SUPREME COURT OF QUEENSLAND

CITATION:	*R v ND* [2003] QCA 505
PARTIES:	**R** **v** **ND** (appellant)
FILE NO/S:	CA No 77 of 2003 DC No 403 of 2002
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction and Sentence
ORIGINATING COURT:	District Court at Ipswich
DELIVERED ON:	14 November 2003
DELIVERED AT:	Brisbane
HEARING DATE:	10 October 2003
JUDGES:	McPherson JA, Holmes and McMurdo JJ Separate reasons for judgment of each member of the Court, McPherson JA and Holmes J concurring as to the orders made, reasons of McMurdo J dissenting
ORDERS:	**1. Appeal allowed** **2. Conviction set aside** **3. Retrial ordered** **4. Appellant remanded in custody until further or other order of a court with jurisdiction to grant him bail**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS – UNREASONABLE OR INSUPPORTABLE VERDICT – OTHER CASES – where appellant submitted that Crown opening adverted to evidence that did not emerge – where appellant submitted that complainant's evidence was inconsistent with relationship evidence opened – where appellant submitted that complainant's evidence rendered verdict unsafe and unsatisfactory – whether it was open on the evidence for the jury to reach a guilty verdict CRIMINAL LAW – APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS – CONDUCT OF LEGAL PRACTITIONERS – where appellant did not give evidence at trial – whether appellant was not adequately advised of the value of giving evidence – where error in the basis of advice – whether verdict should be set aside for

miscarriage of justice

R v Green [1997] 1 Qd R 584, considered
Re Knowles (1984) VR 751, considered
R v Kyriacou (2000) 210 LSJS 296, applied
R v McConnell [2000] QCA 463; CA No 14 of 2000, 14 November 2000, considered
R v Scott (1996) 137 ALR 347, considered
R v Szabo (2001) 2 Qd R 214, considered
Sankar v State of Trinidad and Tobago [1995] 1 WLR 194, considered
TKWJ v R (2002) 76 ALJR 1579, considered

COUNSEL: P J Callaghan for the appellant
S G Bain for the respondent

SOLICITORS: Roberston O'Gorman for the appellant
Director of Public Prosecutions (Queensland) for the respondent

[1] **McPHERSON JA:** I agree with the reasons of Holmes J, which I have had the advantage of reading. The appeal should be allowed; the conviction and verdict should be set aside; and there should be an order for a new trial. It is, of course, a matter for the Crown to determine in the light of all the available evidence, including that now contained in the exhibit to the affidavit of the appellant's solicitor provided after the appeal was heard, whether or not the prosecution continues. In saying that, I should not be taken as implying that the contents of that exhibit necessarily furnish a reason for not proceeding. The contents, timing and circumstances of the most recent statement from the complainant, which is exhibited to the affidavit, may be susceptible of a different interpretation.

[2] On the issue considered in paragraph [29] of the reasons of Holmes J, I would add only that cross-examination of the accused at the trial about other occasions on which he had physically beaten the complainant was, on the face of it, precluded by s 15(2) of the *Evidence Act* 1977.

[3] For reasons of the sort explained in *R v Green* [1997] 1 Qd R 584, 591, it is not often that the Court will be in a position to analyse the reasons why counsel advised the accused not to give evidence at the trial, or to find that they were based on a mistaken premise. Here, however, the candour of the appellant's legal advisers has enabled us to reach a conclusion about them. The decision in *R v Green* must now be read in the light of *R v Paddon* [1999] 2 Qd R 387, 398, and the authorities referred to there. Nevertheless, the circumstances revealed in *R v Green* [1997] 1 QdR 584, 592, show how imprudent it generally is for the Court to engage in "second-guessing" counsel's advice. Here, however, we know precisely why the appellant was advised not to testify at his trial, and we are able to say that the reason for that advice was in law erroneous. I agree with Holmes J in thinking that, in the circumstances of this case, that involved a miscarriage of justice with the meaning of s 668E(1) of the Criminal Code.

[4] **HOLMES J:** The appellant appeals against his conviction on two counts of rape and two counts of incest on the grounds, firstly, that the conviction is unsafe and

unsatisfactory; and, secondly, that inadequate legal advice which led to his not giving evidence has produced a miscarriage of justice.

The relationship evidence as opened and led

[5] Counsel for the appellant, Mr Callaghan, argued that there were a number of factors leading to an inevitable conclusion that the verdicts were unsafe. First, he said, the Crown prosecutor in his opening address adverted to evidence which did not in fact emerge. The complainant, S, who was thirteen at the time of the trial, was the daughter of the appellant's de facto wife. She said that the appellant had been a part of the household since she was about five. The Crown prosecutor described an incident, not the subject of any of the counts on the indictment, and occurring at an earlier, unidentified time. In this account, the appellant asked the complainant to "do something special for him", and indicated towards his groin. She rebuffed him. The prosecutor went on to say, "She'll tell you though that it progressed to the point that on occasions she was required to suck his penis or fellate him. Again, she'll tell you there were a couple of occasions that that occurred but there's two occasions that she can specifically recall the events that surrounded what occurred."

