Avoiding Incompetent Trial Advocacy According to the Authorities

A Defence Perspective

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Introduction

I have had the pleasure and privilege of running criminal trials on indictment with a speaking role since I was a Senior Solicitor at Legal Aid NSW in 2015. After running one jury trial in 2015, and one judge alone trial in 2016, in that capacity, I later appeared in several more trials as a Solicitor Advocate at Legal Aid NSW between 2019-2022. Since being called to the Bar in NSW in 2022, I have appeared in many more trials as defence counsel. Moreover, since 2025, I have been accepting briefs as a non-salaried Crown Prosecutor, but I have only appeared in two jury trials in that capacity thus far.

Despite that experience over time, I still consider myself a neophyte when it comes to the business of running criminal trials. This is because of the myriad possibilities and complexities that attend such business. Every trial is different. Every accused person is different. Every complainant is different. The circumstances and attendant evidence in respect of alleged human wrongdoing is of infinite possibility. Moreover, the artform of trial advocacy is something that I firmly believe is never mastered, but rather incrementally improved through a painstaking process of preparation, experience, and reflection. I expect to still be preparing, improving, and reflecting until I retire, should the cost of living and interest rates ever permit such a radical state of affairs.

The following topic, a rather delicate and taboo one for criminal law practitioners, it must be said, is therefore designed to help me, principally, to avoid falling afoul of a substantiated claim of incompetence. I say substantiated because it would seem that most appeal points asserting incompetence of trial counsel are found wanting. And for good reason. The authorities recognise a bandwidth of competent forensic decisions that can be made by trial counsel and, just because different or more felicitous judgement might have been exercised on reflection, or by different counsel, does not mean the impugned barrister was incompetent. It is also unsurprising that those accused persons found guilty, following contested trials, might try to convince themselves it was the fault of their legal representatives, rather than the pure and simple weight of admissible evidence.

Disclaimer

I give no warranty that experienced practitioners will learn anything new. I hope, however, that the insights provided will assist practitioners to reflect upon and improve their own trial preparation, irrespective of the jurisdiction in which they practise. While the focus of this paper, and the authorities cited therein, is on indictable criminal trials, the principles are equally applicable to summary defended hearings.

I originally presented on this topic to the Orana Law Society at their annual CPD Conference in 2024, however, this is the first iteration of this paper to be disseminated to the profession. I have also not used any Artificial Intelligence programs or applications to assist in the preparation of this paper. Please note that the cover page image was sourced from www.evess.co.

The Ethical Dimensions of Competence

It is important to bear in mind that lawyers practising in criminal litigation are ethically obliged to act competently. This is enshrined in the *principles* of the *Legal Profession Uniform Conduct (Barristers) Rules 2015* (NSW) at r 4(c):

> [B]arristers as specialist advocates in the administration of justice, must act honestly, fairly, skilfully, bravely and with **competence** [emphasis added] and diligence.

It also finds expression as an *other fundamental ethical duty* in the *Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2025* (NSW) at r 4.1.3:

> A solicitor must also … deliver legal services **competently** [emphasis added], diligently and as promptly as reasonably possible.

It must therefore logically follow that to act incompetently can constitute a breach of your ethical obligations as a lawyer. Though it is important to bear in mind that while an appellate court might make a finding of incompetence, or even flagrant incompetence, it does not become a *de facto* regulator of professional standards; that role remains within the purview of the Bar Association, the Legal Services Commissioner, and the Law Society, respectively.

Incompetent Trial Advocacy

Examples of what is incompetent trial advocacy according to the authorities

The following are a selection of cases which reveal conduct by defence trial counsel which the courts have considered to be incompetent.

Tuckiar v The King [1934] HCA 49

In *Tuckiar*, the appellant, a First Nations man, was tried before a judge and jury in the Supreme Court of the Northern Territory and found guilty of the *murder* of a police constable. He was sentenced to *death*. The Crown case relied on two pieces of confessional evidence given by two other First Nations men.

During the trial, the accused's counsel interviewed him at the behest of the trial judge about this confessional evidence and returned and stated in open court, in front of the jury, that he was in a predicament, the worst predicament he had encountered in all his legal career. This public statement had the effect of communicating to the jury that the evidence called by the Crown of a confession made by the accused was correct.

The trial judge proceeded to allow inadmissible good character evidence to be led by the Crown concerning the deceased; and impermissibly commented to the jury about the accused not giving evidence. No objection was taken by defence counsel in respect of either issue.

The HCA ultimately unanimously allowed the appeal, quashed the conviction and judgment, and directed that a verdict and judgment of acquittal be entered. This has become a seminal case in this space.

Regina v Lawson [2000] NSWCCA 214

In *Lawson*, the appellant was tried before a judge and jury in the District Court of NSW and found guilty of serious *child sexual assault* offending. His appeal asserted, among other grounds, that his trial counsel was incompetent.

