HIGH COURT OF AUSTRALIA

KIEFEL CJ,
BELL, GAGELER, KEANE, NETTLE, GORDON AND EDELMAN JJ

RONALD MICHAEL CRAIG APPELLANT

AND

THE QUEEN RESPONDENT

Craig v The Queen
[2018] HCA 13
21 March 2018
B24/2017

ORDER

Appeal dismissed.

On appeal from the Supreme Court of Queensland

Representation

J A Griffin QC with E P Mac Giolla Ri and K M Hillard for the appellant (instructed by Fisher Dore Lawyers)

C W Heaton QC with J A Wooldridge for the respondent (instructed by Director of Public Prosecutions (Qld))

CATCHWORDS

Craig v The Queen

Criminal law – Appeal against conviction – Murder and manslaughter – Intention to kill or cause grievous bodily harm – Incorrect advice – Where appellant's case was that he had not intended to kill or cause grievous bodily harm – Where appellant incorrectly advised that giving evidence would likely lead to cross-examination on prior convictions – Where chance of cross-examination on prior convictions possible but not likely due to s 15(2) of *Evidence Act* 1977 (Q) – Where appellant's account of incident to his solicitor inconsistent with prior statements to police – Where appellant was correctly advised that giving evidence would likely lead to cross-examination on inconsistencies – Where appellant gave evidence on appeal that had he been physically and mentally well and absent the incorrect advice he would have given evidence at trial – Where no evidence to suggest trial would have been conducted differently absent the incorrect advice – Whether no miscarriage of justice.

Words and phrases – "criminal history", "cross-examination", "decision not to give evidence", "fair trial", "inconsistent evidence", "incorrect advice", "intent", "intoxication", "miscarriage of justice", "murder", "prior convictions".

Criminal Code (Q), ss 644, 668E(1).
Evidence Act 1977 (Q), s 15.

1 KIEFEL CJ, BELL, GAGELER, KEANE, NETTLE, GORDON AND EDELMAN JJ. The appellant was convicted following a trial before the Supreme Court of Queensland (Jackson J and a jury) of the murder of his partner, Kylie Anne Hitchen, by stabbing. The appellant did not give evidence at the trial. He had been advised by his counsel, incorrectly, that it was likely if he gave evidence that he would be cross-examined on his criminal history, which included a conviction for an offence involving the fatal stabbing of a man ("the incorrect advice"). The appellant also had been advised by his counsel, correctly, that if he gave evidence he was likely to be cross-examined on inconsistencies between his evidence and the account that he had given the police in a recorded interview.

2 The appellant appealed against his conviction to the Court of Appeal of the Supreme Court of Queensland (Fraser, Gotterson and Morrison JJA) contending, among other grounds, that the conduct of his trial occasioned a miscarriage of justice. On the hearing in the Court of Appeal, this ground was particularised by reference to the incorrect advice, which it was argued effectively left the appellant without the option of giving evidence[1]. The Court of Appeal dismissed the appeal, holding that there was a sound forensic reason for the appellant not to testify, about which he had been correctly advised. The circumstance that the appellant had been given an additional, incorrect reason for the decision did not diminish the role of the correct advice in providing a rational reason, nor, of itself, did it give rise to a miscarriage of justice[2].

3 The appellant appeals by special leave granted by Kiefel CJ, Bell and Keane JJ on 7 April 2017 on the ground that the Court of Appeal erred in finding that the incorrect advice did not result in a miscarriage of justice. The appellant contends that an essential component of a fair trial is the accused's informed choice to give evidence and it follows that the denial of an informed choice will, at least ordinarily, be a miscarriage of justice. For the reasons to be given, the generality of this proposition cannot be accepted. Whether the receipt of incorrect legal advice bearing on the accused's choice not to give evidence is productive of a miscarriage of justice requires consideration of the effect of the

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1 *R v Craig* [2016] QCA 166 at [20].

2 *R v Craig* [2016] QCA 166 at [44].

advice on the conduct of the trial. Here, that consideration does not establish that there has been a miscarriage of justice and, accordingly, the appeal must be dismissed.

Procedural history and facts

4 On 10 March 2014, the appellant was arraigned on an indictment that charged him with the murder of the deceased at Esk on or about 21 January 2011. He pleaded not guilty to murder but guilty to manslaughter. The prosecution declined to accept the plea in discharge of the indictment and the trial proceeded.

