SUPREME COURT OF QUEENSLAND

CITATION:	*R v Oulds* [2014] QCA 223
PARTIES:	**R** **v** **OULDS, Shane Michael** (appellant)
FILE NOS:	CA No 349 of 2012 SC No 860 of 2011
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	5 September 2014
DELIVERED AT:	Brisbane
HEARING DATE:	15 April 2014
JUDGES:	Holmes and Fraser JJA and Thomas J Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**The appeal is dismissed.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – MISCARRIAGE OF JUSTICE – PARTICULAR CIRCUMSTANCES NOT AMOUNTING TO MISCARRIAGE – OTHER IRREGULARITIES – where the appellant was convicted by a jury of the murder of Jye Burns – where the two men present when Burns was killed were the appellant and Shane Moroney – where Moroney's account that the appellant shot Burns was critical to the prosecution's case – where the appellant's defence was that it was Moroney who shot Burns – where the appellant appeals his conviction on the ground that the conduct of his trial counsel was incompetent and resulted in a miscarriage of justice – where the appellant contends that his trial counsel should have called him to give evidence – where the appellant complains that without his giving evidence, the jury had only Moroney's detailed version of events before them – whether trial counsel's advice not to give evidence was so flawed as to produce a conclusion of incompetence giving rise to a miscarriage of justice EVIDENCE – COURSE OF EVIDENCE AND ADDRESSES – ADDRESSES – GENERALLY – where the appellant was convicted by a jury of the murder of Jye Burns – where the two men present when Burns was killed were the appellant and Shane Moroney – where Moroney's account that the

appellant shot Burns was critical to the prosecution's case – where the appellant's defence was that it was Moroney who shot Burns – where the appellant appeals his conviction on the ground that the conduct of his trial counsel was incompetent and resulted in a miscarriage of justice – where defence counsel made an opening statement but did not allege that Moroney had shot Burns – where the appellant complains that trial counsel's failure to outline the appellant's case in the opening statement was incompetent – where there is no prescription for what may be said in an opening statement in Queensland – where an opening statement properly identifies the issues – where the real issue here was not whether Moroney had killed Burns but whether he could be believed beyond reasonable doubt when he said that the appellant had done so – whether there was any incompetence or miscarriage of justice

EVIDENCE – COURSE OF EVIDENCE AND ADDRESSES – WITNESSES – WHEN PERMITTED AND IN GENERAL – ON WHAT MATTERS – where the appellant was convicted by a jury of the murder of Jye Burns – where the two men present when Burns was killed were the appellant and Shane Moroney – where Moroney's account that the appellant shot Burns was critical to the prosecution's case – where the appellant's defence was that Moroney shot Burns – where the appellant appeals his conviction on the ground that the conduct of his trial counsel was incompetent and resulted in a miscarriage of justice – where the appellant contends that his counsel failed to cross-examine Moroney in accordance with his instructions – where trial counsel made a decision as to what parts of the appellant's instructions he should put to Moroney – whether that decision was a legitimate forensic choice – whether there was any miscarriage of justice

EVIDENCE – COURSE OF EVIDENCE AND ADDRESSES – COURSE OF EVIDENCE – RE-OPENING CASE AND RECALLING WITNESSES – BY PARTIES – where the appellant was convicted by a jury of the murder of Jye Burns – where the two men present when Burns was killed were the appellant and Shane Moroney – where Moroney's account that the appellant shot Burns was critical to the prosecution's case – where the appellant's defence was that Moroney shot Burns – where the appellant appeals his conviction on the ground that the conduct of his trial counsel was incompetent and resulted in a miscarriage of justice – where trial counsel omitted to put to Moroney that he had changed his clothing – where Moroney was recalled by telephone so that the question could be put – where the appellant submitted that trial counsel's failure to put the question when Moroney was first called and allowing him to be re-called by telephone rather than in person constituted incompetence causing a miscarriage of justice – whether any miscarriage of justice resulted

Criminal Code 1899 (Qld), s 590AA(2)(e), s 619
Evidence Act 1977 (Qld), s 15(2)

R v Karapandzk (2008) 101 SASR 7; [2008] SASC 126, explained
R v MM (2004) 145 A Crim R 148; [2004] NSWCCA 81, explained
R v Nona [1997] 2 Qd R 436, cited

COUNSEL: W Terracini SC for the appellant
M R Byrne QC for the respondent

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

[1] **HOLMES JA:** The appellant was convicted by a jury of the murder of Jye Burns. He appeals that conviction on the ground that the conduct of counsel representing him at trial resulted in a miscarriage of justice. In particular, complaint is made of what were said to be these deficiencies in counsel's conduct of the case:

(i) failing to call evidence on the appellant's behalf and, in particular, failing to call the appellant himself to give evidence;

(ii) failing to outline the appellant's case in his opening address;

(iii) failing to cross-examine an indemnified Crown witness, Shane Moroney, in accordance with the appellant's instructions;

(iv) failing to put the entirety of his instructions to Moroney, so that the latter had to be recalled for further cross-examination, and consenting to conduct that further cross-examination by telephone.

[2] A passing motorist found Mr Burns lying on Old Caloundra Road near Landsborough at about 10.05 pm on 8 July 2010. He had been shot five times with a .32 calibre revolver, twice in the head, twice in the trunk and once in an arm. He was still alive when he was found, but died not long after. Earlier that evening he had been in a nightclub in Mooloolaba; CCTV footage from the nightclub showed him leaving it at 9.39 pm in the company of the appellant and Shane Moroney.

Moroney's evidence

[3] The Crown case relied heavily on the evidence of Moroney, who had been given an undertaking that his evidence would not be used against him. His account was that on the evening of 8 July 2010 he went to the Maroochydore Tavern where he met Mr Burns, the appellant and another man named Dan. He had met Burns once before; he had known Oulds for some years; and Dan was the friend of an associate. The group moved to another bar where there was a confrontation between Mr Burns and Dan, the former punching the latter. The appellant, Burns and Moroney moved on, unsuccessfully trying to get into a Mooloolaba nightclub and then going to another bar. After a short while, Moroney announced that he wanted to go home; the appellant indicated to him that he did not want to be left with "this dickhead" (Burns).

