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

BETWEEN:

RONALD MICHAEL CRAIG
(Appellant)

and

THE QUEEN
(Respondent)

RESPONDENT'S SUBMISSIONS

PART I: PUBLICATION ON THE INTERNET

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

PART II: RESPONDENT'S STATEMENT OF PRESENTED ISSUES

2. The Court of Appeal found[1] that the appellant was incorrectly advised as to the likelihood of his being cross-examined on a prior conviction in the event that he gave evidence in his trial.

3. The Court also found that the appellant was correctly advised in relation to the likelihood of his being cross-examined about the events on the night in question and the inconsistencies between the version he might give in evidence and that which he told the police in his formal interview[2]. The Court found that this

[1] *R v Craig* [2016] QCA 166 at [38].
[2] *R v Craig* [2016] QCA 166 at [43].

Submissions on filed on behalf of the Respondent
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provided a sound forensic reason for the appellant to not testify[3] and that in the circumstances of this case, no miscarriage of justice resulted.

4. The issues on this appeal are:

   i) whether, in considering if the erroneous advise led to a miscarriage of justice, the Court of Appeal applied incorrect legal reasoning (at paragraphs [39] to [45] of the judgment); and/or

   ii) whether the Court of Appeal erred in concluding that there was no miscarriage of justice in this case.

PART III: SECTION 78B OF THE JUDICIARY ACT 1903 (CTH)

5. The respondent has considered whether any notice should be given in compliance with section 78B of the *Judiciary Act 1903* (Cth). No notice is required.

PART IV: CONTESTED MATERIAL FACTS

6. The facts as outlined in paragraphs 8 to 12 of the appellant's submissions are not disputed. The factual summation of the evidence at trial in [2] to [11] of the judgment of Gotterson JA in *R v Craig* [2016] QCA 166 is not in contention. Further factual matters relevant to the determination of the issue raised in this appeal are outlined below.

7. In preparation for trial, the appellant gave to his solicitor a handwritten account of the events which resulted in the death of *the* deceased dated 25 September 2012, and a document headed '*Chronological Movements After the Fact*' dated 28 September 2012. The events disclosed in these documents were promoted by the appellant as his truthful account of the relevant events. These documents however recorded a version of events materially inconsistent with his earlier account to

[3] *R v Craig* [2016] QCA 166 at [44].

police and other objective evidence.[4] Regardless, the appellant maintained this new version of events in conference with his Counsel on 18 November 2013.[5]

8. The appellant did not give any further specific instruction as to the evidence he would give if he *gave* evidence at trial.[6]

9. The appellant provided signed instructions titled "*Instructions for Trial*" in which he stated that he did *not* wish to give evidence, as he did not want to be cross-examined about his previous criminal history *"or the incidents of the night in question".*[7]

10. The affidavit material filed on behalf of the appellant in the proceedings before the Court of Appeal, *demonstrates* that the decision to not give evidence was based upon a number of factors and was a decision about which he vacillated, in spite of having received the advice in relation to this previous conviction for manslaughter. The appellant stated that:

i) "Despite *these issues and despite the advice that my history would go before the jury, I still, at different stages thought that I should, and would, give evidence.*"[8]

ii) "*I know that at different times after 18 November 2013, I told Mr Seth and Mr Taylor that I wanted to run the trial on the basis of my version and I wanted to give evidence.*"[9]

iii) After signing the document "*Instructions for Trial*"[10] dated 20 January 2014, which expressly referred to not wanting to be cross-examined on his criminal history[11], the appellant maintained that he wanted to give evidence at his trial.[12]

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[4] *R v Craig* [2016] QCA 166 at [28] and [29].
[5] *R v Craig* [2016] QCA 166 at [30].
[6] Transcript of proceedings before the Court of Appeal of 13 April 2016 at R20.
[7] *R v Craig* [2016] QCA 166 at [22] and [23].
[8] Exhibit 'TF4' to the affidavit of Terence Fisher sworn 6 April 2016; [17] of the 'further affidavit of the appellant' purportedly sworn on 31 March 2016. In the context of paragraph 19, the appellant did not identify any distinction between his decision to give evidence and how his trial would be run.
[9] Paragraph 11 of the further affidavit of the appellant sworn 31 March 2016, Exhibit 4 to the affidavit of Terence Fisher sworn 6 April 2016.
[10] In fact headed "Instructions for Pre-trial".
[11] Paragraph 5 of the Instructions.
[12] Paragraph 131 of the statement of the appellant dated 13 January 2016; exhibit 1 to the affidavit of Terence Fisher sworn 21 January 2016; Paragraph 131 of the affidavit of the appellant sworn 27 January 2016.

