INCOMPETENCE OF COUNSEL AS A GROUND OF APPEAL IN THE CCA

Peter Guirguis
Senior Solicitor, Legal Aid NSW
Accredited Specialist – Criminal Law

March 2016
Intercontinental Golf Resort and Spa, Natadola, Fiji

GENERAL PRINCIPLES

1. An appellant who appeals against his or her conviction on the basis of an allegation that defence counsel was incompetent must demonstrate that counsel's conduct caused a miscarriage of justice. It is the miscarriage of justice that is the basis of intervention by the Court of Criminal Appeal. That is because the Court only has jurisdiction conferred by statute, namely, section 6(1) *Criminal Appeal Act 1912*, which provides:

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

Thus the only way in which complaints that form the substance of these appeals can find a footing in section 6(1) is if the court is satisfied that *"... on any other ground whatsoever there was a miscarriage of justice."*

2. The early case law in this area was plagued by references to the need to prove "flagrant incompetence" as a prerequisite to a successful appeal. "Flagrant incompetence" is sometimes used to describe the extent of the departure from the standard expected by counsel. The High Court, however, has since made it abundantly clear that the relevant question is whether the act or omission by counsel has resulted in a miscarriage of justice – not whether counsel was "flagrantly incompetent". As explained by McHugh J in *TKWJ v The Queen* [2002] HCA 46 at [97]:

> *"A test such as "flagrant incompetence", while a convenient label that may show that a miscarriage of justice has occurred in a particular case, is unhelpful generally in determining whether there has been a miscarriage of justice within the terms of s 6(1) of the Criminal Appeal Act. Whether there has been a miscarriage of justice is the ultimate issue that the court must decide."*

3. The phrase "flagrant incompetence" gained traction in the well-known decision of *R v Birks* (1990) 19 NSWLR 677, the seminal decision on the subject of incompetence of counsel generally. The accused was charged with a range of sexual assault offences (18 counts in total) and malicious wounding. At the time of these events, the complainant was living in an isolated rural property with her two young children. The accused, a complete stranger, claimed his car failed mechanically and approached the complainant's house to seek assistance. It was alleged that he entered by the rear door, punched and threatened the complainant, and then proceeded to engage in oral, vaginal and anal intercourse with her without consent. The

complainant suffered extensive lacerations and bruising to her face. The accused admitted having sexual intercourse with the complainant but said that she had consented.

4. The question as to how she came to suffer the injuries to her face was not only critical to the charge of malicious wounding, but it was of substantial practical importance in relation to the sexual assault charges. If the jury concluded that the accused physically assaulted the complainant, one might think, they might have had real difficulty in accepting that the sexual intercourse which followed was consensual.

5. The accused instructed his counsel that the injuries to the complainant's face were caused when the accused warded off blows from a torch which the complainant used to strike him. He said that he threw up his arms to ward off the blow and, in doing so, knocked the torch out of her hand which flew up into the air and hit the complainant in the face. He also instructed his counsel that no anal intercourse occurred. His counsel, however, failed to cross-examine at all about her account of how she came to sustain the facial injuries (which she undoubtedly suffered) and he did not put to her that no anal intercourse occurred.

6. In the course of his evidence, the accused explained the facial injuries by reference to the mishap with the torch and said that no anal intercourse occurred. The prosecutor attacked his credibility on the basis that, since his counsel had not put this version of events to the complainant, it must have been something the accused invented on the spot. Despite the clear instructions received before the trial, counsel had simply forgotten to cross-examine on these matters and thereafter took no steps to correct the error.

7. Counsel's conduct was characterised as "flagrant incompetence" and was held to have caused a miscarriage of justice. Gleeson CJ, (with the agreement of McInerney J, Lusher AJ dissenting) quashed the conviction and made the following often cited statement of guiding principle at p 685:

> *"1. A Court of Criminal Appeal has a power and a duty to intervene in the case of a miscarriage of justice, but what amounts to a miscarriage of justice is something that has to be considered in the light of the way in which the system of criminal justice operates.*
>
> *2. As a general rule an accused person is bound by the way the trial is conducted by counsel, regardless of whether that was in accordance with the wishes of the client, and it is not a ground for setting aside a conviction that decisions made by counsel were made without, or contrary to, instructions, or involve errors of judgment or even negligence.*
>
> 3. *However, there may arise cases where something has occurred in the running of a trial, perhaps as the result of 'flagrant incompetence' of counsel, or perhaps from some other cause, which will be recognised as involving, or causing, a miscarriage of justice. It is impossible, and undesirable, to attempt to define such cases with precision. When they arise they will attract appellate intervention."*

8. These principles were expanded in *TKWJ v The Queen* [2002] HCA 46. It was alleged that the accused had committed sexual offences against the young son and daughter of a woman with whom he was in a relationship with at the time of the offences. The accused was convicted of two counts of aggravated indecent assault and one count of aggravated indecency following a trial in the District Court. The initial indictment, which alleged offences against both complainants, was severed to enable separate trials to be held. In the course of the trial relating to the offending against the son, counsel for the accused informed the prosecutor that he intended to adduce evidence of the accused's good character. The prosecutor replied that, in that event, he would seek to call the daughter to give evidence about the allegations relating to her to rebut the evidence of good character. As a result, counsel did not call evidence of good character.

9. The High Court held that the course taken at trial reflected a forensic choice which was reasonably open to counsel. Gleeson CJ observed at [8],[16]:

> *"8. On the face of it, that was an understandable decision. It was certainly not self-evidently unreasonable, or inexplicable. It was the kind of tactical decision routinely made by trial counsel, by which their clients are bound. And it was the kind of decision that a Court of Criminal Appeal would ordinarily have neither the duty nor the capacity to go behind. Decisions by trial counsel as to what evidence to call, or not to call, might later be regretted, but the wisdom of such decisions can rarely be the proper concern of appeal courts."*
>
> …
>
> *"16. It is undesirable to attempt to be categorical about what might make unfair an otherwise regularly conducted trial. But, in the context of the adversarial system of justice, unfairness does not exist simply because an apparently rational decision by trial counsel, as to what evidence to call or not to call, is regarded by an appellate court as having worked to the possible, or even probable, disadvantage of the accused. For a trial to be fair, it is not necessary that every tactical decision of counsel be carefully considered, or wise. And it is not the role of a Court of Criminal Appeal to investigate such decisions in order to decide whether they were made after the fullest possible examination of all material considerations. Many decisions as to the conduct of a trial are made almost instinctively, and on the basis of experience and impression rather than analysis of every possible alternative. That does not make them wrong or imprudent, or expose them to judicial scrutiny. Even if they are later regretted, that does not make the client a victim of unfairness. It is the responsibility of counsel to make tactical decisions, and assess risks. In the present case, the decision not to adduce character evidence was made for an obvious reason: to avoid the risk that the prosecution might lead evidence from K."*

10. In *Nudd v The Queen* [2006] HCA 9, the accused was convicted of being knowingly concerned in the importation into Australia of cocaine. It was accepted by the High Court, directly and indirectly, that counsel conducted the trial incompetently. He failed, inter alia, to advise the client properly, made admissions of fact in error and without instructions to do so, failed to object to inadmissible and prejudicial evidence, failed to take instructions

appropriately and conducted the trial on a fundamental misapprehension of the elements of the offence.

