SUPREME COURT OF QUEENSLAND

CITATION:	*R v Carter* [2002] QCA 431
PARTIES:	**R** **v** **CARTER, Stephen Wayne** (appellant)
FILE NO/S:	CA No 201 of 2001 SC No 587 of 2000
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	18 October 2002
DELIVERED AT:	Brisbane
HEARING DATE:	6 August 2002
JUDGES:	McMurdo P, Jerrard JA and Mackenzie J Separate reasons for judgment of each member of the Court, each concurring as to the orders made.
ORDER:	**1. Appeal against conviction allowed** **2. Conviction quashed and retrial ordered** **3. Appellant remanded in custody until further order**
CATCHWORDS:	CRIMINAL LAW – EVIDENCE – CONFESSIONS AND ADMISSIONS – STATEMENTS – VOLUNTARY STATEMENTS – FUNCTIONS OF JUDGE AND JURY – DETERMINATION OF ADMISSIBILITY – VOIR DIRE PROCEEDINGS – where appellant made full admissions to injecting the deceased with heroin in a police interview – where appellant instructed his lawyers that he participated in the interview only because he was affected by drugs and under threats by police – where appellant's barrister did not apply to have interview excluded at pre-trial hearing – where appellant's barrister applied at end of the prosecution case for the interview to be excluded – where learned trial judge refused that application – where learned trial judge did not ask the appellant's barrister whether he was requesting a voir dire to examine the voluntariness of the confession – whether learned judge erred in failing to conduct a voir dire in the absence of an express application by the defence CRIMINAL LAW – APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS – CONDUCT OF

LEGAL PRACTITIONERS – where appellant's barrister did not expressly apply to the learned trial judge for a voir dire to examine the voluntariness of his client's confession – where appellant instructed his lawyers that he gave the confession only because he was affected by drugs and under threats by police – where appellant's barrister had not previously conducted a criminal trial involving an application to exclude the admission of a recorded interview – where appellant's barrister may have interpreted the learned judge's refusal to exclude the interview as precluding him from applying for a voir dire and from allowing his client to give evidence – whether the failure to apply for a voir dire deprived the appellant of the chance of an acquittal – whether conduct of trial by the appellant's barrister was flagrantly incompetent

Criminal Code (Qld), s 592A,
Criminal Law Amendment Act 1894 (Qld), s 10

Basto v R (1954) 91 CLR 628, considered
MacPherson v The Queen (1981) 147 CLR 512, distinguished
R v Birks (1990) 19 NSWLR 677, considered
R v Green [1997] 1 Qd R 584, considered
R v Lane [1965] QWN 33, considered
R v Miletic [1997] 1 VR 593, applied
R v Paddon [1999] 2 Qd R 387, applied
R v Walbank [1996] 1 Qd R 78, distinguished
R v Zerafa [1935] St R Qld 227, considered
Royall v R (1991) 172 CLR 378, considered
Wilde v R (1988) 164 CLR 365, applied

COUNSEL: C Chowdury for the appellant
SG Bain for the respondent

SOLICITORS: Legal Aid Queensland for the appellant
Director of Public Prosecutions (Qld) for the respondent

[1] **McMURDO P:** The amended grounds of appeal and the relevant facts are fully set out in the reasons of Jerrard JA and Mackenzie J. I will only repeat those necessary to explain my reasons.

The conduct of the appellant's case

[2] It is common ground that the prosecution case could not have succeeded if the appellant's admissions contained in a video recorded interview with police were excluded. In that interview, the appellant made full admissions to injecting the deceased, Gail Marke, with heroin intending that this would kill her in accordance with her stated wishes.

[3] Nor is it in contention that the appellant's instructions to his lawyers (not his lawyers on this appeal) were always that he had injected himself with heroin a few hours before the interview with police officers and that he was heavily affected by heroin during the interview. He instructed his lawyers that he did not understand he had a choice whether or not to accompany police officers James and Kruger to the police

station and that there police officer James, in the presence of police officer Kruger, threatened to set him up for trafficking in heroin unless he made a statement about the death of Ms Marke. He instructed his lawyers that he participated in the video recorded interview only because of this threat and his confused, tired and drug-affected state. He believed his lawyers would attempt to have the record of interview excluded from his trial and he instructed them he was prepared to give evidence.

[4] The appellant also deposed that, after the interview, police officer James asked him if he wanted a solicitor, rejected the names suggested by the appellant, and recommended the solicitors' firm which represented the appellant at all his court appearances up to and including the trial.

[5] The circumstances surrounding the police interview were pursued by the appellant's barrister during the cross-examination of police officer James at the committal proceedings and were relied upon during the appellant's successful Supreme Court bail application. His lawyers arranged to challenge the admissibility of the record of interview in a pre-trial application under s 592A *Criminal Code* but abandoned this because police officer James had left the Queensland Police Service and was unavailable to give evidence either at any pre-trial hearing or at the trial.

[6] The appellant's trial barrister in his affidavit prepared for this appeal noted that he was concerned that if the court determined before the trial that the interview was admissible "then the issue of coercion by Detective James could no longer be raised at trial". During cross-examination, the barrister said that he understood that, despite any pre-trial determination, those issues could be raised at the trial. The barrister did not think the prospects of excluding the record of interview were promising because of the appellant's demeanour and appearance during the video recorded interview. (During the interview the appellant stated that he was not presently under the influence of any liquor, drug or medication, was warned that he did not have to answer questions or make a statement, emphatically agreed that he was voluntarily present and said he was happy with the police treatment of him.) Later the barrister said he thought he had a 50 per cent chance of excluding the interview.

[7] The appellant's barrister, in consultation with his client, decided not to pursue the application to exclude the interview at a pre-trial hearing but to wait instead until at least the end of the prosecution case. He had difficulty explaining his reasons for this decision but it seems it was because the jury may have been suspicious of police officer James's absence and therefore have doubts as to the reliability of the police evidence, and also because it was less likely that the respondent would locate and call police officer James after the closure of their case.

[8] Another unusual dimension to this case is that the instructing solicitor had given some assistance to police officer James in his law studies. By the time of the trial, police officer James had made enquiries about future employment at the instructing solicitor's firm and had good prospects of obtaining a position there when he was admitted as a lawyer. Police officer James was employed there by the time this appeal was heard. The appellant was unaware of these issues.

[9] The appellant's lawyers were not very experienced in matters such as this. His barrister was admitted in 1997 and this was either his first or perhaps second murder

trial. He had not previously conducted a criminal trial involving an application to exclude the admission of a record of interview. The instructing solicitor had no previous experience in murder trials and had instructed on only two District Court criminal jury trials in his career.

