occurred as a result of the instances of incompetence that it accepted. It concluded that it had not. It therefore dismissed the appeal.

63 Now, by special leave, the appellant has appealed to this Court. He complains that he suffered a miscarriage of justice. He submits that he was deprived of the chance to advance the defences now identified and that, on that basis, his conviction is unsafe. But he also says that, because of the incompetence of those who represented him at his trial, he did not secure a fair trial. He asks that his conviction be quashed and that a retrial should be ordered. Did the Court of Appeal err in declining that relief?

The principles on incompetent representation

64 *Starting with the statute*: In *TKWJ* and in *Ali*, this Court emphasised the importance for appellate courts, considering complaints of incompetent representation in criminal appeals, to keep at the forefront of their attention the ambit of their jurisdiction and power contained in the applicable criminal appeal statute. Those appeals are not, as such, an inquiry into the professional competence of the legal representatives of the accused. That function, if it is to be undertaken, belongs to other bodies in a hearing in which procedural fairness is assured to the legal practitioner concerned. Of necessity, the only relevance of professional competence to a criminal appeal following conviction, is how far any proved incompetence contributed to the grounds enlivening the powers of the appellate court to quash the conviction.

65 When, in recent years in criminal appeals, complaints came to be raised in increasing numbers concerning alleged incompetence in the representation of the accused at trial, appellate courts, in Australia and elsewhere, reached for non-statutory explanations as to when such a complaint would be entertained. Thus, a suggested requirement was adopted that the incompetence had to be "flagrant"[90]

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88 Reasons of Callinan and Heydon JJ at [149]-[154].

89 (2002) 212 CLR 124. The Court of Appeal also applied its own decision in *R v N* (2003) 149 A Crim R 497, in which a new trial had been ordered.

90 *Clinton* (1993) 97 Cr App R 320 at 326; *Fergus* (1994) 98 Cr App R 313 at 322. See also *R v Thakrar* [2001] EWCA Crim 1096 per Keene LJ at [34].

or "radical"[91]. For a short time, that became the accepted law in many jurisdictions. However, the defect of this approach was that the additional word, although designed to eliminate unimportant or immaterial mistakes, was ultimately unilluminating. It had, moreover, no textual foundation in the criminal appeal legislation applicable throughout Australia.

66 Even in England and Scotland, where resort to such a formula had been common[92], it has more recently been abandoned under the influence of the language of Art 6 of the European Convention on Human Rights[93], which guarantees the criminal accused a fair trial. Thus, in *R v Peeris*[94], Henry LJ observed:

> "… the proper approach does not depend upon any assessment of the quality or degree of any suggested culpability of counsel. It depends rather on consideration of whether the manner in which the defence was conducted – taken exclusively or in conjunction with other features of the case – was such as to raise any sensible doubt about the safety of the conviction."

67 In this way, the resort to pejorative adjectives describing the professional incompetence complained of has been replaced by a "practical", "pragmatic" or "functional" analysis ("a practical approach") that addresses the consequences of any professional incompetence for the outcome of the criminal trial.

68 *A focus on outcomes*: A focus on the consequences of the suggested incompetence has been emphasised by this Court[95], principally because of its insistence upon adherence to the statutory mandate in such cases of courts of criminal appeal. A like approach is now common in virtually all jurisdictions of which I am aware, addressing issues of incompetent legal representation.

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91 eg, *Anderson v HM Advocate* 1996 SLT 155. Other pejorative expressions are noted in *TKWJ* (2002) 212 CLR 124 at 134 [31] per Gaudron J, 150-151 [80]-[83] per McHugh J, referring to *R v Birks* (1990) 19 NSWLR 677 at 685.

92 See, eg, *Anderson v HM Advocate* 1996 SLT 155 at 163-164. See also *Balston v The State* (*Dominica*) [2005] UKPC 2 at [36] per Lord Hope of Craighead.

93 Convention for the Protection of Human Rights and Fundamental Freedoms, opened for signature 4 November 1950, 213 UNTS 222 (entered into force 3 September 1953).

94 [1988] EWCA Crim 597.

95 *TKWJ* (2002) 212 CLR 124 at 149 [79] per McHugh J, 157 [103] per Hayne J; *Ali* (2005) 79 ALJR 662 at 668 [38] per Hayne J; 214 ALR 1 at 10.

69 *United States cases*: In the United States, where such issues often arise from a suggested failure to comply with an accused's constitutional right to "the assistance of counsel for his defence"[96], the Supreme Court has addressed "… whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result"[97]. The Court has said[98]:

> "… [T]he purpose of the effective assistance guarantee … is not to improve the quality of legal representation, although that is a goal of considerable importance to the legal system. The purpose is simply to ensure that criminal defendants receive a fair trial."

70 Given that purpose, the Supreme Court has insisted[99]:

> "The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome."

71 So expressed, the test in the United States has been described as "highly demanding"[100]. It has been applied in many recent cases[101]. It is now regarded as settled law in that country[102].

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96 United States Constitution, Sixth Amendment.

97 *Strickland v Washington* 466 US 668 at 686 (1984) ("*Strickland*") per O'Connor J, delivering the opinion of the Court.

98 *Strickland* 466 US 668 at 689 (1984) per O'Connor J, delivering the opinion of the Court.

99 *Strickland* 466 US 668 at 694 (1984) per O'Connor J, delivering the opinion of the Court.

100 *Kimmelman v Morrison* 477 US 365 at 382 (1986) per Brennan J, delivering the opinion of the Court.

101 eg, *Nix v Whiteside* 475 US 157 (1986); *Kimmelman v Morrison* 477 US 365 (1986); *Lockhart v Fretwall* 506 US 364 (1996); *Glover v United States* 531 US 198 (2001); *Wiggins v Smith* 539 US 510 (2003); and *Rompilla v Beard* 355 F 3d 233 (2005).

102 *Williams v Taylor* 529 US 362 at 391 (2000).

72 *Canadian cases*: The approach is similar in Canada. Whilst emphasising the critical importance to the operation of the "adversarial process" of effective legal representation, Canadian courts have said[103]:

> "Where counsel fails to provide effective representation, the fairness of the trial, measured both by reference to the reliability of the verdict and the adjudicative fairness of the process used to arrive at the verdict, suffers. In some cases the result will be a miscarriage of justice. This court is under a statutory obligation to quash convictions which are the product of a miscarriage of justice …."

73 The Supreme Court of Canada has insisted that attention be addressed to the consequences (if any) of any alleged incompetence[104]. It has accepted that, where a miscarriage of justice is not established, appellate courts in such cases can properly leave any remaining concerns about the performance and conduct of incompetent counsel to the disciplinary bodies of the legal profession[105].

74 Canadian cases have explained the reticence of courts of criminal appeal to accept criticism of the conduct of trial counsel as operationally effective. In *R v White*, the Ontario Court of Appeal examined the need to draw a clear line between incompetence and tactical decisions later judged unwise or imprudent[106]:

> "The art of advocacy yields few, if any, absolute rules. It is a highly individualized art. What proves effective for one counsel may be ineffective for another. Most cases, therefore, offer defence counsel a wide scope for the exercise of reasonable skill and judgment. Appellate judges, many of them advocates in their own practices, should not be too quick to conclude that a trial lawyer's performance was deficient because they would have conducted the defence differently."

75 *United Kingdom cases*: A like approach has also been adopted in the United Kingdom. English courts now accept that "the appellant has to go beyond the incompetence and show that the incompetence [has] led to identifiable errors or irregularities in the trial, which themselves [render] the process unfair or

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103 *R v Joanisse* (1995) 102 CCC (3d) 35 at 57 per Doherty JA; *R v GDB* [2000] 1 SCR 520 at 531 [25] per Major J, delivering the reasons of the Court.

