SUPREME COURT OF QUEENSLAND

CITATION:	*R v DBB* [2012] QCA 96
PARTIES:	**R** **v** **DBB** (applicant)
FILE NO/S:	CA No 321 of 2010 DC No 190 of 2010
DIVISION:	Court of Appeal
PROCEEDING:	Miscellaneous Application – Criminal
ORIGINATING COURT:	District Court at Townsville
DELIVERED ON:	17 April 2012
DELIVERED AT:	Brisbane
HEARING DATE:	12 April 2012
JUDGES:	Muir and White JJA and Mullins J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. The applicant have leave to read the six affidavits, copies of which are in the supplementary appeal record.** **2. The abandonment of the appeal by notice of abandonment filed on 21 May 2011 be set aside.** **3. The appeal be reinstated.** **4. The appeal be allowed and the verdicts of guilty be set aside.** **5. A re-trial be ordered.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS OF APPEAL – CONDUCT OF DEFENCE COUNSEL – where the applicant was convicted of two counts of indecently dealing with his intellectually impaired stepdaughter – where the applicant filed a notice of appeal with respect to these convictions – where legal aid for the appeal was refused for the stated reason that prospects of success were "insignificant" – where the applicant then filed a notice of abandonment – where the applicant was subsequently advised that his prospects of a successful appeal were reasonable – where the applicant applied to have the his appeal reinstated – where the applicant submitted that the trial judge failed to adequately warn the jury to scrutinise the complainant's evidence with a great deal of care – where the applicant's counsel failed to adduce evidence of the

applicant's good character at trial – whether the abandonment should be set aside and the appeal reinstated – whether the trial judge properly directed the jury with respect to the complainant's evidence – whether the failure to call good character evidence amounted to a miscarriage of justice

Criminal Code 1899 (Qld), s 632
Criminal Practice Rules 1999 (Qld), r 70

D v The Queen (1996) 86 A Crim R 41, considered
Melbourne v The Queen (1999) 198 CLR 1; [1999] HCA 32, applied
Mraz v The Queen (1955) 93 CLR 493; [1955] HCA 59, cited
Nudd v The Queen (2006) 80 ALJR 614; (2006) 225 ALR 161; [2006] HCA 9, applied
R v Birks (1990) 19 NSWLR 677, approved
R v Clayton [2008] QCA 337, considered
R v DAH (2004) 150 A Crim R 14; [2004] QCA 419, considered
R v Hunter and Sara (1999) 105 A Crim R 223; [1999] NSWCCA 5, distinguished
R v Murray (1987) 11 NSWLR 12, considered
Sharma v The Queen [2011] VSCA 356, distinguished
TKWJ v The Queen (2002) 212 CLR 124; [2002] HCA 46, applied

COUNSEL: R M Sweet for the applicant
D L Meredith for the respondent

SOLICITORS: Paul Williams & Associates for the applicant
Director of Public Prosecutions (Queensland) for the respondent

[1] **MUIR JA: Introduction** The applicant was convicted on 2 December 2010 of two counts of indecent dealing with an intellectually impaired person under care (his 18 year old stepdaughter).

[2] On 23 December 2010, the applicant's solicitors filed a notice of appeal on behalf of the applicant relying on one ground only: that the convictions were unsafe and unsatisfactory because they were based on uncorroborated testimony of the complainant who was intellectually impaired.

[3] After legal aid was refused for the stated reason that prospects of success on the appeal were "insignificant", the applicant abandoned his appeal on 21 May 2011. He was subsequently advised that he had reasonable prospects of having the convictions set aside on appeal and now applies to have the abandonment set aside and his appeal re-instated pursuant to r 70 of the *Criminal Practice Rules* 1999 (Qld).

[4] In his proposed amended Notice of Appeal annexed to his application filed on 3 January 2012, the applicant listed the following new grounds of appeal:

(a) That the conviction is unsafe and unsatisfactory in that the learned trial Judge erred in failing to warn the Jury to scrutinise

the Complainant's evidence with a great deal of care in circumstances where she was labouring under an intellectual impairment and her evidence as to the allegations contained in Counts three (3) and four (4) was completely uncorroborated.

(b) That the conviction is unsafe and unsatisfactory in that a substantial miscarriage of justice resulted from the flagrant incompetence of the Applicant's Counsel in that he failed to adduce evidence at the trial firstly; that the Applicant had no prior criminal convictions (apart from a minor traffic matter) and secondly; that he failed to adduce any evidence of the Applicant's good character from other witnesses in circumstances where the Applicant had provided his solicitor with several written character references.

[5] The applicant also applies for leave to adduce further evidence in the form of affidavits from the applicant's two daughters and two friends testifying as to the applicant's good character. Also sought to be relied on was an affidavit by the applicant's present solicitor and an affidavit by the applicant swearing that he had provided a number of written references to his solicitor prior to the trial.