[10] Although the evidence of the appellant's barrister is not entirely easy to follow on this point, it seems that he intended at the end of the prosecution case to apply for a voir dire to exclude the record of interview, during which he would call the appellant and perhaps the appellant's partner. Alternatively, he may have merely intended to call this evidence in the defence case and then ask for the interview to be excluded: cf *R v Walbank*.[1] He did neither of these things.

[11] During the prosecution case, the barrister cross-examined the only police officer called at trial who was present during the interview with the appellant, police officer Kruger, and suggested to him that prior to the interview police officer James threatened the appellant with drug charges if he did not cooperate. Police officer Kruger denied this.

[12] At the close of the prosecution case the barrister made the following rather confused statement:

> "I might take this opportunity, if I may, your Honour, to flag the relevance of the record of interview pending – I suppose it is probably not the appropriate time to do it now – to the calling of my client to give evidence in relation to the admissibility of the record of interview and whether the record of interview should go to the jury for consideration in the light of the cross-examination of Detective Kruger in relation to the question of detective James."

[13] The judge was understandably uncertain as to what was the barrister's request. After some discussion, the barrister submitted the record of interview was inadmissible. The judge correctly pointed out the interview was tendered without objection. The barrister requested that, in any case, the judge should exercise his discretion to exclude it, in support of his application referring to *Walbank*. The learned trial judge correctly pointed out that, unlike *Walbank*, there was here no evidence which would justify the exclusion of the interview, police officer Kruger having denied the suggestions put to him in cross-examination. Understandably, the judge refused the application to exclude the record of interview.

[14] The barrister asked for an adjournment to get instructions from his client and when the court resumed the prosecutor closed her case and the appellant, accepting advice from his barrister, chose not to give evidence.

[15] The appellant's lawyers unwisely did not take their client's written instructions as to the conduct of his trial and although they discussed the conduct of the case with the appellant, his trial barrister deposed the appellant left the conduct of the case to him.

[16] The addresses and the judge's summing-up followed and the appellant was subsequently convicted of murder.

Did the judge err in failing to determine the voluntariness of the confession?

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1 [1996] 1 Qd R 78.

[17] Once the issue of the voluntariness of a confession is raised, trial judges are obliged to satisfy themselves that the confession is voluntary, even in the absence of an application to the judge to exclude it: *MacPherson v The Queen*[2] and *R v Walbank*.[3]

[18] With the benefit of hindsight, it is unfortunate that the learned primary judge did not ask the appellant's barrister if he was requesting a voir dire to examine the issue of voluntariness. I am not however persuaded that the learned primary judge here erred in failing to conduct a voir dire in the absence of any application. The appellant was legally represented, unlike the situation in *MacPherson*. In *Walbank*, evidence of involuntariness was raised in the defence case, whilst here there was no evidence of involuntariness; the suggestions put to police officer Kruger were denied and there was no other evidence to support those suggestions. In those circumstances, the learned primary judge correctly ruled the record of interview was admissible. In the absence of any such evidence or any application to call such evidence on a voir dire, there was nothing to require the judge to further determine the question of voluntariness of the confession. This ground of the appeal must fail.

Was the conduct of the trial incompetent?

[19] To set aside his conviction, the appellant must establish the conduct of his defence was so flagrantly incompetent as to occasion a miscarriage of justice: *R v Paddon*.[4] There are often many different ways and styles of conducting a defence case. A tactical decision taken by one barrister which would not have been made by another is not necessarily incompetence. Incompetence must go beyond an error of judgment made under the significant pressures of litigation.

[20] It seems from the trial transcript and from the evidence given by the appellant's barrister during this appeal that the barrister was at least considering requesting a voir dire to determine the admissibility of the record of interview at the end of the prosecution case but was dissuaded from so doing by the judge's firm dismissal of the application to exclude the record of interview in the absence of any evidence questioning its fairness and voluntariness. The barrister may have quite wrongly interpreted this ruling as precluding him from pursuing any application for a voir dire and perhaps from calling his client to give evidence.

[21] The respondent concedes that without the appellant's admissions in the interview the prosecution had no case against him. With those admissions, the case against the appellant was compelling. There is no suggestion the appellant had any separate defence to the charge other than through attempting to exclude the record of interview or throw doubt on its reliability because of the circumstances surrounding it. The appellant had everything to gain and nothing to lose from testing the admissibility of the record of interview in a voir dire hearing before the judge in the absence of the jury. This is ordinarily done by way of a pre-trial hearing under s 592A *Criminal Code* or prior to the opening of the prosecution case. Otherwise, if evidence is excluded after being opened by a prosecutor and lead before the jury, it is likely that its subsequent exclusion would result in a mistrial. An application for a voir dire should ordinarily be made either at a pre-trial hearing or before the prosecution opening, consistent with counsel's duty to the court and the administration of justice. Here, however, there was no particular problem in raising the admissibility of the interview late because the prosecution case stood or fell on it

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2 (1981) 147 CLR 512, 523, 525-526.
3 83-84.
4 [1999] 2 Qd R 387.

alone; its exclusion would mean the end of the case against the appellant, not an expensive mistrial.

[22] The appellant's barrister, in failing to make an application for a voir dire raising questions of voluntariness and fairness in which he would call the appellant and perhaps another witness or other witnesses, acted in a way in which there was no possible realistic tactical advantage to the appellant.[5] The judge would have been obliged to accede to such a request: *MacPherson*; *Walbank*. If the voir dire was successful, the appellant would be discharged. If it was unsuccessful, the appellant could still have explored the reliability of the admissions before the jury and, if he wished, elected not to give evidence at the trial and have his barrister address the jury after the prosecutor. Indeed, the appellant's barrister has made no attempt to support his decision not to request a voir dire. In all the circumstances, this decision, which does not seem to be the clear, informed, written instructions of the appellant, was not a mere error of judgment made during the pressure of litigation but was flagrant incompetence.

[23] Although there were very significant obstacles in the way of success of the voir dire, in the absence of any evidence which may have been called in the voir dire it cannot be said that the failure to apply for a voir dire may not have deprived the appellant of the chance of an acquittal.

[24] The appeal must be allowed and a re-trial ordered. The appellant should be remanded in custody. If the appellant wishes to apply for bail, the merits or otherwise of that application should be canvassed in full at that time.

Orders:

Appeal allowed.

Conviction set aside.

New trial ordered.

Appellant remanded in custody.