[6] S's evidence was that on one occasion when she was eight or nine, the appellant asked her to do him a special favour: "Just put your hand down there". She refused; nothing else happened on that occasion. She did not speak of any other sexual encounter between this incident and the occurrence of the offences charged. Mr Callaghan argued that there was an inconsistency between the complainant's evidence, which was limited to this incident, and the relationship evidence which had been opened.

S's account of the incidents underlying counts 1-3

[7] S said that in September 2001, when she was eleven, she and her three younger sisters were at home with the appellant. His father, AN, might also have been present. The appellant instructed her to go into the room of her older brother, Brian, who was not living with the family at that stage. Once they were in the room the appellant told her she could have a belting or she could suck his "doodle" (by which she meant his penis). He put his penis into her mouth and held her head so she could not move away. At that stage she was sitting on a bed. He then moved her crossways across the bed, sat astride her hips, and re-placed his penis in her mouth. Then he told her to roll over on her hands and knees and anally penetrated her, moving backwards and forwards. He desisted and went out of the room, but then returned and again sodomised her. These allegations gave rise to the first three counts on the indictment: one of rape and two of incest.

[8] During these events, S said, she screamed and called out for help. Her little sisters knocked on the door and the appellant told them to go away. She did not tell anyone, because the appellant said that if she did so she would get the belting of her life. Mr Callaghan said of the events as described by S that they were implausible, given the presence of others in the house, and unsupported. It might have been supposed that one at least of the younger sisters, who was nine, would have been able to give evidence. No explanation was offered as to why she had not been called as a witness.

S's account of the incident underlying count 4

[9] The events giving rise to the fourth count on the indictment, also of rape, happened, S said in evidence in chief, a week or two before her 12th birthday. The appellant, who had been working as a taxi driver, woke her and asked her to open the front gate. After she did so, he reversed the taxi out, and then instructed her to get in, because he was about to take it back to the depot where it was kept. They drove down a road named Paradise Road to a bushy area where the appellant stopped the car. He told her to get in the back. He left the vehicle to urinate and then came back, took his trousers down, and made her suck his penis. Again she was threatened with a belting if she told anyone. They returned home.

S's timing of events

[10] Later that morning, S said, her baby sister suffered serious burns when she pulled over herself a cup of hot water that S was using to make coffee. It was common ground that the baby was admitted to hospital for treatment of the burns on 2 November 2001, which was a Friday. The children were sent for the weekend to a family friend, Ms G, while S's mother and the appellant spent time at the hospital with the child. S said that it was on that weekend she had been meant to have a 12th birthday party. Her birthday was on 31 October. In cross examination, however, she said that she thought that the incident in the taxi had occurred a week or two before her birthday. It was argued for the appellant that if the incident had indeed happened on the day her sister was burned, her confusion was inexplicable, because of the memorable nature of the two events.

The retraction

[11] S gave evidence that she had told Ms G about the appellant's anal penetration of her and being made to perform fellatio on him. Ms G confirmed that she had looked after S and her sisters while the baby was in hospital, and that the complainant had reported the incidents of oral sex and anal penetration to her. It seems that Ms G then contacted S's older brother Brian, and S repeated the allegations to him. Brian then took S to her mother, who was at the hospital with the baby, and the allegations were conveyed to her. S's evidence was that her mother expressed disbelief, and said she wanted to send her to a girl's home; so, to appease her, she said she had invented the story of abuse. According to Ms G, on the following day the complainant said this to her: "Oh, the things I told you aren't true. I was only trying to get back at Dad, because I thought that he was pushing me away from the family." S's brother Brian was present for that conversation.

[12] The complainant agreed that the latter conversation with Ms G occurred. She said that she had made the retraction because her mother had told her to, and because the appellant was present while she was talking to Ms G. That contrasted with Ms G's evidence, that only S's brother Brian was present when this happened. Mr Callaghan relied on the retraction, coupled with the inconsistency between S's claim that the appellant was present when she made it and Ms G's evidence, as a further basis for a conclusion that the verdicts were unsafe and unsatisfactory.

The pornographic video

[13] The final matter relied on by the appellant on this ground was S's admission that she had seen a pornographic video she had found in her brother's room. Its contents are best summarised in the questions and answers in her evidence under cross-examination:

> "You told me that what it had on that video was men putting their penises into ladies' bottoms, wasn't there [sic] – Yes.
>
> There was men putting their penises into ladies' mouths, wasn't there? – Yes."

As to when S saw the video, she said in re-examination it was "after the time in the taxi but I think it was a day before the one in the bedroom"; which does not seem correct, because the incidents were, on her earlier evidence, in an order the reverse of that.

[14] All of these matters, taken with S's motive to complain, in the form of her perception of unfair treatment, physical abuse and neglect by the appellant; her agreement that she had previously asserted that she had been improperly touched by an older brother (although the truth or otherwise of that assertion was not canvassed); and the lack of corroboration, should, Mr Callaghan contended, have led the jury to a reasonable doubt.

Were the verdicts unsafe and unsatisfactory?

[15] I do not think that the matters identified for the appellant on this ground are, either individually or taken together, of great moment. S's evidence does not appear to have departed very substantially from the opening of it; indeed, the prosecutor's language in his opening being rather ambiguous, any discrepancy is hard to gauge. As the evidence emerged, there seems little point in the account of the appellant asking S to touch his groin. As an isolated incident a matter of years before the events with which the indictment was concerned, it could hardly be said to establish any context for the offences charged. But it was a minor occurrence in the scheme of things, and I doubt that it had any great impact on the jury's considerations.