The alleged offences

[6] Counts 1 and 3 on the indictment alleged unlawful dealing with the intellectually impaired complainant. Count 2 alleged an attempt to procure the intellectually impaired complainant to engage in carnal knowledge and count 4 alleged wilful and unlawful exposure of the intellectually impaired complainant to an indecent act. Counts 1, 3 and 4 each had the aggravating circumstance that the applicant had the complainant under his care.

[7] The jury were unable to reach verdicts on counts 1 and 2 and a *nolle prosequi* was entered in respect of those counts on 2 December 2010. The substance of the allegations, in respect of counts 3 and 4, as recounted by the trial judge to the jury in his summing up, was:

Count 3 – the applicant's touching of the complainant's chest, the pulling aside of her bathers and the putting of his mouth on her crotch area around Christmas 2008 whilst the family were on holidays on Long Island.

Count 4 – the applicant's exposing his penis to the complainant and asking her to touch it on a night during a family holiday at Long Island.

The evidence before the jury

[8] There were three witnesses called by the prosecution: the complainant; Mr Walkley, a forensic psychologist; and the complainant's mother. The applicant also gave evidence.

[9] In a report dated 11 September 2009, Mr Walkley expressed opinions that the complainant:

- had an IQ that placed her at the margin between borderline mental retardation and mild mental retardation;

- operated and functioned within the mild mental retardation classification;
- had an understanding of what it means to tell the truth, but did not understand the notion of being under oath;
- given her low levels of intellectual ability and her poorly developed sense of legal process, had a highly suspect capacity to provide reliable evidence, particularly under the pressure of cross-examination; and
- was likely to have a memory which was "less than fully reliable".

[10] The complainant's mother gave evidence of complaints made to her by the complainant in response to being asked by the complainant's mother whether the applicant had ever touched her. The complainant's mother said, in effect, that she had no reason to suspect before then that the applicant may have behaved improperly in relation to the complainant.

[11] The applicant gave evidence in which he denied the complainant's allegations.

[12] It is now convenient to address the proposed grounds of appeal.

Ground 1 – Failure to warn the jury to scrutinise the complainant's evidence with a great deal of care

[13] It was submitted by counsel for the applicant that the trial judge's direction was inadequate to alert the jury's attention to the necessity that they should "scrutinise the complainant's evidence with a great deal of care" because she was intellectually impaired and her evidence was uncorroborated.

[14] Reliance was placed on *R v DAH*,[1] in which White J (with whose reasons the other members of the Court agreed) noted[2] that the High Court referred with approval to the following statement of Lee J in *R v Murray*[3] concerning a provision of the *Crimes Act* 1900 (NSW), similar to s 632 of the *Criminal Code* (Qld):

> "[I]n all cases of serious crime it is customary for judges to stress that where there is only one witness asserting the commission of the crime, the evidence of that witness must be scrutinised with great care before a conclusion is arrived at that a verdict of guilty should be brought in; but a direction of that kind does not of itself imply that the witness' evidence is unreliable.
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> There will be cases where the failure to bring home to the jury the position of the uncorroborated witness will undoubtedly lead to the verdict being set aside but that is a different matter altogether from requiring a direction that it is unsafe to act on the uncorroborated evidence of the complainant in a sex case."

[15] The fact that the complainant was "intellectually disabled in terms of her intellect" coupled with the circumstance that her evidence was about matters that had occurred, allegedly, some two years prior to the trial and the lack of corroboration of her evidence called for a stronger warning than the one given. This failure, it was

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1 [2004] QCA 419.
2 At [60].
3 (1987) 11 NSWLR 12 at 19.

submitted, constituted a miscarriage of justice in that the applicant was denied a chance of acquittal that was fairly open.[4]

[16] The trial judge directed the jury as follows:

> "Obviously what is in issue here in relation to all four of the charges is whether you're satisfied beyond a reasonable doubt on all the evidence, whether the incidents occurred as described by the complainant. **That entails that you give careful consideration to the evidence of the complainant. There is no independent evidence that supports her.** The fact that she made complaints to her mother is not independent evidence. The mere fact that someone complains about something doesn't mean that that something occurred.
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> You may also use the evidence of those conversations to consider whether there are any consistencies or inconsistencies in the account that she gave to her mother and her evidence at the trial. And by that I included the statements that she made to the police officers. If there is consistency, you may find that that supports her credibility. If there are inconsistencies, you may find that it detracts from her credibility. It's a matter for you, ladies and gentlemen, to determine whether there are inconsistencies or consistencies and what impact they might have on the credibility of the complainant. But you've got to understand that the mere fact of making a complaint is not independent evidence of the facts on which the complaint or to which the complaint relates. **As I say, here there is no independent evidence which supports the complainant, so your assessment of this case very much depends on your assessment of the complainant as a witness.**
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> You must examine her evidence carefully, particularly **considering that she is intellectually impaired** and you have evidence as to the extent of that impairment from the evidence of Mr [Walkley]. If you find that she was a credible witness, that is accurate and reliable, you would find that the incidents occurred as she described and you would then need to determine whether the accused is guilty of each of the offences by considering their individual elements, particularly with regards to count 2, whether what the accused did and what the accused said amounted to an attempt in the way that I've described. If you can't be satisfied that the complainant is truthful and reliable, then you should acquit. As I say, also if you can't determine where the truth lies, you should acquit." (emphasis added)