[4] All three men left the club and got into Moroney's vehicle, a Range Rover, with Moroney driving, the appellant in the front passenger seat and Burns sitting in the back. The appellant suggested that they should go to the house of a man named Mike near Landsborough to procure some cocaine. Moroney drove in the direction of Landsborough. En route, at the appellant's request, they stopped at his parents' house. He went inside and returned after a few minutes. Driving on, the three men discussed the possibility of assaulting Mike and stealing his money. While Burns was pre-occupied with talking on his mobile phone, the appellant confided in Moroney that he intended to teach Burns a lesson. He directed Moroney to take Old Caloundra Road, which was a gravel road. Some distance along it, the appellant instructed Moroney to pull over because he needed to urinate. He told him also to keep the volume of the music playing in the car up and to do a U-turn.

[5] Both the appellant and Burns alighted from the car and walked up an embankment. Moroney said that as he moved the vehicle on he heard a gunshot. He looked to his left to see Burns slouched over and the appellant shooting at him. He turned the vehicle as he had been instructed and heard more gunshots. Looking over again, he saw Burns on his knees and the appellant still shooting. He pulled over, past where the two were. Burns had left open a rear door, which Moroney shut. The appellant got back into the front passenger side of the vehicle and said that he had shot Burns and he was dead. Moroney saw that he had a weapon with him, which looked to him to be a revolver. The appellant folded the gun into a beanie and put it into his pants. They drove back in the direction from which they had come. At some stage as they were driving, the appellant examined the revolver chambers and observed that he had "used all six".

[6] Retracing their route took them north on the Bruce Highway. They left it at the Nambour exit, where the appellant asked Moroney once more to pull over so that he could urinate. Returning to the vehicle, he said that it needed to be cleaned and that he had blood on his tracksuit jacket. He instructed Moroney to drive to the Maroochy River where he asked for Moroney's phone in order to get rid of it. He threw Moroney's iPhone and his own, together with the gun, into the river. (Police divers later found two iPhones, one used by Moroney and the other belonging to the appellant, but not the gun.) When they had gone some 500 metres further, the appellant asked Moroney if he had any other telephones and Moroney disclosed that he had an old one, which the appellant also threw into the river.

[7] On their journey back to Mooloolaba the two men pulled into a car wash, where the appellant used a high pressure gurney to hose the outside of the Range Rover down. They stopped once more at the appellant's parents' house, where he went inside for a short period. Back in Mooloolaba, they returned to the nightclub they had unsuccessfully attempted to enter earlier that evening, going in through the back entrance. On the way in, the appellant put the beanie in which he had concealed the gun into a rubbish skip at the rear of the club. A CCTV camera recorded their return to the nightclub at 11.00 pm and the appellant throwing an item into the skip bin. In that footage the appellant is still wearing his tracksuit jacket, but once inside the nightclub, he is recorded on camera carrying it.

[8] According to Moroney, the appellant went into the nightclub toilets and returned with the jacket concealed under his shirt. He indicated to Moroney that he should come with him. (CCTV footage showed the two leaving the nightclub and walking in the direction of the seafront, the appellant with something apparently stuffed

under his t-shirt). Moroney saw the appellant go to the water's edge and then return with the top, which was wet. He threw it in a rubbish bin in a park. The two men returned to the nightclub (again recorded; on that footage the appellant now appears to have nothing under his shirt). Moroney left the club to go home at 11.20 pm, shortly after the excursion to dispose of the jacket. On the way home he was stopped for a random breath test. Later CCTV footage showed the appellant leaving the nightclub at 1.20 am, not wearing or carrying a jacket. On that film, he can be seen dancing away from the club, down the Mooloolaba Esplanade.

[9] The following morning, Moroney washed all of the clothing he had worn the previous evening. Later, at his mother's urging, he reported the loss of his iPhone (which was a work phone) to police. During the course of the day he became aware that it was known that Mr Burns had been shot. That morning, after a call from the appellant, he went to the latter's unit at Maroochydore, where he saw the appellant remove wet clothing from a washing basin and put it into a plastic bag. The two of them drove, with the appellant directing, to a street where there was a skip bin into which the appellant deposited the plastic bag of clothes. (On 11 July, police searched the skip and found a t-shirt, pants and shoes matching those which the appellant could be seen wearing in the CCTV footage. They were in a plastic bag which had the appellant's palm print on it and which contained items of rubbish including a nappy and baby food packet of the same make as similar items later found at the appellant's apartment).

[10] Later on 9 July, the appellant told Moroney they needed to get their stories straight. They rehearsed the account each would give to the police; it was that they had been with Burns but had last seen him in Mooloolaba. That evening, the appellant vacillated in conversations with Moroney between that version and a version in which Burns was dropped at Old Caloundra Road, which would cover the contingency that Moroney's vehicle's tyre tracks could be identified. Eventually he settled on the latter version. On the following morning, 10 July, the appellant took Moroney for a drive in order to check what video surveillance cameras there were on the route they had taken towards Landsborough. They then returned to the appellant's townhouse, where they cleaned the inside of the Range Rover.

The cross-examination of Moroney

[11] Under cross-examination, Moroney admitted to being a heavy drinker and a heavy user of cocaine. He had also used other drugs, ecstasy and fantasy. He agreed that his excessive drinking and drug use was affecting him mentally and physically in 2010; among other things it had caused some memory failure. He admitted he had supplied friends with cocaine when they had given him money, but, he claimed, he had purchased it from the appellant. On his previous encounter with Burns, he had supplied him with cocaine. He denied that in fact he was a major supplier of drugs to customers including the appellant. Moroney agreed he had been told by others that Mr Burns was a seller of drugs, possessed guns and had a history of violence. He acknowledged that he was familiar with the area on Old Caloundra Road where Burns' body was found.

[12] Moroney agreed that the appellant and Mr Burns had known each other for some time and seemed happy enough talking to each other on the evening of 8 July. He was challenged about whether the appellant had made the reference to not leaving him with "that dickhead", but he maintained that he had said those words; nonetheless, he

conceded, there had been no sign of antagonism between the appellant and Burns up until that point. He denied that there had been any agreement between the three of them before they left the bar that they would go together to obtain cocaine; he thought he was merely going to drive the appellant home. The appellant had raised the prospect of getting cocaine at "Mike's place"; he had not heard of it before.

[13] Moroney agreed that there was nothing unusual about the appellant's gait or manner when he returned to the vehicle after having been at his parents' house; he had not noticed anything bulky on the appellant's person. The appellant's statement that he intended to teach Mr Burns a lesson came in the absence of any prior sign of animosity towards Burns. At Old Caloundra Road, the appellant had done nothing to entice Mr Burns out of the car; he had alighted of his own volition and walked to where the appellant was. Moroney recalled them stopping side by side, a half metre to a metre apart.