[16] There does not seem to me any overwhelming improbability in S's account of the first set of sexual assaults occurring while others were in the house. The appellant was in charge of the household, and was unlikely to be challenged if he took S to another room, apparently for physical punishment. It is true that it is unknown precisely what evidence the nine-year-old sister might have been able to give as to the presence of S and the appellant in the room, but it is unlikely to have been decisive. On the Crown version she and the other children had done no more than knock on the door and been told to go away, and on the defence version the incident had not happened. If the Crown version were right, it is difficult to see why the child should have had any recall of the incident, since physical punishment of the complainant was a regular event.

[17] The confusion as to the precise date of the taxi incident – that is, whether it occurred a week or two before S's 12th birthday, or on the day that her baby sister was burned, i.e. two days after her birthday – is explicable in terms of S's youth, and the fact the events had occurred, not in the preceding calendar year, but the one before that. Mr Callaghan is no doubt right in saying that the events of her birthday and of the child's burning would loom large in S's memory; but it does not follow that her

timing of the incident relative to them would necessarily be correct. S was not adamant about the timing of the incidents; and it would not be surprising if the lapse of 18 months had a compressing effect in her memory, so that she believed all events to have occurred within the compass of that couple of days.

[18] S offered an explanation for her retraction of her complaint, in her desire to pacify her mother. Her apparently erroneous account that the appellant was present for the retraction to Ms G was not necessarily a lie, as opposed to mistake. It is possible, on the evidence, that he had been there shortly before the retraction. S's evidence varied slightly; having said that the appellant was standing there when she told Ms G her account was untrue, she went on to say, "before [ND, the appellant] – after [ND] left I told her, I told her as [ND] was leaving". That was not clarified. Ms G was cross-examined purely as to who was present when the conversation took place, and was not asked whether the appellant had been there at all around that time.

[19] The watching of the pornographic video was of some significance, but was something of which the jury was well aware and could take into account in considering the complainant's evidence. The fact that S had complained of molestation by an older brother is neutral, in the absence of any evidence that the complaint was false.

[20] It was, in my view, open to the jury to be satisfied of the appellant's guilt beyond reasonable doubt on the evidence before it.

The evidence which might have been called for the defence

[21] The second ground of appeal concerns whether in fact more evidence should have been before the jury, in the form of a positive defence case. The appellant's written instructions contained a denial of each of the complainant's allegations. It is common ground that he was advised against giving or calling evidence, and, in conformity with that advice, chose not to do either. It was argued here that it was reasonable for him to be guided by his legal advisors on the point; but that a sworn denial would have been a powerful means of rebutting the complainant's evidence, or at least causing the jury to have a reasonable doubt about it.

[22] In addition to the appellant's own evidence, his father could have been called for the defence. AN has provided an affidavit in which he says that between August and 10 October 2001 (a period which would seem to cover the first of the sexual assaults charged) the bedroom in which the complainant said she was sexually assaulted was occupied by her brother Brian, and another young man named David. David was unemployed and used to remain sleeping in the room until mid to late afternoon. The bedroom did not have a lock. In the period between August and October 2001, AN deposes, there was an incident when he was driving around delivering art union tickets with the assistance of the complainant. He told her that he intended to drive to a bushy area on Paradise Road in order to urinate. He did then drive to such an area, got out of the car to urinate. although, as he later discovered, he was mistaken about the name of the road. It is worth noting in this context that there was some reason to question the complainant's evidence about Paradise Road; in describing the event there in evidence in chief, she had said "we were going down Paradise Road as usual, we used to go down sometimes or we used to go different ways near Coopers Plains."; but in cross-examination she said "I never been down Paradise Road except for that day."

The advice the appellant received from his legal representatives

[23] There is no significant dispute about the advice that was given to the appellant by his legal representatives, chiefly because the latter very properly and completely recorded the advice given. Mr Law, a legal officer employed at Legal Aid Queensland, has provided an affidavit. In it, he explains that counsel who appeared for the appellant at trial had also appeared at committal, and had formed a view that the complainant presented as an unreliable witness. Counsel and Mr Law concluded, for a number of reasons, that it was not in the appellant's interest to give evidence, and advised him accordingly. Their reasons, summarised, were as follows

- The appellant in conference looked a poor prospective witness, displaying, Mr Law says, "a flippant attitude, poor disposition and [he] was prone to say inappropriate things."
- The appellant himself expressed a considerable reluctance to give evidence, saying, according to the conference notes, "The situation would have to be desperate to give evidence, I may get angry or I may get tongue-tied."
- The excessive physical discipline alleged by S, and her possible fear of the repercussions for being the cause of her baby sister's burns provided a motive for her to fabricate allegations of sexual misconduct. There was accordingly no point in disputing her allegations of abuse, and indeed the appellant agreed, mixing his metaphors, that she had "copped the raw end of the stick".
- There was a risk of cross-examination on the question of physical abuse which would highlight S's allegations in this respect, to the detriment of the appellant.
- There was a considerable advantage in retaining the right of last address.