104 *R v GDB* [2000] 1 SCR 520.

105 *R v GDB* [2000] 1 SCR 520 at 532 [29].

106 (1997) 32 OR (3d) 722 at 745. See also *R v Wells* (2001) 130 OAC 356 at [76] per McMurtry CJ.

unsafe"[107]. Similarly, in Scotland it has been held that, unless the incompetent conduct has "resulted in a miscarriage of justice", the criminal appeal statute requiring relief "will not apply". In *Anderson v HM Advocate*[108], the Lord Justice General said[109]:

> "[Professional incompetence] can only be said to have resulted in a miscarriage of justice if it has deprived the accused of his right to a fair trial. That can only be said to have occurred where the conduct was such that the accused's defence was not presented to the court."

76 *New Zealand authority*: The New Zealand Court of Appeal has likewise brought such cases back to the requirement that a miscarriage of justice must be shown by counsel's failure to comply with instructions, or by radical errors in counsel's conduct of the case (including lack of preparation)[110]. The Supreme Court of New Zealand recently dismissed an application for leave to appeal against a decision adopting this approach[111]. In *R v S*[112], the Court of Appeal held specifically that:

> "In order to establish a miscarriage of justice an appellant must show that the mistake could well have had a significant prejudicial effect on the outcome of the trial."

77 This review of authority makes it clear that the approach adopted by this Court in *TKWJ* and in *Ali* is substantially similar to that observed by courts of high authority elsewhere, considering the same problem within their legal systems. The factors that have influenced this approach are basically the same. The first duty in criminal appeals is to the text of the law authorising relief against infirm verdicts and miscarriages of justice. As well, courts deciding such appeals observe the practical approach demanded by such laws in the review of an outcome that has followed the verdict in a criminal trial. Such a verdict is ordinarily entitled to respect and treated as final, particularly where made by a

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107 *Day v The Queen* [2003] EWCA Crim 1060 at [15] per Buxton LJ.

108 1996 SLT 155.

109 1996 SLT 155 at 164.

110 *Taito v The Queen* [2005] NZCA 22 at [42].

111 *Taito v The Queen* [2005] NZSC 36 at [3].

112 [1998] 3 NZLR 392 at 394-395; cf *R v Horsfall* [1981] 1 NZLR 116 at 123 per Cooke J, delivering the opinion of the Court.

jury that acts upon the entirety of the evidence and with a collective wisdom that is addressed to the case viewed in its entirety.

78 *A practical approach*: The foregoing analysis still leaves it for the appellate court to say whether the preconditions for relief, or any of them, have been made out, particularly whether "on any ground … a miscarriage of justice" has occurred.

79 There are legal and pragmatic reasons why a great deal of latitude must be accorded to counsel appearing in a criminal, or indeed any, trial[113]. Ordinarily, a party is held to the way in which his or her counsel has presented that party's case[114]. This is not merely because the relationship between lawyer and client is grounded in the law governing agency and apparent authority[115]. There are other, highly pragmatic, reasons for this approach that cannot be ignored. The adversarial system of trial (including its variant of the accusatorial criminal trial) could not operate effectively without according a high measure of deference to the multitude of decisions necessarily made by a legal representative in the course of conducting a trial[116]. The appellate approach is thus a practical one, influenced by the realities of our trial process.

80 In criminal appeals, courts are alive to the dangers of retrospective wisdom and appellate hindsight applied to instantaneous professional judgments that have to be made, often in fraught circumstances[117]. Moreover, they understand the natural tendency of some who "have been properly and deservedly convicted to attribute the result to the perceived incompetence of their counsel"[118].

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113 *TKWJ* (2002) 212 CLR 124 at 147 [74] per McHugh J.

114 *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.

115 *Strauss v Francis* (1866) 1 QB 379 at 381 per Blackburn J cited in *TKWJ* (2002) 212 CLR 124 at 147 [74] per McHugh J.

116 *R v Birks* (1990) 19 NSWLR 677 at 682-685; *TKWJ* (2002) 212 CLR 124 at 128 [8] per Gleeson CJ; *Ali* (2005) 79 ALJR 662 at 664 [7] per Gleeson CJ; 214 ALR 1 at 4.

117 *R v GDB* [2000] 1 SCR 520 at 532 [27] per Major J, delivering the reasons of the Court.

118 *R v S* [1998] 3 NZLR 392 at 394. See *Ratten v The Queen* (1974) 131 CLR 510 at 516; cf *TKWJ* (2002) 212 CLR 124 at 149 [78] per McHugh J.

81 Considerations such as these have led appellate courts everywhere to insist that those who complain on the score of suggested incompetence in their legal representation at trial must establish the defect of the resulting verdict or otherwise show a "miscarriage of justice". It is not the function of the appellate court to attempt "to rate counsel's conduct of the case according to some scale of ineptitude"[119].

82 *Miscarriage – affront of extreme conduct*: The foregoing analysis leaves to be decided the point noted by White J in the Court of Appeal upon which the appellant relied and in respect of which opinions, with different emphasis, have been expressed in this and other courts.

83 Taking the criterion, relevantly, as the establishment of a "miscarriage of justice", the question remains: Is the "miscarriage" spoken of confined to a case where, directly or indirectly, the incompetence of counsel has led to a verdict that, judged on the evidence, is unsafe and cannot be left to stand? Or are there exceptional cases where, although the appellate court may be convinced from the whole of the evidence that the conviction is not unsafe, the affront to the appearance of justice in the trial is such that a fair trial was not had, requiring a retrial, in effect to uphold the integrity of the judicial process?

84 This is not a new question. Nor is it one confined to criminal cases involving alleged professional incompetence. It is a question that has arisen more generally in the application of the "proviso" to the common form criminal appeal statutes[120]. It has also arisen in the cases concerning the provision of a permanent stay of criminal proceedings in circumstances of serious delay on the part of the prosecution[121]. The conceptual basis of such relief is disputed: Is it to prevent public authorities taking advantage of their own dilatory conduct? Or is it the obligation of the courts to protect the integrity of the judicial process *per se* and the perception of that process by parties, the community and the judges themselves? In short, is the foundation for relief simply the prevention of unjust outcomes? Or is it the defence of the "purity of the 'temples of justice'"[122].

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119 *Teeluck v State of Trinidad and Tobago* [2005] 1 WLR 2421 at 2433 [39] (PC).

120 *Wilde v The Queen* (1988) 164 CLR 365 at 373 per Brennan, Dawson and Toohey JJ. See reasons of Gummow and Hayne JJ at [35].

121 *Carver v Attorney-General (NSW)* (1987) 29 A Crim R 24; *Aboud v Attorney-General (NSW)* (1987) 10 NSWLR 671 at 689; *Jago v District Court (NSW)* (1988) 12 NSWLR 558 at 568, 570, 578.

122 *Levinge v Director of Custodial Services* (1987) 9 NSWLR 546 at 557.

85 Resonances of these debates may be found in the different ways in which McHugh J explained his conclusions in *TKWJ*[123], and the way other Justices did so[124]. The difference is not removed by an appeal to the text of the applicable statutory provision. Each of the foregoing viewpoints accepts the necessity, relevantly, of demonstrating a "miscarriage of justice". However, each regards that phrase somewhat differently, depending on whether it is to be given an exclusively consequentialist content (judged by the outcome of the case) or also a perception content (judged, as well, by the general community's impression of a trial, given the community's interest in maintaining not only the reality, but also the appearance, of fair trials).

86 The application of the consequentialist approach is clear enough. It asks the question, in a case such as the present, whether any incompetence in the legal representation contributed to an outcome (here, a conviction) that is unsafe when all the evidence is considered by the appellate court. However, in his reasons in *TKWJ*[125], McHugh J explained his additional and alternative approach:

> "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 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."

