SUPREME COURT OF QUEENSLAND

CITATION:	*R v Nudd* [2004] QCA 154
PARTIES:	**R** **v** **NUDD, Kevin Philip** (appellant/applicant)
FILE NO/S:	CA No 258 of 2003 SC No 58 of 2003
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction & Sentence
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	14 May 2004
DELIVERED AT:	Brisbane
HEARING DATE:	11 March 2004; 18 March 2004
JUDGES:	Davies JA and White and McMurdo JJ Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDER:	**1. Appeal against conviction dismissed** **2. Application for leave to appeal against sentence is not pursued and is dismissed**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS – CONDUCT OF LEGAL PRACTITIONERS – where prosecution had to prove that the appellant was knowingly concerned in the importation of prohibited imports – where proof of the identity of the appellant in police intercepted telephone conversations and the real nature of those conversations was required – where appellant admitted certain facts at trial – where appellant did not call or give evidence – where appellant's counsel appeared to concede the identity of the appellant in the intercepted conversations and appellant's knowledge of the importation – where appellant was convicted – where appeal against conviction – where it is argued that counsel conducted the case on an incorrect understanding of "knowingly concerned in" – whether case was conducted in a way which is incapable of any reasonable explanation – whether appellant was denied a fair chance of acquittal – whether there was a miscarriage of justice

Customs Act 1901 (Cth), s 233B

R v Birks (1990) 19 NSWLR 677, cited
R v Leff (1996) 86 A Crim R 212, cited
R v Menniti [1985] 1 Qd R 520, considered
R v N [2003] QCA 505; CA No 77 of 2003, 14 November 2003, cited
R v N [2003] QCA 574; CA No 311 of 2003, 19 December 2003, applied
R v Paddon [1999] 2 Qd R 387; [1998] QCA 248; CA No 122 of 1998, 28 August 1998, cited
Re Knowles [1984] VR 751, cited
TKWJ v The Queen (2002) 212 CLR 124, applied
White v Ridley (1978) 140 CLR 342, considered

COUNSEL: M J Byrne QC, with C J Eberhardt, for the appellant/applicant
G R Rice for the respondent

SOLICITORS: Graham Lawyers for the appellant/applicant
Commonwealth Director of Public Prosecutions for the respondent

[1] **DAVIES JA:** In my opinion the appeal should be dismissed substantially for the reasons given by McMurdo J and for the further reasons given by White J. The principal question was whether the failure to call the appellant, on the assumption that the appellant had given to his legal advisers instructions in terms of par 36 of his affidavit, would have been capable of reasonable explanation. In my opinion it would have been. For the reasons given by McMurdo J and White J, competent counsel, on those instructions, could reasonably have made a decision not to call the appellant. I agree with the reasons of McMurdo J for rejecting the other bases for the contention that a miscarriage had occurred.

[2] **WHITE J:** I have read the reasons for judgment of McMurdo J and am grateful for his detailed analysis of the evidence below and of the submissions on appeal.

[3] I agree with his Honour that there is much to be critical of in defence counsel's conduct of the case at trial and his failure to be familiar with the principal authorities governing the construction of the expression "knowingly concerned in" in s 233B of the *Customs Act* 1901 (Cth). But reciting a virtual litany of faults does not avail the appellant if, as a result of counsel's conduct, there has not been a miscarriage of justice. As the High Court in *TKWJ v The Queen* (2002) 212 CLR 124 and this Court in *R v N* [2003] QCA 574 noted, in a case such as this the appellant will be required to establish that the conduct of counsel, however characterised, resulted in the loss of a chance of acquittal fairly open.

[4] Mr Byrne QC for the appellant placed reliance on observations of McHugh J in *TKWJ* at [76] where his Honour said

> "In some cases, the conduct of counsel may be such that it has deprived the accused of a fair trial according to law. If the conduct of counsel has resulted in an unfair trial, that of itself constitutes a miscarriage of justice. If, for no valid reason, counsel fails to cross-

> examine material witnesses or does not address the jury, for example, the accused has not had the trial to which he or she was entitled. In such a case, the failure of counsel to conduct the defence properly is inconsistent with the notion of a fair trial according to law. It cannot be right to insist that the appeal can succeed only if the court thinks that counsel's conduct might have affected the verdict. To require the accused to persuade the court that the conduct might have affected the verdict comes close to substituting trial by appellate court for trial by jury. No matter how strong the prosecution case appears to be, an accused person is entitled to the trial that the law requires. In principle, therefore, where the trial has been unfair, the accused should not have to show that counsel's conduct might have affected the result..."

[5] His Honour commented that in perhaps the majority of trials although the conduct of defence counsel may be irregular it will not necessarily deprive the accused of a fair trial. I agree with McMurdo J that there was no material irregularity and the appellant had a fair trial according to law.

[6] As McMurdo J points out, competent counsel faced with the material in para 36 of the appellant's affidavit would be placed in something of a dilemma. If the appellant were called there would be a real credibility tension between the evidence which he would give set out in para 36(b), that is, that he had some knowledge of pseudoephedrine being imported into New Zealand, and para 36(d) that, in effect, he distanced himself from the true illegal importation plan after his meeting with Peter Jackson at the Los Angeles airport on 7 March 2001.

[7] I agree with McMurdo J's analysis that competent counsel instructed in terms of para 36 would not have been bound to call the appellant as a witness. Accordingly, if the course taken at the trial of not calling the appellant to give evidence, whether or not the reason for not doing so was flawed or irregular, was the course which properly instructed competent counsel could have taken then there was no miscarriage of justice.

[8] I agree with the orders proposed by McMurdo J.

[9] **McMURDO J:** The appellant was tried before Philippides J and a jury on a charge that between 8 November 2000 and 3 May 2001 he was knowingly concerned in the bringing into Australia of prohibited imports to which s 233B of the *Customs Act* 1901 (Cth) applies, being a quantity of cocaine of not less than the commercial quantity applicable to that substance. He was convicted and sentenced to 22 years' imprisonment with a non-parole period fixed at 11 years.

[10] The sole ground of appeal is that the conduct of the appellant's case at the trial was so incompetent that it led to a miscarriage of justice. The appellant has abandoned his original ground of appeal, which was that the conviction was unsafe and unsatisfactory. He has also abandoned his application for leave to appeal his sentence.

[11] The appeal thereby involves the application of the principles expressed most recently in the High Court in *TKWJ v The Queen* (2002) 212 CLR 124 and in this Court in *R v N* [2003] QCA 574. Before discussing the application of those

principles to this appeal, it is necessary to discuss the respective cases which were conducted at the trial.

The prosecution case at trial

[12] On 3 May 2001, police and Customs officers intercepted the yacht "Sparkles Plenty" in Moreton Bay. They found 99 packs of cocaine, 29 of which were badly affected by water penetration to the extent that approximately 10 kilograms of cocaine had dissolved. The remaining cocaine weighed about 89 kilograms at 70 per cent purity.