[14] Moroney accepted that he had lied to police and also to a Telstra employee about having lost his phone, and he had lied to friends about what he had done on 8 July. He agreed that on the morning of 10 July he was intercepted by armed police who informed him that he was under arrest for the murder of Burns. They handcuffed him and took him to Caloundra Police Station, where they indicated that they wanted to question him about Burns' murder, and undertook two interviews with him. He had lied to the police in those interviews: his account to them was that Burns had been the person giving instructions about where he should drive, and had told him to go to Old Caloundra Road and pull over; they had dropped him there; Moroney and the appellant had returned to the latter's parents' house for a short period and then gone back to the nightclub. Moroney explained in evidence that he was giving the version the appellant had instructed him to give.

[15] It was apparent, Moroney said, that the police did not believe his story. He agreed that, after having discussed the matter with his solicitor, it was clear that giving a statement implicating the appellant as the shooter, while maintaining his own lack of involvement in the shooting, was the only way he could avoid being prosecuted for murder and facing life imprisonment. On 11 July, Moroney decided to co-operate with the police and provide a statement. He maintained that he had not been promised that he would not be prosecuted, but accepted that at the committal he had said that on providing a statement he would be allowed a "complete walk". Both the statements he subsequently had made were expressed to be given on the understanding that they could not be used against him.

[16] Moroney was asked whether he had asked the appellant why he killed Burns. He said that the appellant had said something to the effect that Mr Burns had threatened his family and had said he was going to "do a home invasion" on him. (His evidence was ambiguous as to whether "him" was a reference to the appellant or to himself.) Nonetheless, Moroney conceded, when he had agreed to provide a statement to police on 11 July, he could not, in response to their questions, provide any motive for the killing. It was only when he gave a second statement on 21 July 2010, some two weeks later, that he raised the threat and home invasion allegations.

[17] Moroney agreed that in his first statement he had said that he thought the gun was still wrapped in the beanie when the appellant threw it in the river. It was only later, he said, that he recalled seeing the beanie on the car floor after the throwing and included the detail of the appellant's putting it in the bin in his second statement.

Moroney was asked whether the appellant had wanted him to get rid of his, Moroney's, tracksuit top; he replied that he did not think so. He agreed that he had washed all of his clothing after the events of 8 July, although there was no occasion for it to get dirty.

[18] The following propositions as to how the killing occurred were put to Moroney in cross-examination. When he left the bar with Mr Burns and the appellant, he had agreed to supply Burns with cocaine and was heading to where he had his stash in Old Caloundra Road. While they were stopped at the appellant's parents' house, there was a dispute between him and Burns: Burns had demanded that he provide the cocaine on credit and threatened that if he did not do so he would rob him at gunpoint. When they pulled up at Old Caloundra Road, Burns and the appellant had gone to urinate and Moroney had shot Burns in the back. He had informed the appellant when they drove away of Burns' threat and reached an agreement with him that they would dispose of their mobile phones. He had kept the gun, which was concealed under the driver's seat. The appellant was effectively his accessory in attempting to assist him to avoid the consequences of the killing. Moroney denied all of those propositions.

The appellant's record of interview

[19] The appellant was interviewed by police on 10 July 2010. He said that he and Burns were friends. On 8 July, he had gone to a hotel and bar with him and Moroney. Burns had wanted to borrow Moroney's vehicle; the latter had refused, but offered to drive him where he wanted to go. The appellant and Moroney had driven with him towards Landsborough. On the way, they had stopped at the appellant's parents' place so that he could borrow some money from his mother. Burns had directed them to drive along Old Caloundra Road, where he seemed to be expecting to meet someone. When that person did not appear, he instructed them to drive him back to the junction of the road with the highway. Burns got out of the car on the understanding that he would meet the others back at the nightclub, but did not arrive there.

[20] The appellant had been wearing tracksuit pants and a black shirt. On the return journey from Landsborough he had stopped at his home to get another shirt to replace the one he had been wearing all day. He left the night club in the early hours of the morning with another male and two girls, Moroney having gone home earlier. They went elsewhere to have a party; indeed with such enthusiasm that the police arrived, in response to a noise complaint. In the course of the night, he had lost his iPhone. On the following day, he and Moroney had taken the latter's car to a carwash.

The appellant's account to his lawyers

[21] On 12 December 2012, the appellant signed a statement prepared by his solicitors headed, "The evidence I would give if I decided to give evidence in my trial". The statement contains footnotes referring to apparent changes in his instructions from an earlier statement derived from notes he sent his solicitors from prison. It was not in evidence before us, but the appellant, under cross-examination in this court, agreed that he had added details as indicated in the footnotes.

[22] On the account in the 12 December 2012 statement, the appellant had got out of the Range Rover at Old Caloundra Road in order to urinate, without realizing that

Burns had also alighted. He was at the rear of the vehicle when he heard shots and ducked down behind it until the shooting ceased. He believed that the shooter had come from the front of the car. He heard Moroney yelling "What the fuck have I done". The latter was crying and panicking and claimed that Burns was going to rob him. The two got back into the Range Rover, Moroney leaning over to shut the rear door. (A footnote indicated that the appellant had not previously provided that detail.) Once in the car, Moroney said that Burns was going to rob and kill him, and pointed to Burns lying on the road. (In his previous instructions, the appellant had only referred to a threat to rob, not to kill). The appellant could see that Burns was barely moving and that there was a lot of blood; that was, he went on to say, "the only time and last time I seen him." (He had previously said that he had seen Burns gasping for air before he got back into the vehicle.) Both he and Moroney were panicking; he, the appellant, said "We have to go now".

[23] According to the appellant's statement, Moroney gave an account of looking in the back seat to see if Burns had spilt anything and finding a gun. He claimed that he had got out of the vehicle to confront Burns and asked him what he was doing with the gun, to which Burns responded "I'm gonna rob and kill you". The appellant's view of that as expressed in his statement was that it was probably a joke, although he had noted that the two men were arguing at the point in their journey when he went into his parents' house and returned to the car. (The appellant's previous instructions had been that the conversation involving Moroney's explanation occurred later.) Moroney made a three-point turn and they left Burns on the road.

[24] Moroney had asked for the appellant's help. He saw Moroney put the gun under the driver's seat and did not see it again subsequently. It was Moroney who had thrown the phones in the river and who had left the nightclub to get rid of everything, including the gun. The appellant said in his statement that some four weeks prior, Burns had robbed someone who worked for Moroney selling cocaine, and not long after that Moroney had told him that Burns was trying to find out where he lived because he wanted to rob him.