5 It was common ground that the appellant went to the Brunswick Heads Police Station on the morning of 22 January 2011 where he reported that he had cut the deceased's neck with a kitchen knife. Following the report, Queensland police went to the appellant's home in Esk and found the body of the deceased. The deceased died from knife wounds to the throat: the left and right carotid arteries had been wholly severed. So, too, the left jugular vein had been wholly severed. The incisions penetrated to the vertebrae. There were two stab-type incised wounds to the deceased's front right shoulder. The appellant's DNA was found on the deceased's fingernails.

6 The appellant made extensive admissions at the trial[3]. These included that he and the deceased had drunk alcohol heavily throughout their relationship. They also included an account of an incident in April 2010 in which the deceased had sustained a fracture to her right cheekbone. The deceased reported the incident to the police on 3 May 2010 alleging that the appellant had assaulted her. On her account, the assault occurred during the night when she had climbed over the appellant to go to the toilet. She told the police that the appellant had inquired "[w]hat's your problem bitch?" and punched her.

7 The appellant was questioned by the police about the incident and he gave the account that the deceased's injury was sustained "when we were play wrestling". The appellant was charged with causing the injury to the deceased and released on bail that was conditioned on him not having contact with the deceased. Despite the bail condition, and the terms of a domestic violence order, the appellant and the deceased continued to have contact with each other. In

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3 *Criminal Code* (Q), s 644.

mid-May 2010 the deceased asked the police to withdraw the charge. The request was refused. Several months later she renewed the request, which was refused again.

8 The appellant described the events leading up to the death of the deceased in a recorded interview with police ("the interview"). He said that he and she were at home and that both of them were drunk. He complained that she had been forcing him to "scull" beer although he had not wanted to drink any more: "I just wanted us to go to sleep, you know, and give her a cuddle and go to bed." In the event, they had ended up fighting over the deceased's insistence that they keep drinking. The appellant had gone outside to "cool down". On his return, the deceased had accused him of having telephoned another woman. He claimed that the deceased was always accusing him, wrongly, of cheating on her.

9 The appellant's account of the fatal incident was in these terms:

> "Then when I said I don't wanna drink anymore, she got real angry, and she - Kylie grabbed the knife first and I took the knife off her and she cut her, in the process of that she cut her hand. And then blood went everywhere, and then it just, it, it exploded, you know? She just lost the plot, and she's throwin stuff, and broken tv's, blood everywhere, and in the heat of the moment, I just fuckin cut her on the neck, and it was just, there was no thought, it['s] just, drunkenness you know? … And it wasn't premeditated, it was just somethin that happened, and if she didn't pick the knife up in the first place, it wouldn't have happened.
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> [POLICE OFFICER]: Ok. Are you able to tell me how you cut her?
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> [APPELLANT]: Oh, I disarmed her, and in the process the knife come around on her fingers and then it bled pretty seriously and obviously needed stitches. Then as soon as the blood went everywhere, she just lost it and started attackin me again, throwin stuff at me and I just tackled her into the corner, and she's just goin off and losin it. All I wanted to do was fuckin keep her quiet and fuckin calm down and clean her, clean her hand up, and get it seen to.
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> [POLICE OFFICER]: And so, then what's happened?
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> [APPELLANT]: [unintelligible] it was just temporarily, you know, temporarily fuckin in the heat of the moment fuckin drunk insanity, you

know? I just fuckin cut her fuckin throat, ya know? I'd no, no intentions of doin it, it's just somethin that just fuckin happened, ya know. We really wanted to make this fuckin relationship work, and she just wouldn't get off me back about rootin some other sheila and I never did. … And she just kept kickin me down, makin me feel like shit, every night she'd drank she made me feel like shit. And this went on for fuckin eighteen months … and I put up with her, and I loved her. She just wouldn't fuckin let it go, she wouldn't let it go …

[POLICE OFFICER]: What happened after you cut her?

[APPELLANT]: I sat there and fuckin cried for a fuckin hour … I couldn't believe what I saw on the kitchen floor, it was just, it's me fuckin girlfriend!

[POLICE OFFICER]: Mate, when you said you cut her throat, can you say how you did that?

[APPELLANT]: [unintelligible]

[POLICE OFFICER]: I know that sounds like a silly question.

[APPELLANT]: [unintelligible] it was a kitchen knife, I just, cut it like I was cuttin a loaf of bread, you know? I didn't even think it was her at the time, honest to god …

[POLICE OFFICER]: Did she pass away soon after?

[APPELLANT]: Yeah, a couple of minutes I'd say, less, probably, I heard, heard the gurgling sound, you know, from her throat."