[13] Two men were on board the yacht. One was the captain, an American citizen named Peter Jackson. He and his son Gareth Jackson had sailed the yacht from Mexico, leaving there in May 2000. The yacht made various stops across the Pacific before arriving in Noumea on 8 November 2000. Jackson and his son remained on the yacht in Noumea before flying to Australia on 7 December 2000, remaining here until their visas expired in early March 2001. On 7 March 2001, Peter Jackson flew to the United States, where he obtained a false US passport in the name of "David Geschke" on 28 March, which he used to fly from the United States back to Noumea. He sailed the yacht from Noumea on 28 April. When it was intercepted in Moreton Bay five days later, the Geschke passport and other items representing him to be Geschke were found in the boat's safe.

[14] For some of the three months which the Jacksons spent in Australia, Peter and Gareth Jackson stayed at a Sydney motel where police installed a listening device in their room and intercepted their telephone conversations. Eleven of those conversations were between Peter Jackson and the appellant, who is an Australian but was then living in Los Angeles. There were also intercepted conversations between Jackson and other alleged participants, namely Jackson's sons Gareth and Klaus Jackson, and one Jorge Velarde. The prosecution case was that Velarde, another American citizen, was to act as an intermediary between Jackson and unidentified Australian recipients of the cocaine. There were also intercepted conversations between Jackson and the appellant's sister, Sylvia Aldren. The tape recordings of these conversations, including those 11 between Jackson and the appellant, were tendered as the mainstay of the prosecution case.

[15] At the trial, the appellant admitted certain facts as to the movements of the yacht from the time it left Mexico, the identity of the various persons on board at different times, the movements of Peter and Gareth Jackson, the use by Peter Jackson of the Geschke passport, the quantity of cocaine found on the yacht when intercepted at Moreton Bay, and as to Sylvia Aldren being the appellant's sister.

[16] The prosecution then had to prove that the appellant was knowingly concerned in this importation substantially from the intercepted telephone conversations to which he was allegedly a party, understood in the context of other evidence including the content of other intercepted conversations. That required proof that it was indeed the appellant who was involved in a certain 11 of those conversations. It also required the jury to be satisfied that what was said in those conversations was to be interpreted as the prosecution suggested, because the conversations were in something in the nature of a code.

[17] As the case was opened, the prosecution alleged that the appellant was knowingly concerned in the importation because he knew of it and "he gave some practical

assistance in some way" and in his address to the jury, the prosecutor described the core issues as ones of "knowledge and practical assistance" and argued that the appellant was one of the "inner circle" involved in this venture. He appeared to assume a burden of proving that the appellant's conduct had "the effect of pushing this process along". Particulars were provided of the respects in which the appellant was concerned in the importation. Before going to them, it is necessary to say something more of the course of events and the alleged proper interpretation of the intercepted conversations.

[18] The yacht was owned by a Jackson family company. In its voyage across the Pacific it stopped at Papeete and Tonga before arriving in Noumea. The yacht remained in Noumea for more than five months before setting out for Brisbane. The delay was apparently explained by three problems in the implementation of Mr Jackson's plan. One was that, as police and Customs later found, water had penetrated some 29 packs of the cocaine. A second problem was that Mr Velarde, the intended intermediary, had not made satisfactory arrangements for the disposition of the cocaine once it arrived in this country. Thirdly, when Peter Jackson arrived in Australia from Noumea in December 2000, some traces of cocaine were found in an item within his luggage. The amount was so small as not to be visible to the naked eye, but Peter Jackson was questioned by Customs officers as to whether he used cocaine. No charge was laid in relation to this, but the prosecution asked the jury to infer that Jackson became so concerned that he was identified in this way with cocaine that he sought to obtain a false passport under a different name for further travel, and that in particular, he became concerned about flying back to Noumea travelling under his own name fearing that the Australian authorities would report the detection of traces of cocaine to the authorities in New Caledonia, where the Sparkles Plenty with its cargo remained. The prosecution case was that the intercepted conversations demonstrated that the appellant was assisting or attempting to assist in the resolution of these problems.

[19] From 20 February 2001, when Jackson and his son Gareth were staying at the Sydney motel, Jackson was attempting to obtain two false passports. One was an Australian passport, which he did not obtain. The other was the US passport in the name of Geschke which, as mentioned, Jackson obtained upon his return to the United States in March 2001. Conversations between Jackson and the appellant in late February and early March allegedly demonstrated that the appellant was offering and providing assistance to Jackson to obtain each of those passports.

[20] On 20 February 2001, Jackson was recorded telephoning his son Klaus in North America. He instructed Klaus to go to Jackson's house in Mexico to find what he called "the Florida ID", a description used in many of the conversations which the Crown said was a reference to items which were to be used to identify Jackson as Geschke for the purpose of obtaining the US passport including the items of identification found with the Geschke passport on the yacht when it was intercepted. Those items included some "ID card" in the name of Geschke bearing a photograph of Jackson and a student card and MasterCard in the same name. On 22 February, there were several conversations between the appellant and Jackson about this matter. Jackson then referred to "that Florida information" and that Klaus "is going to the house to look for it", saying that if Klaus could find it, he could "proceed from there". They discussed that Jackson "would need to come back" (allegedly a reference to a return to the United States) if that information could be found. On this and other days, Jackson and the appellant discussed the incident in which traces

of cocaine had been found in Jackson's luggage as he entered Australia in December 2000. That cocaine had been detected by the use of ion scan test equipment, about which Jackson said to the appellant that he wished that he had one of those "swipers myself", this being an alleged reference to the wand which is used to take the swab from the item in question. The appellant's response was to say that "if the bad guys have got these things why can't the good guys buy 'em…there …must be some way where we can buy one 'cause...there's a lot of business involved".

[21] In one of these conversations of 22 February, Jackson reminded the appellant that the appellant had previously said it was possible to get what he referred to as "some kind of…paperwork" in Australia, to which the appellant said that he would make enquiries and ring Jackson back between 4 and 6 that afternoon. The appellant did ring Jackson at about 4.15 that afternoon, and said that he had made enquiries, and that he had "good news…regarding the…documentation you need for applying for the blue credit card", (which it was alleged was a reference to an Australian passport). In that conversation, he gave Jackson instructions as to what needed to be done and told Jackson that he had a sister in Sydney with whom he had made arrangements for her to help Jackson in this respect. He said that he had arranged for his sister to call Jackson the following morning. Early the next morning, on 23 February, the appellant telephoned Jackson asking if his sister had called and telling Jackson that she would be calling soon. The appellant then gave Jackson instructions as to obtaining several sets of photographs. About an hour after this call, the appellant's sister, Sylvia Aldren, telephoned Jackson. This was the first of several telephone calls between them. They made arrangements to meet later that day. After that phone call, Jackson was observed going to a photo shop and then meeting Aldren as they had arranged.