[17] The words emphasised above were emphasised in counsel for the applicant's outline of argument. The evidence in the case was relatively brief. The complainant's evidence consisted of brief records of interviews conducted on 20 March 2009 and 11 May 2009, a very short evidence-in-chief and a fairly brief cross-examination. The complainant's evidence about the acts the subject of the alleged offences was clear and it was not suggested that there were any significant inconsistencies between the complainant's evidence on trial and what she had said on previous

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4 *Mraz v The Queen* (1955) 93 CLR 493; and *TKWJ v The Queen* (2002) 212 CLR 124 at [26].

occasions, including on the committal hearing, except that the allegation the subject of count 4 was not mentioned in the first record of interview and only three instances of offending conduct were referred to on the committal hearing.

[18] The matters in issue and the extent of the evidence were confined and the trial judge's summing up was succinct and clear. In the passage from the summing up quoted above, the trial judge drew the jury's attention to the intellectual impairment of the complainant and the evidence of Mr Walkley. He said that the complainant's evidence had to be examined carefully because of her intellectual impairment. That was after he directed that the jury give careful consideration to the evidence of the complainant and informed the jury that there was no "independent evidence that supports her".

[19] In my opinion, the difference between what the trial judge said and what the applicant asserts he should have said is largely semantic. There is in fact very little difference between an admonition to scrutinise evidence "with a great deal of care" and a direction that "careful consideration" must be given to the complainant's evidence as there is no independent evidence supporting her and a further direction that her evidence must be considered carefully "particularly considering that she is intellectually impaired".

[20] It might have been preferable if the trial judge had reminded the jury of the relevant evidence of Mr Walkley, but his oral evidence was brief and would have been fresh in the jury's mind. Consequently, it does not appear to me that there is any substance in the applicant's criticisms in this regard.

[21] Ground 1 was not made out.

Ground 2 – There was a substantial miscarriage of justice resulting from counsel's incompetence in failing to adduce evidence of good character and a lack of criminal history

[22] The applicant who was 46 years of age at trial and had no criminal history, other than a 10 year old minor drink driving offence, gave no evidence in this regard. No character evidence was called on his behalf despite his having provided his solicitor with what his solicitor described in pre-trial instructions to defence counsel as "numerous character references… some of which are from his own children". The solicitor remarked in the instructions that "these would be of no relevance except perhaps for sentencing arguments".

[23] In this Court, the solicitor gave evidence via telephone that if written character references had been provided to him his practice would have been to place them on the file. He said that he had not located any on the file and he surmised that the reference in the instructions to counsel must have been to the provision of names of persons who could give character evidence. That explanation does not sit comfortably with the wording of the instructions.

[24] The applicant swears to having provided his solicitor, before the trial, with at least three written references; one being from his daughter, Lisa. She swore that she provided a written reference to her father shortly after he was charged with the subject offences. The applicant also swore that neither his solicitor nor his barrister advised him that "it would be appropriate to consider whether or not any evidence [of good character] could be called". He swore, and his evidence in this regard is

uncontradicted, that his only conference with defence counsel was on the morning of the first day of the trial and that no mention was made in the conference of the possibility of calling character evidence.

[25] The applicant's solicitor made no note of anything said in that conference or, for that matter, of anything said at any time during the trial.

[26] Mr CP was one of the potential referees whose name was provided by the applicant to his solicitor. It was in houses owned or rented by Mr CP and his wife that the offences in counts 1 and 2 were alleged to have been committed. Neither Mr CP nor Mrs CP was approached by the applicant's solicitor to provide a statement.

[27] It was submitted that any competent firm of solicitors would have obtained proofs of evidence from the persons who were put forward by the applicant as possible character witnesses and that any competent counsel would have led character evidence from all or some of the potential witnesses at the applicant's trial. It was submitted also that counsel's failure to call evidence as to lack of criminal history and as to character was not capable of a rational explanation on forensic grounds.[5]

Consideration of ground 2

[28] Reliance was placed by counsel for the applicant on the decision of the New South Wales Court of Appeal in *R v Hunter and Sara*[6] in which one of the grounds on which a verdict of guilty of aggravated robbery against one of two co-accused was set aside was a miscarriage of justice resulting, inter alia, from the erroneous decision of the appellant's counsel not to lead evidence of a "portfolio" of "impressive and persuasive" character references. The facts were very different to those under consideration and the failure to lead character evidence was but one of a litany of serious errors on the part of defence counsel which led the Court to the conclusion that there had been a miscarriage of justice.