10 The evidence pointed to the likelihood that the deceased died sometime after 9:35pm on 20 January 2011. She had spoken by telephone with her brother at around 6:30pm that evening. Two calls were made from her mobile telephone at around 9:35pm. At 3:24am the following morning the appellant withdrew $1,000 from the deceased's bank account at an ATM in Kilcoy. Around four and a half hours later the deceased's keycard was used to make a further withdrawal of $300 from her bank account at an ATM at Kallangur. At 11:38am that morning the appellant was recorded by CCTV cameras in the bar at a Brunswick Heads hotel. He spent the night of 21-22 January at that hotel having registered under a false name.

11 It was the appellant's case at the trial that he had not intended to kill the deceased or to do her grievous bodily harm. It was a case that relied on the account in the interview to raise a doubt that in his intoxicated state it was open to draw the inference that he had formed the murderous intent. The deceased's death occurred before amendments to the *Criminal Code* (Q) relating to the partial defence of provocation came into effect[4]. Where evidence raised the issue, the onus remained on the prosecution to negative that the accused acted under provocation. The defence did not rely on provocation at the appellant's trial. Nonetheless, the judge considered that the account in the interview sufficiently raised the issue to require that the jury be directed of the necessity for the prosecution to negative that the appellant acted under provocation.

The proceedings in the Court of Appeal

12 The Court of Appeal gave leave to adduce new or fresh evidence on the hearing of the appeal in support of the ground which contended that there was a miscarriage of justice[5]. The appellant's handwritten instructions given to his solicitor, dated 25 September 2012, were in evidence. These contained an account that differed radically from the account the appellant had given in the interview. It was an account that raised consideration of the "defences" of accident, self-defence and provocation. In summary, the appellant described having been greatly alarmed by the deceased, who was holding the knife in front of her. He said that she had threatened to have him "knocked" and that she "came at" him leading him to throw a punch in the hope of distracting her so that he could seize the knife. He described how they had grappled for control of the knife as they stood, face to face, against the sink. He said that in the course of this struggle he had managed to position the sharp edge of the knife "very close to, if not intermittently touching" her neck. He had wanted to "shut her mouth" so the neighbours would not hear. They had lost their balance during the struggle and fallen to the floor. They were drunk, disoriented and in virtual darkness. The first incision to the deceased's neck occurred at the point of impact with the floor. Warm blood had squirted into the appellant's eyes and face. He had reacted clumsily and it was then, he believed, that the second incision was made.

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4 *Criminal Code* (Q), s 304(1).

5 *R v Craig* [2016] QCA 166 at [13(3)], [19(2)], [20].

13 Photographs of the scene taken by the police showed the deceased's handbag around her left wrist and a cigarette lighter in her left hand. A second set of handwritten instructions given to the appellant's solicitor, dated 28 September 2012, contained an emphatic assertion that the deceased's handbag had not been around her wrist nor was she holding anything in her left hand.

14 The appellant's signed instructions given to his solicitor shortly before the commencement of the trial were also in evidence. Those instructions were, relevantly, in these terms:

> "I am not relying on self defence or provocation as defence for tactical or legal reasons. Firstly, I did not raise these defences in my interview to police and secondly it would require me to give further evidence if such defences were to be raised. I have already given my preliminary view that I do not wish to give evidence as I do not want to be cross-examined about my previous criminal history."

15 The appellant's criminal history included convictions in the Northern Territory for offences arising from a "home invasion" that took place on 8 November 1995. Some of these offences involved stabbings. The victim of one offence died as the result of the stab wound. The appellant was sentenced for this offence upon acceptance that the stab wound was inflicted accidentally as he was fleeing from the premises.

The incorrect advice

16 Under s 15(2) of the *Evidence Act* 1977 (Q), an accused who gives evidence is not required to answer any question tending to show that he or she has been convicted of any offence. The prohibition is subject to exceptions, including under s 15(2)(c) in a case in which the accused gives evidence of his or her own good character, or where the nature or conduct of the defence involves imputations on the character of any witness for the prosecution. Questions tending to show that the accused has been convicted of any offence under the exception provided in s 15(2)(c) may only be asked with the permission of the court[6].

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6 *Evidence Act* 1977 (Q), s 15(3).

17 The appellant and trial counsel each swore affidavits in the proceedings before the Court of Appeal and each was cross-examined on his affidavit. Trial counsel acknowledged that he had advised the appellant that it was likely if he gave evidence that he would be cross-examined on his criminal history. Trial counsel also acknowledged that he had not advised the appellant that such cross-examination would only be permitted by leave of the court[7].