[22] Over the next few days, the appellant telephoned Jackson from time to time, apparently making enquiries as to what progress was being made with the matter the subject of Aldren's assistance. On 28 February, a conversation between Jackson and Aldren recorded her having difficulty in obtaining someone to vouch that he or she had known Jackson for the necessary period (to support his application for an Australian passport). Aldren then told Jackson that she had tried to persuade a particular individual to assist, saying that she had told this person that "maybe it could be up to five (thousand)" but that he had "still said no...(and that) he would be willing to do it for nothing if he had known you for twelve months but on the application…it says…that the person only had to know you for twelve months". A couple of days later, Aldren was recorded telling Jackson that she had contacted other people for the same assistance but unsuccessfully.

[23] On the prosecution case, the tapes of the intercepted conversations show that by 2 March 2001, Jackson had learnt that his son Klaus had successfully retrieved the Florida identification documents. There were then conversations between Jackson and the appellant in which Jackson's return to the United States was discussed. Jackson's visa was to expire three months from his entry, that is on 8 March. Jackson and the appellant discussed that Jackson should return to the United States so that they would try to get a new "Bible" (which the prosecution said was a reference to a new passport). The appellant was recorded as saying to Jackson "if you've…got the things from…Florida…I can get the other thing…you will have your new Bible probably within from the day you come with me, probably seven to ten days after". Shortly before he flew from Australia, Jackson was called by the

appellant and they arranged to meet at Los Angeles airport upon Jackson's arrival. In that conversation, Jackson referred to his having to "pick up those things from …Klaus" to which the appellant said "Okay that's fine because look…I've contacted my friend and you know…she…is…all ready to go the only thing we need to do is of course…pay you know like because…we need to pay a fee of course". The prosecution said that this was a reference to procuring from the person described as "my friend" a false passport with the benefit of the documents collected by Klaus Jackson.

[24] On 7 March, Jackson was observed meeting the appellant at Los Angeles airport. There was no evidence of the conduct of the appellant after this meeting, until he was apprehended in Los Angeles when the Sparkles Plenty was intercepted in Moreton Bay.

[25] The problem of Mr Velarde was allegedly the subject of several discussions between Jackson and the appellant. In essence, Jackson was complaining that Velarde was not doing what was required and that he was having difficulty contacting him. The appellant, who was under surveillance by authorities in Los Angeles, was in contact with Velarde who was in the United States whilst Jackson was staying in the Sydney motel. On 22 February, the appellant rang Jackson and told him that "our friend (allegedly a reference to Velarde) was on the way to see me", and the appellant rang Jackson about an hour later saying that this person had not arrived because his car had broken down. Jackson's response was to continue to make complaints about this person. On 23 February, in the course of discussions about other matters, the appellant told Jackson that he had not heard from "our other friend", and on 25 February, the appellant told Jackson that he had spoken to "our friend…George Harrison", (which the prosecution said was a reference to Jorge Velarde). The appellant told Jackson that "George Harrison" would definitely call on 27 February, suggesting that the appellant had arranged this. On 27 February, there was a telephone conversation between Jackson and, on the other end of the line, the appellant and Velarde, who were being observed at that precise time by US Customs officer to be speaking at a public pay phone. The observer saw the appellant make a call and appear to have a conversation for a few minutes before handing the phone to Velarde who carried on the conversation. That corresponds with the tape recording of a conversation between Jackson and the two men at that time. It involved a heated argument between Jackson and Velarde, in which allegations and counter allegations were made as to their respective contributions to the difficulties in implementing a certain plan. Velarde then referred to the "damage to goods", (which the prosecution said was a reference to the water damaged packs of cocaine). There were further discussions as to these "damaged goods", Velarde telling Jackson that he needed to produce them for "these people's accounting", (allegedly a reference to persons to whom Velarde was accountable). The evidence of the US Customs officer observing Velarde and the appellant at the pay phone was that the appellant stood by within earshot throughout this conversation, after which they drove to a restaurant where they talked for some time. On the following day, the appellant rang Jackson and said "Look I must apologise for the arsehole you spoke to…yesterday…He's got…no idea of what the fuck you've been through". Subsequently in that conversation Jackson said "Well he should be here…right" to which the appellant replied "Of course".

[26] There were several conversations between the appellant and Jackson in which reference was made to the "damaged building supplies" and to "about thirty per cent

of these…Italian tiles" as being "broken". The appellant was in the building industry in the United States and the prosecution said that this was his coded way of referring to the damaged cocaine.

[27] The prosecution alleged that conversations also contained discussions as to what should be understood as enquiries which had been made by the appellant of friends in Australia as to the chartering of another yacht in which to make the final leg of the trip. In a conversation on 22 February 2001, the appellant said: "I also spoke to a couple of my friends in Australia and they were saying that…if you head up north right ya know the same place I'm from…just…is maybe…simplest to actually hire a yacht from up there", to which Jackson replied: "Oh definitely it is…but they don't like that…overseas stuff at all I…enquired a bit." The appellant said: "You did" and Jackson said: "If there was a meeting a way to do a meeting you could maybe get away with that ya know…it wouldn't really help my position but it would help the whole thing maybe." The appellant then asked: "Why don't you…get your son to go to Gilligan's Island pick up your bus and come by and pick you up", Jackson replied: "Yeah that's…another way but that's…what I'm thinking more or less but it's…you know that contamination problem is severe" to which the appellant said: "Oh the contamination right yeah…I completely forgot about that". In a later conversation that day, Jackson was apparently discussing his plans when he said: "I'm deciding between here and the island" and said that one possibility was "what we were talking about before kind of meeting with the charter thing." The appellant asked: "why don't you charter one there? Charter the whole thing?" Jackson replied: "Well I am (going) to try some more. The first place was not interested…and meet half way is what I was thinking…to cut the time thing." A few days later, the appellant asked Jackson: "…have you made anymore calls for a charter?" to which Jackson replied: "Yeah I called today there it might be possible I really would like to go up there and talk to him in person".

[28] The particulars provided by the prosecution alleged seven respects in which the appellant was knowingly concerned in the importation. The first particular involved a matter not already mentioned, which was that in November 2000 the appellant travelled from the United States to Noumea, so it was alleged, to meet Jackson to discuss the importation of cocaine into Australia. The evidence was that a person travelling under the name of Josephsen travelled to Noumea with a Ms Gurin, who resided at the appellant's address in the United States. There was also evidence of an application for an United States passport in the name of Josephsen containing a photograph of a person identified as the appellant. The prosecution argued that Josephsen was the appellant, and that it should be inferred that his purpose in travelling to Noumea was to meet Jackson about this venture, although there was no direct evidence that they had there met. At that time the Sparkles Plenty was in Noumea and Jackson resided on board.

