SUPREME COURT OF QUEENSLAND

CITATION:	*R v Vollmer* [2011] QCA 355
PARTIES:	**R** **v** **VOLLMER, Richard John** (appellant)
FILE NOS:	CA No 132 of 2011 SC No 587 of 2010
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	9 December 2011
DELIVERED AT:	Brisbane
HEARING DATE:	23 November 2011
JUDGES:	Margaret McMurdo P, Muir JA and Douglas J Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**Appeal against conviction dismissed.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS OF APPEAL – CONDUCT OF DEFENCE COUNSEL – where the appellant was convicted of murdering his de facto partner – where evidence as to the deceased's past violent history in a previous relationship was available at the time of trial but not relied on by defence counsel – where there was no evidence led at trial or on appeal of a history of violence between the appellant and the deceased – where the appellant sought to rely on defences of self defence and provocation at trial – where the appellant submitted on appeal that defence counsel failed to follow his instructions in relation to evidence of the deceased's past violent history – whether the conduct of defence counsel at trial gave rise to a miscarriage of justice *Criminal Code* 1899 (Qld), s 271(2), s 304, s 668E(1) *Nudd v The Queen* (2006) 80 ALJR 614; [2006] HCA 9, considered *R v Birks* (1990) 19 NSWLR 677, considered *R v Hajistassi* (2010) 107 SASR 67; [2010] SASC 111, cited *R v Mogg* (2000) 112 A Crim R 417; [2000] QCA 244, cited *Re Knowles* [1984] VR 751; [1984] VicRp 67, cited *TKWJ v The Queen* (2002) 212 CLR 124; [2002] HCA 46, considered

COUNSEL:	M J Byrne QC, with A McDougall, for the appellant M R Byrne SC for the respondent
SOLICITORS:	Potts Lawyers for the appellant Director of Public Prosecutions (Queensland) for the respondent

[1] **MARGARET McMURDO P:** I agree with Muir JA's reasons for dismissing this appeal against conviction.

[2] The appellant was convicted of murdering his partner. His contention that his counsel at trial should have called evidence of the deceased's past violent history is made with the very considerable advantage of hindsight. After reading a portion of the prosecutor's final address to the jury[1] and the trial judge's final directions to the jury,[2] it is now possible to conclude that such evidence would have assisted the appellant's case at trial. It may have been of limited use as to self-defence for it is difficult to see how the force he used (multiple deep stab wounds to the deceased after disarming her) was "necessary for defence" under s 271(2) *Criminal Code* 1899 (Qld).

[3] But the trial judge's directions as to the question of loss of control in the defence of provocation included:

> "In considering whether the conduct of [the deceased] caused [the appellant] to lose control, you must consider the gravity or level of seriousness of that conduct so far as [the appellant] is concerned, that is, from the perspective of [the appellant]. This involves assessing the nature and degree of seriousness for [the appellant] of what [the deceased] did or said just before [the appellant] inflicted the knife wounds."

[4] The evidence of the deceased's past violent history may have made the jury less willing to reject the defence of provocation under s 304 *Criminal Code*.[3]

[5] This, however, does not assist the appellant. His difficulty is that defence counsel at trial had sound reasons for not calling evidence of the deceased's past violent conduct. The toxicology report showed the deceased's blood alcohol concentration was 0.201 per cent and she had methylamphetamines, amphetamines and tetrahydrocannabinol in her blood. The pathologist, Dr Little, gave evidence of fibroid tissue in her heart consistent with long term amphetamine use. Queensland Health forensic medical officer, Dr Swain, gave evidence that side effects of long term amphetamine use included sudden outbursts of anger, aggression and violence. The injuries to the appellant's arms were consistent with defensive wounds. The evidence of neighbours and dinner guests was consistent with the deceased behaving aggressively and irrationally that night. Defence counsel had evidence in the prosecution case from which to suggest to the jury that the deceased was aggressive and irrational. The evidence of the deceased's past violent conduct did not concern her relationship with the

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1 Set out at [28] of Muir JA's reasons.