18 It was trial counsel's evidence that from a very early stage in their discussions the appellant had indicated a disinclination to give evidence and that the appellant had acknowledged the significant tactical merit in running a narrow defence that was not inconsistent with his initial account. Counsel's reasons for advising of the likelihood that the appellant would be cross-examined on his convictions were his assessment of the risks (i) that the appellant's evidence might convey the imputation that the police had tampered with the crime scene; (ii) that the appellant might raise his good character in evidence[8]; (iii) that if the deceased's statements were received in evidence she might be treated as a prosecution witness for the purposes of s 15(2)(c); and (iv) that evidence of the appellant's conviction for a fatal stabbing might be received to rebut the "defence" of accident[9].

The appellant's evidence

19 The appellant gave a detailed account in his first affidavit of various physical and mental health difficulties that he had suffered in the period leading up to the trial. These had culminated in his hospitalisation following an unsuccessful suicide attempt some days before the trial commenced. The appellant acknowledged that he had not been advised that he could not give evidence but, rather, that he would be in "some difficulty" in the event he chose to testify. The appellant also acknowledged that his physical and mental condition was one of the reasons for his decision not to give evidence. And he acknowledged that a matter at the forefront of his mind in making the decision was the understanding that he would be cross-examined about the significant differences between his evidence and his account in the interview. He

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7 *Evidence Act* 1977 (Q), s 15(3).

8 *Evidence Act* 1977 (Q), s 15(2)(c).

9 *R v Craig* [2016] QCA 166 at [34].

maintained that his concern about cross-examination on these inconsistences was not as important as his concern about the disclosure of his criminal history.

The Court of Appeal's analysis

20 The Court of Appeal considered that had the appellant given evidence there was a risk that permission would have been given to cross-examine him on his convictions. It was a risk raised by the first and second of counsel's reasons. Counsel's third and fourth reasons were, in the Court of Appeal's view, without legal merit[10]. The Court of Appeal concluded that counsel had been correct to advert to the risk of cross-examination on the appellant's criminal history but incorrect to advise that this was likely. At the highest, the Court of Appeal found that the degree of likelihood that the appellant's convictions would be disclosed to the jury was no more than a possibility[11].

21 Gotterson JA, writing the leading judgment, observed that the appellant's acknowledgment of the advice – that he would be in "some difficulty" in giving evidence that departed from the account in his interview – was consistent with written instructions in which the appellant stated his preference not to be cross-examined "about the incidents on the night"[12].

22 The critical passage in his Honour's analysis, which is the focus of the appellant's challenge, is par [44]:

> "There was then a sound forensic reason for the appellant not to testify. He was correctly advised about that reason [the likely damage resulting from inconsistent accounts of the circumstances of the killing]. His decision not to testify, insofar as it was justified by that advice, was not the consequence of his having been misled by incorrect advice. That he did not give evidence in these circumstances did not result in a miscarriage of justice. The fact that he was given an additional, but inaccurately expressed, reason not to testify did not diminish the role of

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10 *R v Craig* [2016] QCA 166 at [36].

11 *R v Craig* [2016] QCA 166 at [38].

12 *R v Craig* [2016] QCA 166 at [33].

the former as a rational reason not to testify, or, of itself, give rise to a miscarriage of justice."

The appellant's submissions

23 The appellant's complaint is with the application of an objective test drawn from the judgments in *TKWJ v The Queen*[13] to the Court of Appeal's determination that the incorrect advice did not occasion a miscarriage of justice. As the appellant observes, the analysis in *TKWJ* is concerned with challenges to forensic judgments that are within counsel's remit. The objective test that *TKWJ* holds is to be applied to the determination of challenges of that kind takes into account the wide discretion conferred on counsel under our adversarial system of criminal justice[14]. A necessary consequence of that discretion is that the accused will generally be bound by counsel's forensic choices. It is only where the appellate court is persuaded that no rational forensic justification can be discerned for a challenged decision that consideration will turn to whether its making constituted a miscarriage of justice.

24 By contrast, the appellant points out that his challenge is not to a forensic choice made by counsel but to the circumstance that counsel's incorrect advice was material to a forensic choice which was reserved for him to make personally. The appellant's argument is posited on the proposition that the accused's informed choice to give evidence is an essential condition of a fair trial according to law. At its widest, the argument is that any material error in legal advice on the accused's choice to give evidence denies that a choice *not* to give evidence is an informed choice and for that reason occasions a miscarriage of justice. The appellate court, on this analysis, does not stay to consider the causal relation between the incorrect advice and the conduct of the trial or its outcome.