In finding that his trial counsel was indeed incompetent, but that such incompetence did not result in a miscarriage of justice, Sperling J noted that trial counsel received the brief only the day before trial (at [55]) and his Honour commented on the following failings, at [113] (in summary):

- Cross-examination of an expert which resulted in worse evidence for the appellant concerning timing.
- Failing to ask that expert about whether a scar might have been caused at a different time.
- Cross-examining in such a way as to reinforce the complainant's account of events.
- Failing to object to the trial judge's erroneous direction to the jury about the use of complaint evidence to the expert.
- Failure to ask for an inadmissible answer given by the complainant in cross-examination to be struck out or for an immediate direction to be given to the jury to disregard the answer.
- Failing to seek a direction concerning the Crown's failure to call a particular witness.

Nudd v The Queen [2006] HCA 9

In *Nudd*, the appellant was tried before a judge and jury in the Supreme Court of Queensland and found guilty of *being knowingly concerned in the importation into Australia of cocaine*. He was sentenced to a term of imprisonment of 22 years, with a non-parole period of 11 years.

His appeal before the HCA claimed that his conviction involved a miscarriage of justice due to the asserted incompetence of his trial counsel. In their judgment, Justices Gummow and Hayne stated the following about counsel's conduct of the trial, and how it related to the broader picture of whether there had been a miscarriage of justice, at [25]:

> Pointing to the fact that trial counsel did not take proper instructions from the accused, did not properly understand the statutory 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?

Justice Kirby was not so confined to a tripartite criticism, and went further in summarising trial counsel's incompetence as including, at [54] (citations omitted):

> *The professional incompetence:* In summary, the professional incompetence included:
>
> (1) Failing to understand, and properly advise the appellant on the elements of the offence with which he was charged;
>
> (2) Conducting the defence case and opening to the jury on the basis of an incorrect understanding of the offence, thereby putting the appellant on the back foot before the jury from the outset of the trial;
>
> (3) Failing to take, or procure, detailed written instructions from the appellant relevant to his version of the facts;
>
> (4) Failing properly to advise the appellant on such version as to his legal liability for the offence charged and to prepare and present the defence case accordingly;
>
> (5) Failing, on the basis of a correct understanding of the offence and like appreciation of the appellant's version of the facts, to give advice to the appellant on whether or not to offer evidence on his own behalf at the trial;
>
> (6) Making a concession before the jury that it was the appellant whose voice could be heard on the telephonic interception tapes without first obtaining specific instructions in that respect and considering the necessity and wisdom of needlessly doing so;
>
> (7) Failing to seek appropriate directions from the trial judge concerning the way in which the jury could use the content of discussions between other persons, not had in the presence of the appellant;
>
> (8) Failing to object to the tender of parts of telephonic tapes containing arguably inadmissible and prejudicial material irrelevant to the offence charged; and
>
> (9) Introducing immaterial and prejudicial information in the closing address to the jury concerning the appellant's arrest in the United States for visa violations, his deportation to Australia and the loss of property seized from him by the Australian authorities.

His Honour went on to say, at [55]:

> Taken individually, some of the foregoing acts and omissions of counsel were not instances of the most serious professional incompetence. Some may even … be put to one side as ill-judged, but available, tactical decisions, designed to advance the appellant's case in the context of very strong prosecution evidence. However, in combination, the instances of incompetence are clearly serious…

Ultimately, however, despite the litany of errors by trial counsel, and the strong censure of the various Justices of the HCA, the appeal was dismissed because the Crown case was so strong that no real prospect of acquittal had been lost and therefore no miscarriage of justice had occurred.

Taylor v R [2009] NSWCCA 180

In *Taylor*, the appellant was tried before a judge and jury in the District Court of NSW and found guilty of *sexual assault inflicting actual bodily harm* on his domestic partner. At the heart of the ultimately successful appeal ground, asserting miscarriage of justice through incompetence of counsel, was an insipid effort by defence counsel to adduce admissible evidence of a continuing sexual relationship between the appellant and the complainant *after* the alleged sexual offending, under s 293[1] of the *Criminal Procedure Act* 1986 (NSW), which was then abandoned mid-trial.

In reaching the conclusion that there had been a miscarriage of justice through incompetence of counsel, Campbell J (Latham and Harrison JJ agreeing) made the following observations, at [70]:

> In the present case, if one were restricted to drawing inferences from the transcript, it was inconceivable that counsel appearing at the trial made an informed and deliberate decision not to present the type of argument that the court upheld in ***Warner*** as to why evidence of an ongoing sexual relationship between the accused and the complainant after the events that form the subject of the charge was admissible. It would also be inconceivable that counsel appearing at trial made an informed and deliberate decision not to refer the judge to relevant cases on section 293 or its predecessor, or to cases that showed how the proposed evidence *"related to"* the relationship within the meaning of section 293(3)(b). It would also be inconceivable that counsel appearing at trial made an informed and deliberate decision to conduct the discussion (it can hardly be called an application) he had with the judge concerning section 293 when he had only *"looked at it very quickly"*, and without having reduced to writing the nature and scope of the evidence he hoped to elicit in cross-examination of the complainant. No forensic advantage could have come from counsel deciding to act in any of these ways. It was these actions that were the substantial cause of there being no attempt made to elicit the evidence concerning the topics on which he had instructions…

This case provides a chilling reminder that lawyers need to be across the procedural, substantive, and evidentiary legislation and caselaw that are relevant to the issues in their trial or summary defended hearing.