[29] The second particular was that the appellant made enquiries concerning the availability of yacht hire in order to import the cocaine then on Jackson's yacht. The third particular was the alleged involvement of the appellant in facilitating a contact between Jackson and Velarde. The fourth was an allegation that the appellant was involved in collaborating with Jackson concerning various difficulties being experienced in the importation, being a perceived lack of performance by Velarde, the contamination of some of the cocaine, and the need for Jackson to obtain a false passport. The fifth particular was the conduct in arranging for the appellant's sister to assist Jackson to obtain a false Australian passport. The sixth

was the meeting between Jackson and the appellant at Los Angeles airport on 7 March 2001, which the prosecution asked the jury to infer was for the purpose of assisting with this importation. The seventh particular was the alleged assistance by the appellant in obtaining the Geschke passport.

[30] Most of the prosecution witnesses were called to prove the movements of Jackson, the appellant and other relevant parties, and to prove the accurate recording of the telephone conversations. There was no apparent basis for challenging the fact that there were conversations using those certain telephone services and in the terms and upon the dates related by these witnesses. With the admitted facts, the prosecution was left to prove that it was the appellant who was speaking in certain of these conversations and that what was said had to be understood as demonstrating that he was knowingly concerned in the importation. They were matters which the jury were asked to infer rather than being the subject of direct evidence to be challenged by cross-examination.

The Defence case at trial

[31] The appellant did not call or give evidence. Not surprisingly, there was no substantial challenge to the Crown case by cross-examination. The defence case was revealed in the appellant's address, after the prosecutor had addressed the jury for nearly three hours. The appellant's counsel commenced his address early on a Friday afternoon and completed it immediately prior to the luncheon adjournment on the following Monday.

[32] The appellant's counsel appeared to concede from the outset of his address that it was the appellant who was speaking in the relevant taped conversations. His address seemed also to concede that the evidence demonstrated that the appellant knew that Jackson was in the process of bringing cocaine to Australia. His argument was that the appellant was not knowingly concerned in that importation because the appellant had provided no "practical assistance". His use of this expression almost certainly came from the prosecutor's use of it, both in his opening and in his address. The appellant's counsel then developed a lengthy argument in which a recurring theme was that nothing which the appellant had done or had offered to do, did in fact provide any assistance. He began by telling the jury what they should understand by the term "practical assistance" in this context. He said:

> "you can't give practical assistance by giving advice to people who know what they're doing, who have a plan in place, much less to give advice or encouragement to someone who has already actioned an idea of their own. That's not practical assistance… It's got to be an original idea, all your own. It's got to be something new which assists someone in perhaps going off in a different direction or developing or formulating an idea. It's got to have content, originality, something beyond what one or a group of people engaged in an exercise might be about."

[33] Counsel told the jury that to find that the appellant was knowingly concerned, they had to "identify something in the conduct of my client that you believe really took this enterprise forward". He also said that for any advice to constitute practical assistance, it had to be "useful advice" being "advice of the kind that will carry the matter forward". He added:

> "…you can't advise people who have already got a plan in a useful way. You can't suggest something to someone that is useful to them if they've thought of it already and you certainly can't take a matter forward if someone has already taken the steps to action an idea."

As other parts of his address made clear, counsel meant by "carrying the matter forward" that the prosecution had to demonstrate that the appellant provided some effective assistance.

[34] The appellant's counsel then proceeded to discuss at some length the prosecution case by reference to at least most of its particulars. So as to the appellant's arranging for his sister to meet Jackson apparently to help him to obtain a false Australian passport, counsel's first submission was that this was an irrelevant act, because the passport was not obtained. However, counsel did make a further submission as to that passport, which was the jury could think that the passport was to be procured not to assist the cocaine importation, but to assist Jackson to take up permanent residence in Australia, a submission which, on one interpretation of a taped conversation had some arguable basis in the evidence. By these arguments, it was effectively conceded that the jury could infer that the appellant took steps to assist Jackson to obtain that passport.

[35] As to the Geschke passport, it was argued that no practical assistance was provided, because the Jackson family had proved itself well able to procure that passport without it. On this matter as on other particulars, the argument was that although the appellant knew of the relevant problem or requirement of Jackson, and spoke to Jackson about it, the appellant was so remote from what was being done by Jackson and others to address that problem, that he was not knowingly concerned. He was portrayed as an observer or a commentator, and not a participant.

[36] Similarly, it was urged that the appellant played no effective part in facilitating communications between Jackson and Velarde. It was argued that those two had had many discussions to which the appellant was not privy as to the implementation of Jackson's plan.

[37] In respect of the meeting at Los Angeles airport, the point sought to be made was that all which was witnessed was two men talking, and that no documents or other items were seen to have passed from one to the other. This was consistent, it was suggested, with the appellant's role being that of a friend of Jackson, rather than as a participant in his venture.

[38] Counsel developed this proposition of the appellant being too remote from the plan by saying that the appellant was not "anywhere near the inner circle". Again, this was a response to the use of that expression in the prosecutor's address.

[39] It was impliedly conceded that it was the appellant who travelled as Josephsen to Noumea, but it was argued that as the evidence went no further than that, and that many people visited Noumea for other reasons, no inference of guilt should be drawn.

[40] At the end of the hearing on the Friday, the trial judge, in the absence of the jury, asked the appellant's counsel whether she was correct in understanding his address to concede that the appellant was the person recorded on the tapes. Her Honour referred to this passage from counsel shortly after he had commenced to address:

> "I didn't have to put Mr Nudd in the witness box, that's his undoubted right and, having said that, you can't draw…an adverse inference, and having said that about his silence he's hardly been silent in this Court, has he? You've heard him on tape and those tapes I'd ask you to bear in mind are contemporaneous with events."

When her Honour asked counsel whether he had intended to say that it was the appellant's voice which was recorded on the tapes, counsel replied: "No. I hope if I've done it, it was a slip of the tongue and nothing more than." The prosecutor then said that it involved more than that passage from his address, correctly observing that: "It was implicit in everything my learned friend said that there's no contest as to Jackson and Nudd being the parties". This exchange then occurred between her Honour and the appellant's counsel:

> "Her Honour: I take it your instructions are not then that Mr Nudd is the person in the telephone calls?
>
> Mr Laws: They're my present instructions, your Honour."

[41] At that point the prosecutor took the opportunity to tell her Honour that *R v Tannous* (1987) 10 NSWLR 303 was a relevant authority on the requirement of knowing concern which might assist in the summing up. What then appears in the transcript from the appellant's counsel fairly indicates that he was unacquainted with that case.

[42] When the trial resumed on the following Monday, her Honour, again in the absence of the jury, asked for clarification as to whether it was the appellant's voice recorded on the tapes. The initial response of counsel was as follows:

> "I have perhaps been guilty of semantic carelessness. The issue of - my instructions are, and always have been, that I am to put the Crown to proof and as part and parcel of that the voice identity question was left in issue. In terms of putting the Crown to proof your Honour will have observed that other sensible concessions were made procedurally, but on substantive points those certainly were my instructions and remain my instructions."