Sankar v State of Trinidad and Tobago

25 The appellant calls in aid the statement of the Judicial Committee of the Privy Council in *Sankar v State of Trinidad and Tobago*[15]:

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13 (2002) 212 CLR 124; [2002] HCA 46.

14 *TKWJ v The Queen* (2002) 212 CLR 124 at 128 [8].

15 [1995] 1 WLR 194 at 201; [1995] 1 All ER 236 at 242-243.

> "It cannot be said that, if the defendant had not been deprived of the opportunity of properly considering whether to give evidence or make a statement, he would have decided not to do so. At least if he had given evidence, it is almost certain that the judge would have been under an obligation to leave issues of accident, self-defence and possibly provocation to the jury. What would have been the outcome, if this had happened, is pure speculation."

26 It may be accepted that the choice to give evidence is ultimately for the accused to make and that in some circumstances counsel's failure to adequately advise the accused with respect to the exercise of the choice not to give evidence will occasion a miscarriage of justice[16]. *Sankar* was such a case. Sankar's counsel had not conferred with him before the trial and had not advised him of the options available in the conduct of the defence case. During the evidence of the last prosecution witness, counsel went over to the dock and told Sankar that "he was not sending me in the box because of the way the trial had gone". Sankar had understood that he would give his account of the fatal incident in evidence, an account which their Lordships found would have raised accident, self-defence and possibly provocation. Sankar did not press his wish to give evidence because he was worried that it would look bad for him if the jurors saw him arguing with his counsel. In the result, Sankar did not give evidence or make a dock statement, and in the absence of his account being placed before the jury, he had no answer to the prosecution case. In these circumstances it was held that Sankar's trial had miscarried.

27 *Sankar* is not authority for the proposition that any inadequacy or error in legal advice relating to the accused's right to give evidence, without more, occasions a miscarriage of justice. Certainly where it is not in issue that the accused was aware of the right to give evidence, the contention that any material error in legal advice bearing on the exercise of the right denies an essential condition of a fair trial must be rejected. At the least, demonstration that incorrect advice has occasioned a miscarriage of justice will require

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16 *Sankar v State of Trinidad and Tobago* [1995] 1 WLR 194; [1995] 1 All ER 236; *R v McLoughlin* [1985] 1 NZLR 106; *Nightingale v The Queen* [2010] NZCA 473; *R v Szabo* [2001] 2 Qd R 214 at 222-223 per Thomas JA; *R v ND* [2004] 2 Qd R 307 at 319-320 [36] per Holmes J.

consideration of the relation between the advice and the decision not to give evidence.

The appellant's narrower case

28 The appellant's narrower case seeks to demonstrate the materiality of the incorrect advice to the decision not to give evidence and the capacity of that decision to have affected the outcome of the trial. It will be recalled that the appellant acknowledged that a number of considerations bore on his decision not to testify: his physical and mental health; the disclosure that he had given inconsistent accounts of the circumstances of the deceased's death; and the concern that his criminal history would be disclosed to the jury. He argues that disclosure of his conviction for an offence involving a fatal stabbing would have done irreparable harm to his case and that, in the circumstances, the incorrect advice is to be seen as having foreclosed his choice to testify. Notwithstanding the absence of a finding, the appellant submits that the only reasonable inference is that the Court of Appeal considered that the incorrect advice was, at the very least, a material factor in his decision not to give evidence.

29 The appellant's argument accepts that he would have been pressed hard in cross-examination on the inconsistencies between his evidence and his answers in the interview. Nonetheless, he submits that had he given evidence in line with his handwritten instructions, his evidence would have raised self-defence and laid a more comprehensive foundation for consideration of the partial defence of provocation. The prosecution would have been required to negative each beyond reasonable doubt before a verdict of guilty of murder could be returned. In the circumstances, the appellant submits, it cannot be said that his election to give evidence would have made no difference to the outcome of the trial.

30 The last-mentioned submission may be thought to overestimate the forensic difficulty of disproving self-defence and provocation in the context of this powerful prosecution case and to underestimate the forensic advantages of not testifying. Cross-examination on the inconsistencies between the appellant's proposed evidence and his account in the interview would have destroyed his credit and resolved against him any doubt as to proof of his intent that his answers in the interview otherwise might have raised. In the event, it is unnecessary to further address the contention that the outcome of the trial might have been different had the appellant given evidence.