87 *Procedural and substantive outcomes*: In my view, McHugh J was right to conclude that, for a criminal appeal to succeed on an argument of incompetent

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123 (2002) 212 CLR 124 at 148 [76].

124 See, eg, (2002) 212 CLR 124 at 157 [103] per Hayne J.

125 (2002) 212 CLR 124 at 148 [76] (emphasis added), referring to *Wilde v The Queen* (1988) 164 CLR 365.

representation at trial, it is not a universal requirement that the accused must establish that the conduct complained of might have affected the result[126].

88 The issue is not finally settled by past authority in this Court. It did not need to be decided to reach the outcomes stated in *TKWJ* and *Ali*. Any observations on the point in those decisions were *obiter dicta*. Nevertheless, in *Ali*, remarks of Callinan and Heydon JJ lend some support to the conclusion expressed by McHugh J in *TKWJ*. Thus in *Ali*[127], Callinan and Heydon JJ said:

> "The appellant has not demonstrated that any conduct on the part of his counsel at the trial deprived him of a fair chance of acquittal. In saying that we would not want to be taken as suggesting that the fact that a case appears a strong one in any way diminishes the obligation of those conducting the trial to ensure that it is a fair one. Indeed, the contrary is the case."

89 In the end, Callinan and Heydon JJ rejected the appeal in *Ali* because counsel's errors "were not egregious ones"[128]. They held that the impact of the errors, if any, "could only have been slight and temporary". They were cured by accurate judicial directions. On this ground, "no miscarriage of justice occurred"[129]. Because the issue is not settled by authority, it is open in this appeal where, in my view, it is specifically presented for resolution.

90 Moreover, as a matter of principle, neither the criminal appeal legislation nor the law generally confine attention solely to pragmatic consequences. The law is concerned with principles and with the appearance of justice in the conduct of trials[130]. This concern derives from the long experience of the law

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126 cf *Weiss v The Queen* [2005] HCA 81 at [44]-[45].

127 (2005) 79 ALJR 662 at 677-678 [100]; 214 ALR 1 at 22.

128 Note the similarity between the requirement that counsel's errors be "egregious", and the older non-statutory formulations, discussed above at [65], which required counsel's errors to be "flagrant" or "radical". As explained above at [65], the problem presented by this approach is that the additional word, although designed to remove from consideration minor errors, ultimately fails to shed any additional light on the content of "incompetence". Nor does it have any textual foundation in Australian criminal appeals legislation.

129 (2005) 79 ALJR 662 at 678 [104]; 214 ALR 1 at 23.

130 *R v Sussex Justices; Ex parte McCarthy* [1924] 1 KB 256 at 259. See also *Johnson v Johnson* (2000) 201 CLR 488 at 502 [42]; *Re Minister for Immigration, Multicultural and Indigenous Affairs; Ex parte Lam* (2003) 214 CLR 1 at 14 [37];

(Footnote continues on next page)

that substantive justice is heavily dependent upon (and often flows from) observance of proper procedures and the conduct of hearings untainted by relevant unfairness. Care must be taken against dismissing complaints about the incompetence of legal representation solely on the basis that an impugned decision of counsel could have been taken competently, although for different reasons. That approach involves an inevitable element of speculation and retrospective justification. In a case of serious and multiple complaints (as here) the accused is entitled to object that he has been deprived of a fundamental right to a fair trial, with his defence put to the jury *a priori*, not considered only in a trial before appellate judges in which the apparent errors are justified or explained away *ex post*.

91 To the extent that there is any doubt as to the meaning of the criminal appeal statute, the provisions of the International Covenant on Civil and Political Rights[131] may assist in resolving the ambiguity. Australia has no constitutional Bill of Rights. However, it is a party to that Covenant, and to the First Optional Protocol[132] which inevitably brings such provisions of international law to bear upon the elucidation of Australian law[133].

92 By Art 14.1 of the ICCPR, "[i]n the determination of any criminal charge against him … everyone shall be entitled to a fair … hearing by a competent, independent and impartial tribunal established by law". By Art 14.3, "[i]n the determination of any criminal charges against him, everyone shall be entitled to … minimum guarantees, in full equality", including "(b) [t]o have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing" and "(d) … to defend himself … through legal assistance of his own choosing".

93 The Human Rights Committee of the United Nations, determining communications complaining about non-compliance with such provisions, has explained that they imply a guarantee of adequate, proper or effective legal

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NAIS v Minister for Immigration and Multicultural and Indigenous Affairs (2005) 223 ALR 171.

131 International Covenant on Civil and Political Rights ("ICCPR"), opened for signature 16 December 1966, 1980 ATS 23 (entered into force 23 March 1976). The ICCPR entered into force in respect of Australia on 13 November 1980.

132 First Optional Protocol to the ICCPR, 1991 ATS 39 (entered into force 23 March 1976). The Protocol entered into force in respect of Australia on 25 December 1991.

133 *Mabo v Queensland [No 2]* (1992) 175 CLR 1 at 42 per Brennan J.

representation[134]. The more serious the case and grave the potential punishment upon conviction, the greater is the obligation of the State party to ensure against incompetence in representation by providing the time and resources necessary to prepare an effective defence, so far as this is available[135]. The ICCPR and the elaboration of it by the independent treaty body, afford a useful reminder of the ambit of the obligation to ensure a fair trial for the criminal accused. The notion imports assumptions of basically competent representation without the need invariably to prove that any incompetence demonstrated actually altered the outcome.

94 Because fundamental rights belong to individuals[136], their provision is not necessarily confined to cases where their deprivation results in adverse consequences that might not otherwise have occurred. Upholding fundamental rights, when applicable, will sometimes have a value in itself. This may be so quite apart from the beneficial consequences of their observance for those immediately affected.

95 Moreover, judicial authority from a number of sources lends support to the view, expounded by McHugh J in *TKWJ*, that it is not invariably necessary to prove that the outcome would have been different but for the incompetence of counsel.

96 Thus, in Canada, the Supreme Court has emphasised that a miscarriage of justice, in the context of criminal appeals, may take many forms including both procedural unfairness and an impact on the reliability of the outcome of the trial[137]. This dichotomy was noted earlier in *R v Joanisse*[138], where Doherty JA explained:

> "… this court's obligation to quash convictions which are the product of a miscarriage of justice requires that it consider the impact of counsel's

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134 *Vasilskis v Uruguay* (Case 80/80); *Kelly v Jamaica* (Case 253/87); *Campbell v Jamaica* (Case 618/95) in Joseph, Schultz and Castan, *The International Covenant on Civil and Political Rights*, 2nd ed (2005) at 443 ("Joseph").

135 *Campbell v Jamaica* (Case 618/95); *Hussain v Mauritius* (Case 980/01); *HC v Jamaica* (Case 383/89); *Taylor v Jamaica* (Case 705/96) in Joseph at 443-445.

136 *NAGV and NAGW of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 79 ALJR 609 at 619-620 [67]-[68]; 213 ALR 668 at 682.

137 *R v GDB* [2000] 1 SCR 520 at 532 [28] per Major J, delivering the reasons of the Court.

138 (1995) 102 CCC (3d) 35 at 62.

> incompetence on both the reliability of the result, and the fairness of the process by which that result was achieved. A reliable verdict may still be the product of a miscarriage of justice if the process through which that verdict was reached was unfair."

97 In *Sungsuwan v The Queen*[139], the Supreme Court of New Zealand likewise identified a distinction between cases where errors or irregularities in the trial, occasioned by counsel error, rendered the verdict unsafe and cases where they resulted in the denial of the right to a fair trial *per se*. In each of those instances, Elias CJ observed[140]:

> "It is difficult to envisage that a verdict reached without fair trial or which is unsafe will not amount to a substantial miscarriage of justice."