11. The approach of the members of the Court varied, though all agreed that the appeal should be dismissed. Each judgment placed considerable emphasis on the strength of the prosecution case, which was characterised as being "effectively unanswerable" (even allowing for evidence that might have been excluded if the trial were conducted by competent counsel). There was consensus among the members of the Court that, if the accused had been deprived of a real chance of an acquittal by reason of the effect of counsel's incompetence then the verdict could not stand. It was held ultimately that there was no failure of process that departed from the essential requirements of a fair trial, despite the fact that counsel was woefully incompetent. Gleeson CJ, however, said at [6]:

> *"… 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."*

12. Callinan and Heydon JJ, in a joint judgment, similarly placed particular emphasis upon the strength of the prosecution case, concluding at [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."*

13. Gummow and Hayne JJ referred to the appellant's complaint that his trial counsel had failed to give him proper advice and continued at [27]:

> *"…. 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, 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."*

14. With respect to the complaint that his counsel did not call him to give evidence, their Honour's said at [27]:

> *"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."*

15. The ultimate question of whether a miscarriage of justice has occurred in the context of counsel's incompetence raises two issues: *TKWJ* at [79]. First, did counsel's conduct result in a material irregularity in the trial? Secondly, is there a significant possibility that the irregularity affected the outcome? The test of whether there is a material irregularity is objective. In the majority of cases, irregular conduct of counsel will not deprive the appellant of a fair trial: *TKWJ* at [77].

16. In *TKWJ*, McHugh J examined the circumstances in which a miscarriage of justice by reason of counsel's conduct could arise and, in particular, the standard for determining whether counsel's conduct constituted a material irregularity: *TKWJ* at [74]. His Honour stated that whatever characterisation is given to counsel's conduct, the question is whether the act or omission of counsel has resulted in an unfair trial. His Honour concluded that if an accused person had been deprived of a fair trial according to law, he or she should not have to demonstrate that counsel's conduct might have affected the result, as no matter how strong the prosecution case appears to be, "*an accused person is entitled to the trial that the law requires*". His Honour observed at [77]:

> *"... a miscarriage of justice always occurs when there is a significant possibility that a material irregularity at the trial has resulted in the conviction of an accused person: see Ratten v The Queen (1974) 131 CLR 510 at 516."*

17. His Honour posed the question as to the circumstances in which an appellant would be able to discharge the heavy burden of establishing that counsel's conduct constituted a material irregularity amounting to a miscarriage of justice: *TKWJ* at [80]. He considered that *"flagrant incompetence"* was a likely circumstance in establishing a material irregularity. Moreover, he observed that *"an accused will find it difficult to establish a miscarriage of justice when the alleged errors of counsel concerned forensic choices upon which competent counsel could have differing views as to their suitability"* and *"[it] will be even harder for the appellant to succeed where counsel has made the choice because of a perceived "forensic*

advantage": *TKWJ* at [81]. However, if there is a defect or irregularity in the trial, the fact that counsel's conduct is explicable on the basis that it resulted or could have resulted in a forensic advantage is not necessarily determinative of the question whether there has been a miscarriage of justice. In this context, Gaudron J (with the agreement of Gummow J) said this in *TKWJ* at [28]:

> *"It may be that, in the circumstances, the forensic advantage is slight in comparison with the importance to be attached to the defect or irregularity in question. If so, the fact that counsel's conduct is explicable on the basis of forensic advantage will not preclude a court from holding that, nevertheless, there was a miscarriage of justice."*

18. In *Nudd*, Kirby J expressed agreement with McHugh J's approach in *TKWJ* and stated that his Honour *"was right to conclude that, for a criminal appeal to succeed on an argument of incompetent representation at trial, it is not a universal requirement that the accused must establish that the conduct complained of might have affected the result*": at [87]. His Honour considered there were cases where it was not necessary to prove that the outcome would have been different, but for the incompetence of counsel. He concluded that there are rare cases where legal representation may have been of such a quality, either because there may have been misbehaviour, errors or incompetence in the legal representation of an accused at trial that was so egregious, frequent or obvious as to amount to a miscarriage of justice, observing that at [100]:

> *"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 ..."*

19. Gleeson CJ in *Nudd* observed that where it is claimed that an appellant has not had a fair trial, then the court is primarily concerned with "*what happened at, or in relation to, the trial*", rather than why it happened. Thus at [8]:

> *"... 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."*

20. In other words, it is the "*fairness of the process that is in question, not the wisdom of counsel*": *Nudd* at [9]. His Honour pointed out that the question of incompetence of counsel is not a pejorative reflection on the skill or learning of the particular legal practitioners concerned, though that could explain the impugned conduct. Nor is the focus of the inquiry on the advocacy skills or performance of trial counsel. Rather, it is the acts and omissions themselves as they impact on the fairness of the trial and whether the result constitutes a miscarriage of justice. His Honour explained the concept of a miscarriage of justice in these terms at [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."

APPLICATION OF THE OBJECTIVE TEST IN APPEALS WHERE INCOMPETENCE OF COUNSEL IS ALLEGED

21. The issue of whether a miscarriage was occasioned is to be resolved by deciding whether the course taken by counsel, objectively ascertained, was capable of explanation as having been taken for the purpose of obtaining a forensic advantage. The subjective reason why counsel took the impugned course is ordinarily irrelevant and inadmissible on appeal. In this context, in *TKWJ*, Gleeson CJ said at [8]:

"Decisions by trial counsel as to what evidence to call, or not to call, might later be regretted, but the wisdom of such decisions can rarely be the proper concern of appeal courts. It is only in exceptional cases that the adversarial system of justice will either require or permit counsel to explain decisions of that kind. A full explanation will normally involve revelation of matters that are confidential. A partial explanation will often be misleading. The appellate court will rarely be in as good a position as counsel to assess the relevant considerations. And, most importantly, the adversarial system proceeds upon the assumption that parties are bound by the conduct of their legal representatives."

22. Gaudron J said at [26]-[28]:

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

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

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

of forensic advantage will not preclude a court from holding that, nevertheless, there was a miscarriage of justice."

23. Hayne J said at [107]:

> *"No less importantly, however, it follows from the characteristics of a criminal trial which I have identified that, when it is said that a failure to call evidence which was available to the defence at trial has led to a miscarriage of justice, the question presented to an appellate court requires an objective inquiry, not an inquiry into the subjective thought processes of those who appeared for, or advised, the accused at trial. The relevant question is not: why did counsel not lead the evidence, or was counsel competent or incompetent? It is: could there be any reasonable explanation for not calling the evidence?*
>
> *If there could not be any such explanation, there may have been a miscarriage of justice. It would then be necessary to go on to ask whether the jury would have been likely to entertain a reasonable doubt about guilt if the evidence had been led. If, however, there could be a reasonable explanation for not calling the evidence, that will be the end of the matter. It is not to the point then to inquire whether counsel did or did not think about the point, or acted competently or incompetently, even though the conclusion that there could be no reasonable explanation for the course followed at trial would seem to entail the conclusion that counsel did not act competently."*

24. In *Nudd*, Gleeson CJ again left open the possibility that in some cases an investigation of the subjective reason why counsel acted as he or she did might be necessary at [10]:

> *"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."*

25. Then again at [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."*

26. His Honour stressed, however, that *"so far as justice permits, the enquiry should be objective"*, adding that *"there may be circumstances where it is relevant to ask why some act or omission occurred"*: at [10]. One example that his Honour identified was at [10]:

> *"…. 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 the conduct cannot altogether be eliminated."*

Is evidence from trial counsel admissible on appeal where incompetence of counsel is alleged?

