IN THE HIGH COURT OF AUSTRALIA
BRISBANE REGISTRY **No. B24 of 2017**

BETWEEN:

RONALD MICHAEL CRAIG
Appellant
and
THE QUEEN
Respondent

APPELLANT'S SUBMISSIONS

Part I: CERTIFICATION OF PUBLICATION

1. These submissions are in a form suitable for publication on the internet.

Part II: STATEMENT OF ISSUES

2. The Appellant was wrongly advised that if he gave evidence in his murder trial it was likely he would be cross-examined on his previous convictions in the Northern Territory including a manslaughter by accidental stabbing.

3. As a result, he did not give evidence that would have allowed self-defence to be considered by the jury. The Court of Appeal held that because there was, apart from the wrong advice given, an alternative, objectively rational, basis to decide not to give evidence there was no miscarriage of justice.

4. That approach was in error. A defendant making an informed choice whether or not to give evidence is an essential component of a fair trial. Its denial by plainly wrong legal advice will (at least) ordinarily amount to a miscarriage of justice.

5. The Court of Appeal treated counsel's conduct as if it was a challenged forensic judgment. It was not. Counsel gave wrong legal advice that foreclosed the Appellant from rationally deciding to give evidence.

Part III: NOTICE OF CONSTITUTIONAL MATTER

6. The Appellant has considered whether any Notice should be given pursuant to s 78B of

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the *Judiciary Act 1903* (Cth). A Notice is not necessary.

Part IV: CITATIONS FOR REASONS FOR JUDGMENT BELOW

7. The reasons for judgment of the intermediate court, the Court of Appeal of Queensland, before Fraser, Gotterson and Morrison JJA have not been reported but are published as *R v Craig* [2016] QCA 166.

Part V: RELEVANT FACTS

8. The Appellant killed his partner with a knife on or about 21 January 2011 and was charged with murder. He gave an account to the police when arrested that permitted the question of intent in the context of intoxication to be put in issue at trial. It did not clearly raise self-defence and only barely raised the partial defence of provocation.

9. In the course of preparing for trial the Appellant gave instructions as to what occurred that would have permitted both self-defence and a more fulsome defence of provocation[1] to be put in issue at the trial, although that account was inconsistent with the account given to the Police. If self-defence or provocation were raised the Crown would have been required to negative each beyond reasonable doubt.

10. Trial counsel wrongly advised the Appellant that if he gave evidence he was likely to be cross-examined on his prior convictions, including one for accidental manslaughter with a knife in the Northern Territory in the course of a home invasion.[2] Trial counsel followed that up with correct advice that he would "almost certainly" be convicted of murder if the jury found out about his criminal history.[3]

11. The Appellant was also correctly advised that there were risks in him giving evidence of an account inconsistent with his initial account to the police.

12. The Appellant elected not to give evidence. His written instructions in January 2014, taken after committal and some two months before the trial, included:

> "I am not relying on self-defence or provocation as defence for tactical or legal reasons. Firstly, I did not raise these defences in my interview to police and

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1 Provocation was left to the jury at the instigation of the trial judge, but only in a limited way. Had the Appellant given evidence, a more expansive and helpful factual basis for the defence would have been left.
2 See transcript of sentence proceedings, Court of Appeal, Appeal Record Book at 186, Line 12.
3 Transcript of Court of Appeal hearing, Day 2, 13 April 2016 at T32.20

secondly it would require me to give further evidence if such defences were to be raised. I have already given my preliminary view that I do not wish to give evidence as I do not want to be cross-examined about my previous criminal history."[4]

13. The Appellant's subsequent instructions at trial to not give evidence and his decision to plead guilty to manslaughter were tainted by this erroneous advice.[5]

14. At the Appeal hearing, the Appellant gave evidence that although he was conscious of the difficulties he would face because of the inconsistencies in his versions, the primary reason he did not give evidence was the advice that he would be cross-examined on his criminal history.[6]

Part VI: ARGUMENT

The Court of Appeal's reasoning

15. The Court of Appeal held that the advice given to the Appellant was wrong in that it was not likely that the Appellant would be cross-examined on his criminal history. At its highest, such cross-examination was no more than a possibility.[7]

16. Having so found, the Court of Appeal reasoned in the following way:
    a. The advice was wrong;[8]
    b. That error having been established the "question that next [arose]" was whether the error occasioned a "substantial miscarriage of justice";[9]
    c. The test to apply in answering that question was taken from *TKWJ v The Queen*[10] (***TKWJ***) namely whether the Appellant in that case had been "deprived of a fair chance of an acquittal that was fairly open" and that in the context of a decision by counsel, where "[a] decision to take or refrain from taking a particular course...is explicable on [the] basis that it...could have led to a forensic advantage may well

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4 *R v Craig* [2016] QCA 166 (***Craig***) at p 10 ([22]). See also the affidavit Ronald Craig annexure "RC 2" titled "Instructions for Pre-Trial" dated 10 January 1015 at [5] annexed to the affidavit of Terence Fisher annexure 1.