i) The instructions of the appellant dated 4 March, 2014 wherein he stated that he did not "*wish to give evidence as I do not want to be cross-examined about my previous criminal history or the incidents of the night in question*" was a "*fair assessment of my feelings at the time.*" He maintained that his main concern was always "*my NT conviction going before the jury*", although he admitted "*My physical and mental conditions were also factors in my decision not to give evidence but by far the biggest consideration was the jury finding out about my history.*"[13]

11. In evidence before the Court of Appeal, the appellant's counsel stated that from the outset in his *dealings* with the appellant, the appellant had indicated a recognition "*that there was a significant tactical merit in running a narrow defence that was not inconsistent with the version of events that he had given to the police*", and that this was consistently reaffirmed with the appellant.[14]

12. In his evidence before the Court of Appeal, the appellant also accepted that he had been given *advice* to the effect that he would be "*in some difficulty*" if he gave evidence, on account of the differences in the versions.[15]

Part V: STATEMENT OF APPLICABLE STATUES

13. In *addition* to the legislative provisions referred to by the appellant, the respondent also refers to section 618 of the *Criminal Code (Qld)*.

Part VI: STATEMENT OF THE REPSONDENT'S ARGUMENT IN ANSWER

14. In response on this appeal, it is submitted that:

i) As a matter of fact, the appellant was not deprived of a choice whether to give evidence or not.

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[13] Paragraph 13 of the further affidavit of the appellant sworn 31 March 2016; Exhibit 4 to the affidavit of Terence Fisher sworn 6 April 2016.
[14] See paragraph 52 to 57 of the affidavit of Richard William Taylor sworn 17 February 2016 and outlined in *R v Craig* [2016] QCA 166 at [30]. See also [31] and [32].
[15] *R v Craig* [2016] QCA 166 at [33].

ii) The choice he made was based to some extent upon erroneous advice given by his counsel. However, the case is not one of a fundamental denial of a fair trial according to law, but was a case in which a mistake by counsel intruded into the integrity of the trial as a whole. It is a case of an irregularity caused by a mistake of trial counsel, not a fundamental failure of the appellant to receive a fair trial.

iii) Consequently, whether a miscarriage of law resulted from the mistake of counsel is to be determined by applying the principles derived from *TKWJ v R* (2002) 212 CLR 124 and *Nudd v R* (2006) 225 ALR 161, and looking at all of the circumstances of the trial.

15. It was this approach which was undertaken by the Court of Appeal.

16. There is no error in the approach that the Court of Appeal took in the consideration of the issue raised on this appeal nor in the finding by the Court.

Discussion

17. The power of an appellate court to intervene is derived from s.668E of the *Criminal Code (Qld)*. Relevantly, the test is 'miscarriage of justice'. What is a miscarriage of justice is not defined in the legislation but the decided cases demonstrate that a miscarriage of justice can result in a variety of ways.

18. The circumstances by which unfairness may be occasioned, and may result in a *miscarriage* of justice, are broad. It is well established that a trial may have been unfair, leading to a miscarriage of justice, by reason of the manner in which counsel appearing for the accused conducted his defence.[16]

19. The remarks of Gleeson CJ at [7] in *Nudd* are uncontrovesial and succinctly illuminating;

> *"The concept of miscarriage of justice is as wide as the potential for error. Indeed, it is wider, for not all miscarriages involve error. Process is related to outcome, in that the object of due process is to secure a just result. Justice,*

[16] *TKWJ v R* (2002) 212 CLR 124 at [25], [28], [31], [75], [97], [101], [103]; *Ali v R* (2005) 214 ALR 1 at [9], [99]; *Nudd v R* (2006) 225 ALR 161 at [2], [12]–[15], [24]–[25], [62], [81], [151].

however, means justice according to law, and the observance of the requirements of law according to which a criminal trial is to be conducted has a public as well as a private purpose. An unjust conviction is one form of miscarriage. Another is a failure of process of such a kind that it is impossible for an appellate court to decide whether a conviction is just. Another is a failure of process which departs from the essential requirments of a fair trial."