98 In endorsing this dual foundation for relief, Gault, Keith and Blanchard JJ cited with approval a statement of the Privy Council in *Teeluck v State of Trinidad and Tobago*[141]. In that case, Lord Carswell, giving the judgment of the Judicial Committee, said[142]:

> "There may possibly be cases in which counsel's misbehaviour or ineptitude is so extreme that it constitutes a denial of due process to the client. Apart from such cases, which it is to be hoped are extremely rare, the focus of the appellate court ought to be on the impact which the errors of counsel have had on the trial and the verdict rather than attempting to rate counsel's conduct of the case according to some scale of ineptitude."

99 Obviously, care needs to be taken in deriving support from judicial opinions focused on texts other than the common form of Australian criminal appeal legislation applicable in the appeal. This is especially so because constitutional, statutory or treaty requirements existing in other jurisdictions may import norms missing from the Australian legal scene.

100 Nevertheless, the trend of the decisions that I have mentioned appears to sustain the distinction drawn by McHugh J in *TKWJ*. Sometimes, rarely, the misbehaviour, errors or incompetence in the legal representation of an accused at

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139 [2005] NZSC 57.

140 [2005] NZSC 57 at [6] per Elias CJ.

141 [2005] 1 WLR 2421 (PC).

142 [2005] 1 WLR 2421 at 2433 [39] (PC) citing *Boodram v The State* [2002] 1 Cr App R 103 [39]; *Balson v The State* [2005] UKPC 2; cf *Anderson v HM Advocate* 1996 SLT 155.

trial may be so egregious, frequent or obvious as, without more, to amount to a miscarriage of justice. The "proviso" postulates upholding the verdict at the conclusion of a trial that has met the minimum standards required for a fair trial. It does not envisage the affront to the appearance of justice of upholding orders that have followed a proceeding that did not amount, in law, to a proper trial at all[143].

The application of the principles

101 *Unsafe outcome analysis*: I turn to apply the foregoing principles to the evidence and circumstances of the appellant's trial. I can do this briefly because the reasons of Callinan and Heydon JJ do so comprehensively. Material incompetence of the appellant's legal representation at his trial was contested as to particular instances. However, in my view, it could not be disputed that, in important respects (especially in the failure to research and explain to the appellant the legal ingredients of the offence and to take a thorough proof from him on the basis of which available trial strategy could have been determined with his informed instructions) material incompetence was clear-cut. It was abundantly established.

102 In their reasons, Callinan and Heydon JJ have described the powerful objective case that the prosecution built against the appellant at his trial[144]. That case was based mainly on the tapes of intercepted telephone conversations and the unchallenged observations of the appellant in the company of Jorge Velarde, conversing by telephone with Peter Jackson[145]. So overwhelming is the objective evidence presented against the appellant in this and other respects that the application to the record of a correct understanding of the offence of being "knowingly concerned" in the undoubted importation into Australia of the prohibited drug cocaine, clearly establishes the appellant's involvement in, and guilt of, that offence. It renders the belatedly suggested "defences" (that the appellant was ignorant of the nature of the drug; that he thought any drug importation was destined for New Zealand; and that he had cut off relations with the importers) thoroughly unconvincing.

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143 An analogous approach is taken by the United States Supreme Court in cases where the performance of counsel is so deficient that the appellate court concludes that the lawyer at trial did not qualify as "counsel" as envisaged by the Sixth Amendment. See *Strickland* 466 US 668 at 687 (1984) per O'Connor J, delivering the opinion of the Court.

144 Reasons of Callinan and Heydon JJ at [159]-[160].

145 *R v Nudd* [2004] QCA 154 at [25].

103 These "defences" were, as the respondent submitted, an after-thought suggested by the questions raised by the jury after they had been deliberating for nearly 24 hours[146]. Those questions asked whether the accused needed to know the final destination of the shipment and what would happen if he were knowingly concerned with the bringing of the drugs to another destination, not Australia, which only became the destination "through revised planning or other reasoning"[147]. No complaint was made of the trial judge's directions in answer to these questions. But now the appellant has latched on to the questions. He has propounded "defences" that are unconvincing when judged against the totality of the evidence, especially that contained in the recorded tapes.

104 If, therefore, the sole miscarriage of justice that was in question in this appeal was that concerned with the appellate court's judgment of the guilt of the appellant, based on the entirety of the evidence in the trial, no error has been shown in the conclusion of the Court of Appeal, discharging its own function of assessing the appellant's conviction on the basis of that evidence. There was ample, indeed overwhelming, evidence at the trial to warrant the conclusion of the Court of Appeal that the prosecution had established, to the requisite standard, that the appellant was knowingly concerned in the importation of cocaine into Australia. On this basis, although the appellant's defence was most imperfectly conducted, his conviction in his trial resulted in no substantial miscarriage of justice which had actually occurred[148]. So judged, his appeal was rightly dismissed. In substance, on this point, I agree with the analysis of Callinan and Heydon JJ.

105 *Fair trial analysis*: But what of the alternative way in which the appellant pressed his appeal? Can it be said that the defects in his representation were so egregious, frequent and obvious as to have denied the appellant the basic elements of a fair trial? What of his submission, in the words of McHugh J in *TKWJ*[149], that "the conduct of counsel has resulted in an unfair trial, that of itself constitutes a miscarriage of justice", without any need to prove more?

106 I have found the resolution of this issue much more difficult. In my opinion the argument is available to the appellant on a correct understanding of the content of "miscarriage of justice", as that expression is used in s 668E(1) of the Code. So has this alternative submission been made out?

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146 *R v Nudd* [2004] QCA 154 at [64].

147 *R v Nudd* [2004] QCA 154 at [64].

148 The language of s 668E(1A) of the Code.

149 (2002) 212 CLR 124 at 148 [76].

107 Of greatest concern is the failure of the appellant's legal representatives, and especially his counsel, to research and thoroughly understand the ingredients in law of the very serious charge brought against the appellant. Also troubling is the failure to take as full a proof of evidence as the appellant would provide and to advise him then on the conduct of the trial, applying the law as understood to the facts as so revealed. In a sense, these were tasks so rudimentary to the duties of a lawyer that the omission to perform them contaminated what followed.

108 Competent counsel might have made this or that particular decision in the course of running the trial. But the concordance of well-made decisions with those actually made by trial counsel in ignorance of, or mistake about, the basic ingredients of the offence, was largely coincidental. In many cases it was accidental. The defence of the appellant was arguably not conducted as the basic postulate of a properly defended criminal trial envisages. All other mistakes and errors might be explained or excused. But the defects of legal understanding, of factual analysis and of securing proper instructions on that basis are self-evidently of a most serious order.

109 Yet did they, in the end, result in a trial lacking in essential fairness as the law requires?[150] I have hesitated over the answer to this question. I regard the case as being at the borderline. Ultimately, what convinces me that the trial was not unfair (and hence that there was no miscarriage of justice of the second category) is that the prosecution evidence against the appellant was so detailed, overwhelming and in large part uncontested, that it left no significant possibility of an acquittal, otherwise open, had the appellant been differently and competently represented at the trial. In short, like Callinan and Heydon JJ, I regard the case proved against the appellant as "effectively unanswerable"[151].

110 The appellant, serving his long prison sentence, may say (and doubtless will) that he never obtained a proper opportunity to answer the prosecution case because his mind, and those of his legal representatives, were never ultimately focused together on the real issues for trial and how, if at all, those issues could be answered. If I thought that any answer were reasonably available to the appellant in the record that I have read, that might have resulted in an acquittal, I would accept that complaint. Because there was no such possibility, and because the trial judge instructed the jury on the applicable law with complete accuracy, it cannot be said that the trial was unfair, occasioning a miscarriage of justice on that footing.