[25] **JERRARD JA:** On 16 March 2000 the appellant Stephen Wayne Carter injected Gail Marke with heroin, believing that that injection of heroin would probably kill her. At that time he believed Ms Marke wanted to die, had made up her mind to do so, had tried to end her life a couple of times before, and wanted to die in a painless way by heroin overdose. Immediately after injecting heroin into Ms Marke, he inserted a syringe containing heroin into the arm of Patrick Thomas Smyth, at Mr Smyth's request, and watched while Mr Smyth pushed on the syringe plunger. Mr Carter believed when inserting the needle into the arm of Mr Smyth that he was sick of living, wanted to die, and would certainly die as a consequence of being injected with the quantity of heroin in the syringe. Mr Carter had obtained the heroin injected into both Ms Marke and Mr Smyth, and had helped Mr Smyth pay for it. Mr Carter knew from his own experience as a user of heroin, who had used heroin previously with Mr Smyth, that Mr Smyth had adversely reacted to heroin dosages in the past, and Mr Carter was confident Mr Smyth would die from the injection received, and intended that his own actions would cause Ms Marke and Mr Smyth

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5 *Paddon* at 397.

to achieve the death each told him they desired. They did both die with Smyth apparently dropping dead immediately, and Ms Marke's last known words being "what a rush" before she lay down. She was still breathing when Mr Carter left the room immediately after Mr Smyth had dropped to the floor, and the evidence did not establish precisely how long it took her to die. The injections appear to have occurred around 10.00p.m. on 16 March 2000[6], and both were found dead about 8.30a.m. the next day.

[26] Mr Carter was convicted on his own plea of having unlawfully supplied heroin to Patrick Smyth, and of having aided Patrick Smyth in killing himself. He pleaded guilty to aiding Gail Marke killing herself, but was convicted by a jury of her murder, and he has appealed against that conviction. He asks leave to do so on two grounds, neither of which appear in the notice of appeal. The first is that the conduct of the trial by his counsel was flagrantly incompetent, depriving him of a significant possibility of acquittal, and thereby resulting in a miscarriage of justice. The second is that the learned trial judge erred in failing to determine the question of the voluntariness of a confession he made, once that issue had been raised during the cross examination of a police officer.

Alleged Incompetence of Counsel

[27] The first particular of the asserted flagrant incompetence of Mr Carter's barrister was that counsel's failure to seek to have excluded from evidence the contents of an interview between Mr Carter and the investigating police officers, before those contents were admitted into evidence in the trial. Affidavit evidence was read by leave from Mr Carter, from his solicitor, and from his counsel. All three were cross examined on the appeal hearing. That counsel had represented him on a successful application for bail, then at the committal hearing, and finally on the trial.

[28] The effect of the affidavit evidence was to establish that Mr Carter had given his legal advisors instructions that he had taken heroin himself, between 2.30a.m. and 3.00a.m. on the early morning on 24 March 2000, on which day the police investigating the two deaths came to his home shortly after 6.00a.m. in the morning and awoke him. Syringes apparently evidencing the unlawful past possession and administration of drugs were found in his home, and he accompanied those police officers to the Noosa Heads Police Station. He was interviewed there, and the video taped interview began at 7.38a.m. and concluded at 9.08a.m. on 14 March 2000.

[29] Mr Carter's affidavit evidence that he gave his legal advisors instructions that he understood when going to the police station that he would be asked about "drug matters", and that when taken to an interview room he was asked by a police officer, Detective James, "what do you know about Patrick Smyth and Gail Marke"? He responded (inaccurately) that he had not "seen Pat for some time", to which reply he contends Detective James responded by telling him that if he did not make a statement and tell the police what had happened, then Detective James would take him back "to my place and throw a "ten weight" bag (apparently of heroin) on the table and do me for trafficking". Mr Carter's instructions were that he took that threat seriously, believed Detective James would carry it out, and accordingly

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6 These facts are taken from admissions made by Mr Carter in an interview with Queensland Police Officers.

participated in the interview "because of my confused, tired and drug affected state, and because of the threat from Detective James".[7]

[30] His counsel did inform the judge hearing his application for bail on 31 May 2000 that the defence would seek to have a record of interview excluded on his trial, and it was put to Detective James at the committal proceeding that he had spoken as alleged to Mr Carter. Detective James denied the allegation. At the trial Detective James was not called as a witness, he being described as being on extended sick leave for four months as at the trial date (23 July 2001). The court learnt during the appeal hearing that Detective James was, as at the trial date, an applicant for employment as a law graduate with the appellant's solicitors, and that he had good prospects of getting that employment at that time. A Senior Constable Kruger, who had been at all relevant times present with the appellant and Detective Sergeant James, was called at the trial.

[31] During the cross examination of Detective Kruger, it was put to him that Detective James had made the threat described. Detective Kruger denied that this occurred. The appellant's counsel had not asked prior to the trial commencing before the jury to have any portion of the record of interview excluded, whether on the grounds of it being inadmissible by reason of that asserted threat, or on any other ground. The first inkling that the trial court would have had of the instructions given by Mr Carter was in that portion of Detective Kruger's cross examination.

The Interview and Confessions

[32] A transcript of the relevant interview was produced on the hearing of the appeal, and its contents demonstrate that the appellant made responsive answers to each of the many questions asked of him. Significantly, when asked if he was happy with the way that the police had treated him that day, he replied:

> "Oh yes sir everything's fine".

He also agreed that at his home he had been asked by the two police officers if he was prepared to come back with them to discuss what had been located there (the syringes) and "another matter". The transcript also records his being advised that he could make a phone call to a relative, friend or solicitor, and have any of those persons present if he wanted, and that he could invoke that right at any time. It shows his describing, in two quite lengthy answers quite early in the interview, all that had happened to cause the death of Ms Marke and Mr Smyth; and that thereafter he was asked a series of questions which elicited the facts of the matter in more careful detail. The transcript itself does not indicate any confusion in the appellant's mind about any of the events leading to those deaths or about the appellant's role in causing those. Significantly, the following question and answer are recorded:

> "Are you presently under the influence of any liquor or drug? No Sir."

[33] Mr Carter is recorded advising the police officers in that interview that he is a drug user of "heroin – oh, painkillers, narcotics analgesics". He had at least two opportunities in that interview to tell the police that he was affected by the heroin he says he had taken between five to seven hours earlier, and he said he was not affected. He had the opportunity to complain that he had been threatened with a

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7 Affidavit of Mr Carter, read by leave.

fabricated charge involving drugs, and instead he agreed he was happy with the manner in which he was treated. Further, Detective Kruger was asked in cross examination at the trial whether he did not think it appropriate to have the appellant examined by a government medical officer, and replied:

> "Well, we had no reason to because he was asked whether he was under the influence of any drugs. He said that he hadn't and I was sure that he wasn't either. I could tell that by the way answered the questions."

[34] The circumstances of the trial included the contents of the record of interview, the fact that it was put in evidence without any objection made to the learned trial judge, the fact Mr Carter was represented by counsel, and the answer last quoted given by Detective Kruger. In those circumstances the cross examination of Detective Kruger to the effect that Detective James had threatened to cause the appellant to be charged with a false charge of supplying a dangerous drug in the event of non cooperation did not require that the learned trial judge to take any steps at that stage to determine if it was being alleged that the admissions made during the interview had been induced by the threat described[8], (and would therefore be inadmissible).

