SUPREME COURT OF QUEENSLAND

CITATION:	*R v NE* [2003] QCA 574
PARTIES:	**R** v **NE** (appellant)
FILE NO/S:	CA No 311 of 2003 DC No 245 of 2003
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction
ORIGINATING COURT:	District Court at Beenleigh
DELIVERED ON:	19 December 2003
DELIVERED AT:	Brisbane
HEARING DATE:	3 December 2003
JUDGES:	McMurdo P, Davies JA and Chesterman J Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**Appeal against conviction dismissed**
CATCHWORDS:	CRIMINAL LAW - JURISDICTION, PRACTICE AND PROCEDURE - MATTERS CONCERNED WITH CONDUCT OF DEFENCE - LEGAL REPRESENTATION - GENERALLY - where appellant convicted of rape - where tape recording of police interview with appellant tendered in evidence - where on tape, appellant denied act of rape but was uncertain about things he allegedly said to complainant - where appellant had two conferences with legal representatives concerning whether he should give evidence at trial - where appellant did not give evidence at trial - where, had appellant given evidence, he would have given evidence inconsistent with his earlier version - whether miscarriage of justice occurred by failure of appellant to give evidence *R v ND* [2003] QCA 505; CA No 77 of 2003, 14 November 2003, considered [[2004] 2 QdR ###] *R v Paddon* [1999] 2 QdR 387, considered *TKWJ v R* (2002) 212 CLR 124, followed
COUNSEL:	M J Byrne QC for appellant D L Meredith for respondent

SOLICITORS: Ryan & Bosscher for appellant
Director of Public Prosecutions (Queensland) for respondent

[1] **McMURDO P:** I agree with the reasons for judgment of Davies JA which I have had the benefit of reading.

[2] The evidence given on the appeal by the appellant and his legal advisors at the trial amply demonstrates an objectively reasonable explanation for the appellant's lawyers advising him not to give evidence: *TKWJ v R*.[1] The appellant made an informed and free choice to accept that advice. He has not demonstrated that he has been deprived of the chance of an acquittal that was fairly open to him and that a miscarriage of justice has resulted.

[3] I agree with Davies JA that the appeal should be dismissed.

[4] **DAVIES JA:** On 1 September this year the appellant was convicted in the District Court at Beenleigh of rape. He appeals against that conviction. He also sought leave to appeal against his sentence but that application appears to have been abandoned. This Court accordingly dismissed that application. He is also no longer pursuing his original ground of appeal which was that the verdict was unsafe and unsatisfactory and sought leave to substitute the following ground of appeal:

> "A miscarriage of justice occurred due to the Appellant not being properly advised as to whether he should give evidence on oath at the trial."

Leave was granted to substitute that ground.

[5] The circumstances giving rise to the appellant's trial and conviction were as follows. The appellant and Mr S had known each other for 22 years and according to Mr S, the appellant was his best friend. The appellant had also known Mrs S, the complainant, from about the time she first met her husband in 1986.

[6] On the night of 23 March 2002 the appellant and his companion Ms D, with whom he had been living for two years, were at the residence of Mr and Mrs S where they had been invited to dinner. At and after dinner all consumed a quantity of alcohol. It was decided that the appellant and Ms D would stay overnight. After making up a sofa bed for them in the sitting room Mrs S retired for the night to her bedroom.

[7] The bedroom had two doors, one leading to the lounge room, the other to an ensuite bathroom which also had a door leading into a hallway which also served the laundry (next to the bathroom), a toilet (the other side of that laundry) and another bedroom. Entrance to that hallway was from the family room which was in one open plan room with the lounge room. Before retiring Mrs S closed both bedroom doors.

[8] Ms D had also got into the bed in the sitting room. The appellant was getting ready for bed and Mr S was still in the same room watching the television. The appellant then went to the toilet which was near the bedroom. Shortly afterwards the complainant screamed out.

[9] Her evidence was that she woke to find a penis in her mouth. She thought at first that it was her husband's but opened her eyes and realized it was not. She said that

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1 (2002) 212 CLR 124, [13]-[17], [107]-[112].

she had heard a zipper being pulled up. She then saw, in a mirror, the appellant going from the bathroom into the toilet. She ran into the lounge room and confirmed that her husband was there and went back and challenged the appellant as he came from the toilet.