[1] Now s 294CB.

Kho v R [2012] NSWCCA 71

In *Kho*, the appellant was tried before a judge and jury in the District Court of NSW and found guilty of *supplying 13.9kg of heroin*. He was sentenced to a term of imprisonment of 18 years, with a non-parole period of 12 years (at [1]-[3]).

On appeal, the appellant asserted, amount other grounds, that his trial counsel was incompetent. The incompetence relied upon was the failure to ascertain whether a particular witness was able and willing to give evidence consistent with evidence they gave in their own sentence proceedings, namely, that the appellant was not involved in the offending.

In determining this ground of appeal, McClellan CJ at CL (Johnson J and Grove AJ agreeing) stated as follows:

> [22] In the present case defence counsel gave evidence before this Court. It is apparent that, most likely through inexperience, he did not identify the fact that once Loh had pleaded guilty he may be able to give evidence in the appellant's trial which, if accepted, would have led to his acquittal. There was no tactical or forensic reasons why the appellant's counsel did not seek to have Loh give evidence. It is plain that he should have taken this course.
>
> [23] I am of the opinion that, for this reason, the appellant was incompletely represented at his trial. Counsel should have questioned whether Loh could give evidence to support the appellant's account. It may be assumed from the fact that he gave that evidence at the sentencing hearing that he would have done so. If Loh's account was to be accepted by a jury the appellant's acquittal would be inevitable. There was no direct evidence of the appellant's involvement in the criminal enterprise.

The Court ultimately upheld this ground of appeal, quashed the conviction, and ordered a new trial.

Madden v R [2022] NSWCCA 196

In *Madden*, the applicant was tried before a judge and jury in the District Court of NSW and found guilty of 54 counts relating to historic *sexual offences* against three complainants (each then an adolescent). He was sentenced to a term of imprisonment of 15 years, with a non-parole period of 10 years (at [1]-[3]).

This appeal succeeded on various grounds, including a complaint concerning trial counsel's incompetence as demonstrated by his cursory cross-examination of the complainants, and the paucity of his closing address. In respect of this issue, Ward P (Hulme and Bellew JJ agreeing) made the following findings:

> [477] Of the complaints made by the applicant as to the conduct of the trial by defence counsel, to my mind that which takes this matter outside the ordinary running of a trial (to use the language of Gleeson CJ in *Birks*) is the perfunctory nature of the cross-examination of the complainants coupled with the equally inadequate closing address. The gross failings in that regard are amply demonstrated by the comprehensive and careful way in which the applicant's (different) counsel on appeal explored the inconsistences in the evidence of MA and DN

> and the matters that it was contended should have raised a reasonable doubt in the mind of the jury. Even if, as the Crown here suggested, there was a rational forensic decision to take the (concededly unorthodox) approach that defence counsel did in cross-examination of MA and DN (**doing little more than putting to them that their account of events was incorrect** [emphasis added]), there is no apparent rational basis for failing to highlight to the jury the inconsistencies in the evidence – particularly the evidence that the Crown concedes is not readily reconcilable. There is much force to the observation that this was a case that defence counsel appears to have allowed the case simply to "wash over" him; and in those circumstances the applicant did not have a fair trial on the very serious counts alleged against him.
>
> [478] … I consider that defence counsel's failure was so incompetent that the applicant was deprived of the opportunity to have a fair trial. Even if the lack of address was more significant for some counts than others, all are infected by the error because of the reliance on tendency evidence which pervaded each count.

In agreeing with the conclusions of Ward P, the following additional comments were offered by R A Hulme J, that provide a stark illustration of just how incompetent trial counsel was in this case:

> [482] … It may be generous to regard the brevity of [trial counsel's] cross-examination of the three complainants (occupying an aggregate of 6 pages of transcript) as being an astute forensic tactic. The closing address, however, was anything but that. **It was so perfunctory that it ran to a mere 36 lines of transcript**. It was confined to telling the jury about a subject that had already been covered by the Crown Prosecutor and would be addressed again by the trial judge: the onus and standard of proof. There was not the slightest attempt at providing the jury with any critical analysis of the quality of the evidence relied upon by the prosecution. In these circumstances, **it is difficult to understand how the applicant benefited from having legal representation at all** [emphases added].

Ultimately, the appeal was allowed, the convictions were quashed, and a mixture of acquittals and new trials were ordered (at [480]).

Stern (a pseudonym) v The King [2023] VSCA 57

In *Stern*, the applicant was tried before a judge and jury in the County Court of Victoria and found guilty of two charges of *rape* in respect of his former partner. The applicant was represented at trial by the 'in-house counsel' of a firm of solicitors.