5 It was accepted by the Crown that the decision to plead guilty to manslaughter was tainted by the advice. See [5] in Respondent's Supplementary Outline in the Court of Appeal, dated 21 January 2016.

6 Transcript of Court of Appeal hearing, Day 2, 13 April 2016 at T8.01-16. The link between the decision not to give evidence and the plea to manslaughter is explained in *Craig* at p 17 ([45]).

7 *Craig* cited at footnote 4, at p 15 ([36], [38]).

8 *Craig* cited at footnote 4, at p 15 ([39]).

9 *Craig* cited at footnote 4, at p 15 ([39]).

10 *TKWJ v The Queen* [2002] 212 CLR 124; [2002] HCA 46.

have the consequence that a chance of acquittal that might otherwise be open was not, in the circumstances, fairly open";[11]

d. There was "a sound forensic reason for the Appellant not to testify", namely the inconsistency between his proposed evidence and the account that he had given to the Police. The reference to "sound forensic reason" [12] was apparently taken from *Nudd v The Queen*[13] (***Nudd***), possibly at [31];

e. In the key part of its reasoning, the Court of Appeal held:

"There was then a sound forensic reason for the appellant not to testify. He was correctly advised about that reason. His decision not to testify, insofar as it was justified by that advice, was not the consequence of his being misled by incorrect advice...The fact that he was given an additional, but inaccurately expressed, reason not to testify did not diminish the role of the former as a rational reason not to testify, or, of itself give rise to a miscarriage of justice".[14]

17. The Court of Appeal was wrong to approach the question in this way. The ultimate question that it needed to ask and answer was whether the wrong advice caused a miscarriage of justice and, if it did, whether it could nonetheless be said that no substantial miscarriage of justice has actually occurred.

18. The proxy that the Court of Appeal purported to apply in this context was the objective test provided in *TKWJ* for the assessment of alleged errors of forensic judgements made by trial counsel. The approach that it took was wrong for the following reasons:

a. *TKWJ* applies to forensic judgements of counsel. Wrong advice on the decision to give evidence is not a forensic judgement – it is an error going to a choice not for counsel at all – but a choice reserved personally to a defendant;

b. Because of the fundamental importance to a fair trial of a defendant's informed choice to give or not to give evidence, the denial of an informed choice will amount – at least ordinarily – to a miscarriage of justice;

c. This is so regardless of whether or not there is another good reason why a defendant might, apart from the wrong advice, choose not to give evidence. The gravamen of this miscarriage of justice is the denial of an informed choice to give

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11 *Craig* cited at footnote 4, at p 16 ([39]).
12 *Craig* cited at footnote 4, at p 17 ([44)].
13 *R v Nudd* [2006] HCA 9; 80 ALJR 614; 162 A Crim R 301.
14 *Craig* cited at footnote 4, at p 17 ([44]).

or not give evidence. It is no answer to that mischief to point to other reasons (or perceived rational basis) for the choice;

d. Equally, the denial of an informed choice to give evidence is an error of a fundamental kind such that the proviso either cannot apply or, at the very least, ought not be applied in this case; and

e. In this case, there has been a miscarriage of justice. Any defendant in this position would, by any measure, be denied his or her entitlement to make an informed choice as to whether or not to give evidence. The effect of that was that the jury did not hear a sworn account and the Crown was relieved of the obligation it would otherwise have had to negative self-defence beyond reasonable doubt.

The Court of Appeal appears to have accepted that the wrong advice was material to the decision to not give evidence

19. The Court of Appeal made no express finding as to whether the Appellant would have given evidence but for the advice in relation to the likelihood that he would be cross-examined on his criminal history.

20. That issue may have fallen away in its importance given that trial counsel ultimately gave evidence that he told the Appellant it was "most likely" he would be cross-examined on his criminal history[15] and that he would "almost certainly" be convicted of murder if the jury found out about his criminal history.[16]

21. The nature of that advice took away any meaningful choice to give evidence from the Appellant. In any event, the absence of a finding on the issue could not properly be taken as a finding that the Appellant would have still chosen not to give evidence even if he had not been wrongly advised. Had the Court of Appeal thought that the Appellant would have chosen to give evidence even if the wrong advice had not been given then it would presumably have said so and decided the case on that basis. It did not. The only reasonable inference is that the Court of Appeal considered that the erroneous advice was, at the very least, a material factor in the Appellant's decision not to give evidence.

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15 Transcript of Court of Appeal hearing, Day 2, 13 April 2016 at T33.01.
16 Transcript of Court of Appeal hearing, Day 2, 13 April 2016 at T32.20.