[10] She said that she grabbed him by the throat and pushed him against the cupboard and said "Why did you do that to me? Tell them what you've done to me". She said that he gave her a forlorn looking face and said "I don't know what I'm doing when I'm drinking". She said that she was hysterical and screaming after this.

[11] Mr S who confirmed that his wife challenged the appellant and was striking him, said that when she asked him how he could have done such a thing to her he said words to the effect that he wouldn't do anything like that. However at one stage he said he heard the appellant say "I don't know what I do when I'm pissed".

[12] He said that at that point he lost his cool and started assaulting the appellant. It also appears that the complainant commenced assaulting Ms D.

[13] Ms D had fallen asleep by the time of these events. She was awoken by loud arguments but could not speak of any specific conversation.

[14] After the assaults by Mr S on the appellant and Mrs S on Ms D the appellant and Ms D decided to leave. They were persuaded to come back into the house but the arguments deteriorated and Mr S commenced assaulting the appellant once again. He was a much bigger and stronger man than the appellant. The appellant and Ms D then left with Mr S following and assaulting the appellant in the yard.

[15] The appellant did not give evidence but a tape recording of a police interview with him was tendered in evidence. In it, he first described the incident in the following terms:

> "And - but I wasn't feeling well, I don't know particularly why. So I sort of washed my hands, splashed some water on me face and was just having a - you know, when you've had a few you just sort of stop and just think, hang on, I'd just better just get myself --
> Mmm-hm? -- a bit more with it here.
> Yep? -- And pretty much after [Mrs S] started screaming and carrying on and then [Mr S] came in and [Mrs S] started carrying on, like, hysterically and [Mr S] sort of said, 'Well what's going on?' And [Mrs S] started making accusations and I thought, oh, this is - I mean, I was not drunk enough to not know what was going on but I thought, if I say that this - like, I mean, I don't know how she could think I - I could have done what she said.
> Mmm-hm? -- But if I say anything contrary to what she said then I'm accusing her of fabricating something --
> Mmm-hm? -- which is going to be bad between them two and me.
> All right? -- If I say nothing it's going to be bad between the three of us. So I stood to gain nothing and win nothing out of that and before I sort of could think about what I do about it [Mr S] starts - or [Mrs S], first of all, started scratching and pushing me around and then [Mr S] started."

[16] A little later in the interview he was brought back to this incident again:

> "Right, okay. So you're washing your hands, is that what's happened? -- I washed my hands and then - and then I just splashed my face and then I was just having - I - having a break, just having a - I was feeling a bit - not well, I don't know, I can't even say. I hadn't drank that much.
> Yep? -- Whether it was the one glass of red wine that I had that had an affect on me, I can't really say.
> Mmm-hm all right. At that time did you then go into [Mrs S'] room? -- No.
> Okay? -- Did you ever go into her room when you were in that bathroom for any reason whatsoever? -- I don't believe so.
> Well what makes you say, 'I don't believe so'? Is it a case of you may have gone in there and you can't remember or is it the case that you never went in? -- Like, I can't recall going in there.
> Right? -- And I can't recall why I would go in there 'cause, like I said, there was no light on in that area.
> …
> What - what did you learn at that stage? What was the first thing that you heard that made you think, hang on, something is going on here? -- Well that's when [Mrs S] said - what did she exactly say, I can't - that's when she said something about - that I put my penis in her mouth. And I thought how could I do that, that was - that's a stupid sort of statement."

[17] The appellant admitted in the interview that, when accused of this he did not make any reply. Afterwards Ms D asked him why he did not say something, why he did not defend himself. His response to this, in the interview was:

> "And I said, 'Well, what can you do?' If she says that I'm either - there's going to be a problem. And what would have been the sensible thing to do at the time, when we walked to the door the first time was to walk out the door."

[18] The police officer then put the specific question to him as to whether he put his erect penis in the complainant's mouth and he answered "No". However when the police officer returned to the accusation made by the complainant the following exchange occurred:

> "She said that she'd approached you when she saw you walking down the hallway from the - we presume it's the bathroom - and she said words similar to, 'Tell them what you did. Admit to them what you have done. You could - how could you do this to me?' Do you recall her saying words similar to that? -- Oh maybe something like that but I couldn't say exactly what ---
> She - she claims that you then replied, 'I don't know what I'm doing when I'm drinking'. Do you recall saying words similar to that? Do you deny saying those words? -- I wouldn't - I wouldn't have been that drunk.
> Those words though; you didn't say those words? -- I can't recall that, no.
> And then obviously the rest of it is pretty consistent with both versions obviously, then obviously there's conversations? -- I mean the amount of - the amount of alcohol that I had is not enough to be out of control."