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150 *TKWJ* (2002) 212 CLR 124 at 148 [76] per McHugh J.

151 Reasons of Callinan and Heydon JJ at [159].

111 *Federal jurisdiction*: The trial of the appellant occurred in the Supreme Court of Queensland, exercising federal jurisdiction in accordance with the Constitution[152]. The appellant was tried on indictment of an offence against the law of the Commonwealth, namely the *Customs Act*. In accordance with s 80 of the Constitution, the appellant was entitled to, and secured, trial by jury. Such trial was obliged to conform to all requirements of Ch III of the Constitution.

112 No arguments were advanced in this Court, whether based upon the terms of s 80 of the Constitution or more generally upon any due process implications to be found in Ch III[153] that the application of the criminal appeal provisions of the statute law of Queensland, picked up and applied to a trial in federal jurisdiction, were inconsistent with any constitutional requirements governing the appellant's trial. Because the parties were well represented in this Court, and raised no such issues, I am content to accept that they need not be addressed by me. The constitutional implications (if any) for cases of this kind of trial as Ch III requires, and trial by jury as s 80 requires, can be postponed to another day.

Orders

113 I agree that the appeal should be dismissed.

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152 Constitution, s 73(ii).

153 *Polyukhovich v The Commonwealth* (1991) 172 CLR 501 at 606-614 per Deane J, 703-706 per Gaudron J; cf at 532-535 per Mason CJ; *Leeth v The Commonwealth* (1992) 174 CLR 455 at 483-488 per Deane and Toohey JJ, 501 per Gaudron J; cf at 467-469 per Mason CJ, Dawson and McHugh JJ. See Parker, "Protection of Judicial Process as an Implied Constitutional Principle", (1994) 16 *Adelaide Law Review* 341 and note *Weiss v The Queen* [2005] HCA 81 at [30].

114 CALLINAN AND HEYDON JJ. The only ground of appeal in this case, as in the recent case of *Ali v The Queen*[154], is that the appellant's counsel at his trial was so grossly incompetent that it miscarried, and that the Court of Appeal of Queensland should have so concluded.

115 The appellant was convicted by the Supreme Court of Queensland (Philippides J with a jury) of being "knowingly concerned in" the importation of cocaine into Australia contrary to s 233B of the *Customs Act* 1901 (Cth). He was sentenced to 22 years imprisonment with a non-parole period fixed at 11 years.

Facts

116 It is necessary to set out the facts in some detail, not only because the events with which the Court is concerned are complex, but also because of the compelling complexion that they assume when they are so stated.

117 Police and Customs officers intercepted the yacht "Sparkles Plenty" in Moreton Bay on 3 May 2001. On board they found 99 packets of cocaine, 29 of which were damaged by water. The undamaged cocaine weighed about 89 kilograms and had a purity of 70 per cent.

118 There were two men on the yacht when it was boarded, a citizen of the United States, Peter Jackson, and his son Gareth Jackson. They had left Mexico in May 2000 on the yacht and crossed the Pacific Ocean to Noumea which they reached on 8 November 2000. From there they flew to Australia on 7 December 2000, where they remained until their visas expired in early March 2001.

119 On 7 March 2001, Peter Jackson flew to the United States, where he obtained a false United States' passport in the name of "David Geschke". On 28 March 2001 he flew from the United States to Noumea on the false passport. He then sailed the yacht from Noumea to Moreton Bay where the boat was intercepted. The false passport and other items representing him to be Geschke were found on board.

120 For part of the period of three months in which the two men were in Australia they lived in a motel in Sydney. A listening device had been installed in their room to intercept telephone conversations. Eleven of those conversations were between Peter Jackson and the appellant, who is an Australian citizen and was then living in Los Angeles. Additionally, there were intercepted conversations between Jackson and other participants in the importation of the cocaine, Jackson's two sons Gareth and Klaus, Jorge Velarde, and the appellant's sister, Sylvia Aldren.

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154 (2005) 79 ALJR 662; 214 ALR 1.

121 The role of Velarde, another citizen of the United States, was to act as an intermediary between Jackson and unidentified Australian recipients of the cocaine.

122 At the trial, the appellant admitted the passage of the yacht from Mexico, the identity of the various persons on board at different times, the movements of Peter and Gareth Jackson, the use by Peter Jackson of the false passport, the quantity of cocaine found on the yacht on its interception in Moreton Bay, and that Sylvia Aldren was his sister.

123 It remained then for the prosecution to prove that the appellant was knowingly concerned in the importation of the cocaine. This it sought to do by the tender of tapes of the telephone conversations. Not surprisingly, taken in isolation, the contents of some of the conversations were cryptic.

124 At the opening of its case, the prosecution alleged the appellant was knowingly concerned in the importation because he knew of it and "he gave some practical assistance in some way". In his address to the jury, the prosecutor characterized the core issues as ones of "knowledge and practical assistance" and argued that the appellant was one of the "inner circle" involved in this venture.

125 The prosecutor conducted the case upon the basis that it was for the prosecution to prove that the appellant's conduct had "the effect of pushing this process along", thereby perhaps unnecessarily raising the hurdle which the prosecutor had to surmount to prove the offence[155]. Seven particulars were provided of the respects in which the appellant was said to be concerned in the importation. They were, first, that the appellant had travelled from the United States to Noumea to discuss the importation of the cocaine by Jackson under a false name. Secondly, the appellant inquired about hiring a yacht. The third was that the appellant facilitated contact between Jackson and Velarde. Next, it was said that the appellant helped Jackson to resolve difficulties in making arrangements for the importation. Fifthly, the prosecution pointed to the assistance afforded by the appellant in arranging for his sister to help Jackson to obtain a false passport. Sixthly, the prosecution contended that the purpose of a meeting between the appellant and Jackson at Los Angeles Airport was to assist with the importation of the cocaine. The last particular was that the appellant assisted Jackson to obtain the false passport.

126 The yacht was owned by a company controlled by Jackson and his family. In its voyage across the Pacific it had berthed at Papeete and Tonga before arriving in Noumea. It had remained there for more than five months before

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155 *Leff* (1996) 86 A Crim R 212 at 214 per Gleeson CJ.

sailing for Moreton Bay. The delay, the prosecution submitted, was caused by problems the offenders had encountered in arranging for the importation: water damage to the cocaine; delays on the part of Velarde in making satisfactory arrangements for the distribution of the cocaine in Australia; and the detection by Customs officers of this country of a minute quantity of cocaine in Peter Jackson's luggage on his arrival in Australia. Despite the absence of a charge in relation to that, the prosecution asked the jury to infer that Jackson became so concerned that he had, or may have been identified and recorded as a cocaine user, that he decided to obtain a false passport to reduce the chances of apprehension on any re-entry to Australia. The intercepted conversations between the appellant and Jackson, the prosecution contended, showed clearly that the former was assisting or attempting to assist in the resolution of the problems.

127 Two attempts were made by Jackson to obtain a false passport. One was an attempt to obtain an Australian passport, which was unsuccessful. The other attempt, which was ultimately successful, was to obtain a United States passport in the name of Geschke on his return to that country in March 2001. The taped conversations between Jackson and the appellant in late February and early March 2001 were capable of being understood as offers by the appellant to Jackson of assistance in seeking to obtain false passports.

128 Jackson was recorded on 20 February 2001 as telephoning his son Klaus who was then in North America. Jackson instructed Klaus to go to Jackson's house in Mexico to find what he called "the Florida ID", a description used in many of the conversations, and which the prosecution alleged was a reference to items which were to be used to identify Jackson as Geschke for the purpose of obtaining the United States passport, including the items of identification found on the yacht when it was boarded in Moreton Bay.