20. The appellant submits, as understood, is based upon the proposition that the irregularity in this case was of such a fundamental nature, that no broader consideration of the relevant circumstances of the case is required for an appellate court to intervene[17]. The appellant submits that the irregularity of itself is so egregious that a miscarriage of justice has resulted. It is submitted that the fundamental irregularity flows from the provision of erroneous advice which had the effect of depriving the appellant of a choice whether to give evidence or not - a decision reserved for an accused alone and which is of significant prominence in the concept of a fair trial.

21. In response it is submitted that whilst that as a general proposition, might in an appropriate case give rise to a conclusion of a miscarriage of justice warranting intervention, this is not such a case.

22. The irregularity is that the appellant was not in fact deprived of a decision, but that his decision was made on a basis which included erroneous advice as to one consequence of his giving evidence. Whilst it is readily accepted that such an irregularity can be a serious factor undermining the intergrity of the trial, the question remains whether the irregularity resulted in a miscarriage of justice in that the appellant was thereby denied a fair chance of an acquittal.[18]

23. The answer to that question requires an assessment of all the circumstances including the evidence given, the evidence proposed and the likely effect on the outcome.

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[17] Expressly at [69] of the appellant's written submissions.
[18] This was the approach of Gotterson JA at [39] citing *TKWJ v The Queen* (2002) 212 CLR 124 per Gaudron J at [26].

24. In *KLM v Western Australia* (2009) 194 A Crim R 54 at [54], after referring to the statements of Gleeson CJ at [17] in *Nudd*, Martin CJ said relevantly:

> *'In this context, reference to an 'informed' decision does not provide a charter for an appellate court to itself revisit and review the precise terms of advice given by Counsel in the often difficult circumstances of a hotly contested trial... If such errors on the part of counsel routinely provided a basis for a conclusion that there was a miscarriage of justice, the trial process would lack finality and certainty. It follows that when a miscarriage of justice is said to result from trial counsel having formed an erroneous view of the law, questions of degree will necessarily be significant.'*

25. This is not a case involving the '*extreme example*' referred to by Gleeson CJ in *Nudd* at [17]. This is a case involving an irregularity in the trial in relation to the conduct of counsel in the provision of erroneous advice. The question then for an appellate court is whether that irregularity resulted in a miscarriage of justice. This was the approach of the Court of Appeal.

26. There was no misapplication of principle.

Miscarriage of justice and the decision to give evidence.

27. The respondent's position is that the appellant was not deprived of the choice whether to give evidence or not in the circumstances of this case. That was a finding of fact, properly made, by the Court of Appeal in the disposition of the appeal at [41] of the judgment of Gotterson JA.

28. The appellant himself, in the affidavit material before the Court of Appeal, attested to maintaining a desire to give evidence at a point in time after the advice was given. The appellant's earlier held intention to nonetheless give evidence despite the advice given, demonstrates that this is not a case where the choice to do so was taken away from him. In the appellant's own mind, even after receiving the advice, the choice to give evidence remained open.

29. Consequently, the case falls to be decided by reference to issues relating to the conduct of counsel and whether that has resulted in a miscarriage of justice.

30. Support for this approach is found, by analogy, in the decision of this Court in *Nudd*. The shortcomings in that case were many. They are perhaps best articulated in the judgment of Callinan and Heydon JJ at [149]. Included amongst them is:

> *"(f) Counsel failed to appropriately advise the appellant in relation to giving evidence."*

31. The failure in *Nudd* stemmed from an erroneous understanding by defence counsel of the nature of the charge faced by the appellant. That failing on Counsel's part, affected the entire basis upon which the case was conducted and also the basis upon the question of his giving evidence was addressed. The appeal against conviction was unanimously dismissed. In each of the judgments of the members of the Court, the resolution of the case turned upon a consideration of the effect of the shortcomings in the trial on the outcome. The Court concluded that the appellant was not, despite those shortcomings, deprived of a fair chance of an acquittal, and consequently there was no miscarriage of justice.