An informed decision?

31 The extent to which, if at all, the Court of Appeal concluded that the incorrect advice was material to the appellant's decision is unclear. On one view the third sentence of par [44] of Gotterson JA's reasons, extracted above, is a finding that the decision was not informed by the incorrect advice. The alternative view, in line with the appellant's submission, is that the analysis in par [44] is wholly objective. The appeal in this Court is to be determined upon acceptance of the latter view.

32 The onus is upon the appellant to establish that "on any ground whatsoever there was a miscarriage of justice"[17]. The category of miscarriage of justice that his argument seeks to engage is that the trial was not a fair trial[18]: the exercise of his right to give evidence in his defence was effectively foreclosed by receipt of the incorrect advice.

33 The appellate court's assessment of whether the decision not to give evidence deprived the accused of a fair trial looks to the nature and effect of the incorrect legal advice on the accused's decision. It is not an assessment of whether an objectively rational justification for the decision can be assigned to it. The point may be illustrated by the extreme example posited by Gleeson CJ in *Nudd v The Queen* of the accused who fails to give evidence because counsel wrongly advises that an accused is not entitled to give evidence[19]. His Honour considered that it was difficult to imagine that an appellate court would not intervene in such a case. That would be so even if the appellate court considered that the accused's failure to give evidence was forensically justified: a fair trial requires that the accused be aware of the entitlement to give evidence in his or her defence notwithstanding that that choice may be unwise.

34 Putting to one side Gleeson CJ's extreme example, the appellate court's determination of whether incorrect legal advice bearing on the accused's decision not to give evidence has occasioned a miscarriage of justice is not without difficulty. Necessarily it is a determination that will only arise following a trial

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

18 *Ratten v The Queen* (1974) 131 CLR 510 at 516 per Barwick CJ; [1974] HCA 35.

19 (2006) 80 ALJR 614 at 620-621 [17]; 225 ALR 161 at 167; [2006] HCA 9.

at which the accused has been convicted. It would be unrealistic not to recognise that the reliability of an accused's honest evidence on appeal, that he or she would have given evidence had the incorrect legal advice not been given, may be affected by an element of hindsight reasoning[20]. And, as here, the decision not to give evidence may be the product of a combination of factors, not all of which are tainted by the incorrect legal advice. The conclusion that the trial of an accused was not a fair trial requires the appellate court to be satisfied that it was the accused's wish to give evidence and that the incorrect legal advice effectively deprived the accused of the opportunity to do so.

35 Here the appellant knew that he had the right to give evidence. He had discussed the relative merits of various defences with his counsel and solicitor at conferences before the trial commenced. He understood that his account in the interview raised an arguable "defence" that in his intoxicated state he had not formed the intent which would make his act murder. And he understood that there was significant tactical merit in not giving evidence and in having his defence conducted on the basis of that account. Nonetheless, he contends that his trial miscarried because his fear of the disclosure of his criminal convictions, about which he received the incorrect advice, was more important to the decision not to give evidence than his fear of disclosure of the inconsistencies in his accounts of how the deceased died.

36 The error in counsel's advice was not in advising the appellant of the risk that if he gave evidence the jury might learn of his criminal convictions, but in counsel's estimate of the likelihood that that risk would come home. It is a large proposition that the appellant's decision not to give evidence was not an *informed* decision because a material factor in making it was his understanding, based on the incorrect advice, that the consequence that he most feared was a likely consequence of testifying and not merely a possible consequence of testifying.

37 In the event, the appellant's case fails by reason of a more fundamental deficiency. The high point of the appellant's evidence in the Court of Appeal was his assertion that "[h]ad I felt physically and mentally well enough to give evidence" and had he not received the incorrect advice, he would have elected to give evidence. Notably, the appellant did not say, and the Court of Appeal did

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20 Cf *Chappel v Hart* (1998) 195 CLR 232 at 246 fn 64 per McHugh J; [1998] HCA 55.

Kiefel CJ
Bell J
Gageler J
Keane J
Nettle J
Gordon J
Edelman J

not find, that absent the incorrect advice he would have given evidence. The Court of Appeal's conclusion that there was not a miscarriage of justice was correct in circumstances in which the evidence did not establish that the trial would have been conducted differently had the incorrect advice not been given.

Order

38 For these reasons the following order should be made:

Appeal dismissed.