[29] A particularly egregious error on the part of defence counsel in *R v Hunter and Sara* was acting for the appellant and his co-accused in circumstances in which defence counsel's duty to one of his clients was in conflict with his duty to the other. The raising of the appellant's good character as an issue would have been detrimental to the interests of the co-accused who had a not insignificant criminal history. Also, the appellant's involvement in the acts constituting the robbery were, at most, those of a person involved in a joint criminal enterprise. There was no direct evidence suggesting that the appellant assisted his co-accused in taking money or was present, ready to assist him. On his evidence, he did no more than break up a wrestling match and chase away a man who, he said, had tried to assault his companion. As a result of the joint representation, it was pointed out in the reasons of Wood CJ at CL, with whose reasons the other members of the Court agreed, the individual cases of the two accused were not adequately separated in addresses or in summing up and the possibility of different verdicts for each was left unexplored.

[30] Although no point of principle of assistance to the applicant was identified by his counsel, the following observations of Wood CJ at CL are instructive:[7]

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5 See *TKWJ v The Queen* (2002) 212 CLR 124 at [17], [25] – [27], [107]; *Nudd v The Queen* (2006) 80 ALJR 614.

6 [1999] NSWCCA 5.

7 At [63].

"The decision whether or not to open up character is often a difficult one, upon which minds may differ. It is one that needs a great deal of careful consideration, as well as a full knowledge of what might be elicited or led by the Crown if character is raised. The potential damage that may be caused to the defence case, if an error is made is considerable: *Hamilton* (1993) 68 A Crim R 298 at 300 to 301. Hunt CJ at CL there said, at 300:

> 'All of this makes it obvious that counsel for an accused (and I include here a solicitor for the accused where acting as the advocate) bears a very heavy burden when advising the client in relation to the decision which *the client* must make as to whether good character should be raised. That advice can only be given properly when it is based upon a *full knowledge* of what may be elicited or led by the Crown should character be raised by the accused. It is *not* sufficient for counsel merely to rely upon a *belief* based only on information provided by the accused. To put it bluntly, a person facing a criminal trial which may have a severe consequence to his or her liberty and/or reputation is not always a reliable source of such information. Such unreliability may result from the client's educational standards, culture, health, embarrassment or lack of comprehension. It may also result from the client's mendacity. Not only is it wise, it is imperative, that the information which the client gives be checked from a source which is reliable *before* any forensic step is taken to raise character.'"

[31] In *R v Birks*,[8] Gleeson CJ, (with whose reasons the other members of the Court agreed) made the following frequently referred to statement of relevant principle:

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

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8 (1990) 19 NSWLR 677 at 685.

[32] Gleeson CJ expanded on those principles as follows in *TKWJ v The Queen*:[9]

> "It is undesirable to attempt to be categorical about what might make unfair an otherwise regularly conducted trial. But, in the context of the adversarial system of justice, unfairness does not exist simply because an apparently rational decision by trial counsel, as to what evidence to call or not to call, is regarded by an appellate court as having worked to the possible, or even probable, disadvantage of the accused. For a trial to be fair, it is not necessary that every tactical decision of counsel be carefully considered, or wise. And it is not the role of a Court of Criminal Appeal to investigate such decisions in order to decide whether they were made after the fullest possible examination of all material considerations. Many decisions as to the conduct of a trial are made almost instinctively, and on the basis of experience and impression rather than analysis of every possible alternative. That does not make them wrong or imprudent, or expose them to judicial scrutiny. Even if they are later regretted, that does not make the client a victim of unfairness. It is the responsibility of counsel to make tactical decisions, and assess risks. In the present case, the decision not to adduce character evidence was made for an obvious reason: to avoid the risk that the prosecution might lead evidence from K.
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> Trial counsel made a decision not to call certain evidence. Viewed objectively, it was a rational tactical decision, made in order to avoid a forensic risk. It did not make the trial unfair, or produce a miscarriage of justice."

[33] In *TKWJ*, Gaudron J, with whose reasons Gummow J agreed, after remarking that,[10]

> "Where decisions taken by counsel contribute to a defect or irregularity in the trial, the tendency is not to inquire into counsel's conduct, as such, but, rather, to inquire whether there has been a miscarriage of justice…"

went on to say that:[11]

> "The question whether there has been a miscarriage of justice is usually answered by asking whether the act or omission in question 'deprived the accused of a chance of acquittal that was fairly open'. The word 'fairly' should not be overlooked. A decision to take or refrain from taking a particular course which is explicable on basis that it has or could have led to a forensic advantage may well have the consequence that a chance of acquittal that might otherwise have been open was not, in the circumstances, fairly open.
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> One matter should be noted with respect to the question whether counsel's conduct is explicable on the basis that it resulted or could have resulted in a forensic advantage. That is an objective test. An

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9 (2002) 212 CLR 124 at [16] – [17].
10 At [25].
11 At [26] – [28].