32. The circumstances of the present case call for the same approach to the disposition of the appeal. This was the approach of the Court of Appeal.

The approach of other jurisdictions?

33. While in some instances reference to precedent from other jurisdictions may be illustrative, care must be taken that the approach of the Court in those decisions relates to a consideration of similar statutory provisions and legal principle and is not, for example, against a background or otherwise entrenched civil liberties.[19]

34. It is submitted however, that a consideration of cases such as *Sankar v The State of Trinidad and Tobago* [1995] 1 WLR 194, referred to by the appellant, does not disclose a different statement of fundamental legal principle. Rather the decision would be properly understood to be an example of circumstances where a miscarriage of justice was found to have arisen. Although *Nightingale v R* [2010] NZCA 473, (also cited by the appellant) refers to the decision in *Sankar* as authority for the proposition that "*where counsel acts so as to deprive an accused of*

[19] See *Nudd v The Queen* (2006) 225 ALR 161 at [99] per Kirby J, and by way of example the reference to the constitutional or quasi-constitutional right to effective assistance from Counsel in the United States and Canada, discussed at [13] and [14] of the judgment of Gleeson CJ in *Nudd*.

the choice of whether to give evidence an appellate court is highly likely to find that there has been a miscarriage of justice", the factual findings of the court in *Nightingale* were such that the principle was not in fact further considered.

35. The authorities of this Court relating to whether the conduct of Counsel has resulted in a miscarriage of justice, properly, it is submitted, do not draw a distinction between the decision to give evidence, or to call evidence, or otherwise adduce evidence, in determining the underlying legal test to be applied.

36. Relevantly in Queensland, section 618 of the *Criminal Code (Qld)* does not refer to the requirement that an accused be asked whether they intend to give evidence, but rather "*whether the person intends to adduce evidence in the person's defence*".

37. Such a decision, as with other decisions made, or instructions given by an accused in the course of a trial, may properly be made on, or with the advice of Counsel. As with many forensic decisions in a trial, there are risks associated with a decision to give or not give evidence. A chance of acquittal may become more remote if the choice is made to give evidence.

38. The appellant's submission is to the effect that as a blanket rule, this Court would see Counsel's conduct or advice going to an accused's decision to give evidence, to be in a different category to conduct or advice of Counsel relating to a decision to call or otherwise adduce evidence, or any other forensic decision in the course of a trial. It is submitted that in determining whether a miscarriage of justice has been occasioned, there is no basis to elevate the first category to be, universally, of more significance than any other. Further, as discussed above, such decisions are rarely able to be viewed in such isolation from one another.

39. In any trial the significance of decisions made to the prospects of an acquittal may vary widely, and not uncommonly only identifiable with hindsight. More relevantly, whether error or irregularity in the conduct of counsel results in a miscarriage of justice depends on the circumstances of each case.

The approach of the Court of Appeal

40. The appellant highlights the inclusion of the word "substantial" in [39] of the judgment of the Court of Appeal as evidencing that, having identified an error,

Gotterson JA incorrectly went on to consider the application of the proviso rather than the test under section 668E(1) *Criminal Code (Qld)*. It is submitted that a reading of the paragraph and those following alleviates this concern. It is apparent from the context of the paragraph that his Honour was considering whether circumstances had been established on which the Court could intervene, pursuant to section 668E(1), rather than grounds on which it could, nonetheless, dismiss the appeal, pursuant to section 668E(1A). The statements of principle referred to by Gotterson JA in the subsequent paragraphs demonstrate that his focus was on what constituted a miscarriage of justice, and whether a miscarriage of justice had been occasioned in the instant case. That approach is not consistent with a consideration of the matters in section 668E(1A) relating to whether such miscarriage of justice was substantial,[20] particularly as no miscarriage of justice was in fact found by the Court.[21] It is submitted that the inclusion of the word "*substantial*" in [39] would properly be considered inadvertent surplusage.

41. Gotterson JA correctly understood the test to be as stated in *TKWJ* and in *Nudd*, as was referred to at [39] of the judgment. The analysis in [41] to [44] of the judgment may be read in the context of those previously cited principles. The factors referred to in [43] and [44] are indicative of a view that the appellant was not deprived of a chance of acquittal that was fairly open, and further, that the advice he was given had a rational basis[22].