129 Those items included an "ID card" in the name of Geschke bearing a photograph of Jackson, and a student card and MasterCard in the same name. On 22 February, there were several conversations between the appellant and Jackson which were recorded. In these, Jackson referred to "that Florida information" and that Klaus "is going to the house to look for it", saying that if Klaus could find it, he could "proceed from there".

130 Jackson and the appellant discussed the detection by the Australian Customs officials of traces of cocaine in the former's luggage on his entry into Australia in December 2000. In one of the conversations, referring to the ion scan equipment used to detect the cocaine in Jackson's possession, the appellant said:

> "If the bad guys have got these things why can't the good guys buy 'em ... there ... must be some way where we can buy one 'cause ... there's a lot of business involved."

131 In another conversation on 22 February 2001, Jackson reminded the appellant that the appellant had previously said that it was possible to get what he referred to as "some kind of ... paperwork" in Australia. The appellant said that he would make inquiries and call Jackson back between 4 pm and 6 pm that afternoon.

132 The appellant did in fact call Jackson at about 4:15 pm on that day. He said that he had made inquiries, and that he had "good news [regarding the] documentation you need for applying for the blue credit card", said by the prosecution to be code for an Australian passport. During the conversation, he told Jackson what needed to be done and that he had a sister in Sydney with whom he had made arrangements to help Jackson achieve this. He said that he had arranged for her to call Jackson the following morning. Early the next morning the appellant telephoned Jackson to ask if his sister had called, and if not, to tell him that she would be calling soon. The appellant then gave Jackson advice to obtain several sets of photographs. About an hour after this call, the appellant's sister did telephone Jackson. This was the first of several telephone conversations between them. They made arrangements to meet later that day. After that telephone call, Jackson was observed entering a photographic shop, and subsequently meeting Sylvia Aldren as arranged.

133 Over the next few days, the appellant telephoned Jackson from time to time, apparently making inquiries as to what progress was being made with the matter the subject of Sylvia Aldren's assistance. On 28 February, a conversation between Jackson and Aldren recorded her as saying that she was having difficulty in obtaining people to vouch that they had known Jackson for the requisite period in support of his application for an Australian passport. Aldren told Jackson that she had tried to persuade a particular person to assist, saying that she had told him that "maybe it could be up to five (thousand)" but that he had "still said no ... [and that] he would be willing to do it for nothing if he had known you for twelve months but on the application ... it says ... that the person only had to know you for twelve months." A couple of days later, Aldren told Jackson that she had unsuccessfully sought assistance from others.

134 On the prosecution case, the tapes of the intercepted telephone conversations demonstrated that by 2 March 2001, Jackson was aware that his son Klaus had successfully retrieved the Florida identification documents. Following this there were conversations between Jackson and the appellant in which Jackson's return to the United States, so that he could try to obtain a new "Bible", was discussed. The prosecution submitted that "Bible" also was code for a new passport. Jackson's visa was to expire on 8 March 2001, three months after his entry. The appellant was recorded as saying to Jackson:

> "[I]f you've ... got the things from ... Florida ... I can get the other thing ... you will have your new Bible probably within from the day you come with me, probably seven to ten days after."

Shortly before he left Australia, Jackson was telephoned by the appellant to arrange to meet at Los Angeles Airport upon Jackson's arrival. In that conversation, Jackson referred to his having to "pick up those things from ... Klaus" to which the appellant said:

> "Okay that's fine because look ... I've contacted my friend and you know ... she ... is ... all ready to go the only thing we need to do is of course ... pay you know like because ... we need to pay a fee of course."

The prosecution said that this was a reference to the procuring from the person described as "my friend", a false passport with the benefit of the documents collected by Klaus Jackson.

135 Evidence obtained by surveillance established that Jackson's next meeting with the appellant was on 7 March 2001 at Los Angeles Airport. There was no evidence of anything done by the appellant after this meeting, until he was apprehended in Los Angeles as "Sparkles Plenty" was intercepted in Moreton Bay.

136 Velarde's inability to find a suitable intermediary was contended to be the subject of several discussions between Jackson and the appellant. The tenor of those discussions was of complaints by Jackson that Velarde was not doing his job and was difficult to contact. The appellant, who was under regular surveillance by authorities in Los Angeles, was in contact with Velarde who was in the United States. At this time Jackson was staying in a motel in Sydney. On 22 February 2001, the appellant called Jackson and told him that "our friend", a reference to Velarde, was on the way to see him.

137 Velarde did not arrive on 22 February 2001. The following day the appellant called Jackson and told him as much. On 25 February, he again telephoned Jackson and said that he had spoken to "our friend ... George Harrison". At the trial the prosecution alleged that "George Harrison" was in fact "Jorge Velarde". The appellant told Jackson that "George Harrison" would definitely call on 27 February.

138 There was a telephone conversation between Jackson, the appellant and Velarde, on 27 February. The appellant and Velarde used the same telephone. They were under surveillance at the time by a Customs officer of the United States who observed them using a public pay telephone. The Customs officer saw the appellant make a call and appear to have a conversation for a few minutes before handing the phone to Velarde who continued it. That observation corresponds with a conversation between Jackson and the two men at that time which was recorded. The recording included a heated argument between Jackson and Velarde, in which allegations were made by both men regarding their respective contributions to the difficulties in implementing a plan. Velarde referred to the "damage to goods" telling Jackson that he needed to produce them

for "these people's accounting". The evidence of the Customs officer observing Velarde and the appellant at the pay telephone was that the appellant stood by, within earshot throughout this conversation, after which they drove to a restaurant where they talked for some time. On the following day, the appellant called Jackson and apologised for the manner in which Velarde had spoken to him.

139 There were several other conversations between the appellant and Jackson in which reference was made to the "damaged building supplies" and to "about thirty per cent of these ... Italian tiles" as being "broken". The appellant was in the building industry in the United States and the prosecution said that this was his way of referring to the damaged cocaine.

140 On the prosecution case other telephone intercepts related to the chartering of a boat for the final leg of the trip to Australia. On 22 February 2001, the following conversation occurred:

> "NUDD: I also spoke to a couple of my friends in Australia and they were saying that ... if you head up north right ya know the same place I'm from ... just ... is maybe ... simplest to actually hire a yacht from up there.
>
> JACKSON: Oh definitely it is ... but they don't like that ... overseas stuff at all I ... inquired a bit.
>
> NUDD: You did.
>
> JACKSON: If there was a meeting a way to do a meeting you could maybe get away with that ya know ... it wouldn't really help my position but it would help the whole thing maybe.
>
> NUDD: Why don't you ... get your son to go to Gilligan's Island pick up your bus and come by and pick you up?
>
> JACKSON: Yeah that's ... another way but that's ... what I'm thinking more or less but it's ... you know that contamination problem is severe.
>
> NUDD: Oh the contamination right yeah ... I completely forgot about that."

In a later conversation that day, Jackson was apparently discussing his plans when he said: "I'm deciding between here and the island" and said that one possibility was "what we were talking about before kind of meeting with the charter thing". The appellant asked: "why don't you charter one there? Charter the whole thing?" Jackson replied: "Well I am [going] to try some more. The first place was not interested ... and meet half way is what I was thinking ... to cut the time thing". A few days later, the appellant asked Jackson: "... have you made anymore calls for a charter?" to which Jackson replied: "Yeah I called

today there it might be possible I really would like to go up there and talk to him in person".