> appellate court does not inquire whether the course taken by counsel was, in fact, taken for the purpose of obtaining a forensic advantage, but only whether it is capable of explanation on that basis.
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> As already indicated, if there is a defect or irregularity in the trial, the fact that counsel's conduct is explicable on the basis that it resulted or could have resulted in a forensic advantage is not necessarily determinative of the question whether there has been a miscarriage of justice. It may be that, in the circumstances, the forensic advantage is slight in comparison with the importance to be attached to the defect or irregularity in question. If so, the fact that counsel's conduct is explicable on the basis of forensic advantage will not preclude a court from holding that, nevertheless, there was a miscarriage of justice."

[34] Referring to counsel's failure to call available evidence or to elicit evidence in cross-examination, her Honour remarked that in such a situation:[12]

> "…it has been customary to focus on the competence of defence counsel, it being said that there must be 'flagrant incompetence', an 'egregious error', 'extreme conduct' or 'significant fault'."

[35] Her Honour noted that although, where there is a defect or irregularity in the trial, the reason why something occurred or did not occur is relevant to the question of whether there was a miscarriage of justice, the "relevant question that must ultimately be answered, is whether the act or omission resulted in a miscarriage of justice".[13]

[36] In his reasons, McHugh J, after observing that, "Ordinarily, a party is held to the way in which his or her counsel has presented the party's case",[14] proceeded to consider the circumstances in which counsel's conduct of the trial may have led to a miscarriage of justice:[15]

> "But in other cases — perhaps the majority — the conduct of counsel — although irregular — will not necessarily deprive the accused of a fair trial. Not every error makes the trial unfair. Nevertheless, the irregular conduct of counsel may have affected the outcome. And a miscarriage of justice always occurs when there is a significant possibility that a material irregularity at the trial has resulted in the conviction of an accused person.
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> The critical issue in an appeal like the present is not whether counsel erred in some way but whether a miscarriage of justice has occurred. However, 'whether counsel has been negligent or otherwise remiss… remains relevant as an intermediate or subsidiary issue'. That is because the issue of miscarriage of justice in such cases ordinarily subsumes two issues. First, did counsel's conduct result in a material

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12 At [29].
13 At [31].
14 At [74].
15 At [77] and [79] – [80] and [85].

> irregularity in the trial? Second, is there a significant possibility that the irregularity affected the outcome? Whether a material irregularity occurred must be considered in light of the wide discretion that counsel has to conduct the trial as he or she thinks best and the fact that ordinarily the client is bound by the decisions of counsel. Accordingly, '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'. The appellant must show that the failing or error of counsel was a material irregularity and that there is a significant possibility that it affected the outcome of the trial.
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> In what circumstances then, will the appellant be able to discharge the heavy burden of establishing that counsel's conduct constituted a material irregularity amounting to a miscarriage of justice? Where the appellant can show that counsel has conducted the trial with flagrant incompetence, it is likely that the appellant will have established a material irregularity in the conduct of the trial that will provide the stepping stone to a finding of a miscarriage of justice.
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> Furthermore, where the alleged error of counsel does not concern a forensic choice, the appellant will usually be in a better position to prove that a miscarriage of justice has occurred than in cases of forensic choice. If counsel omits to call a material witness because of a memory lapse or a breakdown in communication and there is a significant possibility that the omission affected the outcome, the appellant will usually establish that a miscarriage of justice has occurred."

[37] It is useful to complete these references to relevant principle with the following passage from the reasons of Gummow and Hayne JJ in *Nudd v The Queen*:[16]

> "As four members of this Court explained in *TKWJ v The Queen*, describing trial counsel's conduct of a trial as 'incompetent' (with or without some emphatic term like 'flagrantly') must not be permitted to distract attention from the question presented by the relevant criminal appeal statute, here s 668E of the *Criminal Code* (Qld). 'Miscarriage of justice', as a ground on which a court of appeal is required by the common form of criminal appeal statute to allow an appeal against conviction, may encompass any of a very wide variety of departures from the proper conduct of a trial. Alleging that trial counsel was incompetent does not reveal what is said to be the miscarriage of justice. That requires consideration of what did or did not occur at the trial, of whether there was a material irregularity in the trial, and whether there was a significant possibility that the acts or omissions of which complaint is made affected the outcome of the trial.
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> Pointing to the fact that trial counsel did not take proper instructions from the accused, did not properly understand the statutory

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16 (2006) 80 ALJR 614.