On appeal, the applicant claimed his in-house counsel was incompetent on the following four bases, at [2]:

(a) Introduction of evidence of uncharged acts (including uncharged allegations of rape)

(b) Failure adequately to deal with text message evidence

(c) Failure to object to use of evidence as incriminating conduct

(d) Adducing in cross-examination inadmissible and prejudicial evidence

The Court (Priest, Niall, and Macaulay JJA) made the following observations about the cross-examination of the complainant and the overall ground of appeal asserting incompetence:

> [72] When regard is had to the whole of the record, it is clear that the applicant's advocate's cross-examination lacked skill, and, to a significant extent, was incompetent. It was repetitive and overlong, and conducted in such a way that the complainant was given free rein to provide non-responsive answers, many of which contained highly prejudicial matter. Those observations having been made, however, we acknowledge, that were the trial advocate's cross-examination the only matter advanced in support of the contention that the applicant's trial was conducted with flagrant incompetence, we may not have been able to conclude that there had been a substantial miscarriage of justice. But when one takes into account the cumulative effect of all the matters advanced under cover of ground 3, the conclusion that the applicant suffered a substantial miscarriage of justice is inescapable.

The applicant's appeal was, accordingly, allowed, his convictions were set aside, and a new trial was ordered (at [5]).

RE v R [2024] NSWCCA 180

In *RE*, the appellant was tried before a judge and jury in the District Court of NSW and found guilty of various *child sexual assault* offences. He was sentenced to a term of imprisonment of 1 year and 2 months, with a non-parole period of 9 months (at [1]).

One of the appeal grounds concerned trial counsel's asserted incompetence on account of failing to object to an erroneous aspect of the Crown Prosecutor's closing address. It was erroneous insofar as it purported to speculate that the timing of crucial phone calls between the appellant and his friend, could be *moved* forward to fit with the Crown's narrative concerning complaint messages on Instagram from the complainant to her boyfriend; and this despite there being agreed facts pursuant to s 191 of the *Evidence Act 1995* (NSW) concerning the timing of the calls (see [78-[92]).

In concluding that trial counsel was incompetent as alleged on this point, Mitchelmore JA (Davies and Ierace JJ agreeing) found as follows, at [93]:

> I have noted above that the Crown Prosecutor invited the jury to move the timing of the calls between the appellant and EG *forward*, so that they occurred between 8:44pm and 8:46pm. Accepting for present purposes that there was a rational forensic basis for the case run on the appellant's behalf at the trial, the impugned part of the Crown Prosecutor's closing significantly undermined it. On the timing speculated by the Crown Prosecutor, there may have been time for the appellant to lie back down on the bed, but there was next to no time for him to fall asleep. As the appellant submitted, viewing the matter objectively, **there was no rational reason for defence counsel not to object to what the Crown Prosecutor submitted in relation to the timing of the calls** [emphasis added].

For this, and other reasons, the appeal was allowed, the convictions were quashed, and an acquittal and new trial were ordered, in respect of different counts (at [126]).

Holmes v R [2024] NSWCCA 233

In *Holmes*, the applicant was tried before a judge and jury in the District Court of NSW and found guilty of *sexually assaulting* a sex worker. He was sentenced to a term of imprisonment of 4 years and 6 months, with a non-parole period of 2 years and 6 months (at [5]-[8]).

A crucial issue in the appeal was trial counsel's failure to object to some police body worn video which contained various prejudicial evidence, including: evidence suggesting the applicant was detained and trying to leave (at [109]-[115]); complaint evidence corroborating the complainant's account (at [116]-[119]); evidence of another sex worker consoling the complainant and telling the police about the alleged offending (at [120]-[123]); and inadmissible opinion evidence of police talking to the complainant about the alleged offending (at [124]-[126]).

In concluding that trial counsel was incompetent on account of failing to object to this body worn video evidence, Chen J (N Adams and Ierace JJ agreeing) made the following findings:

> [138] It may be accepted that something could be gained from the video showing the manner in which the complainant interacted with the police and, in particular, how the complainant apparently behaved when requested by Constable Foti to provide her with some identification (although, as I observed, above, the applicant's trial counsel did not cross-examine the complainant upon this issue). But that is a *small* part of the video confined to around 20 seconds. It provided no rational explanation, in my view, for the balance of the video being played…
>
> [139] … Given that I have found that any slight advantage to the applicant was outweighed by the significant forensic *disadvantage* to the applicant's case, it follows that I am satisfied that a miscarriage of justice has been established under this ground.

The Court ultimately allowed the appeal, quashed the conviction, and ordered a new trial.

Competent Trial Advocacy

Examples of what is not incompetent trial advocacy according to the authorities

The following are a selection of cases involving impugned conduct by defence trial counsel which the courts have considered not to be incompetent.

Ali v The Queen [2005] HCA 8

In *Ali*, the appellant was tried before a judge and jury in the Supreme Court of Queensland and found guilty of the *murder* of an infant, as well as *interfering with the corpse,* by way of dismemberment and disposal. The facts are gruesome and an appreciation of them is unnecessary for the purpose at hand.

On appeal to the HCA, the conduct of trial counsel was criticised on a number of grounds, including:

- That counsel failed to advance a particular theory of the case consistent with his client's innocence of the principal offence (at [6]).
- That counsel allowed prejudicial evidence to be admitted at trial without objection (at [8]).
- That counsel failed to make a separate trial application from the co-accused, who was the mother of the deceased (at [11]).