27. It is clear from the foregoing that evidence from trial counsel as to the reason why the impugned course was taken is ordinarily irrelevant and inadmissible on appeal.

28. In *Alkheir v R* [2016] NSWCCA 4, Macfarlan JA (with the agreement of Rothman J and Bellew J) reviewed the authorities and identified the following principles as relevant to the determination of the appeal at [31]:

> *"(1) To the extent possible, an appellate court should determine an appeal involving complaints about a trial counsel's conduct of a case by examining the record of the trial to determine from the objective circumstances whether the accused has had a fair trial.*
>
> *(2) Ordinarily, an affirmative answer to this question is required where the impugned conduct is capable of being rationally explained as a step taken, or not taken, in the interests of the accused. This is so even if the accused alleges on appeal that he or she did not authorise the conduct because the nature of the adversarial system means that the client is bound by the manner in which the trial is conducted on his or her behalf.*
>
> *(3) Only in exceptional circumstances will an appellate court find it necessary to resort to subjective evidence concerning the appellant's legal representatives' reasoning at trial or to evidence as to communications between the appellant and those representatives.*
>
> *(4) The ultimate question for an appellate court is whether the appellant has established that what occurred at the trial gave rise to a miscarriage of justice in the sense that the appellant lost a chance of acquittal that was fairly open."*

29. In *Ahmu v R; DPP v Ahmu* [2014] NSWCCA 312, a question arose as to the relevance of an affidavit of trial counsel, adduced by the prosecution as evidence of how prejudicial material came to be made available before the jury. The appellant was convicted of a number of sexual assault offences. In the course of cross-examination of the complainant at trial, prejudicial evidence was adduced by his counsel. The appellant appealed against conviction arguing that his trial counsel was incompetent in adducing such evidence. The appeal was ultimately dismissed, but there was a divergence of opinion regarding the relevance of trial counsel's affidavit. In reliance on *Nudd* at [10], Basten JA emphasised that the focus of attention for

such a question should be on the objective features of the trial process and held that the affidavit from trial counsel was inadmissible finding that: *"it took the matter of miscarriage no further than the inferences available from the course of the trial"* at [31]. Adams J disagreed, finding that the affidavit was admissible on that basis that it elucidated trial counsel's reason for taking his chosen course and countered what would have been a misleading impression that would have arisen from the objective circumstances alone. Fullerton J did not find it necessary to decide on the admissibility of the affidavit.

30. In *Lyndon v R* [2014] NSWCCA 112, the appellant argued that a miscarriage of justice resulted from trial counsel's failure to lead medical evidence to support the contention that the accused could not have committed the sexual act upon the complainant because of a back injury. Trial counsel's affidavit acknowledged that he was aware that the applicant suffered a serious back problem prior to trial, that he had discussed with his solicitor the possibility of obtaining medical evidence and concluded that it was not readily available. He said that he did not consider engaging a suitable expert to provide medical evidence at trial as he believed that the jury would have realised from the applicant's appearance that he was physically incapacitated. Finally, he stated that he *"did not make a deliberate forensic decision that it was in the appellant's best interests to not call evidence of this kind at the trial."* In dismissing this ground of appeal, the Court applied *TKWJ* and held that counsel's affidavit was inadmissible for this reason at [56]:

> *"… To the extent that it might be considered relevant, it confirmed that which could readily be identified from a general understanding of the case, namely that medical evidence was considered but not called on an entirely rational basis, namely that it was unnecessary: see TKWJ at [16] (Gleeson CJ). Indeed, had counsel had available to him at trial Dr Patrick's later report, it is by no means certain that he would have sought to rely upon it. The report did not support the applicant's evidence that it would have been "impossible" for him to kneel, merely stating that he would probably have "found it difficult" to get into a kneeling position. The opinions were highly qualified."*

31. In *Vella v R; Siskos v R* [2015] NSWCCA 148 (the facts of which appear below), trial counsel's affidavit was admitted and, in large part, considered in the determination of the relevant ground of appeal. The Court admitted trial counsel's affidavit for these reasons at [96]-[97]:

> *"First, as has already been adverted to, Counsel identified various items of evidence that were potentially available to the Crown to raise in response to any case on good character raised by Ms Vella. The receipt and consideration of this evidence by this Court is clearly consistent with Nudd. It provides a proper basis for the Court to make an objective assessment of this aspect of the trial. The usual materials provided to the Court on an appeal do not extend to material that was included in the Crown brief or produced to the Court on subpoena but not tendered at the trial.*
>
> *Second, trial Counsel recounts the instructions he received from Ms Vella both on the issue of whether evidence of her good character would be raised and in explanation of the material that was potentially adverse to her character. Consistent with Nudd at [10] and [17] this material can clearly be received and considered. Counsel stated that*

the question of raising character was discussed with Ms Vella and she agreed that it would not be raised. This evidence was not disputed."

32. The Court, however, did not take into account the part of the affidavit where counsel assessed the strength of the evidence available to the Crown to rebut the evidence of Ms Vella's good character. This was on the basis that: *"[c]onsistent with Nudd, a consideration of such assessments should be avoided so "far as justice permits" (Nudd [at 10]).*"

REASONS FOR CAUTION IN UPHOLDING APPEALS ALLEGING INCOMPETENCE OF COUNSEL

33. In *KLM v WA* [2009] WASCA 73, the Court of Appeal of Western Australia cautioned as follows at [48]:

> *"In the face of the apparently increasing enthusiasm for challenging convictions by reference to the incompetence of counsel, it is important to emphasise that these cases make it clear that an appellate court will necessarily be constrained in the extent to which it can allow an appeal brought in reliance upon the incompetence of counsel. I will refer to the principles established in this area shortly. In the meantime, it is sufficient to note that despite the frequency with which appeals are brought in reliance upon the incompetence of counsel, there are only a limited number of cases in which such appeals have been upheld: see for example Re Knowles [1984] VicRp 67; [1984] VR 751; R v Birks (1990) 19 NSWLR 677;"*

34. One reason for such constraint is the recognition of the role of counsel. As noted, a fundamental aspect of our criminal justice system, being adversarial, is that the conduct of counsel binds the accused – even if the conduct taken by counsel was imprudent or contrary to instructions. If it were otherwise, the adversarial system could not function: *Nudd* at [9]. For public policy reasons counsel is vested with considerable discretion in conducting a trial. Many decisions in the conduct of a trial are made somewhat instinctively, on the basis of experience and impression rather than a careful analysis of every possible alternative. On other occasions, decisions will be tactical ones designed to obtain a forensic advantage, or to avoid a forensic disadvantage. To expose these decisions to routine judicial scrutiny would seriously impede counsel's conduct of the trial, and deny counsel the responsibility under the adversarial system to make necessary instinctive and tactical decisions: *TKWJ* at [16].

35. Another reason is that ordinarily the appellate court will rarely be in as good a position as trial counsel to assess the relevant considerations that influenced his or her decisions in the conduct of the trial: *TKWJ* at [8]. Ordinarily it is not possible to know what was in counsel's brief - a full explanation would likely involve revelation of matters that are confidential and a partial explanation may be misleading: *TKWJ* at [24]. It is therefore counsel who is in the best position to make those decisions. Moreover, trial counsel is usually not a party to the appeal, and so has little opportunity to defend himself or herself against the criticisms of his or her conduct: *Ali v R* [2005] HCA 8 at [98]. The position may be otherwise, however, if exceptionally the appellate court is privy to the reasons for trial counsel's impugned decision.