All of these matters were discussed with the appellant, and he was advised that the trial should be run by putting the Crown to proof. It was then left to him to choose whether to give evidence, although no decision was made at that point.

[24] The appellant's written instructions as recorded by Mr Law contain this passage: "I have also had a conversation with my legal advisers about giving evidence. I have been informed that giving they [sic] resulting the prosecutor being able to cross-examine me. One of the matters that he may cross-examine me about is the extent of the physical abuse of [S]. My legal advisers have informed me that they do not believe that there is any need for to give evidence as the motive for her wanting to leave the household will be illicited [sic] through the evidence of [S]. They are of the opinion that my giving evidence may in fact harm my case as there is a chance that I will be portrayed as an abusive and neglectful parent to a greater extent than the claims made in [S]'s statement."

[25] Mr Law agreed with the appellant's assertion in his affidavit that he was not advised of the importance of making a sworn denial before the jury, or of any possible relevance of his not giving evidence at trial to determination of an appeal against conviction. He also agreed that the appellant was not told of any valid basis for objection to cross-examination on the physical disciplining of the complainant; he said that he and counsel held the opinion that any objection would be unsuccessful.

[26] At the close of the prosecution case, there was an adjournment to enable the appellant to confer with his legal representatives. He deposes that he asked at that stage whether anything in the prosecution case had changed the advice given earlier, and was told it had not. Mr Law did not challenge the advice attributed by the appellant to him: that he did not think it worthwhile for the appellant or any other witness to give evidence. In accordance with the advice given earlier, the appellant signed instructions that he did not wish to give or call evidence.

The advice as to the risk of cross-examination on physical abuse

[27] Mr Callaghan submitted that there were two clear and significant errors in the advice given. The first was in the advice that the appellant was liable to be cross-examined to his detriment about the extent to which he had physically disciplined the complainant, and to be portrayed as an abusive and neglectful parent. That advice, he said, was plainly wrong. The complainant was not challenged on her evidence as to having received beltings and been the subject of neglect. There was no reason therefore for the appellant to say anything on the topic. It could not have been relevant or permissible to cross-examine the appellant about any violence or neglect on his part.

[28] Ms Bain, for the Crown, pointed out that the issue of physical discipline might have been raised in cross-examination in this way: the appellant presumably would deny having made the specific threats alleged by the complainant that she would receive a belting if she revealed the sexual abuse. It could then have been permissible for the prosecutor to cross-examine him, in order to establish that a threat of physical punishment was real and was in accordance with a practice of threatening physical punishment for misbehaviour.

[29] I do not think that is so. The evidence as to the threats made to the complainant was admissible in each case as part of the transaction, part of the res gestae. It was open, therefore, to cross-examine the appellant about whether the threats were made. Assuming that he had answered in the negative, it would not have been permissible to cross-examine about other occasions on which he had either threatened to give the complainant a belting, or had given her a belting. To do so could only have been an attempt at increasing the probability that the threats were made by showing a disposition on the part of the appellant to carry out such acts, in circumstances not rising to the level of similar facts. That was not, in my view, a proper basis for cross-examination; nor could the Crown have led such evidence as part of its case. Such cross-examination could properly have been objected to; and it was certainly not the case that the appellant would, had he given evidence, have been open to cross-examination at large on his physical mistreatment or neglect of the complainant. The advice given on this point was not merely an omission; it was positively incorrect.

The failure to advise as to the value of evidence from the defence

[30] The second matter of error relied on by Mr Callaghan was the failure to tell the appellant of the importance of a sworn denial. The obvious disadvantage to the appellant in not giving evidence was that there was then no sworn evidence to different effect from the complainant's. Ms Bain said that the appellant's version emerged to some extent from what was put to the complainant in cross examination, but as she acknowledged, there can be no real comparison between the inference, open from counsel's questions, that instructions might be held, and evidence given

before the jury on oath and subject to cross-examination. And while accepting that the defence representatives had concerns as to how the appellant would conduct himself as a witness, this was not an obvious case in which there was some unanswerable problem that the appellant would have confronted in giving evidence; there was no question, for example, of earlier versions given by him which might be difficult to reconcile with his current evidence.

Miscarriage of justice

[31] Counsel has a wide discretion as to the way in which a trial is conducted, and the accused is bound by those tactical decisions.[1] There is authority to the effect that this Court will not intervene absent what has been described as "flagrant incompetence"[2] on the part of counsel. I do not think that the mistakes identified here deserve characterisation as flagrant incompetence; and, indeed, in all other respects the appellant was given appropriate explanations and proper representation. His trial was competently conducted; the cross-examination of the complainant, always a difficult task, was carried out with considerable skill. But in terms of s 668E of the *Criminal Code*, the inquiry must be, whether on any ground there was a miscarriage of justice; and a wider examination of authority confirms that whether flagrant incompetence can be established is not the ultimate issue[3]. Such a finding may assist in reaching the conclusion of miscarriage of justice[4], but it is not essential to it. This statement by Pincus JA in *R v McConnell*[5], in my respectful opinion, reflects the law in this regard:

> "A clear mistake made by counsel, although not capable of being, without hyperbole, described as demonstrating an 'extremely high level of incompetence' could possibly be of such significance that the verdict cannot stand."

Conversely, demonstrated incompetence will not necessarily produce a miscarriage of justice[6].