[35] That interview was that central part of the prosecution case against Mr Carter. It was the only source of the evidence of Mr Carter's direct involvement in causing both deaths. His lawyers knew its significance and his instructions. Those instructions should have resulted in his counsel raising the admissibility of that interview in evidence at the appropriate time, namely before the jury were told anything about its contents by the prosecuting counsel. Instead, its contents were described during the opening explanation of the Crown case to the jury, and led without objection during the trial. Mr Carter's counsel ought to have asked the judge, before the prosecution case was explained to the jury, to conduct a hearing on the admissibility of that interview, for the purpose of determining whether it was rendered inadmissible by s 10 of the *Criminal Law Amendment Act* 1894 (Qld). That law provides:

> "No confession which is tended in evidence on any criminal proceeding shall be received which has been induced by any threat or promise by some person in authority, and every confession made after any such threat or promise shall be deemed to be so induced thereby unless the contrary be shown."

[36] That section provides a significant protection to a person in Mr Carter's position, if it be true that he was threatened as alleged and participated in the interview because of that threat. The section gives statutory force to the common law position which would otherwise apply, namely that confessions that are not voluntary are excluded from evidence. When it is alleged by an accused person that there was a threat or inducement, the common practice in this jurisdiction is to determine by a hearing in the absence of the jury whether the prosecution satisfies the onus it bears of establishing that any alleged confession was not so induced (a hearing often called a voir dire). The affidavit material filed by the appellant shows that his lawyers were well aware of the law.

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[8] See *MacPherson v R* (1981) 147 CLR 512, described further herein.

[37] The extent to which trial judges are required to go, in ensuring that confessions which may be involuntary are not admitted into evidence, is well demonstrated in two cases which Mr Carter's lawyers appear to have misunderstood. The first is the decision in *R v MacPherson* (1981) 147 CLR 512. In that case the High Court heard an appeal from a conviction in which a self representing accused person had put to police officers in cross examination that they had threatened him for the purpose of inducing him to confess, whilst also putting to those officers that he had not made any admissions. Mr MacPherson elected at the end of the trial to make a statement from the dock (and not give evidence on oath), in which statement he denied making any confessional statements but said nothing about threats made to him. The trial judge had not advised him during the trial of the option open to him to ask the judge to hear evidence in the jury's absence on the alleged involuntariness of the confession.

[38] All members of the High Court held that the conviction should be reversed. Gibbs CJ and Wilson J held that Mr MacPherson's suggestions in cross examination had raised a real question as to the voluntariness of those confessions, and not withstanding that MacPherson denied that any confession had been made, the proper course for the trial judge was to hold a voir dire on which the judge decided whether the confessions were voluntary and admissible (at 525). They held (at 526) that because the confessional evidence was so damaging, and had been admitted without a proper determination of the question whether the condition precedent to admissibility had been satisfied, the conviction could not stand.

[39] Their Honours had earlier ruled (at 123) that once it appeared that there was a real question as to the voluntariness of a confession, the judge had to satisfy himself or herself that the confession was voluntary, and that that would usually be done by conducting a voir dire. Indeed, in these circumstances a judge must proceed to have a voir dire even if none was asked for.

[40] Their Honours added that they were not to be taken as suggesting that a trial judge must conduct a voir dire on every occasion when a confession was led in evidence, nor that a judge was bound to accede to an application made for voir dire when there was nothing to suggest that a real question of voluntariness, unfairness or impropriety arose. Fishing expeditions were to be discouraged.

[41] Mason J (as he then was) (at pages 534 and 536), and Aitkin J (page 537), held that the obligation on the judge was to acquaint Mr MacPherson with his **right** to a voir dire, once an issue as to the voluntariness of a confession arose. Brennan J (at 546) in effect declared in his judgment that the judge was obliged to tell Mr MacPherson of his right to seek a voir dire, adding that it might well be necessary for a trial judge of his or her own volition to hold an inquiry on a voir dire, in order to rule upon the admission of a confession in evidence. There is therefore a slender majority for the view that the obligation is not simply to advise of the right to a voir dire, but also to hold one when a real issue as to voluntariness arises, irrespective of any request for it.

[42] I repeat that, on the single proposition put to Detective Kruger in cross examination, it could not be suggested that any real question as to voluntariness had arisen at that stage of the trial. Nothing said by any judge in *MacPherson v R* could sensibly be understood as encouraging those who know the law to sit by and not challenge the voluntariness and thus admissibility of a confession, when lawyers have instructions

to do so, until after the confession has been given in evidence. The whole point of the decision was that the unrepresented accused was not advised of the right of challenge, of which right Mr Carter's lawyers were plainly aware.

[43] The matter of challenging the admissibility of the confessional evidence was not raised until the substantive Crown case had been completed. Counsel for Mr Carter then announced that counsel was "taking the opportunity" to "flag the relevance" of the record of interview "pending the calling of my client to give evidence in relation to the admissability of record of interview". In response to observations from the learned trial judge, (that the video recording had already been admitted into evidence and without objection), the submission was then made that that record of interview was inadmissible. It was further submitted that despite the fact of there not having been any objection at the time it was tendered, and despite there having been no voir dire, the judge could still exercise a discretion to exclude it.

[44] The learned judge observed that that would be a "mighty peculiar thing" to do. In response, counsel referred to a decision of this court in *R v Walbank* [1996] 1 Qd R 78. This decision, counsel asserted, indicated that it was unnecessary for counsel to object to the admission of the record of interview when it was tended, "for tactical reasons of the defence".

[45] Exchanges occurred between bench and bar in the course of which counsel asserted that the inadmissibility of the record of interview derived from the threat made by Detective James, and conceded that there was no evidence before the court of that threat actually occurring. Counsel added "I suppose if the evidence were to be before your Honour and this is the reason why I am flagging it…"; at which point counsel was interrupted by the learned judge, who then dismissed the application to declare the record of interview inadmissible, upon the ground there was no evidence before the judge of any threat.

[46] The matter of *Walbank* involved a trial in which confessions had been admitted without objections to their admissibility, and without any request for the holding of the voir dire. However, when the police officers involved in giving evidence of those confessions were cross examined, it was suggested to those witnesses that inducements and threats had been made by the police before the confessions were obtained. At the conclusion of the Crown case Mr Walbank elected to give evidence, and his evidence included details of the inducements allegedly made to him by police officers. The judge conducting the trial intervened at that stage, and finally an application was made to have the confessions excluded by reason of those inducements. The judge declined to exclude those confessions, principally because the application had been so late that no objection could sensibly be made to evidence already received.