[25] The appellant also made written notes during the trial which he provided to his solicitor. In the main, they concern perceived flaws in Moroney's evidence. They contain, however, an indication that he gave his clothes to Moroney. The point is made in the notes that the clothes were not washed. Elsewhere in the notes, the appellant's lawyers are told not to "worry about the jacket!" and that there is "no evidence" in respect of it.

The decision not to give evidence

[26] Although the appeal ground was more broadly expressed, the appellant's argument about the decision not to give evidence turned on his counsel's failure to call him; he did not identify any other witness who could have assisted his case. On 14 December 2012, he signed a document headed "Instructions in Relation to Evidence", in which he said that he would not call or give evidence. On the first page, four options consisting of various combinations of giving evidence and calling evidence or one or none of those, were set out. The appellant initialled the fourth, "neither call nor give evidence".

[27] The following reasons for that decision were articulated in the instructions: that the appellant would be cross-examined on lies told during his interview; that he wished his counsel to have the right of last reply; and that if he were to give evidence his

criminal history would be used against him. The instructions acknowledged that if the appellant did not give evidence the jury would not have for its consideration his sworn evidence that he did not kill Burns; and that he had fully considered the matter and did not need further time or advice before giving the instructions.

[28] The appellant swore two affidavits as to how he came to give the written instructions that he would not give evidence. In the first he deposed, oddly, not to how that document had come into being, but what he had told his current solicitor about how it had come into being; which was that he had signed it seated in the dock during the trial. He had wanted to give evidence but felt overborne by the advice of his barrister, Mr Anthony Kimmins, and solicitor, Mr Peter Shields. He had signed the document without reading it because Mr Shields was in a rush. The lies on which he might be cross-examined had not been explained to him; he had challenged his lawyers to specify what they were, but they were unable to answer. They had said that they wanted to have the last address and that the jury would form an adverse view of him if his criminal history were put before them. Mr Shields had assured him that because Moroney was a liar, the jury would not accept his evidence; he believed from his conferences with Mr Shields that it would not be necessary for him to give evidence himself.

[29] In his second affidavit, made in response to one by Mr Shields, the appellant denied any understanding at the time of a conference with Mr Shields on 10 December (at the start of the trial) that if he did not give evidence his counsel would have the right of last address. Mr Shields had not explained the trial procedure to him at that conference; it would have been unnecessary because he had "experience with the basic procedures of a trial". The appellant denied that Mr Shields had ever taken notes in their conferences during the trial. He gave the following reasons as to why he did not give evidence: he was rushed into signing the instructions to that effect, and had not read them; Mr Shields had said that there was no need to give evidence because he would be acquitted; he was told his criminal record would definitely be admitted if he gave evidence; and he felt overborne and as if he had no choice. Mr Kimmins, whose signature as witness appeared on the "Instructions in Relation to Evidence", was not in fact present when he signed the document.

[30] In a conference on 12 December 2012, the appellant had asked his lawyers whether he could give evidence but refuse to answer questions in cross-examination. When Mr Shields had raised the prospect of his being cross-examined as to lies told in his record of interview, his response had not been to explain those lies, as Mr Shields said in his affidavit, but to say,

> "What fucking lies Peter".

When Mr Shields had raised the problem of his criminal history being used against him, he had responded that he could explain it all:

> "Just because I have a few priors doesn't mean that I killed Jye".

[31] The appellant deposed that at a point in the 12 December conference when Mr Shields had left the room, he had a conversation with Mr Kimmins in which he informed the latter that he did not respect the solicitor and was concerned that he was being "fucked". He asked Mr Kimmins what he could do; the latter replied, "You could sack us". The appellant said in evidence that the conversation was the product of his dissatisfaction because his instructions about who was in possession of the gun and what had taken place at the shooting were not being put before the jury.

[32] In cross-examination in this court, the appellant accepted that he had previously been represented by the same counsel and solicitor in a District Court trial concerning the shooting of another man. The tactic adopted at that trial was to attack the truthfulness of the victim, the principal witness, and not to give or call evidence. The result was an acquittal. He acknowledged that he was aware on 10 December 2012, at the start of the murder trial, that if he did not give or call evidence his counsel would have the right of last address. It would be wrong to say otherwise; in his previous trial he had been advised not to give evidence in order to retain the right of last address. When his attention was drawn to the contrary statement in his affidavit as to his state of knowledge, the appellant said that it had been a long time since the previous trial and the procedure might be different because this was a murder trial.

[33] The appellant accepted that there was a possibility that Mr Shields had written notes during the conference held on 10 December 2012, immediately before the commencement of the trial. He was shown notes which Mr Shields had deposed to making on that date. They included the words,

> "Client reinforces that he does not wish to give evidence – prefers that Kimmo [Mr Kimmins] has the right of last address."

He did not dispute saying that; it was, he said, the result of the advice he had been given. He said that he accepted the advice of counsel that the trial ought to be run in the way that the prior District Court trial had been run; he was of the firm belief there was not enough evidence to convict him of murder. He agreed that his lawyers had not told him he could not give evidence:

> "They just made it quite clear that their advice to me and – they suggest I strongly take it, was to not get in that box".

[34] The appellant maintained that he had nothing to fear from the prospect of being cross-examined on his criminal history. His conviction in 2009 of possession of a weapon – involving a handgun and ammunition – would not have presented any difficulty to him, he said, because the gun was found in a linen cupboard wrapped in towels, not next to his bed. He was asked in cross-examination how he would explain lying to the police in his interview. He responded:

> "Well, I didn't lie. I left out – I left out what happened";

although he acknowledged that his assurance to the police that he had told them everything was false. He was also asked what he would say in respect of the video footage which showed him dancing away from the Mooloolaba nightclub in the early hours of the morning before going onto another address to continue to party. He would, he replied, have told the jury that

> "…it wasn't murder, skipping down the street".

[35] The appellant's father, Mr Lee Oulds and his former girlfriend, Ms Morrison, both swore affidavits and gave evidence before this court. Mr Oulds recalled Mr Shields saying words to the following effect at various stages: that the only evidence the Crown had was the evidence of Moroney, who was a self-confessed liar; that the appellant wanted to give evidence but his legal representatives had strongly suggested it would not be in his best interests to do so because his past would be brought up and the Crown would have the last reply; subsequent to that, that the appellant was not going to give evidence; and that the appellant wanted to sack his lawyers.