[19] In short, though the appellant's statements in interview with the police included a denial that he placed his penis in the complainant's mouth he also appeared uncertain about whether he went into the complainant's bedroom and whether he said "I don't know what I'm doing when I'm drinking", his doubt about whether he said that being apparently only because he thought he wouldn't have been that drunk; he had not drunk sufficient alcohol to be out of control. And, as mentioned earlier, he did not ever deny the complainant's accusation either to her or to her husband.

[20] The other evidence in the case, tendered through Ms D, were the clothes which Ms D swore the appellant was wearing on the night in question. In particular it consisted of a pair of jeans with buttoned fly. This was relevant to the complainant's evidence that she heard a zip opening or closing shortly after she had woken to find the penis in her mouth.

[21] The appellant has sworn that, in addition to a conference before his committal proceedings, he had two conferences with his legal representatives, his solicitor Mr Hatzis and his barrister Mr Byrne discussing, amongst other things, whether or not he should give evidence at his trial. The first of these was held prior to the commencement of the trial and the second was held during the trial at the conclusion of the Crown case. At the first of these, he says, Mr Hatzis explained to him what would happen and said that it was his belief that juries like to hear from the accused. He said he was told that the choice as to whether he gave evidence would be his. The appellant said he wanted to give evidence as he wanted to tell his side of the story and he told Mr Byrne and Mr Hatzis that. He left the conference he said with the intention of giving evidence at his trial.

[22] Mr Byrne has sworn that, on that occasion he discussed with him at length the advantages and disadvantages of giving evidence and advised him that generally juries wanted to hear the defendant give his own explanation of the events in question. He said he told the appellant that the decision to give evidence was his and his alone and that he need not decide until the Crown had closed its case. Mr Hatzis, he said, expressed similar views. He did not think that the appellant expressed any view on that question. The evidence of Mr Hatzis was generally to the same effect.

[23] At the conference at the end of the Crown case the appellant said that Mr Byrne told him that the trial had gone very well and that the only way that they could go, if he gave evidence, was backwards. Mr Hatzis disagreed with this and said that it was always his opinion that the accused should give evidence. He said that he was very confused at this stage as to what he should do and decided to take the advice of his barrister as he felt that the barrister would be the more experienced of the two.

[24] It is here that there is a major departure between the appellant's evidence, on the one hand, and that of Mr Byrne and Mr Hatzis on the other. According to Mr Byrne the appellant stated, at the outset, that he did not want to give evidence if he did not have to and inquired of Mr Hatzis and Mr Byrne as to what they thought. Mr Byrne and Mr Hatzis both said that Mr Byrne advised the appellant that he thought the trial had gone well and that all the inconsistencies in the Crown case that they wanted to highlight had been put before the jury.

[25] But Mr Byrne and Mr Hatzis swore that they said to the appellant that as a general proposition they believed juries preferred to hear an accused give his own version of events, explained the advantages and disadvantages of giving evidence and asked the appellant if he had a clear understanding of what they were telling him. The appellant, both said, told them that he understood what had been said.

[26] Mr Byrne also told the appellant in that conference that by being compelled to tender the clothing he had forgone the right of last address to the jury and that, consequently, his giving evidence would not, in that respect, be disadvantageous.

[27] At some point in this conversation, although he may have raised this before, the appellant said that there were things which had been said by him in his police interview with which he did not now agree. They appear to relate to where the appellant was when first apprehended by the complainant and also what was then said. In the record of interview the appellant admitted that he was standing in the bathroom, which adjoined the bedroom, when the complainant said to him "You're not [Mr S] " and he replied, "Yeah, well, I'm not [Mr S] ". He then walked along the hallway away from the bathroom and the bedroom to the toilet and the complainant then commenced screaming.

[28] Both Mr Byrne and Mr Hatzis recall that the appellant wanted to give evidence inconsistent with this; to the effect that, when first confronted by the complainant, he was in the toilet which was some distance from the bathroom and, thus, further away from the bedroom; and that what he had admitted had occurred in the bathroom, he would say did not occur. Mr Byrne's recollection was that the appellant also wanted to make a more categorical denial of the complainant's statement that he said "I don't know what I'm doing when I'm drinking" than he had in the interview.