141 Much of the other evidence of the prosecution was directed to the probity of the recordings of the telephone conversations and the movements of the participants. None of these was susceptible to any credible challenge. The admitted facts, the incontrovertible evidence of the movements of the participants, and the probity of the tapes, left the prosecution merely to submit that the contents of the last, taken with the appellant's association with Velarde and the introduction of his sister to the project, proved that the appellant was knowingly concerned in the importation. Effective cross-examination on any of these matters would have enjoyed no reasonable prospect of success.

142 It is now necessary to turn to the incompetence of counsel for the appellant at the trial. In examining that topic, it is necessary to bear in mind that the criticisms made below must be considered in the light of the fact that counsel was not represented in this appeal. It must also be remembered, as is explained below, that it is very hard to see what case on behalf of the appellant counsel could legitimately have advanced which would have had any prospect of success.

143 The incompetence of counsel to which the appellant particularly pointed was the former's conduct of the trial, from beginning to end, under a fundamental misapprehension as to the elements of the offence with which the appellant was charged. The misapprehension was that it was an element of the offence that an offender must provide practical assistance to any person more directly concerned in the commission of such an offence or that before an offender could be convicted he must be shown to have caused the venture to move forward. It fell to the trial judge to correct counsel and this her Honour did in her summing up to which no objection is or could be made. Her Honour said this:

> "I have to correct some things on this issue said in addresses. It is not the law that in order to be concerned in the importation the accused must put forward an original idea or must assist in taking the venture in a new or different direction, nor is it the law that for the assistance to be practical that it must be effective. Rather, what is required is that the participation is a practical part of the venture. A person can give practical assistance even though the party to whom it is given is an expert on the subject of the assistance. The question is not whether the importation would have taken place without the accused, but whether the accused was concerned in the importation. Being concerned in bringing cocaine into Australia is not limited to direct involvement in the means by which the drugs were brought here such as handling the goods or sailing the boat or loading the goods or things of that nature. Someone who makes arrangements or assists in making arrangements for the importation can also be said to be concerned in the importation. The word 'concerned' covers a wide range of activities and includes acts and events which

> precede the actual bringing of the prohibited goods into the country. It is sufficient if a concern, that is the part played by the accused, occurs in some part of the venture which has as its object bringing drugs into the country, that is to say, if the involvement or participation is a practical part of the venture, the person is concerned in even though the participation occurs before their particular activity which actually brings the goods here."

144 There were other respects in which counsel for the appellant at the trial, who had not previously conducted a major criminal trial before a jury, was incompetent. Neither he, nor the solicitor representing the appellant, obtained his version of events at any time. Even so, counsel submitted that the appellant knew that Jackson was importing cocaine into Australia. Repeating his understanding of a need for practical assistance, at one point in his address to the jury he said this:

> "My task today on the issue of practical assistance – and that's really the defence case – is to demonstrate that, really, anything that my client did, anything that you might be satisfied that my client did, is not, in the relevant criminal sense, a sense that will attract a very severe penalty, practical assistance."

145 Both in the Court of Appeal and in this Court, the appellant has submitted that a failure to call him was another example of his counsel's incompetence. As will appear, had the appellant given evidence, the defence that he would have tried to mount was that he did not know the precise destination of the cargo, which turned out to be cocaine, and that he thought that it could have been pseudoephedrine or some other like substance, and that he believed that the boat and its cargo were headed for New Zealand.

146 There is one further aspect of the conduct of the trial of counsel for the appellant to which reference should be made. In his address to the jury, he appeared clearly to accept on behalf of his client that it was his client's voice on the telephone that had been tape-recorded:

> "I didn't have to put [the appellant] in the witness box, that's his undoubted right and, having said that, you can't draw ... an adverse inference, and having said that about his silence he's hardly been silent in this Court, has he? You've heard him on tape and those tapes I'd ask you to bear in mind are contemporaneous with events."

147 Again it was the trial judge who picked up the possibility of a misapprehension. Her Honour asked him whether he had instructions from his client that it was he who spoke on the telephone. The appellant's counsel said that these were his present instructions. When the trial resumed however, on the following Monday, and her Honour again in the absence of the jury, sought

clarification, after some discussion counsel said that his instructions were to put the Crown to proof of the identity of the speaker on the telephone, and other substantial matters. Nonetheless he asked whether he might take further instructions. The trial judge allowed him to do so. After a brief adjournment, he then informed her Honour that he held instructions to admit that it was his client's voice on the tapes.

148 After the jury had been deliberating for nearly 24 hours, they sought assistance from the trial judge by asking the following two questions[156]:

> "1. Does the accused need to know the final destination of shipment, ie, Australia, in order for him to have committed an illegal act as charged?
>
> 2. If the accused was knowingly concerned in the bringing into destination X, if not being Australia, of prohibited imports and the ultimate destination became Australia through revised planning or other reasoning, does the charge still apply?"

With respect to the first question, her Honour said:

> "And the answer to that question is yes. The charge is importation of the drugs into Australia and I think you now have copies of the indictment."

With respect to the second question, her Honour said:

> "And as to question 2, the answer is that if the accused knew that the goods were being imported into Australia as a result of – well if the accused knew that the goods were being brought into Australia [and] that the ultimate destination was Australia and by whatever means, whether it be revised planning or whatever, the charge still applies. Because the charge is the importing of the goods into Australia and that is what the accused needs to have knowledge of."

The appeal to the Court of Appeal

149 The principal judgment of the Court of Appeal of Queensland, (Davies JA, White and McMurdo JJ) which dismissed the appellant's appeal, was given by McMurdo J. The appellant argued there the same ground as he relied upon in this Court. The particulars of incompetence to which the appellant's counsel on the appeal referred (who was not of course the same counsel as conducted the trial) were ten in number[157]:

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156 *R v Nudd* [2004] QCA 154 at [64].

157 [2004] QCA 154 at [49].

"(a) Counsel failed to understand, and properly advise the Appellant on, the elements of the offence charged;

(b) Counsel conducted the defence case on the basis of his misunderstanding of the meaning of the term 'knowingly concerned';

(c) Counsel failed to take appropriate instructions from the Appellant;

(d) Counsel failed to properly advise the Appellant upon such instructions;

(e) Counsel failed to appreciate or advance two lines of defence reasonably open upon the Appellant's instructions;

(f) Counsel failed to appropriately advise the Appellant in relation to giving evidence;

(g) Counsel made admissions of fact in error and/or without instructions to do so;

(h) Counsel failed to seek an appropriate direction concerning the way in which the jury could use the contents of discussions between persons, such discussions not involving the Appellant;

(i) Counsel failed to object to inadmissible and highly prejudicial material contained in the telephone intercept tapes being admitted and failed to seek an appropriate direction from the learned Trial Judge relating to such material;

(j) Counsel introduced highly prejudicial and inadmissible material in his closing address."

150 The appellant and his counsel at the trial gave evidence on the appeal. It is from that evidence that the purported defence upon which the appellant would have sought to rely had he been properly represented, emerges. In addition to the matters that we have already mentioned, the appellant claimed that he did not know that Jackson was importing cocaine into Australia, that he had no financial or other beneficial interest in the importation, and that he dissociated himself entirely from the affair of the "Sparkles Plenty" on or about 7 March 2001.

151 In the Court of Appeal, McMurdo J correctly identified the ultimate question as being whether there had been a miscarriage of justice[158]. After reviewing the authorities, his Honour said this[159]:

> "As mentioned, the mainstay of the prosecution case was the evidence of the intercepted telephone conversations, and the evidence that it was the accused who was recorded speaking to Jackson was compelling. Without evidence given by or for the accused, the outcome depended upon the inferences which the jury could draw from those conversations. This required some considerable interpretation of the words spoken."