[47] On appeal, Macrossan CJ remarked that s 10 was but one aspect of the rule of common law excluding the admission of confessions that were not voluntary, and that what the Chief Justice considered the statutory obligation placed on a judge, to rule on whether the confession had been induced by any threat or promise by any person in authority, could not be avoided merely because the occasion for its exercise arose so late. He remarked that usually there would be a voir dire early in the trial but that:

> "If, for tactical reasons, the defence does not show its hand in positive fashion, things may go so far that the usual safeguard of

> evidence taken in the absence of the jury may become wholly or partly bypassed. It will depend upon the circumstances of the case. The fairest course to adopt, especially if the defence desire it and it can be arranged, will be to restrict to the judge's ears, the consideration of the evidence that is relevant to admissibility of an alleged confession or to the discretion to exclude it (page 84)."

He added that a ruling at some point during the evidence taking will always be necessary when an application is made (page 84), and further that on the assumption that a ruling should have been made by the trial judge in the case, the conviction would have to be quashed.

[48] Pincus JA agreed that the decision in *R v MacPherson* (supra) reinforced the view that the trial judge should not have treated the lateness of the objection to the confession as making it unnecessary to consider whether the confessions were admissible. His Honour observed how difficulties would arise if the voluntariness of the confession appeared to be accepted until the Crown case was over. Davies JA held that the plain meaning of s 10 was that a confession induced by a threat or promise must be excluded from evidence and that this required a judge, once there was evidence of such inducement, to determine the credibility of that evidence, and if accepted to exclude the confession. (His Honour may have misstated the onus, but that is unimportant on this appeal).

[49] Nothing in that decision either encourages the view that Mr Carter's lawyers were entitled to sit by and allow the damning confession to be admitted without objection, and to then take objection to it. As the learned trial judge in this case observed, "we could not possibly conduct criminal trials if decisions about whether material is to be objected to were postponed until after the jury was only too aware of the details". Macrossan CJ should not be understood as having said anything encouraging any contrary view.

[50] The affidavit and oral evidence considered on the hearing of the appeal provides some explanation for what happened at the trial. The appellant's counsel at the trial (not counsel who argued the appeal) had quite limited experience in criminal trials in which there was a challenge to the admissibility of confessional evidence. That counsel's affidavit and oral evidence shows that counsel was uncertain as to whether or not an unsuccessful challenge to the admission into evidence of the confession, made before the trial started before the jury, would mean that counsel could not raise again before the jury the fact of the inducement alleged to have made the confession inadmissible. Counsel had one point with which to attack the credibility of Detective Sergeant James, that being a matter apparently within the appellant's knowledge, and which counsel intended to lead from the appellant during the latter's own evidence before the jury. It was apparently considered that thereafter an application might be made to have the confession excluded. It was thought this strategy would enable the introduction into evidence of this material, believed adverse to Detective Sergeant James, and probably too late for the Crown to call any evidence rebutting the matter, whatever it was.

[51] It has long been the law that where a question arises whether the statements made by an accused person to the police are admissible, the accused person is entitled firstly to have the evidence excluded if in the judge's view, formed in the absence of a jury, the evidence is not legally admissible; and if the judge decides it is admissible, the accused person is entitled subsequently to have the jury, when

reaching their verdict, decide what weight, if any, should be given to that confessional evidence. The accused is entitled to have that second question, which the jury decides, considered by the jury on the basis of what is often the same evidence as that which the judge has already heard:

> "Once the evidence is admitted the only questions for the jury to consider with reference to the evidence so admitted in its probative value or effect. For that purpose it must sometimes be necessary to go over before the jury the same testimony and material that the judge has heard or considered on a voir dire for the purpose of deciding of the admissibility of the accused confession or statements as voluntarily made. The jury's consideration of the probative value of statements attributed to the prisoner must, of course, be independent of any views the judge has formed or expressed in deciding that the statements are voluntarily." (*Basto v R* (1954) 91 CLR 628 at 640).[9]

[52] There seems to be no discernable forensic advantage to the appellant in the course actually followed by his counsel. Despite counsel's uncertainty about the point, counsel would have been entitled to raise before the jury all matters going to the weight or reliability to be given to the confession, once evidence of it was admitted after an unsuccessful objection in the absence of the jury. There were certainly grounds for counsel believing there was little prospect of success in having that confession excluded, as counsel swore during the evidence heard on this appeal. However, that does create any advantage in applying to exclude it after the jury had heard it and not before. Experienced or inexperienced counsel may well choose not to make an application to exclude a confession which application is very likely to fail, and may prefer to leave the issue of the weight of confession to the jury. In such a case, the judge will not be asked to exclude the confession. If an application for exclusion is belatedly made, the judge is obliged to hear it. (*R v Walbank*).

[53] The strategy devised by counsel in this case involved the appellant actually giving evidence before the jury and possibly before or possibly after an unsuccessful application had been made to exclude a confession already heard by it. There is no evidence of any consideration having been given as to what the appellant would actually tell the jury about the accuracy of the confession or statement he admittedly made.

[54] The appellant's counsel explained on the appeal that he abandoned the attempt to apply before the learned judge at a point which was (too) late in the trial to exclude the confession because of the comments made by the learned judge; and because counsel did not believe he was then successfully advancing the appellant's case. He further explained that what he had been doing was tentatively asking whether the learned judge would entertain a voir dire at that stage.

[55] What actually happened was that after His Honour had ruled on the application to dismiss or exclude the confession the appellant was called upon, some minutes later, as to whether he would give or call evidence at his trial. On the advice of his counsel (after an adjournment to obtain instructions), he elected not to do so. The defence seems to have been thrown into disarray by the promptitude of the rulings

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[9] See too *R v Zerafa* [1935] St R Qld 227 at 232-33; *R v Willie* [1960] Qd R 525 at 529; and *Sparks v R* [1964] AC 964 at 983.

by the learned trial judge, and to have dissuaded thereby from pressing on with the application for a voir dire.

[56] With hindsight one can see that the one point the appellant had throughout the proceedings against him for murder was the application to have the confession excluded. It is possible he would have succeeded on that application, despite the obvious difficulties. It was never made. This was principally because of confusion and mistake by his barrister as to the effects of an unsuccessful application. The actual course that was followed is one that would never be thought by competent counsel in the circumstances of the trial to be of any possible advantage to the accused[10]. In *R v Paddon* (supra) this court was considering the nature of conduct by counsel which will enable an appellant represented by that counsel to have his or her conviction set aside, on the grounds of miscarriage of justice occasioned by that conduct of the case. In this case that conduct denied the appellant the opportunity of having the learned judge consider an allegation the appellant had consistently made since first instructing his solicitors on the day of his arrest. If the Crown could not disprove that allegation, the confession would be excluded.

[57] I consider that in the result, and not because of any omission of the learned trial judge, the proceedings in which the appellant was convicted of murder were fundamentally flawed, as that expression is used in *Wilde v R* (1988) 164 CLR 365 at 37. A matter basic to the admissibility of the evidence on which he was convicted was never considered by the judge, who was obliged to consider whether that confession was admissible once the issue was properly raised before him. On the instructions the appellant is shown to have given, provisions of the criminal law important in the administration of justice were not applied in his case. I am satisfied that this has resulted in a miscarriage of justice, and that the applicant's appeal against his conviction of murder should succeed on the first ground.