2 Set out at [30] of Muir JA's reasons.

3 Reprint 7C as in force 24 September 2009. This provision was substantially amended by the *Criminal Code and Other Legislation Amendment Act* 2011 (Qld), s 5. See current reprint *Criminal Code* 1899 (Qld), Reprint 8C.

appellant; the appellant did not know of it at the time of the killing; and it involved events which occurred between 1993 and 1997, more than 12 years earlier. Significantly, the victims of the deceased's prior violence did not retaliate violently, a point likely to have been emphasised by a prosecutor had the evidence been called. Further, had the evidence of past violent conduct been given, the appellant would have lost the right, highly valued by defence barristers, for his counsel to give his closing address to the jury after the prosecutor.

[6] In those circumstances, it is clear that trial counsel's decision not to adduce evidence of the deceased's past violent history was one that a competent counsel could fairly make. Viewed objectively and at the time it was made, it was a rational, tactical decision which did not give rise to a miscarriage of justice under s 668E(1) *Criminal Code*: see *TKWJ v The Queen*.[4] It follows that the appeal against conviction cannot succeed.

[7] I agree with the order proposed by Muir JA.

[8] **MUIR JA: Introduction** The appellant appeals against his conviction of murder in the Supreme Court on 17 May 2011. His ground of appeal, in effect, is that his legal representatives failed to follow his instructions. The ground, as articulated in the appellant's Outline of Argument, was that there was a miscarriage of justice arising from the incompetence of the appellant's legal representatives in that they:

1. failed to accept the appellant's instructions as to the availability of evidence favourable to him;

2. failed to act on such instructions;

3. consequently, failed to call evidence which could have contributed to the defences of self-defence and provocation; and

4. conducted the defence case in relation to the issue of the deceased's prior acts of violence, contrary to the material in their possession prior to and during the trial.

Relevant facts

[9] The appellant and the deceased had lived in a de facto relationship in Burleigh Heads for some months prior to 17 October 2009. On that date, friends came to their residence for dinner. The deceased appeared unhappy and "worked up"[5]. She withdrew from the company for a time. The appellant tried to "calm her down" and "make her smile". The guests departed at around 10.00 pm by which time the deceased "appeared happier".

[10] Early on the morning of 18 October 2009, a nearby neighbour, Ms Lilley, was awakened by shouting at the appellant's residence. She heard the voices of a man and a woman. The male was heard to say "Shut up" aggressively. Otherwise, Ms Lilley heard only the woman's voice. "Quite a bit of bad language" was used. The shouting stopped for a while after the female said, "You're too f'ing

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4 (2002) 212 CLR 124, Gleeson CJ [16]-[17]; Hayne J [107]-[108], [112] (Gummow J agreeing [101]); Gaudron J [32]-[33] (Gummow J agreeing [101]); [2002] HCA 46.

5 Record 103.

scared to say it again". Ms Lilley went back to bed and the shouting started up again about five minutes later. This time, she heard only the female's voice. After about another 15 minutes, she heard sirens.

[11] The deceased's body was found in the front room of the house lying on the large knife with which she had been stabbed by the appellant. Blood was located at different places in the house, including on the wall of the hallway. There were shoeprints in the deceased's blood at various locations, consistent with having been made by the ugg boots worn by the appellant.

[12] The only samples taken from the blood in the house that matched the blood of the appellant came from his clothing and from a cordless telephone.

[13] A post mortem examination conducted by Dr Little on 19 and 20 October 2009 revealed that the deceased was 164 cm in height and weighed 66 kg.[6] On external examination, Dr Little noted numerous injuries comprising 15 bruises/abrasions and 11 wounds over a wide area of the body. There was bruising on the scalp only observable after reflection.[7] In Dr Little's opinion, most of the bruises and abrasions were caused by a struggle involving hitting walls and the like.

[14] There was one incised wound to the front of the body. The remaining ten were to the back. They were generally grouped to the middle and lower back and followed a range of different directions in relation to the body. Most were relatively minor, but three were particularly serious.