36. There is also a recognition in the case law that appellate courts should not be vehicles through which the competence or otherwise of different counsel can be equalised. This point was addressed by Gleeson CJ in *Nudd* at [11]:

> *"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."*

37. As the foregoing demonstrates, appellate courts are reticent to find that a miscarriage was occasioned through counsel's incompetence. Thus, the onus on an appellant has been described as "*not an insubstantial one*" (*R v Neale* [2004] NSWCCA 311 at [66]), *"a heavy burden"* (*TKWJ* at [74]) and one in which the "*wisdom of hindsight has no place*" (*R v B (GD)* (2000) 143 CCC (3d) 289 at [298]).

IN WHAT CIRCUMSTANCES WILL THE APPELLANT BE ABLE TO DISCHARGE THE HEAVY BURDEN OF ESTABLISHING THAT COUNSEL'S COUNDUCT CAUSED A MISCARRIAGE OF JUSTICE?

38. Although an appellant must identify with particularity that which has generated the alleged miscarriage of justice, the appeal is better positioned to succeed where:

I. The court is satisfied that counsel conducted the trial with flagrant incompetence *"it is likely that the appellant will have established a material irregularity in the conduct of the trial that will provide the stepping stone to a finding of a miscarriage of justice"*: *TKWJ* at [80].

II. The alleged error concerns an obvious mistake as opposed to a deliberate forensic choice: *TKWJ* [at 81]. While the court will usually reject an argument alleging incompetence of counsel if the conduct may have served a legitimate forensic purpose, the court may be more willing to intervene if the forensic risks of the conduct clearly outweigh any possible advantages: *TKWJ* at [33].

III. The failures of counsel produced a trial that did not meet the minimum standards of fairness required of a trial. It is not necessary in these cases to demonstrate that the incompetence of counsel affected the outcome of the trial. This point was made clear by McHugh J in *TKWJ* at [76]:

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

This form of defect is similar to other miscarriages of justice that go *"to the root of the proceeding"*: see *Wilde v R* (1988) 164 CLR 365; *Quartermaine v R* (1980) 143 CLR 595.

EXAMPLES OF COUNSEL "INCOMPETENCE" AS A GROUND OF APPEAL

39. The following is by no means an attempt to be exhaustive.

Defence counsel failing to adduce evidence of good character

40. The alleged failure of trial counsel to adduce character evidence is perhaps the most common situation in which an incompetence ground arises.

41. In *D v The Queen* (1996) 86 A Crim R 41, the accused was convicted of a number of sexual assaults against his daughter. He gave evidence denying the allegations. Defence counsel adverted to the issue of his client's good character during the trial, but failed to call available witnesses to give relevant evidence. The available evidence included the accused's local priest, a former sheriff's officer, sister, friends and associates who would have deposed to his good character, standing and service to the community. Hunt CJ at CL held that the character evidence which was not called was *"very likely to have been regarded by the jury as impressive"* enough to have had *"a substantial effect upon their verdicts"*. His Honour was satisfied that there was *"a substantial"* or "a *significant possibility, that the jury would have acquitted the appellant if this impressive evidence of good character had been given"*. He regarded the failure to lead the evidence as *"unexplained and inexplicable"*.

42. In *R v Hunter and Sara* [1999] NSWCCA 5, the Court accepted that a miscarriage of justice resulted from, inter alia, the erroneous decision of trial counsel not to lead evidence of a *"portfolio"* of *"impressive and persuasive"* character references. A litany of serious errors on the part of counsel for the accused led the Court to this conclusion. A particularly egregious error by counsel was to act for the accused and his co-accused in circumstances in which defence counsel's duty to one of his clients was in conflict with his duty to the other. The raising of the good character of the accused as an issue would have been detrimental to the

interests of the co-accused who had a fairly significant criminal history. As a result of the joint representation, it was pointed out in the reasons of Wood CJ at CL, the individual cases of the two accused were not adequately separated in addresses or in summing up and the possibility of different verdicts for each was left unexplored. The Court accepted that *"the defence case was very poorly conducted, with the consequence that the jury were likely to have been left with a most unfavourable impression of its merits"*. This combination of circumstances led to the view that there was a miscarriage of justice, such that the convictions of each accused were set aside.

43. In *Sharma v The Queen [2011] VSCA 356,* the accused (a general medical practitioner) was convicted of three counts of indecent assault and seven counts of rape of the 24 year old complainant. The accused did not give evidence; however, an electronic record of interview was admitted where he said that the intercourse was consensual. During the trial, an investigating police officer was asked by defence counsel whether he was aware that the accused had no prior offences. The police officer responded that he could not comment and the matter was not taken further by defence counsel. The question of good character was taken up by the judge, who queried whether the prosecution may be able to make some concession in that regard. The prosecutor said that he or she would need to obtain further information but the matter was not taken further.

44. In the course of the sentencing hearing, evidence of the appellant's good character was provided by written references from eight general medical practitioners or specialists, two medical receptionists, a medical centre practice manager, the Chief Executive Officer of an aged care facility, six of the accused's patients and his fiancé. Most of the referees said that they were aware of the charges against the applicant and that he had fine personal qualities and was a caring doctor. The sentencing judge described the references as "powerful evidence" as to the "professional standing and reputation" of the accused. The Victorian Court of Appeal held that counsel's failure to take steps to remove any negative impression caused by the police officer's unresponsive answer to the question of his awareness that the accused had no prior offences, coupled with the failure to call good character evidence, deprived the applicant of a chance of acquittal.

45. In *Vella v R; Siskos v R* [2015] NSWCCA 148, Ms Vella complained, inter alia, that trial counsel failed to adduce evidence of her good character in the form of her lack of criminal convictions since her late teenage years. The Court rejected this argument on the basis that the Crown would have deployed material capable of demonstrating that she was dishonest in financial matters to rebut good character and held, accordingly, that no miscarriage of justice was occasioned by the "failure" to raise character evidence.

46. Similarly, this ground of appeal was argued with respect to Mr Siskos. Although he had not been convicted of any offence for about 28 years, in the early 1980's he was convicted of illegally using a motor vehicle, stealing, malicious injury, possession of Indian hemp and a number of traffic offences. An affidavit was read from trial counsel on the appeal. One matter outlined in trial counsel's affidavit is that prior to the trial he emailed the prosecutor inquiring as to whether, if good character were to be raised, the Crown would seek to rely on Mr Siskos' criminal record. At or about the commencement of the trial the prosecutor confirmed that the Crown would seek to rely on those convictions. The Court concluded that the no

miscarriage of justice was occasioned by the "failure" of his trial counsel to adduce evidence that he had not received any convictions in the 28 years prior to the trial.

47. In *GZ v The Queen* [2015] ACTCA 11 the ACT Court of Appeal held that the combination of the admission of bad character evidence and the failure of the counsel to adduce good character evidence caused the trial to miscarry. In the latter regard, the Court observed at [16]-[17]:

> *"We can think of no forensic reason for the appellant's then counsel not to have raised the appellant's good character before the jury. There was no suggestion on appeal that the Crown, at trial, was in a position to rebut evidence of good character with evidence of bad character.*
>
> *Significantly, this was the type of case where evidence of the good character of the accused would be particularly important. The jury would have been directed that they must take the evidence of the appellant's good character into account both in determining whether he was guilty of the offence and in determining the weight and credibility to be given to his evidence. Where the Crown case largely rose or fell on the evidence of the complainant and the appellant gave evidence denying the offences, the question of credibility was particularly important".*

48. Other cases in which this ground of appeal was pursued as a result of a failure to lead evidence of good character include: *William Albert Smith v The Queen* [2015] VSCA 256, *Da Silva v The Queen* [2013] VSCA 339 and *Clay v The Queen* [2014] VSCA 269.