[29] Mr Byrne then advised him that if he intended to give evidence contrary to his earlier version given in the record of interview he would not enhance his prospects of acquittal and, indeed, that such evidence would harm his case because the jury would be likely then to disbelieve him. He said that there was no advantage in giving that evidence and that the only way he could go in giving such evidence was backwards.

[30] Both Mr Byrne and Mr Hatzis swore that it was only after the appellant said that he wanted to correct some things he had said in his police interview that Mr Byrne expressed his opinion that if he proposed to do that, he would be better not to give evidence.

[31] At first there appeared to be a stark contradiction on this question between the appellant on the one hand, and, on the other, Mr Byrne and Mr Hatzis. However in cross-examination the appellant admitted that Mr Byrne (or Mr Hatzis) "pointed out that changing any details was not a good thing but I said it's not - it's not changing evidence, it's purely clarifying a position that a discussion took place".

[32] There remains a serious conflict between the evidence of the appellant, on the one hand and, on the other, of Mr Byrne and Mr Hatzis. Having heard each of them giving evidence, I have no hesitation in accepting the evidence of Mr Byrne and Mr Hatzis and rejecting that of the appellant. The appellant was, in my opinion, a most unconvincing witness. I was, in the end, disinclined to accept anything that he said which was inconsistent with the evidence of Mr Byrne or Mr Hatzis.

[33] Because of the unfavourable impression I formed of the appellant I have no doubt that Mr Byrne was correct in advising him not to give evidence for I think that a jury would have been likely to form a similar opinion of him. His difficulty in appearing a credible witness in the eyes of the jury would have been exacerbated, as Mr Byrne rightly advised him, if he had sought to contradict, in important respects, what he had told the police officer shortly after the events in question, as it seems he plainly intended to do if he gave evidence.

[34] The only rational defence which the appellant had, as Mr Byrne QC in his written outline correctly states, was that the complainant was either mistaken or lying. There was some support for a contention that the complainant was mistaken in consequence of her excessive consumption of alcohol. On her own evidence she had had three glasses of wine, two glasses of bourbon followed by two further glasses of wine. She admitted to a patchy memory of the night and there were some events which occurred on that night which she could not recall; sitting on the appellant's lap during the evening, an argument between her husband and Ms D and the continuous assaults of her husband on the appellant in the yard. She also admitted that the way in which she said she saw the appellant shortly after the alleged offence, by looking into a sliding mirror, would have been impossible. However she maintained that she saw him at that time.

[35] No doubt a comprehensive and credible denial of the commission of the offence by the appellant by evidence which contradicted that of the complainant would have strengthened the defence case because it would have increased the prospect of the jury having at least a reasonable doubt about the correctness of the complainant's version. But it is plain from what I have said that the appellant's evidence was unlikely to have had that effect.

[36] Those conclusions are sufficient to dispose of this appeal adversely to the appellant. However it is necessary to say something about the decision of this Court in *R v ND*[2] upon which the appellant's counsel relied, for there may otherwise be a tendency, as there appears to have been in this appeal, to find in that case authority for some wider proposition than that for which the case stands.

[37] What an appellant must prove, in a case such as this, is that the advice of counsel not to give evidence, which resulted in the appellant's failure to give evidence, deprived the appellant of a chance of an acquittal that was fairly open.[3] When there has been flagrant incompetence on the part of counsel the burden of proving that may be easily discharged;[4] where for example, the advice was given because of a blatant error and, but for that error, the advice would have been otherwise.[5] It is more difficult to discharge where the alleged error of counsel said to result in the miscarriage involves a decision based on a forensic choice; for example, whether in the circumstances, the appellant's giving evidence will be more likely to help or harm his case. As Gleeson CJ put it in *TKWJ v The Queen*:[6]

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2 [2004] 2 QdR ###; [2003] QCA 505.

3 *TKWJ v The Queen* (2002) 212 CLR 124 at [16].

4 *TKWJ* at [80]; see also *R v Paddon* [1999] 2 QdR 387.

5 At [16]; see also at [81], [82].

6 *TKWJ* at [16].

> "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."

[38] The question, in the end, is an objective one; whether the decision or choice complained of is capable of reasonable explanation.[7] If it is, it cannot be said that an appellant was thereby deprived of a chance of acquittal that was fairly open.