[15] The incision which caused one of the three followed a path which led through the left lung. It was about 45 mm in length on the surface and about 125 mm deep. Another was 48 mm long on the surface and continued for a depth of about 215 mm through the left kidney, the pancreas and the liver. The remaining more serious wound was 50 mm long on the surface and about 170 mm deep. The knife cut through the right kidney and the aorta into the small intestine.

[16] The blade of the knife was about 213 mm in length and 47 mm in width.[8]

[17] The deceased's heart was healthy to the naked eye, but some fibrosis was discovered on microscopic examination. Fibrosis can be caused by the taking of stimulant drugs such as amphetamines over a long period of time.[9] Methylamphetamine and amphetamine were found in the deceased's blood in a concentration at the upper end of the therapeutic range.[10] There was also some reported THC and the breakdown by-product of that drug.[11]

[18] The blood of the deceased had a blood alcohol concentration of 0.201 per cent.[12]

[19] The evidence established that the deceased was likely to have been a chronic user of amphetamines who had both alcohol and amphetamines in her system at the

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6 R 209.40. The submission was made in closing addresses, without complaint, that the appellant was, on visual examination, likely to the stronger of the two based on physical appearance (R 249.35).
7 R 223.10.
8 R 219.40.
9 R 227.35.
10 R 228.45.
11 R 234.32.
12 R 228.10.

time of her death. Dr Little's opinion was that chronic use of amphetamines could result in irrational and aggressive behaviour and that a tendency to aggressive behaviour resulting from the deleterious effects of amphetamine consumption would be exacerbated by alcohol consumption.

The further evidence adduced on appeal

[20] Within days of the deceased's death, the then legal representatives of the appellant, Potts Lawyers, obtained boxes of documents from the appellant's residence. The boxes contained documents relating to the deceased's Family Court and criminal matters as well as her psychiatric condition.

[21] One of the documents obtained was a copy of a 23 page affidavit sworn by Mr Paul Bodycote a previous husband of the deceased in connection with Family Court proceedings. The affidavit dealt with numerous episodes of violent conduct on the part of the deceased between 1994 and 1997. It described the deceased smashing a bottle over Mr Bodycote's head and his being stabbed in the chest by the deceased with a fork. The affidavit depicted the deceased as a woman who frequently behaved destructively and violently when emotional or enraged, as was commonly the case. According to the affidavit, Mr Bodycote frequently bore obvious marks of assaults on him by the deceased, such as black eyes and split lips.

[22] Mr Bodycote's statements concerning a stabbing by the deceased in 1997 were supported by a medical report dated 29 September 1997. The affidavit also dealt with: the deceased's conviction for assaulting her daughter's pre-school teacher; an interim domestic violence order made in Mr Bodycote's favour against the deceased and the deceased's alcohol abuse. Another one of the documents in the boxes was part of an affidavit by Mr Paul Bodycote's brother dealing with aggressive, violent and generally inappropriate conduct by the deceased to her husband, relatives and friends.

[23] Relevant documents were copied by the appellant's previous solicitors who provided copies of the documents to the police for safekeeping. The conduct of the appellant's defence was then taken over by Legal Aid Queensland. The issue of the deceased's violent past was raised by the appellant on a number of occasions verbally and in writing to representatives of Legal Aid and defence counsel. Letters from the appellant to Legal Aid stamped respectively "Received 8 Mar 2011" and "Received 24 Mar 2011" requested Legal Aid to make contact with various people in relation to the deceased's past and mention a past boyfriend "Paul" who was "willing to help us".

[24] The appellant swore that he wrote many letters to Legal Aid Queensland and to defence counsel "wanting them to consider the material [Family Services documents and documents pertaining to New South Wales and Queensland criminal matters] and raise it during [the] trial".