> provisions under which the accused was charged, or had not read the cases that construed those statutory provisions, would reveal that counsel was incompetent. Showing all three of these errors would reveal very serious incompetence. But an appeal against conviction must ultimately focus upon the trial and conviction of the accused person not the professional standards of the accused's counsel. Was what happened, or did not happen, at trial a miscarriage of justice?" (citations omitted)

[38] Counsel for the applicant relied on two other cases in which failure to call character evidence was held to give rise to a miscarriage of justice. In *D v The Queen*,[17] D was convicted of a number of sexual assaults against his daughter. He gave evidence denying the allegations. The complainant's evidence was not corroborated. Defence counsel adverted to the issue of D's good character during the trial, but failed to call available witnesses to give relevant evidence. The available evidence included that of D's local priest, who would have sworn to D's regular attendance at mass, assistance in the parish, honesty and trustworthiness. A former sheriff's officer in the district in which D resided would have sworn to knowing him for over 30 years, the high esteem in which he was held in the community, his trustworthiness, his good relationship with his children, and his volunteer services. D's sister would have sworn in detail to his good relationship with his children. Other friends and associates would have deposed to his good character, standing and community service.

[39] In his reasons, Hunt CJ at CL, drew attention to the lack of corroboration of the complainant's evidence. His Honour was of the view, drawing on his long experience, that the character evidence which was not called was "very likely to have been regarded by the jury as impressive" enough to have had "a substantial effect upon their verdicts". He was satisfied that there was "a substantial" or "a significant possibility, that the jury would have acquitted the appellant if this impressive evidence of good character had been given". He regarded the failure to lead the evidence as "unexplained and inexplicable". The other members of the Court agreed with Hunt CJ at CL's reasons.

[40] In *Melbourne v The Queen*,[18] Hayne J also expressed the view that good character evidence may play a significant role in the outcome of a criminal trial. He said in that regard:

> "Nevertheless, the fact that an accused is a person of good character may loom large at trial. It may be a very persuasive argument in the hands of the accused's advocate and may be very influential in the jury's deliberations. In some cases, it may lead the jury to conclude that they are not satisfied of the guilt of the accused. In at least some cases that may owe more to an appeal to emotion or prejudice than to any identifiable and logical process of reasoning."

[41] In *Sharma v The Queen*,[19] the 33 year old applicant general medical practitioner was convicted of three counts of indecent assault and seven counts of rape of the 24 year old complainant. The complainant and the applicant had consensual sexual

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17 (1996) 86 A Crim R 41.
18 (1999) 198 CLR 1 at 55.
19 [2011] VSCA 356.

intercourse three times before the date on which the offences were committed, including on the morning of the day before the date of the alleged offences. The issue for the jury was whether the offending conduct, which included digital and penile vaginal and anal penetration, was consensual. The applicant did not give evidence. He gave an interview to police in which he denied absence of consent. He said that he and the complainant had both been drunk at the time of the offending conduct and that he had thought the complainant was aware of what he was doing.

[42] During the trial, an investigating police officer was asked by defence counsel whether he was aware that the applicant had no prior offences. The police officer responded that he could not comment and the matter was not taken further by defence counsel. The question of good character was taken up by the judge, who queried whether the prosecution may be able to make some concession in that regard. The prosecutor said that he or she would need to obtain information and the matter was not taken further in the course of the trial.

[43] The applicant deposed that during an adjournment on the third day of the trial, the applicant's fiancée asked counsel whether the applicant needed character witnesses. He said that his counsel was dismissive, saying that his witnesses would be embarrassed by photographs which the applicant had taken in the course of the offending conduct. He was not asked to provide any personal history to defence counsel.

[44] On the sentencing hearing, evidence of the applicant's good character was provided by written references from eight general medical practitioners or specialists, two medical receptionists, a medical practice manager, the Chief Executive Officer of an aged care facility, six of the applicant's patients and his fiancée. Most of the referees said that they were aware of the charges against the applicant and that he had fine personal qualities and was a caring doctor. A medical practitioner and two patients of the applicant who gave evidence on the sentencing hearing said that they maintained a high opinion of the applicant despite his conviction. The sentencing judge noted that there was "powerful evidence" as to the applicant's "professional standing and reputation" in the Bendigo area.

[45] The Court, after noting that under s 276 of the *Criminal Procedure Act* 2009 (Vic) the question for resolution was whether defence counsel's failure to lead good character evidence resulted in a substantial miscarriage of justice, said:[20]

> "This case is very close to the line. As was observed in *Melbourne v The Queen*, the fact that character evidence is admissible to establish the improbability that the accused committed the charged offence, is an anomalous exception to common law principles and 'must be regarded as an indulgence to the accused which continues to be maintained for historical reasons'.
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> Further, as Hayne J said in *Melbourne v The Queen*:
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> > 'the use that a jury may make of such evidence as is given about the previous character of the accused will vary greatly according to the circumstances of the case. It

[20] *Sharma v The Queen* [2011] VSCA 356 at [44] – [45].