152 The difficulty for the appellant with respect to his claim that he should have been advised to give evidence at his trial, as pointed out by McMurdo J, was that he would have had to undergo cross-examination on his assertion that all that he knew was that the cargo may have been pseudoephedrine or a like narcotic and that its destination may have been New Zealand, assertions self-evidently of little credibility and rendering the appellant vulnerable to a detailed cross-examination about the telephone conversations and his involvement generally. McMurdo J was accordingly of the view that a failure to call the appellant was most unlikely to have deprived him of a chance of an acquittal, and to have caused any miscarriage of justice.

153 With respect to the appellant's claim that he would have given evidence of his withdrawal from any involvement and dissociation from the project, the difficulty for him is that by then he had in fact participated in the importation which, as Gleeson CJ said in *Leff*[160], is a process or a venture not confined to the precise moment of the entry of a narcotic into Australia. Accordingly, again as McMurdo J pointed out, this evidence, had it been given, taken particularly with the other evidence on the tape recordings, would have been most unlikely to have availed the appellant.

154 With respect to the other particulars of incompetence, McMurdo J said this[161]:

> "It is necessary to mention those suggested particulars of incompetence which have not been already addressed. The first is that counsel should have sought appropriate directions concerning the way in

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158 [2004] QCA 154 at [59].

159 [2004] QCA 154 at [61].

160 (1996) 86 A Crim R 212 at 214.

161 [2004] QCA 154 at [73]-[75].

which the jury could use the content of discussions between persons, as recorded on the tapes, where those discussions did not involve the appellant. On the strategy which counsel employed, of endeavouring to make his client seem irrelevant to the scheme which was organised by others, there was some potential advantage in allowing the jury to hear these other conversations. Perhaps it was arguable that some of this evidence was inadmissible, because it was not evidence of the existing venture and the appellant's role in it. However, it does not appear to me that some particular direction was required and there is no ground of appeal which is critical of the summing up.

A further complaint is that counsel failed to object to part of the tapes in which the appellant was recounting an occasion on which he was stopped at the airport and was searched. This is a fair criticism of counsel, but it hardly provides a basis for thinking that there has been a miscarriage of justice. Counsel is also criticised for failing to object to a passage from the tapes in which the appellant was recorded as saying that he had been involved 'quite a few times' in what the prosecution interpreted as obtaining false identification. In my view, however, that was admissible as evidence of the case that the accused had attempted to assist Jackson to obtain a false passport.

Lastly, criticism is made of counsel for saying in the course of his address that the appellant was arrested in the United States for visa violations, deported to Australia, remanded in custody from the date of his arrest at the trial and had lost his property which had been seized and sold by the Australian government. The evident intention of counsel was to try to engender some sympathy for his client, consistently with his submission that he was facing such a serious charge in circumstances where he had had no close involvement and there was no evidence of any financial reward. In my view, the volunteering of this information, whilst inappropriate, was not so prejudicial as to be significant here."

The appeal to this Court

The appellant's argument

155 In this Court, the appellant repeats the arguments which he advanced in the Court of Appeal. In developing his submissions, he argued that the incompetence involved here went to the root of his representation at trial, and that the decisions of his counsel were neither informed, rational nor made for any tactical reason: that he therefore has simply not had a fair trial according to law. It is not to the point, he argued, that, put another way, or in some other context, or with a different focus, some of the arguments made may have had some validity, or might be able to be plausibly or justifiably explained in retrospect.

The entire defence as conducted by his counsel at the trial led inevitably to the conclusion that the appellant was guilty.

The prosecution's arguments

156 The prosecution's principal submission is that the case against the appellant was of such a kind and so strong that it seriously limited the forensic choices available and recognizable by even the most competent of counsel. It was further submitted that there were no facts which could have been elicited from any witness in cross-examination which could have supported or improved the defence. The tapes of the telephone conversations were the mainstay of the case for the prosecution and these were effectively beyond denial, and highly inculpatory, indeed consistent only with guilt.

Disposition of the appeal

157 In *TKWJ v The Queen*[162], Gaudron J with whom Gummow J agreed, pointed out that the inquiry of an appellate court in a case of this kind was an objective one, and whether, so viewed, the course taken by counsel was capable of explanation[163]. Hayne J, with whom Gummow J also agreed, too said that an objective assessment of the conduct of the case is required[164].

158 In this case, on any assessment, whether subjective or objective, counsel's conduct was incompetent to a serious degree. So too, on either a subjective or an objective assessment, some at least of counsel's conduct cannot be rationally justified or explained, although perhaps it can be said that the overstatement of the matters required to be proved by the prosecution may have contributed to the appellant's counsel's further and significantly greater overstatement of them. That is not however the end of the matter. Was the appellant's trial a fair one in all of the circumstances? Did justice miscarry to the extent that the appellant was deprived by his counsel's conduct of a chance of an acquittal? In answering these questions, we keep in mind that the more apparently serious the offence, the greater the need there generally will be for punctiliousness in all respects in the conduct of the trial.

159 In the end we have come to the conclusion that the appellant was not deprived of a chance of an acquittal despite the incompetence of his counsel at the trial. This is so because we consider the case against the appellant to have

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162 (2002) 212 CLR 124.

163 (2002) 212 CLR 124 at 133 [27]-[28].

164 (2002) 212 CLR 124 at 158 [107].

been a strong one, and indeed one which was effectively unanswerable. The questions he asked, the statements he made, his invitations, his advice, his persistence and his comments during the numerous telephone conversations were not those of a merely interested, but innocent bystander. Nor was the introduction of his sister to Jackson the act of a person remote from the enterprise. As the prosecution points out, there were no witnesses whom the appellant could call who could give any convincing evidence to controvert any aspect of the case against him. One among many of the inculpatory references during the telephone conversations was to the ion scanning equipment. It is almost impossible to believe that the appellant would have made that reference unless he was concerned in the project of importing the cocaine into Australia.

160 The appellant's counsel at the trial did misunderstand, and accordingly fail to advise the appellant on the elements of the offence with which he was charged. He conducted the whole case upon the basis of that failure. But the trial judge did have a proper understanding of the elements of the offence, and was careful to instruct the jury correctly about them. It is not open to this Court, or indeed to any court, to take the view that had the appellant's counsel advised the appellant accurately about the elements of the offence, the appellant might, or would have changed his story to enable him to deny and disprove one or more of those elements. The Court now does know what the appellant's story is, and for the reasons which we have already given, and the reasons stated by McMurdo J in the Court of Appeal, that story would have been most unlikely to have provided an answer, or raised even a reasonable doubt with respect to the case for the prosecution, had it been told to the jury.

161 Of somewhat more concern is the possibility that some of the evidence of the conversations which were tape-recorded may have been the subject of a valid objection as to their admissibility against the appellant. However, even if the clearly admissible evidence on the tapes, one instance of which we have specifically mentioned, had been isolated, the case against the appellant would still have been a very strong one.

162 This is a case which does cause concern. It is most unfortunate that a person charged with such a serious crime as the appellant was, should come to be represented by a person whose competence fell short of the standard which a court should be entitled to expect. However, just as in medicine there may be terminal cases which not even the most brilliant surgeon can remedy, there will be prosecution cases which an accused could not successfully defend with the aid of the most resourceful and competent of counsel. We have come to the conclusion that this was such a case. That does not mean of course that a person against whom the case is a very strong one, is not entitled to a fair trial. But unlike in the operating theatre, there is in the criminal court a suitably qualified judge, detached from the protagonists and whose duty it is to intervene and make such corrections as need to be made to ensure a fair trial. Trial judges may only correct errors that become apparent to them, but in this case such errors as might

otherwise have caused the trial to miscarry, were duly corrected by way of her Honour's summing up and insistence that instructions be duly obtained.

163 We would dismiss the appeal.