42. The Court of Appeal was, as the result of evidence received, aware of subjective matters pertaining to what had occurred at the trial, including the nature of the advice given by trial Counsel to the appellant. That however did not alter the applicable law, or preclude the Court from applying the accepted objective test in considering whether a miscarriage of justice had in fact occurred.

43. The approach of the Court of Appeal may be seen to be consistent with that of this Court in *Nudd* where the incompetence of Counsel alleged included, but was not limited to, the advice given to the accused as to whether or not to offer evidence on his own behalf at trial.[23] Although the Court was appraised in considerable detail of

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[20] For example as contemplated in *Weiss v The Queen* (2005) 224 CLR 300.
[21] *R v Craig* [2016] QCA 166 at [44].
[22] In this case both objectively and subjectively.
[23] See [54].

the specific reasons behind why the trial had proceeded as it did[24], those matters were not the focus of the Court's consideration.

44. The approach by the Court of Appeal in this case was consistent in principle with that of the Court in *Nudd.* It is submitted that the conclusion reached by Callinan and Heydon JJ in *Nudd* at [170] is particularly instructive. Further while the impugned advice the subject of consideration in this case may be seem to be analogous to that in *Nudd*, in that the conduct related to part to the accused not giving evidence, the circumstances of the conduct of the counsel in *Nudd* would, it is submitted, be considered more egregious to the accused than the present circumstances[25]. Nonetheless, this Court in *Nudd* found that there was no error in the conclusion of the Court of Appeal that no miscarriage of justice had been occasioned.

45. It is submitted that the Court of Appeal did not err in its consideration of the issues and consequently the appeal should be dismissed.

No miscarriage of justice

46. Whilst it is not conceded that there is error in the approach of Gotterson JA (with whom the other members of the Court agreed) in the Court of Appeal, in the event that this Court did find such error, it is submitted that the Court would nonetheless find that the appellant has not lost the chance of an acquittal that was fairly open, and consequently would find that the conclusion of the Court of Appeal that no miscarriage of justice has been occasioned, was nonetheless correct.

47. It is submitted that this was a strong prosecution case. The number and nature of the injuries inflicted upon the deceased spoke strongly of an intention to kill or cause grievous bodily harm to the deceased, notwithstanding such evidence of intoxication as there was. Further, the appellant's post offence conduct could readily be thought inconsistent with a non-intended or otherwise justified killing. Consistent with the the view expressed by the Court of Appeal, particularly at [43] as to the likely effect of the evidence that it is suggested may have been given by

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[24] Both the appellant and his Counsel also gave evidence before the Court of Appeal in *Nudd*: See *Nudd* at [150].
[25] See *Nudd* at [27], [50], [54], [129] and [160] and [162] by way of example.

the appellant, had he given evidence, this Court may be satisfied that the appellant's prospects of acquittal would have in no way improved, had he done so. The appellant therefore has not lost the chance of an acquittal that was fairly open.

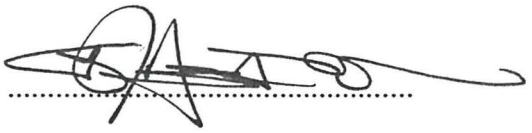
Part VII: STATEMENT OF THE RESPONDENT'S ARGUMENT ON THE NOTICE OF CONTENTION OR NOICE OF CROSS-APPEAL

48. Not applicable.

Part VIII: ESTIMATE OF TIME FOR PRESENTATION OF RESPONDENT'S ARGUMENT

49. The respondent estimates the presentation of oral submissions will be of 1.5 hours duration.

Dated 2 June 2017



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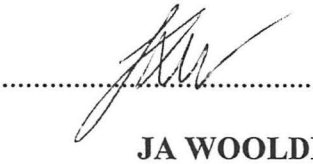

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ANNEXURE TO PART V

LEGISLATIVE PROVISIONS

Criminal Code Act 1899 (Qld)

618 Evidence in defence

At the close of the evidence for the prosecution the proper officer of the court shall ask the accused person whether the person intends to adduce evidence in the person's defence.

Annexure to Part V filed on behalf of the Respondent
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