[58] The second ground of appeal raised by Mr Carter must fail. But is necessary to consider the second particular of the appellant's first ground, which complains of counsel's failure to raise the issue of causation before the jury.

Causation

[59] The learned trial judge directed the jury that Mr Carter would have caused the death of Gail Marke, if an action of his namely the injection of the heroin contributed substantially or significantly to her death. With respect, that direction appears entirely in accordance with the decision of the High Court in *Royall v R* (1991) 172 CLR 378. What the appellant argues is that his counsel had succeeded in adducing in cross examination evidence which would have entitled the jury to have doubt about that finding, but that his counsel had abandoned an available argument about causation based on that cross examination.

[60] The evidence led by the prosecution was that the toxicological reports on Ms Marke revealed the presence of a number of drugs in her body after her death. These included morphine, at least three benzodiazepines, and codeine. Heroin is a diacetylmorphine which is very rapidly broken down in the body to mono-acetyl morphine by the removal of one of those acetyl groups, and then the removal of the second acetyl group produces morphine remaining in the body. Morphine itself is very rapidly broken down into the product of morphine called glucuronides. In

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[10] See *R v Paddon* [1998] 2 Qd R 387 at 397 at par 54 of the judgment of Chesterman J (for the Court).

reports of heroin overdose, all cases have morphine glucuronides present in their blood, so the glucuronides are produced in minutes.[11] The principal effect of a heroin overdose is the depression of the respiratory system, "so the sensor in your brain that tells one to breathe is blocked. It depresses the respiratory centre and you stop breathing" (Record page 60).

[61] The "morphine products" in Ms Marke's blood were described by Dr Ian Pillans, the Director of Clinical Pharmacology at the PA Hospital, as being at the upper end of the therapeutic range, and consistent with a fatal dose, dependent upon the patient's level of tolerance. (There was other evidence, including that in Mr Carter's confession, to the effect that Ms Marke had some experience in using heroin). Dr Pillans' evidence was that one of at least three benzodiazepines in Ms Marke's blood was nordiazepam, and that the level of diazepam (a breakdown product of nordiazepam) in Ms Marke's blood was also at the upper end of the therapeutic range. Dr Pillans considered that this would be consistent with what he called generous recent doses of diazepam. Those benzodiazepines are primarily used as sedatives, and their relevance to the case was that those drugs also were central nervous system depressants.[12]

[62] Another drug found was promethazine, a major tranquilliser which is also a central nervous system depressant; and likewise codeine was present in the blood in high concentration. Codeine is a opioid analgesic and about 10% of codeine is converted to morphine. It is that resultant morphine that is then responsible for the analgesic effect of codeine.

[63] Dr Pillans' evidence in chief was that there were a number of drugs which Ms Marke had consumed which were depressing her respiratory system. An intravenous injection of heroin on top of that would produce the maximum depressant effect on the central nervous system and the respiratory centre, as opposed to giving it slowly, and:

> "It would appear that has tipped the balance and given the setting of all these respiratory depressants the addition of one may be enough to tip the balance and stop breathing".[13]

[64] He considered that since the description of the appellant (apparently in his confessional statement) was that the deceased had been functioning reasonably well, the other substances alone without the morphine would not have caused her death. "In another patient with those sort of levels it is possible but in the setting that we have here I would say unlikely". He added that he did think that the morphine "certainly could have been a substantial cause of her death".

[65] The prosecution had perhaps hoped for something a little stronger. In cross examination counsel elicited the following:

> "So it's fair to say that in light of the fact that these other central nervous system drugs that I have highlighted would have been ingested within that 24 hour period that they would have been ingested prior to the shot of heroin? Yes.

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11 Evidence of Dr Pillans, at R. 83.
12 Evidence of Dr Pillans, R 84, 85.
13 Ibid, R 87.

> And there can be some doubt that the dose of heroin alone would have substantially caused Gail Marke's death given that? Do you agree with that? Yes."

And a little later:

> "And, of course, you have already agreed with me that in the absence of that or if one didn't know that she had taken that amount of drugs, the injection intravenously of heroin, it's possible that it will not have substantially caused her death; that's right isn't it? Correct".

[66] The prosecution attempted to remedy the position in re-examination. The answer was extracted that in the Doctor's judgment from the sequence of events, and the fact that Ms Marke rapidly passed out, that the administration of an injection of heroin "could have been" a substantial cause of her death. When asked by the learned judge to elucidate, the Doctor explained:

> "I guess I can say that it is likely to have been a contributory cause. That's probably as far as I can go".

He added that he thought it was unlikely that the morphine alone could have killed her.

[67] That evidence from Doctor Pillans of the existence of other drugs consumed by the deceased adversely affecting her central nervous system, his opinion that the heroin alone was unlikely to have killed her, and his further limited opinion that the heroin was likely to have been a contributory cause to her death, would have allowed Mr Carter's counsel the opportunity to argue to the jury that they ought not be satisfied that the administration of heroin had substantially or significantly contributed to that death. However, counsel saw it differently and advised the court that causation was not going to be an issue, and would not be placed before the jury by the defence (Record page 100). The jury did have before them the description of what the appellant said were Ms Marke's last words, and the apparent effect, visible to Mr Carter, of the administration of that heroin. They also heard his plea of guilty to aiding both suicides, although those pleas do not establish necessarily that his aiding was a substantial or significant cause of either death. It was certainly open to the jury to find that the addition of that heroin to the cocktail of drugs in her body was enough to tip the balance and cause her to stop breathing, and that the administration of that heroin was a substantial or significant cause of her death. I do not consider that the forensic choice of his counsel in conceding that finding deprived Mr Carter of any significant possibility of an acquittal.

[68] The two further complaints were that counsel had elicited inadmissible and highly prejudicial opinion evidence from the witness Mallissa Northen, and the fact of previous dealings between Detective Sergeant Kruger and the appellant. As to the first the evidence of Ms Northen was that she had at one stage been in a de facto relationship with the deceased Patrick Smyth, and had been aware of his wish to end his own life. She was also aware that Mr Smyth had spoken about that with Mr Carter, and her evidence was that she had warned Mr Carter that it would be morally and legally wrong for him to help Patrick Smyth die. Her evidence was that:

> "Stephen Carter sat there saying that no he could not do that, it was murder. You know, they were the words he said to me across my kitchen table".

[69] Mr Carter's barrister cross examined Ms Northen, and while the answers given in cross examination show considerable hostility to Mr Carter, so did those in evidence in chief. It was in evidence in chief that the jury learnt that Mr Carter himself had described as murder what he would later do with Ms Marke. The cross examination did confirm some of the facts described in the record of interview, and particularly that the appellant and Mr Smyth had taken heroin together in company, on occasions when Mr Smyth had overdosed and had been assisted by the appellant. I think it is difficult to judge whether that evidence helped the appellant's case or hindered it.