[36] Ms Morrison remembered Mr Kimmins saying that the appellant wanted to sack his lawyers and also recalled another conversation in which Mr Shields said that the appellant wanted to get up and give evidence but they (his lawyers) did not want him to do so because the Crown would bring up his past and the jury would know he used to be a bikie; and also because the right of last address would be lost. Both she and Mr Oulds Snr recalled seeing Mr Shields obtain the appellant's signature on a document during trial in circumstances where Mr Kimmins was also in court; Mr Oulds' recollection was that Mr Kimmins was actually addressing the court. Neither could say what the document was or when that had occurred. (The appellant accepted, however, that he might have signed other documents than the "Instructions in Relation to Evidence" while in the dock; one was his instructions to plead not guilty, signed on the first day of the trial.)

The evidence of the appellant's lawyers

[37] Both Mr Shields and Mr Kimmins swore affidavits and gave evidence. Mr Shields said that the plan for the trial was to run it as had been the previous trial in which he was engaged: the appellant would not give evidence and directions would be sought as to the dangers of convicting on Moroney's evidence. He deposed to the conference on 10 December 2012, at which, he said, he had explained the trial procedure to the appellant. The latter said that he could not believe that a jury would convict him on the evidence and made the statement which Mr Shields recorded, as to not wishing to give or call evidence in order to preserve the right of last address.

[38] There had been a conversation between the appellant, Mr Shields and Mr Kimmins on 12 December 2012 before court commenced, in which the appellant said that he proposed to tell the jury what had happened in accordance with his statement and then refuse to answer any questions in cross-examination. As a result of that intimation, Mr Kimmins sought from the trial judge, and was granted, time to confer with the appellant before the trial resumed before the jury.

[39] The conference was held in the holding cell adjacent to the court room. According to Mr Shields' affidavit, the appellant was told that if he gave evidence he would be cross-examined in relation to his criminal history, which would be prejudicial because he had previous criminal convictions for offences of violence involving the use of firearms. He was also advised that he would be cross-examined about the lies he told in his record of interview; in response, he gave some reasons for not telling the truth. The appellant raised the possibility of a dock statement and was told that anything said from the dock would not constitute evidence. He instructed his lawyers that he would not give or call evidence. After that conclusion was reached, Mr Kimmins went on to explain how he proposed to conduct the case.

[40] Before court on 14 December 2012 (day five of the trial), Mr Shields said, he gave the appellant the "Instructions in Relation to Evidence". In the presence of Mr Kimmins, he explained that the document reflected the conversation of 12 December in which the appellant had said that he did not wish to give evidence. Mr Shields denied that the process was rushed. The appellant appeared to read the document, which he signed in the presence of both Mr Kimmins and Mr Shields.

[41] Mr Kimmins swore an affidavit in which he agreed with the contents of Mr Shields' affidavits. He was present when the appellant signed the written instructions and had no memory of his being hurried. His consistent understanding was that the appellant did not propose to give evidence because he wanted the trial run as his previous trial had been run, an approach with which he, Mr Kimmins, agreed. The

appellant had not been promised an acquittal, either by him or in his presence. He had not given any view as to Mr Oulds' prospects of success, apart from saying that if sufficient doubt were created as to Moroney's credibility, the jury might not be satisfied beyond reasonable doubt of the appellant's guilt. Mr Kimmins disputed the appellant's version as to the context in which the "You could sack us" remark was made. He said that the conversation came about because he could not countenance the appellant's proposal of giving evidence and refusing to answer questions in cross-examination.

[42] The Crown prosecutor had been approached and confirmed that if the appellant gave evidence, he would make an application under s 15(2) of the *Evidence Act* 1977 to cross-examine him about his convictions. Mr Kimmins had conveyed that to the appellant, not by saying that his criminal record would be put before the jury, but that if he gave evidence the Crown would seek to cross-examine him. He thought it was more likely than not that the trial judge would grant an application to cross-examine the appellant.

[43] Both Mr Shields and Mr Kimmins recalled that the appellant expressed an additional reason for not wishing to testify; that he did not want to be perceived as a "dibber-dobber". That concern had to do with his association with a motorcycle club. Although the appellant denied having been motivated by such a concern, he used the same word in his own evidence: "I had been brought up not to be a dibber-dobber".

His spontaneous use of the same surprisingly artless expression tended to support the lawyers' evidence on the point.

The witnesses' credit

[44] The evidence of Ms Morrison and Mr Lee Oulds did not really advance matters. So far as it is necessary to reach a view on credit, I accept them and Mr Shields and Mr Kimmins as honest and generally credible.

[45] I do not consider the appellant to be honest or reliable. He was prepared to depose to important matters in his affidavit (for example, denying that at the start of the trial he understood the right of last address) which he then contradicted during cross-examination; and in the process of cross-examination he evinced a tendency to retreat from answers already given which he perceived to be damaging (such as whether he had sought to have the trial run as his previous trial had been, and whether Mr Shields took notes).

[46] The appellant's account of wanting to sack his lawyers because of dissatisfaction with the failure to put his instructions cannot be true, because at that stage of the trial Mr Kimmins' cross-examination of Moroney had not yet commenced. And his claim of having been rushed into signing the instructions unread does not sit well with his having initialled another part of the document. Nor is it credible that he was unaware that if he did not give evidence no other version of events would be before the jury. He is plainly not a stupid man and he had been through a previous trial where no evidence was called in the defence case; as he himself said, given his previous experience, he did not need to have trial procedures explained to him.

The decision not to call the appellant

[47] But a credit finding is not critical in this case. Apart from the appellant's bald assertion that he was overborne by his lawyers, there was no suggestion that they

did anything but advise him. (Indeed it is very difficult to believe, having regard to the tone of the assertions in his affidavit and in the notes he made during the trial as well as his demeanour giving evidence on appeal, that he was at all likely to have been overborne by anyone.) It is plain from his own evidence that he made the decision not to enter the witness box; as he said, he accepted the "strong advice" of his lawyers.

[48] The question is whether that advice was, in any particular aspect or more generally, so flawed as to produce a conclusion of incompetence giving rise to a miscarriage of justice. Generally speaking, whether counsel's forensic decisions have resulted in an unfair trial must be objectively assessed, although in an exceptional case it may be relevant to know the reasons for the decision in question.[1] So, for example, it would be significant if, in circumstances where it was otherwise in his interests to give evidence, the appellant were prevented from doing so purely by a mistaken view as to the legal consequences.