The fundamental importance of an informed choice to give evidence

22. Although a defendant's entitlement (at least in its current form) to give evidence at his or her trial is (in historical terms) a relatively new phenomenon, it has become of fundamental importance. Its importance is demonstrated by the fact that together with the decision to plead guilty or not, it is a decision reserved to a defendant personally.

23. The testimony of a defendant was a standard part of criminal trials in England from about the 5th Century in the form of trial by "wager of law".[17] Notwithstanding that history, for at least 300 years between the 16th and 19th Centuries, defendants were not permitted to testify. Their incompetence was based on the assumption that they were "interested" in the result of the trial and therefore unlikely to be witnesses of truth.[18]

24. The impetus for reform to permit a defendant to testify on his or her own behalf started with Blackstone's Treatises published in 1827. The incompetency of interested witnesses in civil proceedings was abolished in 1843 in England but not in criminal cases until 1898.[19] In the intervening years Canada[20] and most American states passed laws permitting defendants to testify.

25. In modern criminal practice in Australia it is unthinkable that a defendant would not be entitled to choose to give evidence. That right is embedded in the criminal procedures of all States and Territories and, for present purposes, in section 618 of the *Criminal Code 1899* (Qld).

26. The choice to give evidence or not implicates a number of fundamental attributes of a fair trial. The decision to not give evidence embodies the right to silence. The decision to give evidence permits a defendant to challenge the case against him or her. The timing of the election at the end of the prosecution case reflects the burden of proof. The decision to give evidence enables a sworn denial before a jury. As a practical matter the giving of a sworn response to the charges laid may be the only way that an accused can meaningfully offer a defence to charges and reply to prosecution witnesses.

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17 Waiver of the Criminal Defendant's Right to Testify: Constitutional Implications, 60 Fordham L. Rev. 175 1991-1992.
18 Popper, *History and Development of the Accused's Right to Testify*, WULR [1962] Issue 4, 454 at 454.
19 Popper, *History and Development of the Accused's Right to Testify*, WULR [1962] Issue 4, 454 at 464.
20 Noble, Ronald D *"The Struggle to Make the Accused Competent in England and in Canada"* Osgoode Hall Law Journal 8.2 (1970) : 249-275 at 269.

27. As the following review demonstrates, the fundamental importance of the decision to give evidence and the fact that it is a choice for a defendant personally is firmly embedded across other common law jurisdictions.[21]

28. In the United States, *Wainwright v Sykes*[22] noted that "[o]nly such basic decisions as to whether to plead guilty, waive a jury trial, or testify on one's own behalf are ultimately for the accused to make". It was held in *Jones v. Barnes*[23] that the right to testify is grounded in personal autonomy, one reason why it cannot be waived by counsel.

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29. The proposition that the choice to give evidence is for the defendant personally has been confirmed in Queensland on at least two occasions.[24] The personal nature of the decision to give evidence is confirmed in the rules of conduct for Barristers.[25]

30. Since *Rock v Arkansas*[26] the United States Supreme Court has held that the right to testify is constitutionally protected. In that jurisdiction, it is not possible to waive the right to testify other than by way of a "knowing, voluntary and intelligent waiver".[27]

31. Although operating in a different constitutional context, there is substantial
20 commonality between American and Australian conceptions of the attributes of a fair trial both of which are deeply rooted in the English common law tradition.

32. The requirement that a waiver of the right to testify must be "knowing, voluntary and intelligent" or at least be properly informed is entirely consistent with the objective importance of the right to testify in Australia.

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21 It is trite that "the precedents of other legal systems are not binding are useful only to the degree of the persuasive of their reasoning". However, it remains that this court does and should "pay the highest respect to decisions... of the Supreme Court on points of law common to the respective countries" (*Cook v Cook* (1986) 162 CLR 376 at 390).

22 433 U.S. 72, 93 n.1, 97 S.Ct. 2497, 53 L.Ed.2d 594.

23 463 U.S. 745, 751, 103 S.Ct. 3308, 77 L.Ed.2d 987 (1983).

24 *R v ND* [2003] QCA 505 at p 11 ([36]); [2004] 2 Qd R 307 at p 319 ([36]) (Holmes J) citing with approval *R v Szabo* (2001) 2 Qd R 214 at 222-223. (Thomas JA) citing with approval *Sankar* and *R v McLoughlin* [1985] 1 NZLR 106, 107.

25 See, for example, Rule 9.29 of the Victorian Bar's "Professional Standards for Victorian Barristers".

26 483 U.S. 44, 51-53 (1987).

27 See, for example, *Faretta v California,* 422 U.S. 806, 835 (1975).

33. The formal question of whether a denial of the entitlement to give evidence is subject to what is called "harmless error" review has not been determined by the United States Supreme Court.[28] However, in *Faretta v California*[29] the United States Supreme Court declined to apply harmless error review to the denial of the right of self-representation. And, in *Rock v Arkansas*[30] the Supreme Court held that the right to testify is more fundamental than the right of self-representation.