In respect of the apparent failure to advance a particular theory of the case consistent with innocence, this was, in substance, an argument that trial counsel should have raised a hypothesis that the appellant had nothing to do with the murder, but might have happened to take the body, butcher it, and bury it (at [6]).

Such a hypothesis was, however, unsupported by the evidence, and contrary to everything the appellant had previously said, and was inconsistent with the principal line of defence pursued at trial. Gleeson CJ relevantly noted, at [6]:

> … It is not a mark of competent advocacy to pursue at trial every line of argument that can be imagined, regardless of its consistency with other arguments, and regardless of its prospects of success. On the contrary, such an approach is the hallmark of incompetence.

Regarding the complaint about the failure to object to prejudicial evidence, Hayne J made the following comforting observations:

> [23] Showing that objection could have been taken to some questions that were asked by other counsel during the course of a trial does not show that trial counsel was incompetent or show that there has been a miscarriage of justice. **Counsel is not bound to take every objection that is open**. **Objecting** to the form in which evidence is led, or objecting to evidence on a subject about which other evidence has been or is to be heard, **may convey an impression of obstructionism detrimental to the interests of the party for whom counsel is appearing**. Demonstrating that counsel *could* have objected to certain evidence does not demonstrate that counsel *should* have made that objection [emphases added].

As to the failure to make a separate trial application, Hayne J commented that:

> [20] … it is enough to say that I agree with Callinan and Heydon JJ that such an application, if made, would have failed. The prosecution contended, among other things, that the two accused acted in concert…
>
> [21] As Gleeson CJ point out, an important consequence of the appellant being tried with the co-accused was statements Ms Blackwell had made to police, in which she took full responsibility for killing the child and then cutting up the body, were before the jury. Had there been separate trials, those statements may not have been admissible at the appellant's trial…

The HCA ultimately found that trial counsel was not incompetent and the appeal was accordingly dismissed.

Savic v Regina [2008] NSWCCA 312

In Savic, the appellant was tried before a judge sitting alone in the District Court of NSW and found guilty of *wounding with intent to murder*. He was sentenced to a term of imprisonment of 10 years, with a non-parole period of 6 years and 6 months (at [1]-[6]).

One of the various grounds of appeal relied upon by the appellant asserted that trial counsel was flagrantly incompetent by failing to object to evidence being led in the trial of an earlier violent attack by the appellant on the complainant, and for advising the appellant to proceed by way of judge alone trial.

In giving short shrift to these complaints, Allsop P (Kirby and Hall JJ agreeing) concluded, at [40]:

> There has been no incompetence shown. The evidence of what happened in September 2002 was not objectionable and it could have been led before jury or a judge. Identification evidence was crucial, as was credibility. Given the apparent circumstances of the violence of the attack in September 2002 on the complainant's version and the savagery of the attack in January, it might well have been thought to be a prudent course for the appellant's counsel to prefer a judge alone trial in the light of the fact that the evidence was admissible and likely to be admitted.

The appeal was dismissed.

Gillies v Director of Public Prosecutions (NSW) [2008] NSWCCA 339

In *Gillies*, the appellant was tried before a judge and jury in the District Court of NSW and found guilty of *sexual intercourse without consent* in respect of his then partner. He was sentenced to a term of imprisonment of 6 years and 8 months, with a non-parole period of 5 years (at [1]).

One of the appeal grounds asserted that trial counsel was flagrantly incompetent, principally because there was an alleged failure to dispute the authenticity of crucial videotape evidence and to call expert evidence regarding same (at [44]).

Counsel for the appellant gave evidence on appeal that strong advice had been given to the appellant that he was wasting his time pursuing that issue and should deal with the real issue in the case, namely, consent; and that the appellant was initially reluctant to accept that advice but eventually agreed (at [46]).

The Court (Basten JA, Hislop and Price JJ) concluded, at [47]:

> … Whether erroneous or not, it was open for counsel in these circumstances not to challenge the authenticity of the videotape and to concentrate on the critical issue of consent and the appellant's belief that his actions were within the consent of the complainant. It follows that no miscarriage of justice is shown to have occurred.

The appeal was dismissed.

Clee v R [2009] NSWCCA 18

In *Clee,* the appellant was tried before a judge and jury in the District Court of NSW and found guilty of *entering a dwelling house with intent to commit a serious indictable offence, namely, intimidation*. He was sentenced to a term of imprisonment of 2 years and 6 months, with a non-parole period of 20 months (at [1]-[5]).

One of the appellant's three grounds of appeal asserted that trial counsel was flagrantly incompetent by leading evidence of the appellant's criminal record, including a conviction for intimidation. This evidence was referred to in the defence opening and closing addresses and was led through the police and the appellant himself (at [24]).

Part of the background to this approach was summarised in the appeal, at [30]:

> (d) The appellant also was of the opinion that because of the appellant's criminal record the police had not diligently investigated the complaint made against him [regarding the complainant's alleged drug supply activities].