[25] The appellant swore that he had one meeting about four days before the trial with a solicitor employed by Legal Aid and defence counsel. He stated that at that meeting he told his legal representatives to "raise the material at the trial" and that he began talking about "all of the 'stuff' that could be raised". He contended that defence counsel became frustrated "threw his hands in the air and said something like, 'we are going around in circles here' and got up and walked out".

He asserted that during the trial he would try and talk to the solicitor who would "try and pass instructions on to [defence counsel], who would throw his hands in the air and not listen or say what [he] wanted". He recalled signing something at the trial without having read it, but did not remember what it said.

[26] The solicitor who had the carriage of the appellant's defence after Legal Aid took over the matter from Potts Lawyers gave evidence to the following effect in an affidavit filed in these proceedings:

1. She was provided by a solicitor in the employ of Potts Lawyers with an archive box containing copies of what that solicitor said was considered by her to be the "relevant" material.

2. She reviewed the material in the archive box and, in so doing, identified the relevant organisations and government departments to which the relevant documents related. She then issued subpoenas to these bodies in order to obtain the original documents for tendering if necessary. Subpoenas were issued to the Commissioner of Police (NSW), the Department of Child Safety (NSW), the Commissioner of Police (Qld) and the Department of Child Safety (Qld).

3. She inspected the subpoenaed documents at the Supreme Court Registry and made handwritten notes of the contents of the documents provided in response to the subpoenas.

4. She advised defence counsel of the material in Legal Aid's possession and provided him with copies of it. She advised him of the subpoenaed material in the Registry and of its contents.

5. She conferred with defence counsel and the appellant on 2 May 2011 at Arthur Gorrie Correctional Centre when the giving and calling of evidence by and on behalf of the appellant was discussed. The appellant stated that he did not wish to give evidence.

6. The conference was "conducted largely by [defence counsel] in a calm manner. At no time did [defence counsel] stand up and walk out prior to the proper conclusion of the conference".

7. During the trial, she and defence counsel spoke with the appellant at the commencement and conclusion of each day and during any adjournment when time permitted.

8. Shortly before the close of the prosecution case, she provided the appellant with a set of instructions in relation to the giving and calling of evidence. She asked him to read through them carefully and to sign the document if he agreed with them. After reading the document the appellant signed it. It included the following:

> "11. I have considered the advice of my legal representatives and my rights thoroughly, and I instruct that I **do not want** to give evidence at my trial.
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> 12. I understand that by not giving evidence at my trial that the court will not get to hear my story from me and will

> only be made aware of a limited version of my story through the questions asked by my barrister. Direct evidence of certain matters such as the deceased's past history will not be before the jury unless some other witnesses give evidence of it.
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> …
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> 14. I instruct my legal representatives that there **are no witnesses** I want to call on my behalf at my trial.
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> 15. I understand that the decision with regard to me giving evidence and calling evidence on my behalf at my trial is entirely my own, and I make it of my own free will, independent of any undue influence by any party. Further, I make it fully understanding its implications and consequences."

[27] In an affidavit filed in these proceedings, defence counsel swore to the effect that:

1. He had never received or seen any letters addressed to him by the appellant.

2. He did not become "frustrated" with the appellant or walk out of the pre-trial conference between himself, the Legal Aid solicitor and the appellant. There was a general discussion at that conference about the case and as to what matters might be raised, but no definite decisions were reached. He recalled that there was some discussion about the giving and calling of evidence and the effect of that decision on the order of closing addresses.

3. He recalled that the appellant did not wish to give evidence. He did not recall any further conferences as such, but he "certainly discussed the progress of the case often before the Court resumed each day or during adjournments". The appellant never expressed any dissatisfaction with his handling of the case.

4. He did not "throw his hands in the air and not listen or say what [the appellant] wanted".

5. He had in his possession the appellant's signed instructions which were consistent with his initial conversation with the appellant in relation to the giving of evidence. The appellant never expressed a contrary intention.

6. In response to the appellant's assertions that he did not have the opportunity to speak with defence counsel about giving and calling evidence "even as the case progressed" and concerning the allegation that he made many attempts to have his lawyers raise matters concerning the deceased's past, he said that he had spoken to the appellant of the options open to him in relation to giving and calling evidence and explained to him the effect of the giving and/or the calling of evidence on the order of addresses.