34. The special treatment of the choice to give evidence operates in the United States against a general approach to issues of competence of counsel similar to that in Australia.[31]

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35. The Canadian courts have adopted a similar approach. In *R v Ross*[32] Court of Appeal of Nova Scotia considered that "[t]he need for advice in order to make an informed choice [as to whether or not to give evidence] is well settled." In *R v Moore*[33], the Court of Appeal of Saskatchewan accepted that the defendant should have been (but was not) advised that he would be convicted without giving evidence as to his belief about a complainant's age. That appeal was allowed because the Court held that a defendant "was entitled to clear advice with respect to the controlling law or legal principles. Given [the defendant's] lack of legal knowledge it was important for him to have a full grasp of the controlling principles that governed his right to testify as well

20 as advice to assist him in making a decision on the question whether or not he should testify."

36. In *Sankar v State of Trinidad and Tobago*[34] (***Sankar***) the defendant was not properly advised about the need to give evidence where the circumstances of that case required him to give evidence if he was to have any chance of acquittal. The Privy Council allowed the appeal, holding:

> "[t]he [defendant] had been deprived in reality of deciding whether or not he should give evidence or at least make a statement from the dock."[35]

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28 The competing views are set out in *State of Wisconsin v Anthony* 860 N.W.2d 10 (2015) and *State of Louisiana v Hampton* 818 So.2d 720 (2002).
29 422 U.S. 806 [95 S.Ct. 2525, 45 L.Ed.2d 562] (1975).
30 483 U.S. 44, 52.
31 See, the discussion of the US approach to competence in *Nudd* cited at footnote 13, HCA at p 6 ([13]).
32 *R. v. Ross,* 2012 NSCA 56 (Nova Scotia) at [40] citing *R. v. Moore*, 2002 SKCA 30 (CanLII) at para. 51; *R. v. Chrispen*, 2009 SKCA 63 (CanLII) at para. 17; *R. v. Archer*, 2005 CanLII 36444 (ON CA) at para. 139
33 *R v Moore*, 2002 SKCA 30 (CanLII) at para 51
34 *Sankar v State of Trinidad and Tobago* [1995] 1 WLR 194.
35 *Sankar* cited above, at p 199.H.

37. Citing *Sankar* with approval, the New Zealand Court of Appeal found in *Nightingale v R*[36] (***Nightingale***) that:

> "Where counsel acts so as to deprive an accused of the choice of whether to give evidence an appellate Court is highly likely to find that there has been a miscarriage of justice."[37]

38. *Nightingale* was decided against the general approach to questions of competence of counsel in New Zealand that is essentially identical to the approach taken in this court.[38] That is, an effective presumption that a miscarriage of justice follows a denial of choice to give evidence by the conduct of counsel is not thought to be at odds with the general deference to forensic judgements of counsel.

39. Both *Sankar* and *Nightingale* dealt with allegations that the decision to give evidence was not attended by any meaningful advice and was made in a rushed and uninformed fashion. There is no qualitative difference between those situations and one in which the decision is based on wrong legal advice that objectively had the effect of removing any meaningful choice of a defendant to give evidence.

The approach of Australian courts to the election to give evidence

40. The only direct reference in this court to a denial of an informed choice to give evidence is in Gleeson CJ's reasons in *Nudd*[39] where His Honour used an example of where it might be necessary to know why a particular course had been taken at trial. The "extreme example" was "if an accused person failed to give evidence because counsel wrongly advised that an accused is not entitled to give evidence". His Honour concluded that in such circumstances "it is difficult to imagine that a court of criminal appeal would not intervene".

41. Care must obviously be taken in making too much of an example used as an explanatory device. For example, it cannot be said that this mode of denying a

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36 *Nightingale v R* [2010] NZCA 473.
37 *Nightingale* cited above at [12]. See also *R v Le* [2000] NZCA 199 at p 7 ([29]) and *R v K* [2008] NZCA 3 at [42] to [45].
38 *Taito v The Queen* [2005] 2 NZLR 832 and *R v S* [1998] 3 NZLR 392, discussed in *Nudd* cited at footnote 13, HCA at p 30 ([76]) (Kirby J).
39 *Nudd* cited at footnote 13, HCA at p 8 ([17]).

defendant an informed choice to give evidence is the only one that would attract appellate intervention. What is telling is that it appears that Gleeson CJ saw a denial of the choice to give evidence as one which could attract appellate intervention regardless of the effect that it had on the trial. This supports the proposition that an informed choice to give evidence is an essential precondition of a fair trial.