Justice Hislop (Beazley JA and Harrison J agreeing) reached the following conclusion about this complaint:

> [35] The strategy adopted by the appellant's trial counsel was carefully weighed and considered by him. He embarked upon it with the appellant's express instructions to do so. The appellant, it would seem, felt very strongly in relation to what he considered to be the actions of the complainant in dealing drugs and creating risk in respect of abandoned needles. As his Honour observed, counsel had opened on his bad character to the jury on the basis of specific instructions and on the basis of a clear forensic decision.
>
> [36] In my opinion, it would be inappropriate to categorise counsel's decision as flagrant incompetence. On the contrary, it was a carefully considered forensic decision. Counsel's conduct represented a legitimate choice which a competent counsel could fairly make in the circumstances of the trial and viewed objectively it was a rational tactical decision in the particular forensic situation in which it was made. Further, is has not been

established there was a significant possibility that the jury impermissibly relied upon the appellant's criminal history as evidence of guilt.

The appeal was dismissed.

Gillespie v R [2020] NSWCCA 186

In *Gillespie,* the applicant was re-tried before a judge and jury in the District Court of NSW and found guilty of several historic *child sexual assault* offences. He was sentenced to a term of imprisonment of 5 years, with a non-parole period of 2 years and 6 months (at [1]-[3]).

On the re-trial, the applicant was represented by a solicitor, a senior junior barrister with over 25 years of experience at the Bar, albeit entirely in family litigation, and a QC experienced in complex criminal trial work.

The relevant issue was that the QC was tied up in an unrelated trial and was unavailable until the Thursday of the week the trial was due to commence. The matter was listed for mention to ventilate this issue, and the trial judge made it clear that the trial had priority and was to proceed without delay. The relevant transcript is quoted in the appeal judgment at [34]:

> His Honour said (at T 3.36-46):
>
> > … I'm not starting the trial on Thursday. **This Court does not sit at the convenience of counsel.** I've never forgotten and will never forget how difficult it is to run a criminal barrister's diary but you've got to factor in, if you get jammed then someone else is going to have to run it. This is not a case where there isn't a junior. I accept, as you tell me, your experience is in family law but you took the brief and you're a barrister of over 25 years' experience. You've got a very experienced senior. Much of the cross examination of the complainant's been done and there are several days between now and Monday. **I repeat what I said; I expect the trial to commence on Monday morning.** If you're going to make an application to further cross examine the complainant, then you'll need to make it on Monday morning [emphases added].

The unequivocal position of the trial judge is laid bare at [35]:

> His Honour thrice made clear that his Honour wanted it clearly understood that the trial was commencing on Monday, saying that "I'll see what the position is on Monday but you should be under no illusion, my position at the moment is I expect the trial to commence" (at T 5.13-14).

One of the grounds of appeal concerned an assertion that the failure of the senior junior counsel to withdraw in those circumstances, was incompetent, and occasioned a miscarriage of justice. In rejecting that argument, Ward JA (Wilson and Ierace JJ agreeing) found at [148]:

> Accordingly, it has not been established that the failure of [trial counsel] to withdraw as Counsel (even assuming it would have been open to him, consistent with his professional and ethical obligations, to do so) gave rise to a miscarriage of justice. Similarly, I consider that it has not been established that the refusal to grant an adjournment resulted in the retention of (relevantly) incompetent counsel and in turn caused a miscarriage of justice.

Leave to appeal was refused.

Name Suppressed v R [2023] NSWCCA 130

In *Name Suppressed,* the applicant was tried by a judge alone in the District Court of NSW and found guilty of one count of *intentionally sexually touching his daughter*. He was sentenced to a term of imprisonment of 4 years and 6 months, with a non-parole period of 2 years and 3 months (at [1]-[2]).

The applicant's central contention on appeal was that his defence counsel was incompetent because he did not conduct the case on the basis that his ex-wife (the complainant's mother) had encouraged the complainant to make a false allegation in order to obtain sole custody of the complainant in Family Court proceedings then on foot (at [1]).

In determining this appeal, the Court (Ward P; Walton and Ierace JJ) made the following relevant findings, at [116]:

> In my opinion there was a rational explanation for the course that was followed. There was nothing (other than speculation based on the temporal coincidence of the application apparently made by the mother by a motion filed in June 2020 in the Family Court proceedings, following the parenting orders that had been made in May 2020, and the report in July 2020 of the allegations) to provide any foundation for the applicant's contention that the mother was the source of the false allegations. **Indeed, one might have thought that if the mother had been motivated to procure the making of false allegations in order to obtain sole custody she would have done so at a much earlier step in the Family Court proceedings [emphasis added]** (in circumstances where the custody or access issues appear to have been contentious for some time)… Moreover, it seems clear that there was a concern on the part of the defence counsel not to raise matters that might introduce evidence of other complaints of this nature…

The appeal was dismissed.

AK v R [2024] NSWCCA 181

In *AK*, the applicant was tried before a judge and jury in the District Court of NSW and found guilty of various *child sexual assault* offences against his nephews. He was sentenced to a term of imprisonment of 4 years and 6 months, with a non-parole period of 2 years and 4 months (at [1]-[2]).

The subject of the appeal was the failure of the applicant's counsel at trial to use material adverse to the mother's credibility derived from an entirely separate set of proceedings in the Local Court and the District Court concerning allegations made by the mother against the father (the brother of the applicant) for domestic violence (at [6]).