[43] After something further from counsel, her Honour asked him: "So it is not then conceded that Mr Nudd is the person speaking to Peter Jackson?" to which counsel replied: "They are my instructions, your Honour, to put the Crown to proof on substantive questions". Then this exchange followed:

> "Her Honour: You, Mr Laws, are going to now clarify to the jury, are you, that it is not conceded, that the person on the tapes is Mr Nudd?
>
> Mr Laws: Yes, your Honour.
>
> Her Honour: Is that what you intend to do? I'm not suggesting to you how you should run your case. I'm just trying to understand because obviously I have to sum-up the defence case, so I need to understand what it is.

> Mr Laws: Could I take some instructions before we trouble ourselves further?"

[44] The court then adjourned for a few minutes before counsel said to her Honour that "I now hold instructions to admit my client's voice on the (tapes)". The jury returned and counsel continued his address for in excess of another two hours. The address referred to many parts of the evidence and in particular the tapes, but the central theme remained that the appellant was too remote from those who had planned and were implementing this venture for the appellant to have been knowingly concerned in it. At one point he described the appellant's position in these terms:

> "He's not part of this. He's on the fringes and he's picking up pieces of information left, right and centre, and he's repeating them to people. They are not his ideas. It's not because he's privy to anything in the sense of having participated in a decision-making process."

[45] Counsel then emphasised the absence of any evidence of the appellant's actions after his meeting with Jackson on 7 March. He stressed that this was many weeks prior to the departure of the yacht from Noumea, and he described the absence of evidence as to the appellant's conduct within this period as a "black hole". Counsel appears to have suggested two ways in which this black hole was significant. The first was that it was consistent with the appellant never having been concerned in the venture; he was an observer and only for some time. Secondly, at least upon one view of what counsel was saying, the absence of any evidence as to the appellant from 7 March, coupled with some of the evidence of conversations shortly prior to then, suggested that the appellant had reached a point on or about 7 March when he had to decide whether he would become a participant, and that he had decided not to do so. Part of the basis for this argument was a conversation with Jackson on 2 March in which the appellant had said in relation to a person described as the "contractor" that: "he asked me if I can help the…other builders when they come over and I said no fuckin way." This seemed an unpromising argument when that statement was read in the context of the whole conversation, because it seemed to be a reference to some other activity proposed by those he described as "the other builders". Nevertheless, it was reasonable for counsel to argue that the jury could see some significance in the absence of any evidence in relation to the appellant after 7 March, in that this could be regarded as consistent with the appellant's non-participation at any time.

[46] Counsel made two further points. One was that no motive for the appellant's participation was demonstrated. There was no evidence which indicated any particular financial participation by the appellant, or an expected financial reward. Secondly, counsel said that such suggestions as the appellant did make to progress the venture were so unhelpful that, again, it appeared that the appellant was not a participant. He told the jury that "the real plan was something entirely different and beyond the knowledge of the (appellant)".

[47] As mentioned, counsel had addressed the jury in terms of a concept of "practical assistance", which he defined as requiring some "originality" and some assistance which had a discernable effect. By originality, he made it clear, was meant some idea which no other relevant person had put forward. After his address was

completed, but before her Honour began to sum up, the prosecutor asked her Honour to direct the jury that the suggested elements of originality and effectiveness were unnecessary in the proof of this charge. Her Honour upheld the prosecutor's submission and so directed the jury. Upon this appeal, it is common ground that neither of these qualities had to be found in the appellant's conduct for him to have been knowingly concerned in the importation, and that the meaning of "knowingly concerned in", in the present context, was according to *R v Tannous*. In that case, Lee J, with whom Street CJ and Finlay J agreed, held that mere knowledge of an importation was insufficient, but that some act or conduct was required although it need not in fact do anything to further the importation. Her Honour told the jury that she had to "correct some things … said in addresses" and that:

> "It is not the law that in order to be concerned in the importation the accused must put forward an original idea or must assist in taking the venture in a new or different direction, nor is it the law that for the assistance to be practical that it must be effective… It is sufficient if a concern, that is the part played by the accused, occurs in some part of the venture which has as its object bringing drugs into the country, that is to say, if the involvement or participation is a practical part of the venture, the person is concerned …"

[48] In his own view, counsel may have thought that originality and effectiveness were essential elements. However, a counsel not of that view could well have considered that it was relevant to refer to the absence of those matters, not as determinative of the issue, but as a means of distinguishing this case from perhaps a clearer one. If counsel did address without a proper understanding of what was meant by "knowingly concerned in", nevertheless he developed an argument which was consistent with the relevant law, which was that the taped conversations, as they might be interpreted, did not require the jury to infer that the appellant was a participant.

The case on appeal

[49] The appellant strongly attacks the competence of his trial counsel and his then solicitor. The appellant's outline particularises the allegation of incompetence in these terms:

> "(a) Counsel failed to understand, and properly advise the Appellant on, the elements of the offence charged;
> (b) Counsel conducted the defence case on the basis of his misunderstanding of the meaning of the term "knowingly concerned";
> (c) Counsel failed to take appropriate instructions from the Appellant;
> (d) Counsel failed to properly advise the Appellant upon such instructions;
> (e) Counsel failed to appreciate or advance two lines of defence reasonably open upon the Appellant's instructions;
> (f) Counsel failed to appropriately advise the Appellant in relation to giving evidence;
> (g) Counsel made admissions of fact in error and/or without instructions to do so;

(h) Counsel failed to seek an appropriate direction concerning the way in which the jury could use the contents of discussions between persons, such discussions not involving the Appellant;
(i) Counsel failed to object to inadmissible and highly prejudicial material contained in the telephone intercept tapes being admitted and failed to seek an appropriate direction from the learned Trial Judge relating to such material;
(j) Counsel introduced highly prejudicial and inadmissible material in his closing address."

[50] On the appellant's argument the most important of these alleged mistakes was that counsel misunderstood the meaning of "knowingly concerned in", because at least most of the other mistakes could be seen to have resulted from it. This misunderstanding, it was argued, caused counsel to address the jury in terms which gave his client no real prospect of an acquittal. The trial representatives did not obtain the appellant's version of events, apparently because they believed that it might in some way limit their choice of arguments. It is now said that had counsel properly understood the elements of the offence charged, he would have sought the appellant's version and called him to give evidence, because that would have provided the only real chance of an acquittal.

[51] The incompetence of counsel is not of itself a ground for setting aside a conviction. The relevant ground is that there had been a miscarriage of justice by the way in which the case was conducted. The relevant inquiry in this context is whether the case has been conducted in a way which is incapable of any reasonable explanation; it is not an inquiry as to why counsel did conduct it in a certain way. In some cases, it is relevant to refer to the competence or otherwise of trial counsel where that enables a particular course that was taken at the trial to be explained reasonably or otherwise. But the focus must remain on what did and did not occur at the trial, and whether in the light of the facts as disclosed to the appellate court, that involved a miscarriage of justice.

[52] Thus in *R v Birks* (1990) 19 NSWLR 677, Gleeson CJ at 685 said:

"2. As a general rule an accused person is bound by the way the trial is conducted by counsel, regardless of whether that was in accordance with the wishes of the client, and it is not a ground for setting aside a conviction that decisions made by counsel were made without, or contrary to, instructions, or involve errors of judgment or even negligence.