[49] The appellant's complaint was that without his giving evidence, the jury had only Moroney's detailed version of events before them. It was essential that he put his case to the jury and give evidence of matters which were denied by Moroney in cross-examination. (Indeed the appellant's submissions went so far as to say that in such circumstances a jury could not be invited to find an accused not guilty if he did not give or call some evidence on which they could find a reasonable doubt.) In particular, the Crown had placed reliance on the fact that the false stories given by Moroney and the appellant after their arrests matched; it was important for the appellant to give evidence that the story was a joint invention to protect Moroney. The right of last address was not of such significance that it justified the failure to put the appellant's evidence before the jury.

[50] As to the risk of his being cross-examined on his criminal history, it was wrong to tell the appellant that his record would be in evidence before the jury. Defence counsel should have sought a ruling in advance as to whether permission would be given under s 590AA (2)(e) of the *Criminal Code*.

Whether the appellant would be cross-examined on his previous criminal history

[51] Section 15(2) of the *Evidence Act* provides, relevantly:

> "(2) Where in a criminal proceeding a person charged gives evidence, the person shall not be asked, and if asked shall not be required to answer, any question tending to show that the person has committed or been convicted of or been charged with any offence other than that with which the person is there charged, or is of bad character, unless –
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> …
>
> (c) the person has personally or by counsel asked questions of any witness with a view to establishing the person's own good character, or has given evidence of the person's good character, or the nature or conduct of the defence is such as to involve imputations on the character of the prosecutor or of any witness for the prosecution or of any other person charged in that criminal proceeding;

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1 *Nudd v The Queen* (2006) 225 ALR 161 per Gleeson CJ at 167.

…

(3) A question of a kind mentioned in subsection 2…(c) may be asked only with the court's permission."

[52] It seems probable that the appellant was left with the understanding that if he were to give evidence he would inevitably be cross-examined on his criminal history. The document, "Instructions in Relation to Evidence", contains the statement "I am aware that if I were to give evidence, my criminal history will be used against me". Mr Shields' recall in evidence was that the appellant was told the trial judge had a discretion, but his opinion was that the criminal history "would most definitely have been admitted". His affidavit records that the appellant was advised that if he gave evidence he would be cross-examined.

[53] The criminal history was certainly a matter for concern should cross-examination be permitted. It included a 1993 offence of "steal with actual violence while armed with a dangerous weapon and in company" in respect of which the appellant had been sentenced to eight years' imprisonment; burglary and assault offences; and, most significantly, the 2009 conviction of unlawful possession of a weapon. In circumstances in which it was necessarily put to Moroney as part of the defence that he was a liar, a drug dealer and a murderer, it was likely that the trial judge would permit cross-examination on the history; although there might have been a strong argument that the charge of possessing a weapon had little to do with the appellant's credibility and was so prejudicial that it should not be raised. The offences involving dishonesty, though, would have had obvious relevance to the appellant's credit; and their disclosure would, undoubtedly, have been very damaging.

[54] If the appellant was given to understand that his criminal history would certainly, as opposed to probably, be raised, that was an error. But the possibility that he would be cross-examined on parts of it was a proper consideration in the decision as to whether he should give evidence. The prospect of the appellant's "explaining" his criminal history, as he seemed confident of doing, would have been a daunting one for his lawyers. The appellant suggested in submissions that his counsel could have sought an advance ruling under s 590AA of the *Criminal Code* 1899 as to whether cross-examination would be permitted. But in the absence of any occasion for the exercise of the discretion under s 15(2) arising – the appellant not yet having given evidence and the Crown not having sought permission to cross-examine - the trial judge could have given only an indication of his likely view, not a ruling. It seems most improbable that he would have been prepared to do so. In any case, in my view, the discretion was more likely than not to be exercised by permitting some cross-examination as to credit.

Whether the decision against giving evidence was objectively justifiable

[55] If the appellant was deterred from giving evidence by incorrect advice as to the inevitability of cross-examination on his convictions, it is not of much consequence given that the likelihood of that occurring was a powerful and legitimate consideration. The larger question is whether, considered objectively, the decision not to call the appellant in his own defence amounted to incompetence productive of a miscarriage of justice.

[56] In my assessment, there were ample reasons which could justify the decision. Notwithstanding the appellant's submission to that effect, an acquittal was not

precluded by his not giving evidence. The jury had before it a situation in which, on all the evidence, the two men present when Burns was killed were Moroney and the appellant. Moroney's reasons for lying if he were the killer were self-evident. The defence case was not devoid of talking points. Particles characteristic of gunshot residue were found on the handle of the rear driver's side door; Moroney had admitted to closing a rear door, although he maintained it was on the passenger side. The evidence of the police officer who had pulled Moroney over for a random breath test suggested that he might have changed his jumper, something he had denied doing and which might be explicable as motivated by concerns as to the deposit of material during the shooting. The search of the Maroochy River had located the iPhones but not the gun, which Moroney claimed to have seen being thrown in the river. There was a real possibility that the jury, having regard to those matters and receiving the usual warnings about the caution necessary in assessing the evidence of an indemnified witness, would not be prepared to take the word of Moroney - the other prospective culprit - to find beyond reasonable doubt that the appellant was the shooter.

[57] Against the advantages of the appellant's giving evidence that Moroney was indeed responsible were the likelihood (not certainty) that he would be cross-examined on at least some parts of his previous criminal history; the fact that aspects of his account were implausible and there were parts of the Crown case he would have difficulty explaining; and the prospect that he would make a very poor witness.

[58] The version of events that the appellant had to advance was largely derived from what, according to him, was Moroney's account immediately after the shooting: Burns had put the gun in the car; he had responded to Moroney's challenge by saying that he intended to rob and kill him; and Moroney had shot him. That version had a practical difficulty; as the appellant conceded, Burns was wearing a tracksuit and could hardly have concealed his possession of a firearm throughout the evening's drinking in various venues with the appellant and Moroney.

[59] There was another peculiarity to the appellant's account: although Burns and Moroney could not have been much more than a car's length away from him, according to his statement and his evidence before this court, his only knowledge of their conversation came from what Moroney told him later. The jury might have found it odd that he heard nothing of it direct. A further problem was the fact that, on the appellant's own statement, his response to the completely unexpected sight of his friend Burns lying on the road, barely moving and bleeding, was to tell Moroney, "We have to go now", and depart, leaving Burns to die. The jury might have found that evidence either not credible or extraordinarily callous; neither a very palatable option for the defence.