7. He had further discussions with the appellant about the giving of evidence concerning the deceased's past, prior to and after the evidence of Dr Swain. After the cross-examination of Dr Swain, he told the appellant that he thought that the appellant should not rely on material relating to the deceased's past. That advice was based on:

    (a) the toxicology report relating to the deceased;

    (b) the evidence of the forensic pathologist relating to the scar tissue of the heart and a finding that it was consistent with long term amphetamine use;

    (c) the cross-examination of Dr Swain as to the side-effects of long term amphetamine use including sudden outbursts of anger, aggression and violence;

    (d) the evidence of Dr Swain concerning the injuries to the appellant's arm which were consistent with "defensive" wounds;

    (e) the evidence of the "dinner guests" as to the behaviour and demeanour of the deceased on the night in question; and

    (f) his recollection that the material to which the appellant referred concerned events between 1993 and 1996 and the complainant's victims in those events did not resort to violent retaliation.

8. The appellant did not at any stage after Dr Swain's evidence give him contrary instructions as to the tactics to be employed in his defence.

The appellant's arguments

[28] Both the prosecutor and defence counsel addressed on the issue of the lack of evidence of a violent past of the deceased. The prosecutor said in the course of his address:

> "So what we do know about [the deceased] and her background does not reveal the picture of a person who was likely to come at her boyfriend with a knife to try and kill him. I can put it as simply as that."

[29] Defence counsel concluded his address on this issue with the words:

> "… so we simply don't know whether she has a violent past or not. It (sic) largely irrelevant."

[30] In summing up, the trial judge said:

> "There has been some reference in the addresses of counsel to the lack of evidence of any violent history on the part of [the deceased]. There is no burden whatsoever in this trial on Mr Vollmer to put in any evidence before you as to the history of [the deceased].
>
> …
>
> In considering whether the conduct of [the deceased] caused Mr Vollmer to lose control, you must consider the gravity or level of

> seriousness of that conduct so far as Mr Vollmer is concerned, that is, from the perspective of Mr Vollmer. This involves assessing the nature and degree of seriousness for Mr Vollmer of what [the deceased] did or said just before Mr Vollmer inflicted the knife wounds."

[31] The defence case on trial was simply that an argument was heard by a neighbour, with a female voice dominating the argument, and the deceased was later found dead with stab wounds in her back. The appellant also had three stab wounds. He had a blood alcohol concentration of between 0.195-0.338 at relevant times. The deceased had a blood alcohol concentration of 0.201 at the time of her death.

[32] On the hearing of the appeal, counsel for the appellant submitted, in effect, that had evidence been led of the violent past history of the deceased, the prosecution would not have been able to submit to the effect that there was nothing to show that the deceased was likely to be violent. Also, instead of the primary judge mentioning that there was no burden on the defence to lead evidence of any history of violence, that history would have been mentioned and other passages of the summing up would have been seen by the jury against this background.

[33] Reference was made to other submissions of the prosecutor attempting to shed doubt on the availability of the exculpatory circumstances of self defence and provocation. Those submissions, it was said, would have been foreclosed also by evidence of the deceased's past violent history.

[34] Counsel for the appellant referred to a written submission of counsel for the respondent to the effect that the number of wounds to the back of the deceased and the extensive other injuries inflicted on her in circumstances in which the appellant had not described a violent struggle to gain control of the knife "were always to be the dominant consideration of the applicability of the defence [of self defence] under S271(2)" of the *Criminal Code*. Counsel for the appellant submitted that that very circumstance made it all the more important that the deceased's history of violence be placed before the jury.

[35] In summary, counsel for the appellant submitted that the deceased's violent nature and history were clearly relevant and, indeed, singularly important. The failure to call available evidence on this issue led to the appellant suffering a miscarriage of justice.