Defence counsel erroneously adducing the criminal history of the accused

49. In *Seymour v R* [2006] NSWCCA 206 the accused was convicted of aggravated take and detain and armed with intent to commit an indictable offence, namely, assault. It was alleged that the accused detained the complainant (a prostitute) in an apartment against her will for two nights and subjected her to significant violence during this period. It was alleged that the accused threatened to cut off her toes with a bolt cutter, to stab her with a syringe and to kill her. It was further alleged that he choked her with a dog collar and punched her numerous times to the face resulting in a wound.

50. When she pleaded with the accused to let her go, he responded *"I just got out of gaol five days ago, you'll dog me to the cops"*. This evidence was not the subject of objection by trial counsel. The Court held that if it was objected to, it ought to have been excluded under s 137 of the *Evidence Act*.

51. More detrimentally, however, counsel adduced virtually the whole of his client's criminal history (through the cross-examination of the OIC) to demonstrate his good character in a particular respect in accordance with s 110(3) of the Evidence Act as proof that his client had no record of violence against women. When asked by the judge to make it clear why the issue had been raised in this way, counsel said that his intention was *"just to demonstrate there's no previous record [of] violence [against women] or offences against women."*

52. The Court held that there was no possible rational or responsible explanation for the tender of his criminal history by counsel. In finding that a miscarriage was occasioned by the conduct of counsel who lost the accused a chance of being acquitted, Hunt AJA (Simpson and Rothman JJ agreeing) said at [50]:

> *"… I can see no possible rational or reasonable explanation at all for the tender of virtually the whole of the appellant's criminal record. It would have been sufficient to have asked Det Sen Const Draper whether, in the course of his investigations, he had found that the appellant had no record of convictions for violence against women. Nor can I see any possible rational or reasonable explanation for the extraordinary emphasis counsel placed in his cross-examination of Det Draper, and in his final address to the jury, on (i) the length of the appellant's record ("a fair amount of reading", "this fairly extensive record" and "a very long document containing his record"), (ii) his lack of success in crime ("a failed crim"), (iii) his propensity for "street offences" and (iv) his description as a "property crim"."*

53. It is worth noting this restatement of principle at [21]:

> *"Relevant to the existence of a miscarriage of justice in the particular trial are the issues of whether the conduct of counsel represented a legitimate choice a competent counsel could fairly make in the circumstances of that trial and whether, viewed objectively, it was a rational tactical decision in the particular forensic situation in which it was made. When that situation is examined, issues such as the forensic advantage which may have been sought and possible prejudice which may have been caused by counsel's conduct are relevant but not necessarily decisive considerations: TKWJ v The Queen at [16]–[17], [24]–[28], [31], [33], [81]–[85], [95], [97], [106]–[112]; Ali v The Queen at [9], [12], [24]–[25], [98]–[99]; Nudd v The Queen at [9]–[10], [55], [157]–[158]."*

54. *Seymour* was applied in *Mouroufas v R* [2007] NSWCCA 58. As in *Seymour,* counsel placed his client's criminal history before the jury in circumstances where it was not rational or reasonable to do so. Counsel's error stemmed from his misunderstanding of the operation of s 104 (2) *Evidence Act*; erroneously believing that leave would have been granted for the Crown to cross-examine the accused on prior convictions. The Court found that a miscarriage of justice was occasioned by the conduct of counsel who lost the appellant a chance of acquittal fairly open to him.

55. Other situations where incompetence of counsel was raised as a ground of appeal:

I. Defence counsel failing to articulate the basis upon which to cross-examine the complainant in a sexual assault case pursuant to s 293 of the *Criminal Procedure Act 1986*: *Taylor v R* [2009] NSWCCA 180.

II. Defence counsel's failure to object to prejudicial evidence: *Clay v The Queen* [2014] VSCA 269; *Steve v Regina* [2008] NSWCCA 231; *Ali v R* [2005] HCA 8. In *Ali*, the main ground of appeal against the conviction (for murder) focused on trial counsel's failure

to object to evidence that showed the appellant to be of bad character. In dismissing the appeal, Hayne J, with the agreement of McHugh J, reasoned as follows [at 22]:

> *Showing that objection could have been taken to some questions that were asked by other counsel during the course of a trial does not show that trial counsel was incompetent or show that there has been a miscarriage of justice. Counsel is not bound to take every objection that is open. Objecting to the form in which evidence is led, or objecting to evidence on a subject about which other evidence has been or is to be heard, may convey an impression of obstructionism detrimental to the interests of the party for whom counsel is appearing. Demonstrating that counsel could have objected to certain evidence does not demonstrate that counsel should have made that objection.*

Hayne J cautioned that where counsel's failure to object to evidence constitutes a miscarriage of justice, one reason why care must be exercised when considering whether counsel should have objected is that the benefit of hindsight must be put aside [at 24]. Whether counsel could have and should have objected must be judged by reference both to the state of evidence at the time the question was asked and to what might then reasonably have been expected to be the likely future course of the matter. His Honour concluded that criticisms of trial counsel's conduct which may now appear to have some foundation *"might be capable of deflection on the basis that to appear to obstruct the course of evidence would have damaged what little chance the appellant may have had of securing an acquittal"*: at [38].

III. Defence counsel's failure to apply for separate trials: *R v TJF* [2001] NSWCCA 127; *R v Hunter and Sara* [1999] NSWCCA 5.

IV. Defence counsel calling the accused to give evidence: *R v Ranko Ignjatic* (1993) 68 A Crim R 333; *R v N* [2004] 2 Qd R 328.

V. Defence counsel's advice leading to the accused not giving evidence: *R v Japaljarri (formerly known as Hocking)* [2002] VSCA 154; *Rolfe v Regina* [2007] NSWCCA 155; *R v Skondin* [2015] QCA 138; *KLM v WA* [2009] WASCA 73. In *KLM*, a miscarriage was held to have been occasioned on this basis (and the conviction was set aside); however, the Court observed at [59]:

> *"Ordinarily, by reason of the general principles to which I have referred, it will be extremely difficult to make out a case of miscarriage of justice based upon advice given to an accused person relating to the giving of evidence which leaves the decision on that subject to the accused (as it must be). That is because there will always be an obvious forensic advantage to be gained from failing to give evidence, in the lack of exposure to cross-examination. That forensic advantage was no less in this case than in any other. Accordingly, unless there was more to it, it would be extremely difficult to see how the appellant could establish that there was a miscarriage of justice merely because he acted upon advice to the effect that, while he could give evidence if he wanted to, it would be desirable if he did not."*

INCOMPETENCE OF COUNSEL IN THE CONTEXT OF SENTENCING PROCEEDINGS

56. The general principle is that parties to litigation are bound by the manner in which their cases are presented at first instance and will not be permitted to enhance their cases on appeal by producing fresh or new evidence: *R v Fordham* (1997) 98 A Crim R 359 at p 377. This principle applies equally to applications for leave to appeal against sentence as it does with appeals against conviction: *Tran v R* [2014] NSWCCA 32 at [12]; *Khoury v R* [2011] NSWCCA 118 at [104] - [110]). However, the rule is far from absolute, particularly in criminal cases, having regard to the need to accommodate the interests of justice. In this respect, the following was said by Simpson J (with the agreement of Davies J and Grove AJ) in *Khoury* at [105]:

> *"… In criminal cases it has long been recognised that the rigour with which it is applied must be tempered in order to accommodate the interests of justice: Green v The King [1939] HCA 4; 61 CLR 167, per Latham CJ; Ratten v The Queen [1974] HCA 35; 131 CLR 510 per Barwick CJ. In criminal cases, two important but competing policy considerations collide:*
>
> *(1) that the administration of justice requires finality in litigation; in general, parties to litigation (including criminal litigation) have one, and one only, opportunity to present their cases in the best light they can, and are bound by the conduct of their cases at first instance;*
>
> (2) *that error in the sentencing process, however caused, that is the occasion of injustice, ought to be remedied."*

57. As stated above, a "miscarriage of justice" in accordance with s 6(1) of the *Criminal Appeal Act 1912* is the basis upon which a conviction is set aside where incompetence of counsel is raised. However, this section is <u>not</u> the statutory basis for interfering with the exercise of a sentencing discretion. That power is contained in section 6(3), which reads as follows:

> *6(3) ... the court, if it is of the opinion that some other sentence, whether more or less severe is warranted in law and should have been passed, shall quash the sentence and pass such other sentence in substitution therefor, and in any other case shall dismiss the appeal.*

58. Notwithstanding the dissimilarity in the operation of s 6(1) and s 6(3), the NSW Court of Criminal Appeal has adopted the miscarriage of justice test and the principles explained above as being applicable to applications for leave to appeal against sentence: see *Raymond John Munro v Regina* [2006] NSWCCA 350 at [24] - [25], *Puan v R* [2009] NSWCCA 194 at [28] and *Garland v R* [2009] NSWCCA 217 at [26]. In the context of sentence proceedings, it was explained by Beech-Jones J (with the agreement of Leeming JA and Johnson J) in *John Wayne Tsiakas v R* [2015] NSWCCA 187 that at [43]-[44]:

> "*… these decisions appear to treat a conclusion that a miscarriage of justice of this kind was occasioned by the conduct of an offender's legal representative as equivalent to a finding that there was a denial of procedural fairness. The affording of procedural fairness is an "immutable characteristic" of a court, including a court exercising a discretion to impose a sentence (Assistant Commissioner Condon v Pompano Pty Ltd*

[2013] HCA 7; (2013) 252 CLR 38 [at 194] per Gageler J). The establishment of a breach of procedural fairness in the course of sentencing proceedings is a basis for interfering with the exercise of the power to impose a sentence.

With both appeals against conviction and sentences, it is not sufficient to warrant intervention to simply point to some failing, even a gross failing, of the legal representative who appeared during the sentence proceedings. In conviction appeals, where incompetence to the relevant standard is demonstrated, the Court considers whether there is a significant possibility that the acts or omissions of which complaint is made affected the outcome of the trial (Nudd [at 24]). In sentence appeals an analogous principle applies. Thus this Court has considered whether "compelling material was available but not tendered, or its significance not appreciated" (Pym v R [2014] NSWCCA 182 [at 75] per Fullerton J, with Hoeben CJ at CL and Price J agreeing; "Pym"), whether material of "significance" was not presented (R v Abbott (1985) 17 A Crim R 355, 356 per Street CJ) or whether the sentencing court was deprived of a consideration of an offender's circumstances (Munro at [25] per Beazley JA)."

59. The application of these principles can be illustrated by some examples.

60. In *Pym v R* [2014] NSWCCA 182, counsel for the offender at the sentence hearing failed to tender a number of reports from a psychiatrist the last of whom opined that the material pointed "*to the likelihood he was in an altered state of consciousness at the time in question, raising reasonable possibilities he was suffering from a dissociative amnestic state at the time. I remain of the opinion that he has the defence of automatism open to him; however, I understand that he is pleading guilty".* Counsel for the applicant on the hearing of the application for leave to appeal submitted that, since that evidence was available and relevant to sentence, *"to deprive the applicant of the opportunity to have that material considered in mitigation of sentence was productive of a miscarriage of justice"*.

61. The Court was satisfied that the untendered material was of such substance that it warranted the conclusion that the sentencing court had proceeded *"on the basis of incomplete information"* and was satisfied that *"were his Honour to have had the entirety of that evidence before him, his findings with regards to the relevance of the applicant's mental state at the time of the offence would not have been open to him"*: at [84]. The appeal was upheld and the proceedings were ultimately remitted to the District Court for redetermination.

62. Interestingly, incompetence of counsel was not specifically relied upon as the cause of the miscarriage notwithstanding that it was clearly the substance of the appeal. The ground of appeal was framed as follows:

"[T]he omission to adduce psychiatric evidence relevant to his case on sentence resulted in a miscarriage of justice."

Indeed, as observed by Fullerton J (with the agreement of Hoeben CJ at CL and Price J), reliance upon incompetence of counsel was expressly disavowed at [46]-[47]:

"It is clear that counsel who appeared on sentence was in possession of evidence (being Dr Furst's first and second reports and the unredacted third report) which addressed the applicant's psychiatric condition at the time he committed the offences. It was not submitted that counsel's failure to tender the three reports (the third in its unredacted form) amounted to incompetence or that any close examination of counsel's advice or reasons he gave for the forensic decisions he made is called for on the question whether the sentence proceedings gave rise to a miscarriage of justice.

Counsel submitted that it was sufficient for the purposes of the appeal to establish that critical features of the applicant's psychiatric profile, explored by Dr Furst in the reports and foundational to his ultimate opinion that the applicant was in an altered state of consciousness at the time of the attack on Mr and Mrs Hicks, were not in evidence before the sentencing judge. Counsel submitted that since that evidence was available and relevant to sentence, to deprive the applicant of the opportunity to have that material considered in mitigation of sentence has been productive of a miscarriage of justice (emphasis added)."

63. In *John Wayne Tsiakas*, the sole ground of appeal against sentence was that the conduct of the solicitor resulted in a miscarriage of justice. One of the principal complaints made against the solicitor is that he failed to obtain either a psychological or psychiatric report to tender in the proceedings. The Court stated at [67]:

"The evidence demonstrates that the former solicitor's representation of the applicant in this respect was less than the standard to which the applicant or any other offender was entitled. He was entitled to expect that at least genuine consideration would be given to obtaining a psychiatrist or psychologist's report on his behalf. Instead a consideration of the necessity to obtain such a report appears to have been dismissed on a false basis. A fuller picture of the applicant's circumstances could have been presented but the one that was presented was basically accurate. Given the applicant's criminal history and the nature of his offending, something of real significance was required to be presented before this Court if it was to be capable of materially affecting the outcome of the sentencing hearing. Neither the contents of Ms Robilliard's report nor the Justice Health file raise any matter of potentially sufficient weight to warrant a conclusion that a miscarriage of justice was occasioned by the former solicitor's failure to present it"."

64. In *Grant*, a miscarriage of justice was occasioned through the legal representative's erroneous admission of intent to kill. In this case, the Crown accepted a plea of guilty for manslaughter in full satisfaction on the basis of excessive self-defence. The judge asked the representative for the appellant then appearing for Mr Grant these questions at [18]:

His Honour: What was the intention then of the accused?
Solicitor: Your Honour, he was in a situation -
His Honour: What was the specific intent?
Solicitor: The specific intent was to defend himself.
His Honour: What was the specific intent for murder? Did he intend to kill; did he intend to do grievous bodily harm; what is the position?