42. Further, the effect of the advice given in this case was to give the Appellant no real choice to give evidence. Who could rationally give evidence after being told that it was likely you would be cross-examined on prior convictions for stabbings including manslaughter and that you would "almost certainly" be convicted if that occurred? This is – in practical effect – not much removed from the situation posited by Gleeson CJ.

43. Other than the above reference in *Nudd*, the question raised in this case of a denial of an informed choice to give evidence has not been directly considered by this court but has been the subject of decisions of intermediate appellate courts, particularly Queensland.

44. The closest case to the present on its facts is *R v ND*[40] (***ND***) where a defendant was given incorrect advice about matters that could properly be put to him in cross-examination. McPherson JA noted that, because of the candour of trial counsel "[h]ere, we know precisely why the [defendant] was advised not to testify at his trial and we are able to say that the reason for that advice was in law erroneous".[41]

45. The majority (Holmes J (as her Honour then was) with whom McPherson JA agreed) drew a distinction between that case and a decision to give or not give evidence that has "ended badly" and is regretted. In *ND*, the fact that the advice given was "fundamentally flawed" meant that it could not be described as a "rational, tactical decision" and, as a result, the objective test in *TKWJ* was not applied.[42]

46. Holmes J cited *Sankar* with apparent approval[43] and rejected, as her Honour noted that the Court of Criminal Appeal of South Australia had also done, a submission that "for other reasons the decision not to give evidence might have been tactically sound".[44] The

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40 *R v ND* [2003] QCA 505; [2004] 2 Qd R 307.
41 *ND* cited above, at p 2 ([3]); p 311 ([3]).
42 *ND* cited at footnote 38 at p 12 ([39]-[40]); p 320-321 ([39] – [40]).
43 *ND* cited at footnote 38 at p 11 ([37]); p 320 ([37]).
44 *ND* cited at footnote 38 at p 11 ([38]); p 320 ([38]).

appeal was allowed and the conviction quashed.

47. Dissenting in *ND*, McMurdo J considered that the correct question was whether there is objectively "no reasonable explanation for the conduct of the accused's case at trial". His Honour relied on *TKWJ* for that proposition. His Honour concluded that "[if] the reasoning was flawed but the ultimate advice is that which could have been reasonably given, and the case is thereby conducted in an explicable way, then...there has not been a miscarriage of justice".[45] For the reasons discussed below, *TKWJ* did not require an objective test of that kind to be applied in the circumstances there (and here) and the reasoning of the majority is persuasive.

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48. The judgment on appeal in this case effectively follows the dissent in *ND*.

49. In *R v NE*[46] (***NE***) the Court of Appeal held that *ND* should be understood as finding that there was, in fact, no other rational basis for not calling the relevant evidence in that case.[47] With respect, this misunderstands the majority reasoning in *ND*, not least because this issue was precisely the point of difference between the majority judgment and McMurdo J's dissent.

50. *NE* itself was not concerned with an identifiable legal error in advice not to give
20 evidence, but with advice based solely on the risk of giving evidence inconsistent with an earlier police statement. This was classically a matter of forensic judgment. It cannot be said that receiving such advice denied the appellant an informed choice to give evidence. Even so, the Court of Appeal noted that the burden on an appellant in such cases "may be easily discharged; where for example, the advice was given because of a blatant error and, but for that error, the advice would have been otherwise".[48]

51. This situation may be thought analogous to the situation where wrong advice by trial counsel to enter a plea is imprudent and inappropriate, in which case a miscarriage of justice may be found.[49] Or where counsel's wrong advice on a defendant's ability to
30 challenge a relevant matter of fact a miscarriage of justice may also be found.[50]

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45 *ND* cited at footnote 38 at p 14 ([49]); p 323 ([49]).
46 *R v NE* [2003] QCA 574; [2004] 2 Qd R 328.
47 *NE* cited above, at p 8 ([39]); at pp 335 ([39]).
48 *NE* cited above, at p 7 ([37]); p 335 ([37]).
49 *Regina v Wilkes* [2001] NSWCCA 97.
50 *Regina v McLean* [2001] NSWCCA 58.

The approach of this court to appeals based on the conduct of counsel

52. This court has not directly considered the implications of an alleged deprivation of an informed choice to give evidence. However, the related question of when the conduct of trial counsel can result in appellate intervention has been considered.

53. *TKWJ*[51] concerned an alleged failure by trial counsel to seek a pre-emptive ruling on the impact of calling character evidence and the related failure to call that evidence. It was described by Gleeson CJ as on its face "an understandable decision" and "[i]t was the kind of tactical decision routinely made by counsel by which their clients are bound". It was characterised no differently by the other members of the court.[52]

54. The extent to which *TKWJ* is confined to tactical decisions taken by counsel by which their clients are bound is illustrated by Gleeson CJ:

> "It is undesirable 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... It is the responsibility of counsel to make tactical decisions, and assess risks." [53]

55. Similarly, McHugh J noted the importance in assessing whether counsel's conduct amounted to a material irregularity of the "wide discretion that counsel has to conduct the case as he or she thinks best and the fact that ordinarily the client is bound by the decisions of counsel".[54]

56. The decision to give evidence is not for counsel. It is reserved to the defendant personally. Giving a defendant wrong legal advice about the consequences of that choice is not a forensic decision of counsel. It is properly characterised as a mistake.