Consideration

[36] The appellant did not suggest that there was any history of physical violence or emotional strain in his relationship with the deceased. Nor was there any evidence to that effect. There was, however, evidence of excessive consumption of alcohol on the night in question and of aggression on the part of the deceased. Her neighbour, Ms Lilley, said that the deceased was "bellowing" at the appellant. There was also evidence that the deceased had attacked the appellant with a knife. That is what he informed the operator when he rang 000. It was also what he told police when interviewed shortly after at a police station. The appellant's account was supported by evidence.

[37] The appellant had a number of scratch marks to his lower chest, some "heaped skin" on the left ear and right shoulder, minor skin heaping and abrasions on the

right forearm and abrasions and two incised wounds on the right forearm. The evidence of Dr Swain was to the effect that the wounds may have been caused by two or three blows by a knife and the abrasions to the chest would have been caused by fingernails. Having regard to this evidence indicating that the deceased had attacked the appellant with the knife and clawed at him with her fingernails, the evidence that the deceased had consistently behaved violently towards a husband of a previous marriage and had assaulted the husband's brother and a teacher may not have been thought to have been particularly useful to the appellant. That was the view taken by defence counsel.

[38] The introduction of evidence about the conduct of the deceased during a period which was 12 or so years prior to the incident may have caused the jury to wonder why there was no evidence of any such conduct in the course of the relationship between the deceased and the appellant. There was also the possibility of the jury's contrasting Mr Bodycote's failure to respond physically to the deceased's destructive and violently abusive behaviour over time with the appellant's violent reaction.

[39] The main point of introducing the historical evidence would have been to assist the defence case that the appellant had been subjected to a violent attack by the deceased. Counsel for the respondent submitted that it was not clear that the evidence would have been admissible as the relevant conduct had concluded at least 12 years prior to the killing of the deceased and was unknown to the appellant at that time. There are authorities which support the proposition that evidence of a victim's history of violent conduct is relevant and admissible where there is a controversy as to whether the victim was the aggressor even though the accused was unaware of that history.[13]

[40] However, as counsel for the respondent submitted, the deceased's history of violence said nothing about the critical issues in the case. It was reasonably plain that the appellant had been subjected to an unprovoked attack by the deceased. What was far from clear was whether:

- the appellant believed, on reasonable grounds, that he could not otherwise preserve himself from death or grievous bodily harm without acting as he did; and/or

- the deceased's conduct could have caused an ordinary person to lose self control and act the way the appellant did.

[41] There was only one knife found at the house. Consequently, if the deceased had attacked the appellant with the knife he used to kill her he must have taken it from her before he had sustained serious injury. An obvious question which arose for the jury's consideration was whether, having regard to the appellant's weight and strength advantage, an ordinary person in the appellant's position, particularly when armed with a knife, could have acted as he did.

[42] In such circumstances, it was open to a competent defence counsel to conclude that the introduction into evidence of an aged history of violence may prove a harmful distraction to the jury.

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[13] *R v Hajistassi* [2010] SASC 111 at 72, 73; *Re Knowles* [1984] VR 751 at 768; and *R v Mogg* (2000) 112 A Crim R 417 at 428.

[43] As will be apparent from the earlier discussion of the evidence introduced on appeal, defence counsel denied not following the appellant's instruction in relation to the historical material. Neither side sought to cross-examine the other side's witnesses. In these circumstances, I am not prepared to accept the appellant's evidence concerning the conduct of the trial and his instructions in relation to the historical evidence. In the latter regard, his evidence is contradicted by his written instructions. Generally, defence counsel's version is supported by the evidence of his instructing solicitor which, in turn, was supported by her contemporaneous notes.

[44] Even if it had been the case that defence counsel disregarded his instructions in some respects that would not give rise, necessarily, to an entitlement to have the guilty verdict set aside. In *R v Birks*,[14] Gleeson CJ stated the following principles which have application for present purposes:

> "1. A Court of Criminal Appeal has a power and a duty to intervene in the case of a miscarriage of justice, but what amounts to a miscarriage of justice is something that has to be considered in the light of the way in which the system of criminal justice operates.
>
> 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. It is impossible, and undesirable, to attempt to define such cases with precision. When they arise they will attract appellate intervention."