[70] With respect to Detective Kruger, what was adduced in cross examination was that he had dealings with the appellant before, and knew him to be a habitual drug user. The latter fact had been revealed already in the record of interview, and I doubt if it caused the jury any surprise to learn that this self confessed heroin user was known to those police. I do not think that part of the conduct of the trial by counsel either demonstrates flagrant incompetence, or deprived the appellant of a significant possibility of acquittal.

[71] It follows that I am satisfied that the orders of the court should be:

- The appeal against conviction for murder be allowed, the conviction quashed and a retrial ordered.
- The appellant remanded in custody until further order.

[72] **MACKENZIE J:** The appellant was convicted of the murder of Gail Marke. The Crown case was that Marke, who was a heroin addict, had been injected with heroin by the appellant because he believed she wanted to die. At the same time, he inserted a syringe needle into the arm of another heroin addict, Patrick Thomas Smyth, and watched as Smyth injected the heroin into his arm. Both of the persons who had injections of heroin died soon afterwards, Smyth almost immediately, and Marke after exclaiming "what a rush" and lapsing into unconsciousness for some time before dying.

[73] The appellant pleaded guilty to having unlawfully supplied heroin to Smyth and of having aided him in killing himself. He also pleaded guilty to aiding Marke in killing herself but pleaded not guilty to murder. However, he was convicted of murder and the appeal is against that conviction. The grounds of appeal argued were the following:

1. The conduct of the trial by counsel for the appellant was flagrantly incompetent, depriving the appellant of a significant possibility of acquittal and thereby resulting in a miscarriage of justice. Particulars of the incompetent conduct are as follows:

    (a) The failure of counsel to seek the exclusion of the police interview before it was admitted into evidence;
    (b) The failure of counsel to raise the issue of causation as a matter to be considered by the jury;
    (c) Counsel eliciting inadmissible but highly prejudicial opinion evidence from the witness Mallissa Northern;

(d) Counsel eliciting from Detective Senior Constable Kruger that he had previous dealings with the appellant.

2. The learned trial judge erred in failing to determine the question of voluntariness of the confession once that was raised during the cross-examination of Detective Senior Constable Kruger.

[74] For reasons given by Jerrard JA, I agree that grounds 1(c) and (d) have no substance. However, it is necessary to give detailed consideration to the other grounds. For the purpose of the hearing, affidavits from defence counsel and the defence solicitor at trial and from the appellant were read and evidence was heard from the first two deponents.

[75] The appellant had participated in a record of interview in which admissions were made. However, it was the appellant's case that he had injected himself with a considerable amount of heroin in the early hours of the morning before the police arrived at his premises and was still affected by it when interviewed. He also wished to raise the issue of voluntariness based on an allegation that when he denied having seen Smyth for some time prior to his death, Detective Sergeant James had threatened to take him back to his home, throw a bag of heroin on the table and charge him with trafficking. He claimed that this had been done in the presence of Detective Kruger. He deposes that he took the threat seriously and participated in the record of interview in which admissions sufficient to establish a case of murder were made. The defence solicitor deposes that the appellant had informed him of the matters bearing upon voluntariness in a timely way, shortly after his arrest. Detective James was cross-examined at committal proceedings concerning the appellant's condition prior to and during the record of interview with a view to having the interview excluded from evidence.

[76] The proposed challenge to admissibility was raised in a bail application in the Supreme Court and the appellant was granted bail. Later, a s 592A hearing was listed for the purpose of seeking exclusion of the record of interview on the grounds that it was induced by threats and duress and was made by the appellant at a time when he was under the effects of heroin. However, defence counsel deposes that shortly before the hearing date, he was informed that James had taken leave and would be unavailable to give evidence either at a pre-trial hearing or at trial.

[77] As the trial date approached, the proposed challenge to the admissibility of the confession was further discussed and the appellant was given advice about what was necessary. According to defence counsel, he explained to the appellant that should the judge determine that the record of interview was voluntarily made, the issue of voluntariness could not be then raised at trial. He says that the applicant expressed concern that if it was determined that the interview was inadmissible, the issue of coercion by James could no longer be raised at trial. Counsel said that he confirmed with the applicant that that was the case. Counsel also informed the applicant that the issue of voluntariness of the record of interview could be challenged at any time during the course of trial once raised by the defence, even though the record of interview had already been tendered and played to the jury. Advice was also given that there may be potential advantage in raising voluntariness at the trial with Detective Kruger and requesting the trial judge to rule on the issue.

[78] The trial commenced without any application to exclude the record of interview being made. The record of interview was admitted in evidence and played to the jury. Detective Kruger was asked whether James had threatened to plant heroin in his premises and charge him with supplying a dangerous drug if he did not co-operate. Detective Kruger denied that it had happened. Detective Kruger also said that James was on extended sick leave. No application to exclude the record of interview was made at that time. Then, just before the Crown formally closed its case, after discussion of other matters in the absence of the jury, including causation, the learned trial judge asked defence counsel if he proposed to go into evidence. He asked for the opportunity to confer with his client but before the court adjourned for that purpose, he said that he wished to 'flag the relevance of the record of interview' and to calling his client to give evidence in relation to the admissibility of it and whether it ought to go to the jury. He referred to cross-examination of Detective Kruger in relation to James' alleged statement.

[79] The learned trial judge, not surprisingly, pointed out that the record of interview had been admitted without objection. Defence counsel responded:

> 'Well, simply because the record of interview has been entered into evidence without an objection does not mean that the record of interview must go to the jury because there was no objection made to that or, indeed, a *voir dire* as to the relevance of the record of interview.'

His Honour then inquired whether he was foreshadowing or applying for a determination that the video recording should not go into the jury room with the other exhibits. Defence counsel responded:

> 'I'm submitting or flagging to your Honour that the record of interview should be made inadmissible and not allowed to go to the jury.'

[80] The learned trial judge again pointed out that it had been received without objection and said that the moment to object to its reception was when the tender was offered but there had been no objection and it had been played to the jury. Defence counsel responded:

> 'Well, your Honour, I would submit respectfully that despite the fact that were was not an objection to the record of interview being tendered and despite the fact that there was no *voir dire* to that effect that your Honour could still exercise your discretion to exclude it.'

His Honour responded:

> 'That would be a mighty peculiar thing to do, if a judge has ever done it before.'

He invited defence counsel to support his proposition with authority and suggested that rather than foreshadow anything about it he might decide whether he actually wished to apply to have the evidence excluded. Defence counsel said that he wished to do that and referred to *R v Walbank* (1996) 1 Qd R 78.