After observing that the *findings* concerning the mother's credibility in either Court, and the *decision* of the District Court to dismiss various charges, were inadmissible pursuant to s 91 of the *Evidence Act 1995* (NSW) (at [8]), Basten AJA (Rothman and N Adams JJ agreeing) made the following relevant observations:

> [38] The issue of domestic violence was a tangential question. The mother gave evidence of having reported domestic violence to the police. The jury may have inferred that there had been court proceedings but in circumstances where the outcome could not be given in evidence, the attempt to challenge the mother's credibility on the basis of such a complaint would have invited a retrial of the domestic violence allegations. Their relevance would have been peripheral and a distraction from the applicant's primary defence.
>
> [39] That disputed domestic violence allegations between husband and wife may affect the credibility of one or both may be accepted. However, even if the mother's credibility were adversely affected in relation to that matter, the connection between that matter and her allegations with respect to the applicant and the young children, remained obscure…

The appeal was dismissed.

ZBJ v R (No 2) [2025] NSWCCA 187

In *ZBJ*, the applicant was tried before a judge and jury in the District Court of NSW and found guilty of *maintaining an unlawful sexual relationship with his daughter*. He was sentenced to a term of imprisonment of 18 years, with a non-parole period of 11 years (at [1]).

One of several grounds of appeal concerned a claim that trial counsel was incompetent on account of several criticisms, including for not asking questions the applicant wanted asked, and for not tendering documents which the applicant wanted tendered.

In dealing with this issue, Adamson JA (Chen and Rigg JJ agreeing) stated the following, at [136]:

> The starting point is that the applicant was entitled to appear for himself at the trial (as he did in this Court) or be represented by a legal representative. He chose to be represented. The applicant was entitled to competent legal representation, which required his counsel to advance the defence case, to challenge prosecution witnesses, to take appropriate objections and to tender relevant material in support of the defence case. **The applicant's defence counsel was not "some kind of 'mouthpiece'** [emphasis added] for [him], [required to conduct] the case in close conformity with the client's directions": *Birks v R* (1990) 19 NSWLR 677 (*Birks*) at 691-692 (Gleeson CJ). These propositions are reflected in the Legal Profession Uniform Conduct (Barristers) Rules 2015

(NSW) (the Barristers Rules): see the discussion in *Mashayekhi v R (No 2)* [2021] NSWCCA 61 at [50]-[55] (Bell P, Button and Wright JJ agreeing).

Her Honour proceeded (at [137]-[141]) to set out Bar Rules 42, 61(a), 64, 65, and 67, before concluding as follows, at [147]:

> The applicant had firm views about the way he wished the trial to be conducted as were evident from the way in which he conducted the appeal, including in his several complaints (in ground 2) that certain evidence which was available was not tendered as part of the defence case. For the reasons which follow, I do not discern any lack of competence in the way in which defence counsel conducted the defence case. The way in which his discretion, as counsel, was exercised fell within the ambit reserved to him by the Barristers Rules and did not give rise to any matter which would call for this Court's intervention.

Her Honour later observed (at [332]) that the applicant's submissions were redolent with complaints about defence counsel and the following provides a summary of how some of those complaints were rejected:

- Regarding complaints about forensic decision-making. Defence counsel was required to exercise independent forensic judgment and was entitled to act contrary to his client's instructions within the area of forensic discretion (at [334]).

- As to the complaint that defence counsel should have put to the complainant that if she was the victim of weekly sexual abuse, she would not have stayed at home with her father. The applicant's desired course was fraught with forensic risk, including that the jury might regard the defence case as being based on one of the misconceptions exposed by Dr Pulman, namely, *why do child victims of sexual abuse remain within the family home?* It was objectively forensically reasonable for defence counsel not to ask questions which the applicant wanted to be asked to that effect (at [335]).

- In respect of defence counsel not cross-examining the complainant as to the "real reason" she went to a psychologist being depression. This forensic course was also fraught with risk as the jury might have regarded her depression as having been caused by the complainant's incestuous relationship with her father. It was objectively reasonable for defence counsel to refrain from this forensic course (at [336]).

The appeal was dismissed.

AA v R [2026] NSWCCA 10

In *AA*, the applicant was tried before a judge and jury in the District Court of NSW and found guilty of *sexual offences* against his then wife of 13 years. He was sentenced to a term of imprisonment of 5 years and 10 months, with a non-parole period of 4 years (at [1]-[2]).

The central issue on appeal was an assertion that trial counsel did not properly advise the applicant as to whether he should give evidence on oath at trial in circumstances where he did not give such evidence (at [4]).

Trial counsel gave evidence on the appeal and explained the considerations and the steps which led to the accused not giving sworn evidence in his defence at trial. After considering this evidence, and the submissions on the appeal, Adamson JA (McNaughton and Muston JJ agreeing) made the following observations, at [147]:

> It is plain that [trial counsel's] assessment of the applicant was that there was no realistic chance that, as to the issue of whether the complainant consented to the sexual intercourse and sexual touching on 23 August 2022, he would either be believed or that the jury would consider that what he said *might* be true. In these circumstances, as far as [trial counsel] adjudged it, there was no actual benefit to be obtained from his giving evidence since the jury would simply put the applicant's evidence to one side. The dangers of the applicant giving evidence were obvious: the jury might, after hearing the cross-examination of the applicant, be convinced beyond reasonable doubt of his guilt, even if they had not been persuaded to that standard at the close of the prosecution case.