[32] There are a number of cases involving failure to call evidence in which courts have not found it necessary to characterise counsel's conduct in any particular way in concluding that a miscarriage has occurred. In *Re Knowles*, the Full Court of the Victorian Supreme Court had before it a petition for mercy, the petitioner having been convicted of the murder of his de facto wife. Evidence was put before the Court of the deceased's propensity to violence; the Full Court accepted that it would have been admissible at the trial. Some of that evidence had recently come to light, but some of it had been available at the time of trial. Counsel for the petitioner had taken the view that it was not admissible and had taken no steps to lead it. The Full Court regarded that as an error amounting to a vitiating factor; that is to say, vitiating any choice by the accused as to the course to be adopted at the trial. Thus, in the view of the court, evidence of fundamental importance to the petitioner's defence had not been called, producing a miscarriage of justice.

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

2 *R v Paddon* [1999] 2 Qd R 387.

3 *TKWJ v R* (2002) 212 C.L.R. 124 per Gaudron J at 134, (Gummow J agreeing at 157), per McHugh J. at 148-149, 156; *Re Knowles* [1984] VR 751 at 770; *R v Birks* (1990) 19 NSWLR 677; *R v Scott* (1996) 137 ALR 347 at 362; *Ignjatic* (1993) 68 A Crim R 333 at 337.

4 *TKWJ v R* (2002) 212 C.L.R. 124 at 149-150.

5 [2000] QCA 463 at para [2].

6 *R v Birks* at 685; *Ignjatic* at 336; *R v Kyriacou* (2000) 210 L.S.J.S. 296 at para. [28].

[33] In *R v Scott* [7], one of the grounds of appeal was miscarriage of justice arising out of a failure to lead evidence. The appellant was charged with obtaining credit and entering a partnership while an undischarged bankrupt, without disclosing the fact of her bankruptcy. Two witnesses could have given evidence that there had been discussion of her bankruptcy in the presence of the affected partner and creditor; but through a breakdown in communication, nothing was done to arrange their presence at the trial, and they were not called. The Court of Criminal Appeal regarded that evidence as "important evidence, because it was potentially persuasive, which counsel mistakenly regarded as not important."[8] The failure to call the evidence as to discussion of the appellant's bankruptcy in the presence of her business partner, taken together with a brief summing-up in which the trial judge failed to distinguish between the evidence on 14 separate counts, convinced the court that there was a miscarriage of justice: it was evidence which could have led the jury to have a reasonable doubt about the appellant's guilt.

[34] *Knowles* and *Scott* involved slightly different scenarios from the present case, because in those cases, once it was accepted that the evidence not called was admissible, there do not appear to have been competing considerations about whether it ought, as a matter of prudence, to be called. *R v Kyriacou*[9], a decision again of the Court of Criminal Appeal in South Australia, involved a set of circumstances closer to the present case. There the appellant had not given evidence because his counsel advised him that no comment could be made to the jury if he did not do so. In the event the trial judge gave a *Weissensteiner* direction. The Court considered that the advice that no comment could be made was wrong, and it had been important to the appellant in his decision not to give evidence. That error in advice was compounded by the failure of the appellant's counsel to put a crucial part of his case to one of the witnesses. (Here, there is nothing of the latter kind; it is not suggested that any aspect of the defence case was not put.)

[35] Counsel for the respondent in *Kyriacou* argued, as Ms Bain did here, that for other reasons the decision not to give evidence might have been tactically sound, because "the appellant would otherwise have been exposed on other issues." The court rejected this submission:

> "It was advice that was wrong in law and which was tactically inexplicable, other than by reference to a misplaced reliance on a comment by the trial Judge during the prosecution case. The acceptance of the advice compounded the effect of the failure to put the appellant's case to the principal witness for the prosecution. The result was that the jury did not at any stage hear of the essential elements of the appellant's defence, thus depriving him of a chance of acquittal."[10]

Because of the combined effect of the failure to put matters in cross-examination and the advice not to give evidence founded on an error, the court concluded that a miscarriage of justice had occurred, and the appeal was upheld.

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7 (1996) 137 ALR 347.
8 At 366.
9 (2000) 210 LSJS 296.
10 (2000) 210 L.S.J.S . 296 at para. [42].

[36] An appeal which as to at least one of its grounds was based on advice not to give evidence was considered by this court in *R v Szabo.*[11] It was argued for the appellant that he had not been fully advised on the advantages and disadvantages of giving evidence, and that in the context of the trial it was essential that he be advised that his chances of acquittal were remote unless he gave evidence. Thomas JA, with whom de Jersey CJ agreed on this ground, rejected that submission, concluding that the appellant had been adequately advised, and that it could not be said that without giving evidence he was bound to be convicted. Quite to the contrary, because of his previous conflicting accounts of events, giving evidence would have made his prospects of acquittal even more remote. In the course of reaching those conclusions, Thomas JA contrasted the election to give or call evidence, which was a decision in which the client was entitled to have the final say, with other tactical decisions taken in the course of the trial, where counsel was entitled to act without further consultation with the client. He said this of the considerations involved in advising on that decision:

> "It is impossible to lay down in advance the extent of detail that needs to be discussed or what will amount to reasonable discussion for the purpose of assisting the client to make the necessary election. It should be recognised, however, that too much forensic discussion may be bamboozling, and that it is not a lawyer's duty to educate the client to the equivalent of a trained lawyer. Generally speaking it should be sufficient to mention the main points that should guide the particular decision. It is then for the client to accept or reject the advice."[12]

[37] Thomas JA referred, for the proposition that an accused person was entitled to make the final decision as to giving evidence, to *Sankar v State of Trinidad and Tobago*[13] a case on which Mr Callaghan placed some reliance here. In *Sankar,* on the best view of things, the respondent had been given only the most cursory of advice on the question of giving evidence. The Privy Council in its reasons for upholding the appeal said this:

> "The appellant had been deprived in reality of deciding whether or not he should give evidence or at least make a statement from the dock. It had never been explained to him how important his evidence would be to the outcome of the trial and that, without that evidence, in practice there was no defence. These were things he most certainly should have been told."[14]

[38] In *TKWJ v R*[15], the unsuccessful appeal to the High Court was based on a claim to miscarriage of justice arising from a failure to call character evidence. Gleeson CJ concluded that the decision not to call the evidence was a "rational tactical decision"[16], in light of the risks that it would entail. Gaudron J, who, with McHugh and Gummow JJ, considered that, in any event, the failure to call the evidence had

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11 [2001] 2 Qd R 214.
12 At 222-223.
13 [1995] 1 WLR 194.
14 At 241.
15 (2002) 212 C.L.R. 124..
16 At 131.

not resulted in the loss of a chance of acquittal fairly open, expressed a similar reservation:

> "An accused will not ordinarily be deprived of a chance of acquittal that is fairly open if that chance is foreclosed by an informed and deliberate decision to pursue or not to pursue a particular course at trial." [17]

[39] Ms Bain contended that the advice against giving evidence in this case, taken in context with the concern that the appellant might harm his own case, was sensible. Mr Callaghan, on the other hand, argued that the decision not to call evidence could not be characterised as a "rational tactical decision", in the term used by Gleeson CJ, because it was based on error, not a perception of tactical advantage. And he relied on the passage set out above from the judgment of Gaudron J, placing particular emphasis on the word "informed". To that reference might also be added, in support of Mr Callaghan's contention, this statement by McHugh J:

> "where the alleged error of counsel does not concern a forensic choice, the appellant will usually be in a better position to prove that a miscarriage of justice has occurred than in cases of forensic choice."[18]

The appellant here has, as Mr Callaghan said, the advantage of being able to point to actual error in the basis for the advice and the ensuing decision not to give evidence; not merely a tactical approach which has ended badly.

Conclusion

[40] It hardly needs saying, in the light of the above authorities, that not every case in which an accused is advised against giving evidence, with unintended results, will give rise to an appeal. Advice against giving evidence is often a matter of impression and judgment, and an adverse outcome will not automatically produce an appeal point. But the advice given in this case was fundamentally flawed in two respects. The appellant was given wrongly to understand that he was at risk of harming his case through portrayal as an abusive and neglectful parent; and he was not advised of the advantages of putting his version on oath. As a result the jury was presented with only one sworn version. Although there were particular matters in the complainant's evidence which might have caused doubts, taken as a whole and uncontradicted, it justified the jury in reaching a conclusion of guilt beyond reasonable doubt. The situation might have been very different had they had the appellant's denial on oath; and the evidence of his father might also have assisted. In the circumstances of this case there is every reason to fear that a miscarriage of justice has occurred. I would allow the appeal, set aside the conviction, order a re-trial and remand the appellant in custody until further or other order of a court with jurisdiction to grant him bail.

Addendum

[41] After I had completed this judgment I was supplied with a copy of an affidavit of Mr Dominic Brunello, the appellant's solicitor, annexing a hand written document said to be a retraction under the hand of the complainant. In that document, the

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17 At 134.

18 At 152.

complainant says that she lied in making the allegations against the appellant and explains what she now says were the foundations of her account. The document ends, rather oddly, with the statement "and the police question [sic] me without my mum or a solistor [sic] or a family member there". There is no explanation in Mr Brunello's affidavit of the circumstances which led to the preparation of that document.

[42] I have considered this material for the purpose of determining the appropriate course to take in respect of it, but in light of the conclusions I have already reached, I do not think it appropriate that this court now receive it as fresh evidence, or take any course other than that I have already proposed, of ordering a re-trial. The material clearly warrants further investigation, and is appropriately considered by the Director of Public Prosecutions in the context of whether the prosecution should proceed. It may also have some relevance in any application for bail by the appellant.

[43] **McMURDO J:** I agree that it was open to the jury to be satisfied of the appellant's guilt on the evidence before it, for the reasons given by Holmes J. However, I have reached a different conclusion as to the second ground of appeal.

[44] The ultimate question is whether there was a miscarriage of justice from the conduct of the appellant's case at trial. The appellant's case is said to have been misconducted because the appellant did not give evidence, or call evidence from his father. The appellant says that this decision was the result of legal advice, which was affected by three mistakes. First, he says that he was told that if he gave evidence, he was likely to undergo extensive cross examination as to his conduct in physically disciplining the complainant. He says that the advice was flawed, because had he given evidence, such extensive cross examination would not have been allowed. Second, he says that he was not advised that an advantage of giving evidence would be that the jury would have sworn evidence to support his case. Thirdly, he says that he should have been told that the prospects of a successful appeal on the unsafe and unsatisfactory ground would be less if he did not give evidence. He claims that had he been correctly advised on these matters, he would have decided to give evidence and perhaps call evidence from his father, with the result that there was a significant possibility that the outcome would have been different.