[81] His Honour again referred to the fact that no objection had been made at the time of tender and pointed out the inconvenience of the course proposed. Defence counsel maintained that *Walbank* indicated that it was not necessary for him to object when it had been tendered for tactical reasons of the defence. (It may also be observed

that *MacPherson v The Queen* (1981) 147 CLR 512 requires that once a real issue of voluntariness arises, it should be determined on the *voir dire*) The learned trial judge inquired as to the ground upon which it was suggested that it was inadmissible and was told that it was because of the threat made by Detective James. His Honour pointed out that there was not evidence of any such threat. Defence counsel once again referred to 'flagging it'.

[82] To that point it appears that defence counsel may have been suggesting that if the appellant elected to give evidence, the evidence would then be before his Honour. However, his Honour pointed out that it was not a matter of foreshadowing that an objection might be made. There was no evidence before him that the confession had been procured by threats and that the application was therefore refused. After an adjournment of about fifteen minutes to get instructions, the defence elected not to call evidence at all.

[83] It is in that factual matrix that the question of questions raised by the grounds of appeal must be considered. In *R v Birks* (1990) 19 NSWLR 677, Gleeson CJ emphasised that counsel have a wide discretion as to the manner in which proceedings are conducted. Often difficult problems of judgment, including judgment as to tactics, are involved in deciding how the case should be conducted. Generally a party is bound by the conduct of counsel and its consequences.

[84] He went on to state that when it is alleged that counsel has been incompetent or acted contrary to instructions, appellate courts are extremely cautious about intervening. Neither of those circumstances, nor the taking of a decision which with hindsight appears to have been mistaken or unwise will, of themselves, attract intervention. More than that, such as a feeling that the appellant might have suffered some injustice as a result of flagrant incompetent advocacy by his advocate must exist in the court's mind before it will intervene.

[85] In *R v Miletic* [1997] 1 VR 593 the Victorian Court of Appeal said that the mere fact that a decision by counsel in the conduct of the trial might appear in retrospect to have been made ill-advisedly or unwisely would not lead an appellate court to quash a conviction. But an appellate court would intervene if there had been such a defect of judgment or neglect of duty on the part of counsel that the court is left with a view that justice has miscarried. Usually there must be something akin to flagrant incompetence of counsel before it will be moved to intervene.

[86] In *R v Green* [1997] 1 Qd R 584, 587 Fitzgerald P and Thomas J said that generally, a new trial will not be appropriate unless incompetence or improper conduct on the part of counsel deprived an accused of a significant possibility of acquittal. Other than in wholly exceptional circumstances the test will not be satisfied by reference to decisions made in the conduct of a trial which might have involved advantages or disadvantages for the accused; nor will it be satisfied by the fact that a guilty verdict or other subsequent event suggests that the impugned decision or advice did not produce the hoped-for result.

[87] In *R v Paddon* [1999] 2 Qd R 387, which has frequently been applied in subsequent cases, Chesterman J pointed out that a decision capable of providing some forensic advantage to the accused was not a basis for intervention in the particular case. Weighing the benefit against the detriment was a matter for professional judgment of defence counsel even though the exercise of judgment may have been made

differently by most counsel and the way in which it had been exercised was open to criticism. Flagrant incompetence in the sense of obvious shocking ineptitude is not demonstrated by an error of judgment in the conduct of the defence. There must at least be something in the conduct of the defence which could never be thought by competent counsel to be of any possible advantage to the accused. In the present case the last mentioned concept is of particular relevance.

[88] Reference may also be made to a relatively early example of a verdict being set aside, *R v Lane* [1965] QWN 33. Counsel for the defence elicited evidence that the accused had a criminal history for false pretences even though the conduct of the trial was such that the Crown could not have introduced evidence of his convictions in cross-examination. The law had been amended in that regard some months previously. In allowing the appeal the Full Court observed as follows:

> "There was no tactical reason that justified the evidence being led. If the Crown Prosecutor had been entitled to cross-examine the appellant as to his previous convictions, it would have been understandable enough if the appellant's counsel had got in first and brought out the evidence, but … that was not the case. The only conclusion that we are able to reach is that the evidence was brought out by reason of some mistake on the part of counsel."

[89] The fundamental difficulty with maintaining the conviction in the present case is that the only conclusion open is that because of the circumstances which occurred at the conclusion of the Crown case, defence counsel decided not to pursue the issue of admissibility of the record of interview. The only reasonable conclusion is that the decision not to call evidence was taken because defence counsel believed that the learned trial judge would not entertain an application to have the record of interview excluded. However, the reference to dismissing the application must be seen in the context that it occurred. The learned trial judge had been at pains to point out that there was not evidence that a threat had been made, having regard to the denial in the evidence of Detective Kruger that any such threat had been made. The learned trial judge was pointing out that it would be necessary for there to be an application made and, in practical terms, evidence contradicting the denial of Detective Kruger. (Once the matter was the subject of conflicting evidence the onus would have been on the Crown to establish positively, on the balance of probabilities, that the confession was voluntary).

[90] The fundamental misunderstanding of the situation by defence counsel in light of what his Honour had said, in my view takes the case beyond one where there was a mere error of judgment or one where what had been done had been done for tactical reasons. It is, in my view, in the category referred to in *Paddon* of something in the conduct of the defence which could never be thought by competent counsel to be of any possible advantage to the accused, having regard to the fundamental nature of the issue which the appellant wished to raise. By analogy with *R v Lane*, the failure to pursue the issue was the result of a mistake on the part of counsel as to the effect of the learned trial judge's ruling, which affected the subsequent judgment that evidence would not be called and the issue abandoned. For that reason alone the appellant is entitled to have the conviction set aside.

[91] With regard to the ground relating to causation there was evidence from Dr Pillans, Director of Clinical Pharmacology at the Princess Alexandra Hospital. The evidence is analysed in detail in the reasons of Jerrard JA. It is my view, having

read the evidence, that the fact that other drugs, principally of the benzodiazepine family, were also in the deceased woman's blood, did not, in the circumstances in which the death occurred, oblige the jury to find that causation could not be established beyond reasonable doubt. It is my view that counsel may well have been able to make some submissions to the jury legitimately on the issue but that the failure to do so was not likely to have deprived the appellant of a reasonable chance of acquittal. That would be sufficient to ensure that a new trial rather than an acquittal should be ordered. It may also be observed that the issue as it stood at the end of evidence revolved around expressions used by Dr Pillans as to the extent to which the consumption of heroin in conjunction with the other drugs was a contributing factor to the deceased woman's death. Since the submissions that might have been made on the subject to the jury depend on the precise form of the evidence in that trial and there is no guarantee that it will necessarily be in precisely the same form at the retrial, further analysis of it is essentially academic.

[92] In my conclusion, the conviction should be set aside and a new trial ordered. The appellant should be remanded in custody.