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51 All of the members of the court would have dismissed the appeal. Gummow J agreed with the reasons of both Gaudron and Hayne JJ who each delivered separate reasons.
52 *TKWJ* cited at footnote 10, HCA at p 3 ([8]).
53 *TKWJ* cited at footnote 10, HCA at p 5 ([16]).
54 *TKWJ* cited at footnote 10, HCA at p 26 ([79]).

57. Contrary to the approach taken by the Court of Appeal in this case, *TKWJ* is not authority for the proposition that in all cases where the source of an irregularity is the conduct of counsel the test is whether or not there was an objectively sound reason for the course that was adopted, regardless of the actual reasons for it.

58. Gaudron J's approach was intensely case specific and did not admit of the sort of universal test for which *TKWJ* is sometimes thought to stand. Her Honour held that where there is a need to assess whether counsel's conduct is "explicable on the basis that it resulted or could have resulted in a forensic advantage" that will require "an objective test".[55] However, Her Honour made clear that the question of forensic advantage is a "relevant but not necessarily a decisive, consideration".[56]

59. Gaudron J went on to discuss the relevance of the tactical nature of an impugned decision by trial counsel. Her Honour held that:

> "An accused will not ordinarily be deprived of a chance of acquittal that is fairly open if that chance is foreclosed by an informed and deliberate decision to pursue or not to pursue a particular course at trial." [57] and "[w]here it is claimed that a miscarriage of justice was the result of a course taken at the trial, it is for the appellant to establish that the course was not the result of an informed and deliberate decision." [58]

60. Two matters warrant emphasis at this point. First, in this case there was nothing "informed" about the impugned conduct of counsel. It was, as the Court of Appeal held, based on a clear error of law. Second, counsel was not here making a "decision" in the sense that counsel makes most decisions at trial. The decision to give evidence is reserved personally to a defendant.

61. McHugh J echoed Gaudron J's concern to ensure that the deference paid to the conduct of trial counsel only applies to true forensic choices:

> "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

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[55] *TKWJ* cited at footnote 10, HCA at p 8 ([27]).
[56] *TKWJ* cited at footnote 10, HCA at pp 8 ([25]).
[57] *TKWJ* cited at footnote 10, HCA at p 9 ([32]).
[58] *TKWJ* cited at footnote 10, HCA at p 10 ([33]).

than in cases of forensic choice." [59]

62. McHugh J also held that some errors of trial counsel will cause a miscarriage of justice if it has "deprived the accused of a fair trial according to law". In those situations, there was no need to "insist that counsel's conduct might have affected the verdict". McHugh J held that "[n]o matter how strong the prosecution case appears to be, an accused person is entitled to the trial that the law requires. In principle, therefore, where the trial has been unfair, the accused should not have to show that the counsel's conduct might have affected the result".[60]

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63. Hayne J held that the situation in *TKWJ* must be answered by an objective enquiry. The question in that case was not "why did counsel not lead the evidence?" but "could there be any reasonable explanation for not calling the evidence?".[61]

64. There were two policy imperatives underlying Hayne J's preference for an objective test.[62] First, to preserve the importance of reliance on the forensic choices of trial counsel and, second, the undesirability of appellate enquiries into such choices. Neither justification is implicated by an enquiry into the legal correctness of the advice given to a defendant about the consequences of giving evidence.

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65. *Nudd* concerned a series of claimed failures and errors by trial that were collectively said to amount to incompetence resulting in a miscarriage of justice.

66. Gleeson CJ noted that "[t]he concept of miscarriage is as wide as the potential for error"[63] and gave as examples "a failure of process of such a kind that it is impossible for an appellate court to decide if a conviction is just" and "a failure of process which departs from the essential requirements of a fair trial".[64]

67. His Honour considered that "[s]ome irregularities 'may' involve no miscarriage of

30 justice if the appellate court forms a certain opinion about the strength of the case against

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59 *TKWJ* cited at footnote 10, HCA at p 29 ([85]).
60 *TKWJ* cited at footnote 10, HCA at pp 24 - 25 ([76]).
61 *TKWJ* cited at footnote 10, HCA at p 37 ([107]).
62 *TKWJ* cited at footnote 10, HCA at p 38 ([110] and [111]).
63 *Nudd* cited at footnote 13, HCA at p 11 ([7]).
64 *Nudd* cited at footnote 13, HCA at p 11 ([7]) and as per Gummow and Hayne JJ at p 11([24]).