Solicitor: *Well, he intended to kill, your Honour.*

65. In his affidavit the appellant's evidence, in part, was that at [20]:

> *"6. I did not instruct Mr Weller that I intended to kill the deceased as opposed to cause him grievous bodily harm. I did not want the deceased to die. I just wanted him to stop attacking me. I was not trying to kill him.*
>
> *7. I was trying to stop the deceased from hitting me over the head with the iron bar. I pointed the gun at him and said 'stop'. He kept coming towards me. I then shot at him to protect myself. He was about three metres away from me. After I shot at him the first time, he kept coming towards me so I shot at him a second time again to protect myself. As soon as he commenced to leave my home, I did not fire any further shots. When he left, I did not know he was going to die. If I was trying to kill him I would have kept on shooting him.*
>
> *8. I was in Court when Mr Weller made the admission that I intended to kill the deceased. I didn't understand a lot of what was being said during the proceedings. I certainly did not understand the significance of this admission that Mr Weller had made on my behalf. It was never discussed beforehand. It was never explained to me what it meant. If it had been explained to me I would have told Mr Weller that I intended to cause grievous bodily harm not to kill."*

66. In allowing the appeal, the Court held there was a miscarriage of justice because counsel did not explain to the applicant the distinction between the two states of mind within the offence of manslaughter and failed to obtain clear instructions. The judge was satisfied of an intention to kill because of counsel's statement which was not otherwise proven to the requisite standard. The circumstances of the offence were consistent with such an intent, but it was likewise consistent with the applicant's evidence on the appeal, namely, that he acted with an intent to cause grievous bodily harm. The Court made the following observations at [71], [77]:

> *"71. …The inference to be drawn is that Mr Weller did not explain to his client the distinction between the two states of mind, both of which were consistent with manslaughter, and also with wanting to stop his attacked, and did not obtain clear instructions on this basic issue."*
>
> *…*
>
> *"77. Here it was basic that Mr Weller had to obtain clear instructions about his client's state of mind. That did not occur. The primary judge was satisfied of an intention to kill because of Mr Weller's statement. That intention was not something otherwise proven beyond reasonable doubt, bearing in mind the circumstances of the shooting. Although the firing of two shots to the chest was consistent with such an intent, it was also consistent with Mr Grant's evidence in this Court, namely, an intent to cause grievous bodily harm so as to prevent Mr Matheson's imminent attack. Mr Grant's intent was material to the sentence*

imposed by his Honour. Mr Grant was entitled, on this basic point, to have his position correctly conveyed to the primary judge. There was in the circumstances a miscarriage of justice engaging the principles referred to in dealing with proposed Ground 3 above. In our view this ground is made out."

67. In *Khoury*, the approach taken was that a combination of circumstances, primarily the inadequacy of the legal advice given to the applicant, and the strength of the proposed evidence led to the evidence being received. Although counsel had conceded that it *"did not occur to* [*him*] *to call psychiatric evidence"*, incompetence of counsel was not relied upon specifically as the ground of appeal. The evidence disclosed that the applicant, who had functioned effectively as a parish priest, was of such a low level of intellectual functioning that Simpson J regarded it *"as an extremely relevant circumstance had it been made known to the sentencing judge"*: at [146]. Her Honour observed at [116]-[117]:

"In Abbott, one relevant consideration was that the applicant had been incompetently represented, with the result that evidence that could have been available as to her psychiatric condition was not presented. Similar arguments were, on the facts, rejected in R v Goodwin (1990) 51 A Crim R 328 and Stumbles.

Caution must be exercised in the admission of the evidence. As I have already indicated, in Lanham, it was held that a proper basis for the admission of the evidence must be established. In Ehrenburg, Loveday J, with whom Gleeson CJ agreed, described the case as "most unusual"; Samuels JA, who also agreed, cautioned against allowing sympathy to lead the Court, against its duty to the community, to make an error of principle. In Ashton, Howie J warned that the Court must be careful to maintain a principled approach in dealing with appeals before it, and be scrupulous to ensure that there is a proper basis for receiving evidence of events that occur after sentence where there is no error established in the sentence imposed."

68. In *R v Fordham* (1997) 98 A Crim R 359, the Court was concerned with whether a report from a psychologist obtained after sentence, which identified that the applicant was suffering from a *"significant intellectual disability"*, should be received in support of a ground of appeal which challenged a finding by the sentencing judge that the applicant was *"a cunning and not unintelligent (but uneducated) man..."*. In a frequently cited passage, Howie AJ (with whom Hunt CJ at CL and Smart J agreed) said this at p 377-378:

"Generally before fresh or new evidence will be received by this Court, it must be shown that the sentencing of the appellant in the absence of that evidence resulted in a miscarriage of justice. As a general rule, where that evidence was available to the defence at the time of sentencing, a miscarriage of justice would rarely result simply from the fact that the evidence was not before the sentencing judge, even if the evidence may possibly have had an impact upon the sentence passed.

However, fresh evidence has been received by this Court where a miscarriage of justice may have occurred because there has been incompetent legal representation at the hearing before the sentencing court: Abbott (1984) 17 A Crim R 355 or where there has been negligence or carelessness in the presentation of the defence: McKenna

(unreported, Court of Criminal Appeal, NSW, No 60705 of 1991, 16 October 1992). It has been held that new evidence may be admitted where the evidence has real significance to the sentencing proceedings, and where the significance of the evidence was unknown to the appellant and the existence of that evidence was not made known to the legal representatives at the time of sentencing: Goodwin (1990) 51 A Crim R 328: compare De Marco (unreported, Court of Criminal Appeal, NSW, No 60024 of 1993, 20 November 1995). There is also a general power in the court to receive fresh or new evidence where the interests of justice require that course: Many (1990) 51 A Crim R 54."

Defective submissions on sentence

69. In *Yi Hong Puan v R* [2009] NSWCCA 194, the court said [at 55] it would be *"a very rare case indeed that it would be held that a miscarriage of justice has occurred simply because of a defect in submissions made to a sentencing judge by defence counsel."* However, defective submissions could result in the client being placed in position of significant disadvantage.

70. One such disadvantage was expressed in *Zreika v R* [2012] NSWCCA 44. Johnson J (with whom McClellan CJ at CL and Rothman J agreed) observed that the CCA will not entertain arguments in mitigation of penalty which were open on the evidence but overlooked by defence counsel in the Court below. His Honour said at [79] – [80]:

"This court is a court of error. The jurisdiction of the court to interfere with a sentencing decision is exercisable only where there can be seen to have been an error of principle, or some other mistake of fact or law. If material error is demonstrated, before the court would proceed to resentence the Applicant, the court must form a positive opinion that some other sentence is warranted in law and should have been passed. It is, of course, a basic principle that, absent error, the Court of Criminal Appeal may not substitute its own opinion for that of the sentencing Judge merely because (if it be the case) the court would have exercised its discretion in a manner different from the manner in which the sentencing Judge exercised his or her discretion.

There is a practical expectation that an offender's legal representative will make submissions to the sentencing Judge at first instance, by reference to the particular factors which are sought to be taken into account in mitigation of sentence in the case at hand. ... "

More recently in *Dicianni v R; Pintabona v R* [2015] NSWCCA 201 Hoeben CJ at CL (with whom Price and Davies JJ agreed) observed at [282]:

"It is difficult to see how there can be said to be error by the Sentencing Judge's failing to take matters into account when no submissions about those matters were made. This court has made clear in Zreika v R [2012] NSWCCA 44 at [75] to [81], that ordinarily, if a matter has not been put to the Sentencing Judge, this court will be unlikely to find error by reason of the matter not being referred to in the remarks on sentence unless some serious injustice can be shown from the failure to raise the matter in the court below".