3. However, there may arise cases where something has occurred in the running of a trial, perhaps as the result of 'flagrant incompetence' of counsel, or perhaps from some other cause, which will be recognised as involving, or causing, a miscarriage of justice… When they arise they will attract appellate intervention."

[53] In *TKWJ v The Queen*, it was argued that due to the alleged incompetence of trial counsel, certain character evidence was not adduced and that the prospects of an acquittal were thereby impaired. Counsel had been concerned that if this evidence was adduced, the Crown would lead evidence in reply which revealed allegations of

similar sexual offending made by the complainant's sister. The alleged incompetence was in overlooking the course of asking for a ruling, prior to the adducement of the character evidence, as to whether the Crown could then lead this evidence in reply. On the hearing of the appeal, there was an affidavit by the appellant's trial counsel in which he said that he overlooked that course. As the judgments show, had such a ruling been sought, it was 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 conduct of the case then was one for which there was a reasonable explanation, although it came from a process of reasoning which the trial counsel conceded involved some inadvertence. The case then illustrates the distinction between the correctness of counsel's consideration of how the case should be conducted and the objective reasonableness of the way in which the case was conducted. At 129-130 [13] Gleeson CJ said that:

> "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."

Gaudron J, with whom Gummow J agreed, said that the appellate court's enquiry involved an objective test, which was whether the course taken by counsel was capable of explanation.[1] Similarly Hayne J, with whom Gummow J also agreed, emphasised the need for an objective assessment of the conduct of the case, saying at 158:

> "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?
>
> [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."

At 159-160 Hayne J continued:

> [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.

[1] At 133 [28]

> The focus is not shifted from those matters to what trial counsel did, or did not, think about in the course of the trial."

[54] In this Court, *TKWJ* has been applied in two cases, the first being *R v N* [2003] QCA 505 and the subsequent case being *R v N* [2003] QCA 574. In the former case, the Court by a majority set aside the convictions upon the basis that there was a miscarriage of justice by the accused not giving and calling certain evidence. As Davies JA said in the latter case,[2] the decision of the majority "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" and that the 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". In the second *R v N*, the appellant complained that he was wrongly advised not to give evidence but his appeal failed. Citing *TKWJ*, Davies JA, with whom McMurdo P and Chesterman J agreed, said at [38]:

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

Similarly, McMurdo P said that "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", and Chesterman J said at [52]: "There will have been no miscarriage of justice if there could be a reasonable explanation for the act or omission of counsel." His Honour added at [53]:

> "The course of the present appeal suggested that the appellant had accepted the invitation, apparently contained in (the first *R v N*), 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. (Trial counsel)…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 (in *TKWJ*) emphatically rejected the appropriateness of such an inquiry. The rejection should be endorsed by this court."

[55] In this appeal, the appellant tendered affidavits sworn by his present solicitor, relating to discussions and correspondence with his trial counsel and solicitor as well as an affidavit sworn by himself upon which he was cross-examined. The prosecution tendered affidavits sworn by the trial counsel and solicitor, each of whom was extensively cross-examined. That cross-examination covered not only the facts of what instructions were or were not sought or given, but also the process of reasoning of the appellant's trial lawyers and the extent of counsel's experience

[2] At [39]

and knowledge of the criminal law. This cross-examination proceeded without objection, but much of it seemed irrelevant for reasons clearly expressed in *TKWJ* and most recently emphasised by Chesterman J in *R v N*. In *R v Paddon* [1999] 2 Qd R 387, Chesterman J, with whom McPherson JA and Helman J agreed, described the relevance of evidence from the trial representatives in this context. His Honour there explained that such an appeal involves some waiver of legal professional privilege attaching to the communications between the appellant and his former lawyers so that the Crown is free to interview them about those communications and "put before the Court of Appeal anything *of relevance* concerning the impugned conduct" (my emphasis). In cases such as this it is relevant to know what passed between the appellant and his trial representatives, at least because it is usually necessary for the Court of Appeal to understand what instructions they had, or in some cases, what instructions they would have had, if the appellant had been properly represented. It is quite another thing for the evidence of the trial representatives to go to their processes of reasoning in deciding to conduct the case as they did.

[56] Going then to the facts of this case, there may be many legitimate criticisms which can be made of the performance of counsel in this trial. But the principal arguments for the appellant are that there were three courses which should have been taken on his behalf.

[57] The first is that he was not called to give evidence that, so he now swears, he believed that the cargo was not cocaine bound for Australia, but that it was "some chemicals, possibly Ephedra or Pseudoephedrine" bound for someone who was perhaps Velarde's cousin in New Zealand. Secondly, he says that he should have been called to give evidence which, it is argued, would have made out a case that although originally concerned in the venture, he withdrew from it well before the Sparkles Plenty entered Australia. Thirdly, it is argued that even without evidence by the appellant, his counsel should have argued that the jury could not be satisfied that he knew that Jackson's yacht contained drugs.

[58] Although the expressed particulars of counsel's incompetence include an allegation that counsel made admissions of fact in error or without instructions, ultimately the appellant's argument does not suggest that every admission of fact caused or contributed to a miscarriage of justice. For example, it reasonably appears from the transcript of counsel's address that his concession that it was the appellant who could be heard on the tapes was at first made without instructions. Upon the evidence, however, the claim that it was the appellant's voice was compelling, and the concession could not have affected the result.

[59] Although recent cases have expressed the need for an assessment of whether the conduct of the trial could be reasonably explained, the ultimate question remains one of whether there has been a miscarriage of justice. This suggests a need not only for the absence of such a reasonable explanation, but also for some connection between the conduct of the case and the outcome. In (the second) *R v N*, Davies JA identified such a requirement in terms that the relevant conduct of the case "deprived the appellant of a chance of an acquittal that was fairly open".[3] That was how Gaudron J expressed it in *TKWJ* at 133 [26]. And at 135 [33], her Honour said that there will not be a miscarriage of justice where the complaint is a failure to call

[3] At [37] of *R v N* [2003] QCA 574

evidence "unless…the evidence is such that 'when viewed in combination with the evidence given at trial...the jury would have been likely to entertain a reasonable doubt about the guilt of the accused'". Hayne J there expressed the required impact of not calling relevant evidence upon the result of the case as being that the evidence be "such that, viewed in combination with the evidence given at trial, the jury would have been likely to entertain a reasonable doubt about guilt".[4]

[60] However, Mr Byrne QC for the appellant submits that the conduct of this case was so poor that the appellant was denied a fair trial in the sense in which McHugh J used that term in *TKWJ* when his Honour said at 148 [76]:

> "No matter how strong the prosecution case appears to be, an accused person is entitled to the trial that the law requires. In principle, therefore, where the trial has been unfair, the accused should not have to show that counsel's conduct might have affected the result..."