the defendant. The corollary of that proposition is that a defect in process may be of such a nature that its effect cannot be overcome by pointing to the strength of the prosecution case. It is impossible to exhaustively, or to define categorically, the circumstances in which such a defect will occur". 65

68. There is also much to be said for Kirby J's warning against too much deference to pragmatism in his Honour's concurring judgment in *Nudd*:66

"...As a matter of principle, neither the criminal appeal legislation nor the law generally confine attention solely to pragmatic consequences. The law is concerned with principles and with the appearance of justice in the conduct of trials...Care must be taken against dismissing complaints about the incompetence of legal representation solely on the basis that the impugned decision of counsel could have been taken competently, although for different reasons".

The appropriate approach to irregularities said to have been caused by counsel's conduct

69. We submit that the above authorities suggest the following approach to deciding whether a miscarriage of justice is said to have been caused by counsel's conduct:

a. The question to be asked and answered is always the statutory question of whether there has been a miscarriage of justice;
b. Where a miscarriage is said to arise from the conduct of counsel an important underlying principle is the deference paid to counsel's conduct and the general undesirability of appellate enquiry into the reasons underlying counsel's decisions;
c. However, those imperatives logically carry force where the complaint is about a decision made by counsel that was actually for counsel to make and where it concerns an informed forensic choice;
d. They will be of less, if any, importance where:
    i. The conduct of counsel is not an informed forensic choice;
    ii. Counsel's conduct relates to the giving of advice about a decision that can only be made personally by a defendant; and
    iii. The error of counsel has denied the defendant one of the essential attributes of a fair trial.

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65 *Nudd* cited at footnote 13, HCA at p 3 ([6]) citing the reasons of Barwick CJ in *Ratten v The Queen* (1974) 131 CLR 510 at 516.
66 *Nudd* cited at footnote 13, HCA at pp 34-35 ([90]).

e. Where an alleged error is of the first kind (i.e. a forensic choice by counsel on a matter that counsel is entitled to make a choice about) the test will ordinarily be the objective test identified in *TKWJ* (i.e. whether there is a rational reason for the conduct of the trial regardless of what the actual reason was for the choice or choices made). If there is no rational reason then the enquiry will turn to the effect that the conduct had on the trial and whether or not it was capable of affecting the outcome;

f. Where the alleged error is not of that kind, there is no all-purpose proxy for whether there has been a miscarriage of justice. The assessment will be intensely case specific. However, it can be said with confidence that a miscarriage of justice will have occurred if:

   i. The error has denied the defendant one of the preconditions of a fair trial; or

   ii. The error has had a material impact on the likely outcome of the trial;

g. Where, as here, counsel's conduct has the effect of denying a defendant an informed choice to give evidence, that is properly described as denying the defendant one of the preconditions of a fair trial.

The approach that the Court of Appeal should have taken

70. The proper approach, based on the Court of Appeal's finding of error, was to ask and answer the statutory question, namely whether or not there has been a miscarriage of justice. In that context, the proper sequence of findings was and remains:

   a. To recognise that the decision to give evidence was for the Appellant personally – it was not a forensic decision for counsel;

   b. To acknowledge the importance of the proper conduct of a criminal trial that the decision to give evidence be made on an informed basis or at least that it not be attended by plainly erroneous advice; and

   c. To find that it was not so made and, on that basis, a miscarriage of justice followed because either:

      (i) the irregularity was such that it amounts to a miscarriage of justice without the need to consider its likely effect on the verdict; or

      (ii) the error was material in the context of the evidence that would have been given and the issues in the trial.

A miscarriage of justice has occurred

71. The Court of Appeal essentially put to one side the flawed advice as a reason for the decision not to give evidence focusing exclusively on the existence of an alternative reason not to give evidence.[67] In so doing, it failed to consider whether the decision to give evidence was – in its totality – an informed one that could properly be described as a "forensic choice".

72. The Court of Appeal treated the error as it would any other aspect of the conduct of counsel in a trial, namely by asking the question whether there was an objectively "sound forensic reason"[68] for counsel's decision. But this was not a decision. It was wrong advice on a critical decision for the Appellant alone to make, whether to give evidence.

73. The Court of Appeal failed to appreciate that the approach to cases involving alleged incompetence by counsel are predicated on the rule that a defendant is ordinarily bound by the conduct of his or her counsel at trial. But here the decision to give evidence was not for counsel and that rule did not apply.

74. The Appellant was deprived of the opportunity to give evidence because of counsel's error. The Appellant was told that it was likely if he gave evidence that the jury would learn, among other things, that he had earlier been convicted of manslaughter where he had killed someone with a knife accidentally. Once that advice was received the choice to give evidence was for all practical purposes taken from him, particularly given that it was accompanied by advice that if he was cross-examined about his convictions that he would "almost certainly" be convicted of murder.