71. In *Zreika*, Johnson J observed (citing then recent Victorian Court of Appeal authority) that, although the Court will not lightly entertain arguments that could have been advanced on sentence but were not, it may do so in exceptional circumstances where the Court is satisfied that compelling material was available but not tendered, or its significance not appreciated, and that a serious injustice has resulted: at [81].

72. An example where the Court entertained an argument in which counsel failed to make in the District Court is *Lambert v R* [2015] NSWCCA 22. Counsel did not invite the Judge to consider an intensive corrections order as an available sentencing option. In upholding a ground of appeal to the effect that his Honour erred in failing to consider an ICO, Simpson J (with the agreement of Ward JA and Davis J), stated at [39], [46]:

> "39. *As I have made clear earlier in these reasons, nothing was put before Colefax DCJ to suggest consideration of such an order. Ordinarily, an offender is bound by the conduct of his or her case at first instance, and the failure of counsel to put an available argument may be fatal: R v Birks (1990) 19 NSWLR 677 at 683-685. That principle, however, is far from an absolute rule, as the discussion in Birks makes clear: see also R v Zreika [2012] NSWCCA 44; 223 A Crim R 460, per Johnson J at [75]-[83]. Where the interests of justice so dictate, this Court will entertain an appeal ground that raises questions or issues that have been overlooked by the applicant's legal representative at first instance. In my opinion this is such a case."*
> …
>
> "46. *I have reluctantly come to the conclusion that, in the absence of any consideration of the options provided by s 99(2) of the Sentencing Procedure Act, the applicant was deprived of an opportunity to have been sentenced more favourably than she was. In this regard, it is a matter of some significance that s 99(2) expressly provides that the option of an intensive correction order remains open even after revocation of a s 12 good behaviour bond. I should not be taken as suggesting that, in every case of bond revocation, s 99(2) mandates such consideration. But this was a case, for the reasons I have given above, in which an intensive correction order was a realistic potential sentencing outcome. It ought to be emphasised that, in this respect, his Honour did not receive the assistance that was due to him. Equally this Court does not know what instructions the applicant's legal representative had at the time. Wherever (if anywhere) the fault lies, my conclusion is that the sentencing proceedings miscarried. Pursuant to s 6(3) of the* Criminal Appeal Act 1912 *(NSW), the task of this Court is to determine whether some other sentence (whether more or less severe) is warranted in law and ought to have been passed. This Court has no material on which to base that determination."*

STRATEGIES TO AVOID ALLEGATIONS OF INCOMPETENCE

73. Whilst it is essential that as legal practitioners we ensure that we are not incompetent in the foregoing sense; it is equally important that we do not leave ourselves exposed to allegations of this kind.

74. It is natural for a person aggrieved by the outcome of a trial or sentence to assign blame to his legal representatives. The late Sailesh Rajan (a brilliant ALS solicitor who tragically

passed away in 2012 at the age of 29), makes this point neatly and succinctly in his paper entitled *"Things I'm glad someone told me (or wish someone had) when I started."* (September 2010) where he said at page 4*:*

> *"It is the nature of the type of law we practice and the kinds of people we deal with that we are soft targets when things go wrong. Don't take it personally. But cover your backside by being professional at all times. Keep good file notes, and get signed instructions when and where possible."*

75. How do we avoid unwarranted allegations? Michael Byrne SC, in his paper entitled *"Incompetence of Counsel"* (23 October 2007) suggests the following as a guide at pages 4-5:

a) obtain a detailed understanding of the matter, including the client's potential case;

b) give consideration to the evidence likely to be required to be called in the case;

c) ascertain the nature and volume of documentary evidence likely to be relevant in the case;

d) ascertain the identity and number of potential witnesses;

e) give detailed consideration to the manner in which the evidence will be collected and prepared for presentation to the Court;

f) give careful consideration to the likely steps to be taken in the matter, including the prospect of interlocutory proceedings;

g) consider whether, having regard to experience, general competence, and familiarity with the areas of practice likely to be relevant to the matter, you will be able properly to prepare the case for hearing;

h) obtain a detailed statement from your client at the earliest opportunity, which deals with each of the allegations. Such a document will allow the lawyer to not only understand the issues but also to appreciate any legal defences, exculpatory provisions or drafting problems in the charge;

i) ensure that, whenever possible, written and signed instructions are obtained. These should cover tactical matters including, in all cases, the decision as to whether to give evidence; and

j) where tactical decisions are made in the absence of a client, for example which grounds of appeal have prospects of success, it is useful to reduce the reasons to writing in a form such as a letter to your solicitor/barrister.

CONCLUSION AND SUMMARY

76. Incompetence of counsel alone is not a sufficient basis to allow an appeal. The focus of the appellate court is on the consequences of the alleged incompetence and whether it led to a miscarriage of justice. It is a heavy burden which is not easily discharged.

77. The ultimate question of whether a miscarriage of justice has occurred in the context of counsel's incompetence raises two issues – firstly, did counsel's conduct result in a material irregularity in the trial? Secondly, is there a significant possibility that the irregularity affected the outcome? The test of whether there is a material irregularity is objective. In the majority of cases, irregular conduct of counsel will not deprive the appellant of a fair trial.

78. Where the failures of counsel deprived an accused of a fair trial according to law, it is not necessary for an appellant to demonstrate the incompetence of counsel affected the outcome: *TKWJ* at [76]. This form of defect is similar to other miscarriage of justice that go *"to the root of the proceeding"*: see *Wilde v R* (1988) 164 CLR 365; *Quartermaine v R* (1980) 143 CLR 595.

79. It is not necessary in appeals of this type for an appellant to establish that trial counsel was "flagrantly incompetent" or assign epithets (such as "flagrant" or "egregious") to the alleged incompetence. But where the appellant can show that counsel has conducted the trial with "flagrant incompetence", *"it is likely that the appellant will have established a material irregularity in the conduct of the trial that will provide the stepping stone to a finding of a miscarriage of justice"*: *TKWJ* at [80].

80. A relevant consideration in appeals of this type is whether, viewed objectively, counsel's conduct is capable of explanation or whether the conduct may have been for a legitimate forensic purpose. If there could be such an explanation, it follows from the fundamental nature of a criminal trial as an adversarial and accusatorial process that no miscarriage of justice is shown to have occurred.

81. An appellant is better positioned to prove a miscarriage where the asserted error concerns an obvious mistake as opposed to a deliberate forensic choice. While the court will usually reject an argument alleging incompetence of counsel if the conduct may have served a legitimate forensic purpose, the court may be more willing to intervene if the forensic risks of the conduct clearly outweigh any possible advantages.

82. In the context of sentencing, the offender is bound by the presentation of the case at first instance. This principle applies equally to applications for leave to appeal against sentence as it does with appeals against conviction. One consequence of incompetent representation in sentence proceedings is that an applicant will not be permitted to enhance the case on appeal by producing fresh or new evidence. As a general proposition, it must be shown that the sentencing of the appellant in the absence of that evidence resulted in a miscarriage of justice before fresh or new evidence will be admitted.

83. Although the CCA will not entertain arguments in mitigation of penalty which were not argued in the Court below, it may do so in exceptional circumstances where the court is

satisfied that compelling material was available but not tendered, or its significance not appreciated or that a serious injustice has resulted: *Zreika* at [81].

PETER GUIRGUIS
MARCH 2016