[60] One of the most compelling pieces of evidence in support of Moroney's account was the finding of the bag of rubbish with baby items and the appellant's clothing in the skip; if the appellant were, as he claimed, completely uninvolved in the shooting of Burns, there was no reason for him to dispose of his clothing. Asked what explanation he would have given for the clothing found with his hand print in the skip, the appellant said that Moroney had taken his clothes, which were in his van when he was arrested, while the police had taken a rubbish bag from his residence, which had baby-related rubbish in it. The implication was that the police had taken the clothes from Moroney, put them in the rubbish bag and planted it in the skip. One can see that the appellant's representatives may have had some reservations about advancing that argument.

[61] The appellant would also have had to explain the disappearance of his jacket. Quite apart from Moroney's account of its disposition, the CCTV footage from the nightclub demonstrated that it had vanished in the course of the night. Nothing in the appellant's instructions went any way towards explaining what had become of it and why. The adjuration in the notes made during the trial, "Don't worry about the jacket!", was unlikely to provide much reassurance that he would be able to account for it. And, more generally, the variations in the appellant's account evidenced by the footnotes to his statement would not engender confidence in him as a witness.

[62] The appellant raised the importance of his giving evidence in order to explain his lies to police in his interview as part of a jointly agreed attempt to protect Moroney. However, his position, taken in his affidavit and in cross-examination, was that there were no lies in the interview, simply an omission to tell the police everything. The jury may well have formed an unfavourable view of him if he continued to insist that he had not lied in the face of an interview in which he had maintained that he and Moroney left Burns alive and well.

[63] The jury may also have taken some convincing that the appellant's apparent good cheer on leaving the Mooloolaba nightclub, and (according to his account to police), going elsewhere to continue to party, was consistent with the reaction of an innocent bystander to a friend's murder. The proposed response, "It wasn't murder, skipping down the street" is unlikely to have improved matters. My firm view from the appellant's responses in cross-examination in this court is that he would not have made a credible or attractive witness.

[64] Given those features, counsel's decision to advise the appellant not to give evidence, and to focus instead on discrediting Moroney, was a rational tactic which did not result in any unfairness in the conduct of the trial.

Counsel's opening statement

[65] There is no prescription for what may be said in an opening statement in Queensland. The making of such a statement had not been the practice in Queensland before the ruling of Fryberg J in *R v Nona,*[2] and it is still not a common occurrence. Fryberg J took the view that a discretion existed to allow an opening statement which would assist the jury; in that case it took the form of some formal admissions and an invitation to the jury to focus on aspects of the Crown case relevant to self-defence, provocation and intoxication, and to regard the evidence of a principal Crown witness with caution. Fryberg J's conclusion was based on the view that s 619 of the *Criminal Code* 1899 which deals with rights of address, was not a comprehensive statement of the occasions on which an accused person might address a jury. That followed from the fact that the provision indicates that the right of defence counsel to make a closing address exists only after evidence is adduced for the defence; yet the practice has always been to permit such an address.

[66] The position is different in New South Wales, where an accused person has a statutory right to make an opening address limited to matters raised in the prosecutor's opening address and the matters the accused intends to raise.[3] In *R v MM,*[4] Howie J identified the purpose of an address under the section:

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2 [1997] 2 Qd R 436.

3 *Criminal Procedure Act* 1986 (NSW), s 159.

4 (2004) 145 A Crim R 148.

> "to define, for the jury's benefit the real issues in the trial and what the accused might say in answer to the Crown's allegation. It is not an opportunity for defence counsel to embark upon a dissertation on the onus and standard of proof, or the functions of judge and jury, or to anticipate the directions or warnings to be given by the trial judge, or to urge upon the jury the way that they should assess the evidence of a witness to be called in the Crown case."[5]

In South Australia, a trial judge must invite the defendant at the conclusion of the prosecutor's opening address to outline the issues in contention, an invitation which the defendant may accept or decline.[6] In *R v Karapandzk*,[7] the court drew a sharp distinction between identification of issues in contention and argument by reference to the facts of the case. It was inappropriate to make assertions based on the client's instructions or to embark on an outline of general principles.

[67] In the present case, counsel for the appellant at trial made an opening statement which he began by saying that three men had left a bar together; one had been found barely alive on a dirt road later; and of the other two, one was now the accused and the other an indemnified witness, Moroney. He went on to explain the onus on the Crown and the necessity that the jury, before convicting, be satisfied beyond reasonable doubt on the evidence of Moroney that it was the appellant who had shot Burns. He pointed out that Moroney was an indemnified prosecution witness, on any view was at least an accomplice, and was an admitted liar. Counsel explained the sequence of events involving Moroney's arrest and interview leading up to his decision to make a statement to the obtaining of an indemnity. He emphasised the necessity of scrutinising Moroney's evidence, given the position that he would not be prosecuted and the fact that his evidence was critical to the Crown case.

[68] The appellant submitted that in addressing the jury only in respect of the credibility of Moroney, counsel had prejudiced the appellant by not taking the opportunity to outline exactly what the defence case was, and creating the risk the jury might think that the appellant had given no firm instructions as to the matters which were going to be raised. The trial judge had pointed out, at a later stage of the trial, that it had not been suggested in the opening statement that Moroney had shot Burns. Counsel responded that he did not think he could make that statement. The appellant seized on that as an indication of incompetence. He suggested, in addition, that it was plain the trial judge would have permitted counsel to say anything he chose, since his Honour had not insisted on observance of the strictures in *R v MM*.

[69] *MM* and *Karapandzk*, concerning as they do particular statutory provisions which give a right to make an opening statement and identify the matters to which it must be confined, are of limited assistance when one is dealing with a common law discretion residing in the trial judge. In broad terms, the parameters for the exercise of such a discretion are what the interests of justice require. Ordinarily, it would serve those interests to permit a defendant to alert the jury to the issues in the case and any parts of the Crown case in significant dispute, having regard to those issues. Correspondingly, identification of those issues not in dispute would be appropriate.

[70] Section 619(3) of the *Code* contemplates an opening of the evidence intended to be adduced for the defence at the close of the prosecution case. One can readily infer,

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5 At page 175.

6 *Criminal Law Consolidation Act* 1935 (SA), s 288A.