[39] In the light of those principles, the decision of this Court in *R v ND* must be seen as one in which this Court concluded that the decision in that case not to call the evidence in question, principally the evidence of the accused, was incapable of reasonable explanation. There the decision not to call the evidence was based on a mistaken premise. Other reasons were given for not calling the evidence but this Court presumably concluded that, looked at objectively, there could not have been a reasonable explanation for not calling that evidence; and that that failure deprived the appellant of a chance of an acquittal that was fairly open.

[40] It follows from what I have said that it will be a rare case in which an appellant will succeed in appeal on this ground where his counsel has advised him not to give evidence after making an assessment of the prospects of that evidence credibly rebutting evidence against the appellant.

Order

Appeal against conviction dismissed.

[41] **CHESTERMAN J:** In *R v Paddon* [1999] 2 Qd R 387 in a judgment in which all members of the court concurred it was said:

> 'What emerges from the authorities is that before a Court of Criminal Appeal will set aside a conviction on the ground that the conduct of the defence occasioned a miscarriage of justice it must fit the description of "flagrantly incompetent". … An appellant who argues from such a basis faces a difficult task. The court will not lightly infer that counsel's conduct of a trial, which has turned out badly for an accused, was incompetent.'

Later it was said:

> 'The authorities do not provide any precise verbal formula by which one may describe the conduct of a criminal defence which would give rise to the apprehension that an accused was not tried fairly. The authorities do, however, suggest a two fold test. There must be

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7 *TKWJ* at [27], [107] - [112].

> (1) something in the nature of "flagrant incompetence" which (2) deprived the accused of a significant possibility of acquittal.'

[42] The term 'flagrant incompetence' appears to have its origin in an unreported English judgment, *R v Swain*, in which O'Connor LJ observed that if the court had 'any lurking doubt that the appellant might have suffered some injustice as a result of flagrantly incompetent advocacy' it would quash the convictions. The case and judgment were referred to by Lane LCJ in *R v Ensor* [1989] 1 WLR 497 at 502.

[43] In *R v Birks* (1990) 19 NSWLR 677 Gleeson CJ having reviewed a number of authorities, including *Ensor*, said (685):

> 'The relevant principles, may be summarised as follows:
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> 2. As a general rule an accused person is bound by the way the trial is conducted by counsel, regardless of whether that was in accordance with the wishes of the client, and it is not a ground for setting aside a conviction that decisions made by counsel were made without, or contrary to, instructions, or involve errors of judgment or even negligence.
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> 3. However, there may arise cases where something has occurred in the running of a trial, perhaps as the result of "flagrant incompetence" of counsel or perhaps from some other cause, which will be recognised as involving, or causing, a miscarriage of justice. … When they arise they will attract appellate intervention.'

[44] In *R v Green* [1997] 1 Qd R 584 at 586-587 Fitzgerald P and Thomas J said:

> 'The mere fact that valid criticisms can be made of counsel's conduct of the trial does not mean that there has been a miscarriage of justice … the circumstances must be "wholly exceptional" and [the] conviction should be set aside … only if it is, in all the circumstances, unsafe or unsatisfactory. … a new trial will generally not be appropriate unless incompetent or improper conduct by counsel deprived the person convicted of a significant possibility of acquittal …'

[45] *Paddon* has been referred to in this court on many occasions, and always with approval. There are some passages in *R v ND* [2004] 2 Qd.R. 000 which might be thought to diminish the rigour of the principle it stated and which came from the earlier decisions which it examined, some of which I have referred to. In *ND* it was said:

> '… 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. Such a finding may assist in reaching the conclusion of miscarriage of justice, but it is not essential to it. This statement by Pincus JA in *R v McConnell* … reflects the law in this regard:
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> "A clear mistake made by counsel, although not capable of being … 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.'

[46] The principle which finds expression in *Paddon* should not be doubted. To the extent that *ND* may encourage an appellate inquiry into the conduct of the defence of criminal trials in order to see whether, with the benefit of hindsight, the defence might have been more effectively undertaken the urging should be refused. Where it is said that a miscarriage of justice has occurred by reason of the conduct of defence counsel it is only in those cases where there could have been no rational basis for what was done, or omitted, that a court of criminal appeal should intervene. In ordinary parlance such conduct is called 'incompetent'. In *Paddon* it was said that there must 'be something in the conduct of the defence which could never be thought by competent counsel in the circumstances of the trial to be of any possible advantage to the accused.'