[45] The following passage from the judgment of Gleeson CJ in *TKWJ v The Queen*,[15] directed as it is to tactical decisions made by counsel in the course of the trial, is of particular relevance to the present discussion:

> "It is undesirable to attempt to be categorical about what might make unfair an otherwise regularly conducted trial. But, in the context of the adversarial system of justice, unfairness does not exist simply because an apparently rational decision by trial counsel, as to what evidence to call or not to call, is regarded by an appellate court as having worked to the possible, or even probable, disadvantage of the accused. For a trial to be fair, it is not necessary that every tactical decision of counsel be carefully considered, or wise. And it is not the role of a Court of Criminal Appeal to investigate such decisions in order to decide whether they were made after the fullest possible examination of all material considerations. Many decisions as to the conduct of a trial are made almost instinctively, and on the basis of

[14] (1990) 19 NSWLR 677.
[15] (2002) 212 CLR 124 at 130, 131.

experience and impression rather than analysis of every possible alternative. That does not make them wrong or imprudent, or expose them to judicial scrutiny. Even if they are later regretted, that does not make the client a victim of unfairness. It is the responsibility of counsel to make tactical decisions, and assess risks. In the present case, the decision not to adduce character evidence was made for an obvious reason: to avoid the risk that the prosecution might lead evidence from K."

[46] In *TKWJ*, McHugh J observed:[16]

"The role of counsel in a criminal trial is so important that it hardly needs argument to conclude that his or her conduct of the trial can bring about a miscarriage of justice. *Tuckiar v The King* – where counsel's statement and conduct in front of the jury reinforced the presumption of guilt arising from the judge's charge – is a well-known, if extreme, example. Where an appellant contends that the conduct of his or her counsel has caused a criminal trial to miscarry, however, the appellant carries a heavy burden. This is a consequence of the adversarial nature of our legal system and the role and function of counsel. Criminal trials are not inquisitions. They are contests 'in which the protagonists are the Crown on the one hand and the accused on the other'. Ordinarily, a party is held to the way in which his or her counsel has presented the party's case. That is because counsel is in effect the party's agent. Counsel is 'ordinarily instructed on the implied understanding that he is to have complete control over the way in which the case is conducted'. The discretion retained by counsel in the running of a case is very wide. Counsel may even settle a case without seeking the client's consent. Blackburn J noted in *Strauss v Francis* that 'the apparent authority with which [counsel] is clothed when he appears to conduct the cause is to do everything which, in the exercise of his discretion, he may think best for the interests of his client in the conduct of the cause'. In *Strauss* – where the issue was whether counsel had authority to consent to the withdrawal of a juror, notwithstanding the client's dissent – Mellor J added:

> 'No counsel, certainly no counsel who values his character, would condescend to accept a brief in a cause ... without being allowed any discretion as to the mode of conducting the cause. And if a client were to attempt thus to fetter counsel, the only course is to return the brief.' " (citations omitted)

[47] The appeal, in order to succeed, must show that there was a miscarriage of justice on the trial and:[17]

"…the inquiry about miscarriage must be an objective inquiry, not an examination of what trial counsel for an accused did or did not know or think about. The critical question is what did or did not happen at trial, not why that came about."

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[16] At para [74].

[17] *Nudd v The Queen* (2006) 80 ALJR 614 at [27]; seel also at [157] per Callinan and Heydon JJ.

[48] As the above discussion shows, a decision not to call evidence in relation to the deceased's past history of violence, objectively viewed, was a justifiable tactical decision. It preserved the appellant's right to address last and avoided the potential disadvantages earlier discussed. No miscarriage of justice was established.

[49] For the above reasons, I would order that the appeal be dismissed.

[50] **DOUGLAS J:** I agree with the reasons of the President and Muir JA and with the order proposed by his Honour.