McHugh J described an unfair trial in this sense as one which of itself constitutes a miscarriage of justice and his Honour gave examples of where "for no valid reason, counsel fails to cross-examine material witnesses or does not address the jury". His Honour compared such cases with those which he described as "perhaps the majority" where the conduct of counsel, although irregular, will not necessarily deprive the accused of a fair trial, saying:

> "Not every error makes the trial unfair. Nevertheless, the irregular conduct of counsel may have affected the outcome. And a miscarriage of justice always occurs when there is a significant possibility that a material irregularity at the trial has resulted in the conviction of an accused person..."[5]

McHugh J then cited *Re Knowles* [1984] VR 751 as a case of the second kind. In that case, the accused was convicted of the murder of his de facto wife, after his counsel had wrongly concluded that evidence of her propensity to violence was neither relevant nor admissible. In the view of the court, the evidence was relevant and admissible, and was of such importance to the defence, that the failure to call it had resulted in a miscarriage of justice. In the present case, the trial was conducted according to law and to the extent that cross-examination was appropriate, it was undertaken. The appellant's counsel extensively addressed the jury, although, as will be discussed, much of that address may have proceeded upon a misunderstanding of what the prosecution had to prove. In my view, this is not a case where the appellant was denied a fair trial in the sense in which McHugh J was using that term in *TKWJ*. Accordingly, the appellant must demonstrate that the failure to conduct the case as he now says it should have been conducted deprived him of a chance of an acquittal that was fairly open, applying what was said by Davies JA with the concurrence of the other members of the court in (second) *R v N*.

[61] As mentioned, the mainstay of the prosecution case was the evidence of the intercepted telephone conversations, and the evidence that it was the accused who was recorded speaking to Jackson was compelling. Without evidence given by or for the accused, the outcome depended upon the inferences which the jury could

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[4] At 160 [112]
[5] At 148 [77], see also at 156 [97]

draw from those conversations. This required some considerable interpretation of the words spoken.

[62] The evidence which it is said should have been adduced from the appellant is to the effect of what is now sworn by the appellant in paragraph 36 of his affidavit:

> "36. In relation to the charges I say as follows:
> (a) I was not aware that Peter Jackson was intending to bring cocaine into Australia.
> (b) I had some knowledge through Jorge Velarde that Peter Jackson was taking some chemicals, possibly Ephedra or Pseudoephedrine for a person whom I believe to be Jorge Velarde's cousin, whom I also believe resides in New Zealand.
> (c) I had no financial interest in that importation and did not stand to benefit from it in any way.
> (d) After my meeting with Peter Jackson at the Los Angeles Airport on March 7, 2001 I had no further contact with Peter Jackson and no further involvement in any aspect of Peter Jackson's activities. In the course of the meeting at Los Angeles Airport on March 7, 2001 I told Peter Jackson I was not going to have anything more to do with him and the matter as I did not want to have any further involvement in the matter. I did not assist Peter Jackson to obtain a passport in the name of Gescke (sic)."

[63] The appellant's oral evidence was that he instructed his trial lawyers in terms of paragraph (a) but not as to paragraphs (b) and (c) because, he says, they told him on several occasions that he should not provide them with his version of events. As to paragraph (d), on one view of the appellant's oral evidence, he did tell his lawyers effectively everything which now appears in that paragraph. But the preferable view is that, he told his lawyers of what appears in the first sentence of that paragraph but not of the other matters, again, because he was not allowed to do so.

[64] The evidence of his trial counsel and solicitor confirms that no proof of evidence or written instructions were sought or obtained from the appellant. The evidence of counsel also confirms that they were not told of what is now in paragraph 36(b) of the appellant's affidavit, and that the appellant had told them that although he thought that the vessel "might have some form of drug, he denied that he had any knowledge that it was cocaine". Why the appellant said that to his counsel without adding that he believed that the drug was possibly "Ephedra or Pseudoephedrine" and bound for New Zealand is not easy to understand. Counsel for the respondent submitted that paragraph 36(b) has been invented since the trial and that it is inspired by questions raised by the jury. The jury had been deliberating for nearly 24 hours when they asked these questions:

> "Does the accused need to know the final destination of shipment, i.e., Australia, in order for him to have committed an illegal act as charged?
>
> If the accused was knowingly concerned in the bringing into destination X, if not being Australia, of prohibited imports and the ultimate destination became Australia through revised planning or other reasoning, does the charge still apply?"

[65] Whilst it is possible that paragraph (b) is a recent invention, it is not so clearly so that this appeal should be decided upon that premise. It may be that had the trial representatives asked for the appellant's version of events, they could have been told what is now in paragraph 36. On the other hand, it should not be assumed in the appellant's favour that he could have provided further and more detailed instructions to substantiate those assertions. The present position is that the appellant has been convicted after a trial which was conducted according to law, and if he wishes to maintain that there was a miscarriage of justice because critical evidence was not adduced, it is incumbent upon the appellant at this stage to disclose what it would have been.

[66] Returning then to the matter in paragraph 36(a), it is argued that the trial counsel should have told the jury that they could not infer that he knew that the cargo was cocaine. It is said that the explanation for not doing so is that counsel misunderstood the law with respect to the expression "knowingly concerned in". But on an objective view, there would be at least another and reasonable explanation, which is that the point would have detracted from the intended plausibility of the accused's principal argument. It would not have been inconsistent with the argument that the accused was effectively an observer and not a participant to suggest that he was unaware of precisely what drug was being imported. But the evidence strongly indicated that the appellant had a good knowledge of Jackson's venture, having discussed it many times with Jackson who showed no sign of withholding information. A competent counsel could well have thought that the jury would find it so unlikely that the appellant did not know that the drug was cocaine, (at least absent evidence from the appellant as to what he thought it was) that the point would make counsel's address less persuasive overall. That is the type of forensic decision which does not provide a basis for the present ground of appeal. Apart from that concession, counsel for the appellant was unable to suggest some way in which the case *would* have been conducted by an entirely competent counsel, if the accused did not give evidence. Accordingly, the appellant's argument comes down to one that there was a miscarriage of justice by his not being called as a witness.

[67] If a competent counsel had held instructions according to paragraph 36 of the appellant's affidavit, could a failure to call the appellant have been reasonably explained? One problem in calling him would have been that it would have been difficult for him to have given some of that evidence without giving all of it, at least in the course of cross-examination. The credibility of some of that evidence would have been affected by the credibility of the balance, and to some extent there would have been a tension between the evidence the subject of paragraph 36(b) and that the subject of paragraph 36(d).