[45] As to the first of those matters, it is far from clear that he could have avoided cross-examination of the apprehended kind. There was some prospect that such cross-examination, at least to a certain extent, would have been permitted. One reason for that is that the potential ambit of cross examination was affected by what he might have said in answer to permissible questions concerning his relationship with the complainant. I accept, however, that the advice given to the appellant was likely to have over-estimated the extent of the cross examination as to the appellant's physical but not sexual mistreatment of the complainant, so that at least in that respect, the ultimate advice that the appellant should not give evidence was affected by some error in reasoning.

[46] In the appellant's affidavit tendered in this appeal, he swears that, "at no time was I advised of the importance of making a sworn denial before the jury", a statement with which the relevant officer employed by Legal Aid Queensland agrees. The relative advantage of a sworn denial was affected by many variables. One was the strength of the Crown case. Another was the likely impression of the appellant

upon the jury if he gave evidence. Not every witness in a party's case necessarily advances that case, even if the witness is the party himself. The overall impact of calling of a witness may be positive or negative, and the uncertainty results from the fact that the precise testimony of a witness could be other than as anticipated as well as from the prospect that the jurors will be affected by matters such as the demeanour of the witness. The uncertainty as to the impact of an accused's evidence must then be weighed against the relative strength of the Crown case. In some cases, those advising an accused may feel that they must urge the accused to give evidence. In other cases, the advisers may feel that the best prospect of an acquittal is through an effective cross examination of the prosecution witnesses and that the impact of calling the accused could be to put at risk a likely acquittal. These are matters for judgment of the legal advisers, usually the trial counsel, which are affected by a consideration not only of the relevant law, the content of the Crown case and the accused's instructions, but also matters of impression. It is not the case that every accused in a trial such as this would enhance his prospects by giving evidence. Whether this appellant would have done so remains a matter of speculation. What can be said is that there were matters within the Crown case which provided apparent bases for arguing that there should be a reasonable doubt. Accordingly, this is not a case where this court can conclude that giving of evidence by the appellant could only have been beneficial.

[47] The appellant also swears that, "at no time was I advised of the potential relevance of me not giving evidence at trial to determination of an appeal against conviction in the event I was convicted and wished to appeal the conviction". The complaint is that he should have been told this court would take into account the absence of evidence from him in deciding whether the jury's verdict was unsafe. His submission by reference to this evidence was in reliance upon the judgment of Davies JA (with whom Philippides J agreed) in *R v B* [2003] QCA 105 at [33], although that is apparently inconsistent with the judgment of Callinan J (with whom Kirby J relevantly agreed) in *Dyers v R* (2002) 210 CLR 285 where his Honour expressed the view that the failure of an accused to give sworn evidence is not an impediment to the success of any submission that the verdict of the jury was unreasonable.[19] Having regard to *Dyers*, his counsel would have been wrong to tell him that there was an advantage in giving evidence in this respect. But at its highest, the appellant's case is that this is a further aspect of the reasoning of his legal advisers which has affected their ultimate advice that he should not give evidence.

[48] If the appellant's legal advice resulted from an opinion reached by imperfect reasoning, was there a miscarriage of justice? The answer lies in whether those errors in reasoning have caused the appellant's case to be conducted differently from any way which could be reasonably explained. The alleged miscarriage of justice does not come from the advisers' reasoning but from the appellant's failure to give or call evidence. If there could be no reasonable explanation for his not giving or calling this evidence, then there is a miscarriage of justice if there is at least a significant possibility that the absence of that evidence affected the outcome.

[49] The essential difficulty in this ground of appeal comes from the unimportance which I attach to the reasoning underlying the advice. If the reasoning was flawed but the ultimate advice is that which could have been reasonably given, and the case

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19 At [125].

is thereby conducted in an explicable way, then in my view, there has not been a miscarriage of justice. The focus is then upon the conduct of the case and whether, objectively viewed, it was reasonable. Even in a case such as the present where the particular process of reasoning behind the legal advice is revealed, the relevant inquiry is not into the correctness of that reasoning but remains one of whether there is no reasonable explanation for the conduct of the accused's case at trial.

[50] This results from at least most of the judgments in *TKWJ v R* (2002) 212 C.L.R. 124. The appellant there was convicted of sexual offences against the son of the woman with whom he was then living. The complainant had a sister, K, who made similar complaints against the appellant. He was originally charged with offences against both the complainant and K, but the Crown later withdrew the indictment in respect of K. Counsel for the appellant did not call evidence of the appellant's good character because counsel for the Crown indicated that it would lead evidence in reply as to allegations made by K. It was argued that the appellant's trial counsel was incompetent in a way which led to a miscarriage of justice. The alleged incompetence was an oversight, evidenced by the counsel's affidavit upon appeal in which counsel said that it did not occur to him to seek a ruling from the trial judge on the question of whether the Crown would be permitted to call evidence in reply, should the character evidence be adduced in the appellant's case. It was argued that this oversight had infected the appellant's decision, or that made upon his behalf by his counsel, not to call character evidence with the result that his prospects of acquittal were significantly impaired. As the judgments show, had such a ruling been sought, it was at least by no means certain that it would have been given, and the decision not to call character evidence could be reasonably explained by a wish to avoid the risk of evidence in reply of such a prejudicial kind. The ultimate course then was one for which there was a reasonable explanation although it resulted from a process of reasoning by trial counsel which involved some inadvertence. The case then illustrates the distinction which I believe is relevant to the present appeal, which is that between the reasonableness of the course ultimately taken and the correctness of the reasoning behind the legal advice that it should be taken. The distinction was sharply drawn by Hayne J (with whom Gummow J agreed) who said (at 158-160):