7 (2008) 101 SASR 7.

then, that it is not the role of an opening statement to identify that evidence. As to the suggestion here that counsel should have outlined in detail what the defence case was, it would have been neither proper nor wise in this case to put to the jury what the appellant's instructions were. Counsel, perhaps more circuitously than was ideal, correctly identified for the jury the real issue: not whether Moroney had killed Burns, but whether he could be believed to the necessary standard when he said the appellant had done so.

Failure to cross-examine Moroney in accordance with instructions

[71] The appellant pointed to the fact that some of his instructions were not put to Moroney: Moroney's claim to have found the gun in the car where Burns had been sitting; his belief the shooter was at the front of the car; the conversation which Moroney recounted, explaining why he had shot Burns; Moroney's effective confession to the shooting; and that it was Moroney who threw the phones away, not the appellant. In addition, Moroney should have been asked how the gunshot residue on the back door of the car came to be there.

[72] At one stage during the trial, the trial judge had raised with defence counsel the fact that nothing had been put to Moroney about where the gun had come from. Counsel responded that the appellant

> "didn't see it, he was out urinating. I wasn't in the position because I didn't have the instructions to say where it came from because he was out of the car".

The appellant submitted that that statement was wrong: his instructions revealed the provenance of the gun. There was no forensic or tactical reason for not putting those instructions.

[73] The appellant complained that the failure to cross-examine on these matters had put the Crown prosecutor in a position to make arguments to his disadvantage in the closing address. The prosecutor had pointed out that although Moroney was accused of being the shooter, it had not been suggested to him it was at close range, whereas the gunshot residue evidence found on Burns' person supported Moroney's account of the appellant's shooting him at close range. The prosecutor also observed that there had been no questioning of Moroney about how the appellant's clothes came to be in the skip bin.

[74] The appellant also complained that the intention to limit cross-examination was not clearly explained to him. That was disputed, but in any event it is beside the point in considering whether there was any miscarriage of justice.

[75] Mr Kimmins admitted in cross-examination here that he had not put the full version of events to the witnesses. He explained that he had a concern as to whether some parts of it would be accepted by the jury. In cross-examination, he elaborated: he was concerned that that part of the appellant's version which had Moroney describing finding the gun in the back of the car, confronting Burns and being told that Burns was going to rob and kill him, was "too cute".

[76] That concern is explicable; the description of Moroney confronting Burns and the latter readily admitting an aim to rob and kill was implausible. On the appellant's account, that version was Moroney's, not his, but it would have been necessary for counsel to make the distinction between how the event had happened, which was

unknown, and what the appellant claimed Moroney said about how the event had happened. There was also the problem already referred to, of why the appellant, though close by, did not himself hear anything of the confrontation between Burns and Moroney but had to have it relayed to him by the latter.

[77] It is not clear on what basis it is now submitted that counsel should have put to Moroney that Burns was shot at close range. The appellant said that he did not know that Burns was out of the car but believed the shooter had come from the front of the vehicle. That was hardly a basis for putting that the shooting occurred at close range. The suggestion that counsel should have put to Moroney where the gun had come from is not well-founded; at best counsel could have put to Moroney what, on the appellant's account, Moroney had said about the origin of the gun. There was nothing inaccurate about counsel's statement to the trial judge that the appellant did not actually know where the gun had come from. The difficulty (already identified above) was that a suggestion which had Burns bringing the gun into the car suffered from the obvious improbability of his concealing a weapon under a tracksuit for the entire evening's drinking. The failure to put to Moroney that it was he who threw the phones into the river seems to have been an oversight, but not a critical one. On the defence theory of the case, by this stage of events Moroney and the appellant were acting in conjunction to protect the former.

[78] There was no obvious advantage in asking Moroney about the gunshot residue on the car door. He had already given evidence of touching a door handle, which was a sufficient basis for submission. And had Moroney been questioned about the appellant's having given him his clothes, there would have been an associated and obvious question as to how they then came to be in a rubbish bag with the appellant's hand print on them. Since the appellant's explanation was that the police had taken the rubbish, counsel would either have had to leave that question unanswered or pursue a theory of collusion between Moroney and the police. It is unsurprising that he chose to leave the issue alone.

[79] Other counsel might not have made the choices that defence counsel did in deciding what to put in cross-examination; but there is no difficulty in understanding the bases on which he made them.

The failure properly to put the case to Moroney in respect of his change of clothing

[80] Moroney's evidence was that on the evening in question, he was wearing a black "hoodie". After he had given his evidence and been excused, the police officer who had pulled him over for a random breath test was called. In cross-examination, defence counsel elicited from him that when he intercepted Moroney he was wearing a light-coloured jumper. The trial judge put to defence counsel that he could not make a submission that Moroney had changed his clothes on the strength of that evidence, not having put it to Moroney himself. Because it had become an issue, counsel for the Crown offered to recall Moroney, although he asked that it be done by telephone. Defence counsel did not object to that course. Giving evidence by telephone, Moroney said that he had not changed out of the black hoodie, and although he was wearing something underneath it, that was a white shirt, not a jumper.

[81] The appellant suggested that the late cross-examination would have led the jury to think that the appellant had not given any firm instructions on what Moroney was wearing and was making up the case as he went along. In addition, it was argued that counsel should not have consented to Moroney's evidence being taken by telephone, because that deprived the jury of the opportunity of assessing him.

[82] However, nowhere in the appellant's instructions, as they were put before this court, was there any suggestion that Moroney had in fact changed his clothing in the appellant's presence. There was no necessary inconsistency between the proposition (put to Moroney in cross-examination) that the appellant had asked him to do so and he refused, and his having done so at some later point. To have matters left on the basis that the police officer recalled him wearing a different jumper from the hoodie which he claimed to have kept on was plainly advantageous. His demeanour as he denied having changed clothes was unlikely to add to that.

[83] There was plainly an oversight by defence counsel in not putting the questions to Moroney about what he was wearing when pulled over. It was not of major proportions, and it was rectified. No miscarriage of justice resulted.

Conclusions

[84] In my view, none of the matters identified, taken individually or collectively, point to incompetence on the part of the appellant's legal representatives. Nor is there any evidence of a miscarriage of justice arising from anything about the way the trial was conducted. I would dismiss the appeal.

[85] **FRASER JA:** I have had the advantage of reading the reasons for judgment of Holmes JA. I agree with those reasons and with the order proposed by her Honour.

[86] **THOMAS J:** I have also read, and agree with, the reasons of Holmes JA, and with the order proposed by her Honour.