[68] For the appellant, it was submitted that paragraph 36(d) demonstrated a case of disassociation which in itself provided a serious chance of an acquittal. In this appeal, the trial counsel was cross-examined as to his knowledge of case law relevant to that argument, including *White v Ridley* (1978) 140 CLR 342 and *R v Menniti* [1985] 1 Qd R 520. *White v Ridley* involved an accused who delivered a package containing a prohibited import to an air carrier in Singapore for consignment to Australia, and who subsequently became aware that he was under suspicion and sent an instruction to the carrier to stop the dispatch of the package. Nevertheless the package was sent to Australia where it was apprehended by Customs officers and the accused was convicted under s 233B of importing a

prohibited import. It was held that he had been properly convicted, by Gibbs J on the ground that he had not done all that he could reasonably have done to prevent the dispatch; and by Stephen and Aickin JJ on the ground that his attempt to stop the dispatch had not been a new cause displacing the original arrangement as the cause of the importation. Unlike that case, *Menniti* concerned not a principal offender but an aider and enabler, as defined in s 7(b) of the *Criminal Code* (Qld). Absent any statement of a defence of timely withdrawal or countermand in the *Code*, Thomas J held that the relevance of a purported withdrawal went to the question of fact of whether an accused had aided, counselled or otherwise done the acts which constituted the offence on his part.[6] In the present case, had the evidence in paragraph 36(d) been given, the question for the jury would have remained whether they were satisfied that the appellant was knowingly concerned in the importation. In *R v Leff* (1996) 86 A Crim R 212 at 214, Gleeson CJ said in relation to the term "knowingly concerned in an importation" that "importation is a process, or a venture, not a physical act which occurs or ceases at the moment of import." Accordingly conduct which occurs well prior to the moment of import could make for a knowing concern in the importation. The difficulty in assessing whether this evidence would have provided an arguable defence is that an assessment of what had to be done by the appellant to disassociate himself from the venture requires an understanding not only of what he had done in association with the venture, but what he was likely to have done had he remained a participant. What is an effective withdrawal may depend on the mode of an accused's participation.[7] Had the appellant given evidence, the extent of his participation might have been revealed by his own evidence, and the criminality of that conduct might not have been displaced simply by the appellant's saying that he wanted no further involvement in the matter, and by his not being further involved. And a problem with the accused's giving this evidence would have been that he would have thereby proved that in some way he had been involved in the matter. Accordingly the effect of this evidence would have been to deprive the appellant of the line of argument which was employed in counsel's address.

[69] But in addition, in seeking to prove that he did withdraw from the venture, it would have been difficult for the appellant to credibly assert that whilst concerned in the venture, he knew so little about it that he believed that the contaminated goods upon the Sparkles Plenty were not packages of cocaine bound for Australia, but were "some chemicals, possibly Ephedra or Pseudoephedrine" bound for some person in New Zealand. As I have mentioned, the telephone tapes strongly indicate that Jackson was quite prepared to confide in the appellant and to discuss with him the problems of this venture. Moreover, the appellant's affidavit does not disclose the facts and circumstances from which he held the belief asserted in paragraph 36(b). It does not explain why someone speaking almost daily to Jackson about this shipment, including the damage to the cargo, could have been so mistaken as to what the cargo was. In one of the taped conversations there is a reference to a cousin of Velarde's in New Zealand, but not such as to have provided any real support for the claim in paragraph 36(b). The apparent credibility or otherwise of these claims is potentially relevant in two ways. If the suggested evidence in answer to the prosecution case is so incredible that there was no prospect of an acquittal from it, then it provides no basis for this appeal. But before consideration of that question, the relative likelihood of the claims is relevant in the assessment of

[6] At 530
[7] *Smith & Hogan* Criminal Law 9th ed (1999) at p 155

what a competent counsel could have done if given instructions in those terms. For the appellant, it is argued that trial counsel in that position could only have called the appellant to give the evidence, because the alternative course gave the appellant no real prospect of an acquittal.

[70] In my view this was a strong Crown case, but it goes too far to say that there was no prospect of an acquittal absent evidence from the accused. To convict, the jury had to be persuaded to interpret the cryptic terms and references within these taped conversations in the manner advocated by the prosecution. Whilst those conversations demonstrated a knowledge of the venture, the prosecution case depended upon proof that the conversations had to be interpreted in a certain way, which was that the appellant was a participant. The case which was advanced for the accused, was, for the most part, an arguable one in the context of the criminal standard of proof. It was a case which was given some assistance by the level at which the prosecution had described the case which it sought to prove, which was that the appellant was providing "practical assistance" and was within the "inner circle". Counsel went too far in suggesting that the Crown had to prove some "original" thought or contribution, or that the appellant's participation must have had some net effect. But the core argument, which was that the jury could not be satisfied from the tapes that the accused was a participant in this venture, was worthy of serious consideration and it was not without any prospect of success.

[71] A competent counsel with the benefit of instructions according to paragraph 36 of the affidavit would have been required to balance the strength of that core argument with the apparent strength of a case based upon that evidence. In making that judgment, counsel would have considered also the contingencies which would affect the case, including the potential for further and damaging facts to emerge from the accused's evidence and the possibility that the jury would be affected by matters such as demeanour.

[72] In my view, a competent counsel, armed with instructions properly taken, which it must be assumed would have contained no more or less than what is now in paragraph 36 of the affidavit, would not have been bound to call the accused. The weaknesses of the available arguments absent this evidence would not have been so different from the weaknesses in the case had the appellant been called. The present question does not involve a fine consideration of what would have been the better course. If the course which was taken, regardless of the reasoning behind it, was one which a properly instructed and competent counsel *could* have taken, then the case was conducted in a way that involved no miscarriage of justice.

[73] It is necessary to mention those suggested particulars of incompetence which have not been already addressed. The first is that counsel should have sought appropriate directions concerning the way in which the jury could use the content of discussions between persons, as recorded on the tapes, where those discussions did not involve the appellant. On the strategy which counsel employed, of endeavouring to make his client seem irrelevant to the scheme which was organised by others, there was some potential advantage in allowing the jury to hear these other conversations. Perhaps it was arguable that some of this evidence was inadmissible, because it was not evidence of the existing venture and the appellant's role in it. However, it does not appear to me that some particular direction was required and there is no ground of appeal which is critical of the summing up.

[74] A further complaint is that counsel failed to object to part of the tapes in which the appellant was recounting an occasion on which he was stopped at the airport and was searched. This is a fair criticism of counsel, but it hardly provides a basis for thinking that there has been a miscarriage of justice. Counsel is also criticised for failing to object to a passage from the tapes in which the appellant was recorded as saying that he had been involved "quite a few times" in what the prosecution interpreted as obtaining false identification. In my view, however, that was admissible as evidence of the case that the accused had attempted to assist Jackson to obtain a false passport.

[75] Lastly, criticism is made of counsel for saying in the course of his address that the appellant was arrested in the United States for visa violations, deported to Australia, remanded in custody from the date of his arrest at the trial and had lost his property which had been seized and sold by the Australian government. The evident intention of counsel was to try to engender some sympathy for his client, consistently with his submission that he was facing such a serious charge in circumstances where he had had no close involvement and there was no evidence of any financial reward. In my view, the volunteering of this information, whilst inappropriate, was not so prejudicial as to be significant here.

[76] I conclude that the appeal against conviction should be dismissed. The application for leave to appeal against sentence is not pursued, and should also be dismissed.