[47] This approach to appeals brought on the basis of the misconduct of a defence appears to be endorsed by the High Court in *TKWJ v The Queen* (2002) 212 C.L.R. 124. It was a case in which defence counsel chose not to adduce evidence of the accused's good character because he had grounds for believing the prosecution would lead contradictory evidence. Gleeson CJ said:

> '[8] … It was the kind of tactical decision routinely made by trial counsel, by which their clients are bound. And it was the kind of decision that a Court of Criminal Appeal would ordinarily have neither the duty nor the capacity to go behind. Decisions by trial counsel as to what evidence to call, or not to call, might later be regretted, but the wisdom of such decisions can rarely be the proper concern of appeal courts. It is only in exceptional cases that the adversarial system of justice will either require or permit counsel to explain decisions of that kind …
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> [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.'

[48] Gaudron J said:

> '[33] Where it is claimed that a miscarriage of justice was the result of a course taken at the trial, it is for the appellant to establish that the course was not the result of an informed and deliberate decision. This he … will fail to do if the course

> taken is explicable on the basis that it could have resulted in a forensic advantage unless, in the circumstances, the advantage is slight in comparison with the disadvantage resulting from the course in question.'

[49] McHugh J pointed out (at [81]) that:

> '… an accused will find it difficult to establish a miscarriage of justice when the alleged errors of counsel concerned forensic choices upon which competent counsel could have differing views as to their suitability.'

[50] Both Gaudron J (with whom Gummow J agreed) and McHugh J thought that when it is alleged that there has been a conviction resulting in a miscarriage of justice by reason of counsel's conduct it is not necessary to determine as a preliminary question whether the conduct can be described as 'flagrant incompetence' or by some synonym. Rather the inquiry is whether there has been a miscarriage of justice by reason of the impugned conduct. McHugh J put it in these terms:

> '[97] In determining whether the conduct of counsel has resulted in a miscarriage of justice, the "semantic exercise of trying to assess the qualitative value of counsel's alleged ineptitude" is not an end in itself. A test such as "flagrant incompetence" while a convenient label that may show that a miscarriage of justice has occurred … is unhelpful generally in determining whether there has been a miscarriage of justice …'

[51] Hayne J, with whom Gummow J also agreed, put the matter in these terms:

> '[107] … 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 act competently or incompetently, even though the conclusion that there could be no reasonable explanation for the course followed at trial would seem to entail a conclusion that counsel did not act competently.
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> [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.'

[52] *R v Birks* was referred to, with apparent approval, in the judgments of Gleeson CJ and McHugh J. It was that case which largely fashioned the approach taken in *Paddon*. The reasons in *TKWJ* suggest that a slightly different approach to that described in *Paddon* is now required. The early authorities had called for an examination of the conduct of counsel to see whether it could be properly categorised as 'incompetent' in the sense explained in *Paddon*. This approach was noted by Gaudron J (para [29] of her Honour's reasons). It should no longer be the starting point. The question to be addressed is whether there has been a miscarriage of justice by reason of the conduct of the defence. There will have been no miscarriage of justice if there could be a reasonable explanation for the act or omission of counsel. The corollary, that the absence of any reasonable explanation indicates incompetence in the defence, does not have to be separately addressed or found. This is the only emendation required to *Paddon*.

[53] The course of the present appeal suggested that the appellant had accepted the invitation, apparently contained in *ND*, to examine the reasons of defence counsel for advising the appellant not to give evidence at his trial. Counsel for the appellant seemed to assume that if some error in the reasoning process could be discovered there should be a new trial at which the appellant would give evidence, his first tactic, of remaining silent, having proved unsuccessful. Mr Byrne, who conducted himself with great candour and dignity and whose evidence I, too, would accept, was cross-examined with a view to showing that the better tactic would have been to advise the appellant to give evidence. As a matter of fact his advice was shown to be right. More importantly the reasons for judgment of Gummow and Hayne JJ emphatically rejected the appropriateness of such an inquiry. The rejection should be endorsed by this court. In my opinion the proper approach is that indicated by Hayne J. If there could be a reasonable explanation for the questioned decision of defence counsel, the contention that it has led to a miscarriage of justice should be rejected. McHugh J endorsed the remarks of Gleeson CJ in *Birks* that:

> 'it is not a ground for setting aside a conviction that decisions made by counsel were made without, or contrary to, instructions, or involve errors of judgment or even negligence'.

[54] I agree with Davies JA that the appeal should be dismissed for the reasons given by his Honour.