> will vary according to what is said about the previous character of the accused and what relationship (if any) that has to the case that it is sought to make against the accused.'"

[46] The Court remarked on the fact that some of the applicant's answers in his record of interview could have been regarded by the jury as admissions that the applicant did not believe that the complainant had consented to some or all of the sexual acts performed on her. That, it was said, made it arguable that the applicant's admissions would have outweighed any good character evidence. Nevertheless, the contrary view was open and, in the Court's opinion, defence counsel's failure to take steps to remove any negative impression caused by the police officer's unresponsive answer to the question of his awareness that the applicant had no prior offences, coupled with the failure to call good character evidence, deprived the applicant of a chance of acquittal so that a substantial miscarriage of justice had arisen.

[47] It will be seen from the above account that the facts of *Sharma* are quite distinctive and the case provides little assistance for present purposes. That is to be expected. In determining how established principles are to be applied to particular facts, there will often be little to be gained in examining the application of the same principle to quite different facts. At this juncture, it is perhaps useful to note that evidence of good character may be used by the jury in assessing the probability of the accused committing the offence charged and in assessing his credibility.[21] Whether a direction on the use a jury may make of good character evidence should be given is a matter for the exercise of a discretion by the trial judge,[22] but where such a direction is requested by counsel it will normally be given.[23]

[48] On the hearing of the subject application, the applicant sought to rely on affidavits by Mr and Mrs CP, former neighbours of the applicant, and by his married daughters, RR and LL. Both Mr and Mrs CP, had they been approached by the applicant's solicitors at the time of the trial, would have sworn to the effect that they knew the applicant well and regarded him as a truthful, honest and trustworthy person. Mr CP would have said that the applicant had resided in the CP's home for two to three months approximately nine years ago, that he trusted him with his family and regarded, and continued to regard, him as a decent and honest man whom he admired and respected. He swore that he had raised with the applicant his willingness to provide a reference during the trial.

[49] Ms RR swore to the reliability, honesty and decency of the applicant and to being unaware of his ever having sexually interfered with any female friend of hers. Ms LL swore to like effect and testified, at least implicitly, of many occasions on which female friends of hers had stayed overnight in the house with the applicant without there being any indication of sexually inappropriate behaviour.

[50] Counsel for the respondent submitted that character evidence of the type now sought to be led would have been of limited value to the applicant. He submitted that there was little scope to attack the complainant's credit, but more scope to

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21 *Melbourne v The Queen* (1999) 198 CLR 1 at 14 per McHugh J and at 56 per Hayne J.

22 *Melbourne v The Queen* (1999) 198 CLR 1 at 12, 21 per McHugh J; at 28, 29 per Gummow J; and at 57 per Hayne J.

23 *Melbourne v The Queen* (1999) 198 CLR 1 at 12 per McHugh J; and at 28 per Gummow J.

attack her reliability and that was the course taken by defence counsel. He submitted also that the complainant was unsophisticated and highly unlikely to be able to create and maintain a false story. In those circumstances, the jury may well reason that, even though evidence of good character might make the applicant less likely to commit the offences, the obvious innocence of the complainant made it unlikely that she would invent such a story. It was submitted also that a reputation for good character is of limited use in sexual offences of this nature which are inherently of a type which a person of general probity might commit. Finally, it was submitted that the interests of justice did not justify the reinstatement of the appeal after a considered decision to abandon it.

Conclusion

[51] Sexual offending by adult males of previously unblemished reputations and who appear to their friends, relatives and business and social acquaintances to be of impeccable character is found to have occurred all too frequently. There is also ample evidence that adult males, as a general rule, are substantially more likely to commit sexual offences against their stepchildren than their own progeny. The publicity given to the great many cases involving sexual offending by clergymen against children in their care or subject to their influence has tended to devalue even glowing references by clerics in the circumstances under consideration.

[52] It is unlikely, as counsel for the respondent submitted, that the jury would have attached much weight to character references from the applicant's natural daughters. Jurors would expect daughters to be supportive of their father and the fact that the daughters observed no untoward conduct by the applicant in relation to their friends was unlikely to have had significant influence in the credibility contest between the complainant and the applicant.

[53] The fact that the applicant may not have behaved inappropriately in the presence of Mr and Mrs CP is also unlikely to have been regarded by the jury as particularly significant. They would have been aware, and, if not, would most likely have been informed by the prosecutor, that offending conduct of the subject nature is normally clandestine and often does not come to light until well after the discontinuance of the offending conduct.