75. By contrast, a decision to give evidence of an account different to that given on an earlier occasion is not uncommon and often entirely rational.

76. No doubt the Appellant would have been heavily pressed on any change in his account but it must be recalled that once the issues of self-defence and provocation were raised it was for the prosecution to disprove them beyond reasonable doubt. It cannot be said that it would have made no difference – even if that were the test.

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67 *Craig* cited at footnote 4, p 17 ([44]).
68 *Craig* cited at footnote 4, p 17 ([44]).

77. The decision not to give evidence meant that self-defence (provoked or unprovoked) as a complete defence was not before the jury and that provocation was before the jury in a comparatively limited way. Thus, the Appellant's decision not to give evidence on the basis of the wrong advice and availability of other defences to murder, ensured a conviction for manslaughter and led directly to the Appellant's decision to plead guilty to that offence. It was a significant decision based on erroneous advice, and it changed the shape of the trial in fundamental ways.

78. As the Privy Council put it in *Sankar*:

> "It cannot be said that, if the defendant had not been deprived of the opportunity of properly considering whether to give evidence or make a statement, he would have decided not to do so. At least if he had given evidence, it is almost certain that the judge would have been under an obligation to leave issues of accident, self-defence and possibly provocation to the jury. What would have been the outcome, if this had happened, is pure speculation".[69]

The proviso should not be applied

79. The recognition by the Privy Council and the New Zealand Court of Appeal that the decision to give evidence is a special one in the context of a criminal trial raises the question of whether a failure to make the decision on a properly informed basis is "such a serious breach of the presuppositions of the trial" that the proviso cannot apply.

80. The classical statement of this remains *Wilde v R*[70] (Brennan, Dawson and Toohey JJ):

> "The proviso has no application where an irregularity has occurred which is such a departure from the essential requirements of the law that it goes to the root of the proceedings. If that has occurred, then it can be said, without considering the effect of the irregularity upon the jury's verdict, that the accused has not had a proper trial and that there has been a substantial miscarriage of justice. Errors of that kind may be so radical or fundamental that by their very nature they exclude the application of the proviso."[71]

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[69] *Sankar* cited at footnote 34, at p 201.A.
[70] *Wilde v R* (1988) 164 CLR 365.
[71] *Wilde* cited at footnote 70, at p 373 ([10]).

81. In *Evans v The Queen*[72] Gummow and Hayne JJ[73] discussed the utility of the label. Their Honours appear to prefer what might be described as a sliding scale where the more serious the error or irregularity that occurred, the less likely it is that the reviewing court will be able to find on the record of the trial that the defendant is guilty.

82. The short point here is that the approach that the Court of Appeal took did not permit it to properly ask and answer the question whether a miscarriage of justice had occurred and, whether it had, if the proviso could apply in light of the nature of the irregularity.

10 83. In any event, it is beyond the capacity of an appellate review of the record of this trial to determine without speculation how the trial may have concluded if the defendant had given evidence. The shape of the trial would have been so fundamentally changed that discerning its effect on the record alone is impossible.

Part VII: LEGISLATION

Criminal Code 1899 - 668E Determination of appeal in ordinary cases[74]

(1) The Court on any such appeal against conviction shall allow the appeal if it is of opinion that the verdict of the jury should be set aside on the ground that it is unreasonable, or cannot be supported having regard to the evidence, or that the judgment of the court of
20 trial should be set aside on the ground of the wrong decision of any question of law, or that on any ground whatsoever there was a miscarriage of justice, and in any other case shall dismiss the appeal.

(1A) However, the Court may, notwithstanding that it is of the opinion that the point or points raised by the appeal might be decided in favour of the appellant, dismiss the appeal if it considers that no substantial miscarriage of justice has actually occurred.

(2) Subject to the special provisions of this chapter, the Court shall, if it allows an appeal against conviction, quash the conviction and direct a judgment and verdict of acquittal to be entered.

(3) On an appeal against a sentence, the Court, if it is of opinion that some other sentence,
30 whether more or less severe, is warranted in law and should have been passed, shall quash the sentence and pass such other sentence in substitution therefor, and in any other case shall dismiss the appeal.

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72 *Evans v The Queen* (2007) 235 CLR 521.
73 *Evans* cited above, at p 534 ([42]).
74 Current at time of filing.

Part VIII: ORDERS SOUGHT

1. The Appeal be allowed.
2. The decision of the Court of Appeal of Queensland of 21 June 2016 be set aside and, in lieu thereof, order that:
3. The Appellant's appeal to that Court be allowed; and
4. The Appellant's conviction be set aside and a new trial be had.

Part IX: TIME ESTIMATE

The Appellant's estimate of the presentation of oral argument is 1 ½ hours.

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Date of filing:

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