> "[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?
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> [108] If there could not be any such explanation, there may have been a miscarriage of justice. It would then be necessary to go on to ask whether the jury would have been likely to entertain a reasonable doubt about guilt if the evidence had

> been led. If, however, there *could* be a reasonable explanation for not calling the evidence, that will be the end of the matter. It is not to the point then to inquire whether counsel did or did not think about the point, or acted competently or incompetently, even though the conclusion that there could be no reasonable explanation for the course followed at trial would seem to entail the conclusion that counsel did not act competently.

…

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

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

[112] If the relevant question is, as I would hold it to be, whether there could be a reasonable explanation for not calling the

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

[51] Gummow J also agreed with the judgment of Gaudron J, where her Honour, in discussing the particular question of whether counsel's conduct of the trial could be explained on the basis that it resulted, or could have resulted in a forensic advantage, said:[20]

> "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".

[52] Gleeson CJ observed that counsel's decision not to call character evidence was "on the face of it … an understandable decision … certainly not self-evidently unreasonable, or inexplicable". After referring to the evidence of trial counsel as to the matter he overlooked, Gleeson CJ said (at 129-130):

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

[53] His Honour continued (at 130-131):

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[20] At 133.

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

[54] Many of the cases in which a conviction has been quashed upon the ground of the so-called incompetence of counsel can be seen as examples of where the case was conducted in this irrational or unreasonable sense. For example, in *Re Knowles* [1984] VR 751, counsel's failure to call the relevant witnesses had no reasonable basis, because he wrongly believed that their evidence was neither relevant nor admissible. In *R v Scott* (1996) 137 ALR 347, the accused's counsel inexplicably failed to call two witnesses which Doyle CJ described as "capable of putting a very different light on the case".[21] As Holmes J observes, *Knowles* and *Scott*, are cases where there was no competing consideration as to whether the evidence ought, as a matter of prudence, to be called. I do not regard *R v Kyriacou* (2000) 210 L.S.J.S. 296, which predated the High Court's judgment in *TKWJ*, as being inconsistent with it. The Court of Criminal Appeal of South Australia there quashed the conviction because counsel's advice was not only wrong in law but was also "tactically inexplicable", and because the advice had to be considered with the entire conduct of counsel in failing to put the appellant's case to the principal witness for the prosecution, with the result that the jury at no stage heard the essential elements of his defence.[22]

[55] In not every case will the reasoning behind counsel's advice and the conduct of the case be known, whereas in this case it is. But if the reasoning is known, in my view

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21 At 365.

22 At [42].

the Court should not be diverted by it for it is irrelevant to the real question, as the passages cited from *TKWJ* show.

[56] Returning to the present case, the advice to the appellant that he should not give evidence, and in turn, the conduct of the case upon that basis, had an apparently rational foundation. Putting to one side the likelihood of extensive cross-examination as to his physical abuse of the complainant, the decision that he should not give evidence can be reasonably explained by the prospect that his giving evidence could have worked to his forensic disadvantage. That involved a judgment as to the relative strength of the Crown case, including the impact upon that case from the course of the cross-examination. It also involved an assessment, perhaps largely intuitive, as to the likely impression of the appellant upon the jury if he gave evidence. The relevance of that consideration should be obvious, but it is illustrated by the evidence from the relevant officer at Legal Aid that:

> "Our principle concern about [ND] giving evidence was that he had the potential to harm his case. He often displayed a flippant attitude, poor disposition and was prone to say inappropriate things during conference".

It was a decision also reasonably affected by other considerations such as a potential advantage in this case of being last to address the jury, a matter which affected also the decision not to call evidence from the appellant's father. This Court should not be concerned with what was the better course for the appellant but whether the course which he did take was apparently irrational or unreasonable. In deciding this question, the court may be informed by evidence of relevant facts and circumstances which do not appear from the record of the trial and which would be the subject of legal professional privilege but for its implied waiver by an appeal upon this ground[23], but it is a different matter to explore and assess the process of reasoning by which advice was given and the case was conducted.

[57] Accordingly I would dismiss the appeal also in so far as it relies upon this second ground of alleged miscarriage of justice by the failure to give or call evidence.

[58] After the hearing of the appeal, the court was provided with an affidavit of the appellant's solicitor, annexing what purports to be a handwritten recantation. Because of the view of the other members of the court on this second ground of the appeal, it is unnecessary to hear further argument as to the impact or otherwise of this evidence.

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23 *R v Paddon* [1999] 2 QdR 387.