[54] It is arguable that the failure to lead the character evidence contained within the affidavits relied on by the applicant on the hearing of these applications, viewed objectively, is explicable as a reasonable forensic decision. The character evidence which would have been led, as I have explained, was not particularly potent. As such, it was capable of being regarded as distracting from potentially more productive arguments, such as those based on the complainant's incapacity, memory difficulties and inconsistencies, relatively minor though the latter may have been. There is also the element of risk. The prosecutor's cross-examination in relation to character could not be confined to matters relating to the applicant's prior conviction. Accordingly, if evidence of good character was to be led, competent defence counsel would have needed to be satisfied that there were no disreputable matters in the applicant's past capable of being used against him. Competent defence counsel may also have had in mind that the trial judge "might remind the jury that people do commit crimes for the first time, a consideration with particular force in certain types of crime, notwithstanding evidence of past good character".[24]

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[24] *Melbourne v The Queen* (1999) 198 CLR 1 at 39 per Kirby J referring to observations of King CJ in *R v Trimboli* (1979) 21 SASR 577 at 578.

[55] Nevertheless, I am persuaded that there has been a miscarriage of justice. The applicant was deprived of a chance of acquittal[25] and there was a "significant possibility" that if character evidence had been led the outcome of the trial would have been affected. The miscarriage of justice here stems from a combination of things. The applicant informed his solicitor of the availability of persons able to give evidence of good character. The solicitor passed that information on to defence counsel without informing defence counsel of the substance of the evidence the potential witnesses could give and in such a way as to minimise the potential significance of the evidence.

[56] I consider it probable that defence counsel gave no significant consideration to whether character evidence should be led. He did not raise the matter with the applicant. It is unlikely that he raised it with the solicitor. There was, of course, little time for defence counsel to properly consider and evaluate much in relation to the evidence to be led and contested on the trial having regard to the timing and duration of his only conference with the applicant: on the morning of the trial and possibly for less than an hour. The possibility that anyone other than the applicant might be able to give evidence of value in the defence case does not appear to have been adverted to and although the applicant gave evidence, he was not questioned by defence counsel with a view to bolstering his credit.

[57] It is probable that the solicitor, who had been admitted to practice about 18 months prior to the trial, was not alert to the role character evidence could play in the applicant's defence. He appeared to think that such evidence could only be of value in a sentencing hearing should the applicant be convicted. Consequently, the applicant was deprived of something to which he was entitled: the due and informed consideration by his legal advisors of the evidence to be led on the trial. It was also clear that potential avenues of cross-examination were left unexplored.

[58] The outcome of the trial depended on whether the jury accepted the uncorroborated evidence of the intellectually impaired complainant. In the result, guilty verdicts were returned on only half the counts. It should have been apparent to the applicant's legal representatives that the prosecution and defence cases were finely balanced and that it was imperative that all reasonable steps be taken to cast doubt on the complainant's evidence and bolster that of the applicant. The complainant's vulnerability arising from her intellectual impairment made the alleged offending particularly abhorrent. It was thus singularly desirable to show, if possible, that it would be quite out of character for the applicant, having regard to his personal qualities and past behaviour in relation to the complainant and others, to take advantage of the complainant's vulnerability. In the circumstances just outlined, the fact that the character evidence had the limitations referred to earlier would not have necessitated or even supported the conclusion that it should not be led. No steps were taken to bolster the applicant's credibility or, it would seem, even considered. These matters in combination, in my view, constituted material irregularities in the conduct of the trial.

[59] For these reasons, ground 2 was made out.

[60] The applicant filed a notice of abandonment of his appeal acting on advice received by him from Legal Aid Queensland. Under r 70 of the *Criminal Practice Rules* 1999 (Qld), an appeal is taken to be dismissed by the Court when notice of

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[25] *TKWJ v The Queen* (2002) 212 CLR 124 at 144 per McHugh J.

abandonment is given to the registrar. However, the rule empowers the Court to set aside the abandonment and reinstate the appeal if it considers it necessary in the interests of justice.

[61] It has been said that an abandonment of an appeal would not ordinarily be set aside where the abandonment reflected a deliberate and informed decision on the part of the applicant and was not the result of any misapprehension or mistake of fact.[26] However, where the decision to abandon the appeal was based on advice which is shown to be wrong and where reasonable prospects of success on appeal have been demonstrated, a court, at least in the absence of strong countervailing considerations, would normally be disposed to regard the setting aside of the abandonment as being in the interests of justice. Here the grounds of appeal were argued on their merits and ground 2 was made out.

[62] For the above reasons, I would order that:

1. The applicant have leave to read the six affidavits, copies of which are in the supplementary appeal record.

2. The abandonment of the appeal by notice of abandonment filed on 21 May 2011 be set aside.

3. The appeal be reinstated.

4. The appeal be allowed and the verdicts of guilty be set aside.

5. A re-trial be ordered.

[63] Whether, in view of the time already spent in custody by the applicant, a further trial should take place is a matter for the Director of Public Prosecutions rather than this Court.

[64] **WHITE JA:** I have read the reasons for judgment of Muir JA and agree with those reasons and the orders which his Honour proposes.

[65] **MULLINS J:** I agree with Muir JA.

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[26] *R v Clayton* [2008] QCA 337.