Her Honour set out the following guidance to trial counsel on the issue, at [144]:

> Generalisations about whether to advise an accused to give evidence are rarely instructive since this forensic evaluation depends on the facts and circumstances which are germane to the particular case. These matters may include the following:
>
> (1) whether the complainant's evidence has been impugned in cross-examination to the extent that it may not be accepted beyond reasonable doubt (which would result in an acquittal);
>
> (2) how the accused is likely to present in the witness box (including whether the accused tends to answer questions directly or indirectly; whether the accused tends to justify actions which may be regarded as reprehensible by a jury; whether the accused's demeanour is autocratic and entitled, which may make it more likely that he would have sex with the complainant even if she did not consent);
>
> (3) whether there is a real risk that damaging material which has not been tendered in the prosecution case will become admissible and be tendered in the course of the cross-examination of an accused;
>
> (4) whether the accused's evidence is likely to support the complainant's evidence about peripheral matters and thereby make it more likely that the jury will accept, to the requisite standard, the complainant's evidence about the matter in dispute (in this case, whether the complainant consented to the sexual intercourse);
>
> (5) whether it is arguable that any verdict of guilty on the basis of the evidence in the prosecution case would be unreasonable, with the consequence that the verdict could be challenged on appeal on that basis;
>
> (6) whether, if the accused gives evidence, the prospect of a verdict of guilty being found to be unreasonable is likely to be foreclosed; and

(7) whether the Crown case is so strong that the applicant has, in effect, nothing to lose by giving evidence.

Her Honour also cited the leading case on the applicable principles where an appeal alleges incompetence of counsel when advising an accused whether to give evidence, namely, *Craig v The Queen* [2018] HCA 13:

> [153] The following principles, as articulated in *Craig*, are fundamental:
>
> (1) a fair trial requires that an accused be aware of the right to give evidence in his or her defence, even if that choice may be unwise: *Craig* at [33]; and
>
> (2) the decision whether the accused will give evidence at the trial is for the accused and not for defence counsel: *Craig* at [26].

Finally, on the issue of signed written instructions, her Honour noted:

> [166] I note that the applicant was not required by his legal advisers to give written instructions confirming his decision not to give evidence. It is **desirable that such instructions** be obtained in that form when important decisions are made by an accused, such as the decision whether to give, or not to give, evidence or the decision to plead guilty. The requirement to sign written instructions (with the assistance of an interpreter in an appropriate case, such as the present) serves not only to record the instructions but also to bring home to the accused the importance and finality of the decision, which is ultimately one for the accused…

Having concluded that there was no incompetence in this case, however, the appeal was dismissed.

Fundamental Principles

The following are a selection of cases that provide authoritative appellate guidance as to the fundamental principles to be applied in cases concerning asserted incompetence of trial counsel.

R v Birks (1990) 19 NSWLR 677

In *Birks*, Gleeson CJ summarised the applicable principles concerning incompetence of counsel as follows, at 685:

> 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 criminal justice system operates.
>
> 2 As a general rule an accused person is bound by the way the trial is conducted by counsel, regardless of whether that was in accordance with the wishes of the client, and it is not a ground for setting aside a conviction that decisions made by counsel were made without, or contrary to, instructions, or involved errors of judgment or even negligence.

> 3 However, there may arise cases where something has occurred in the running of a trial, perhaps as the result of 'flagrant incompetence' of counsel, or perhaps from some other cause, which will be recognised as involving, or causing, a miscarriage of justice. It is impossible, and undesirable, to attempt to define such cases with precision. When they arise they will attract appellate intervention.

Ignjatic v R (1993) 68 A Crim R 333

In *Ignjatic*, Hunt CJ at CL made the following observations as to counsel's discretion when competently running a trial, at 336:

> Counsel have a wide discretion as to the manner in which proceedings are conducted. Decisions as to which witnesses should or should not be called, what questions should or should not be asked, which lines of argument should be pursued, which points should be abandoned and which of two or more inconsistent defences should be raised are all matters within the discretion of counsel, and they frequently involve difficult problems of judgment, including judgment as to the best tactics to be adopted. Neither disobedience of instructions or even incompetence is sufficient of itself to attract appellate intervention. It is only when the error made was of such a nature in the circumstances of the case as to have led to a miscarriage of justice that this court will interfere.

TKWJ v R [2002] HCA 46

In *TKWJ*, Gleeson CJ made the following observations about the issue of incompetence being assessed on appeal, at [16]:

> 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 [emphases added]…

Nudd v The Queen [2006] HCA 9

In *Nudd*, Gleeson CJ stated the following concerning the test for incompetence, at [9]:

> … As a general rule, counsel's decisions bind the client. If it were otherwise, the adversarial system could not function. The fairness of the process is to be judged in that light. The nature of the adversarial system, and the assumptions on which it operates, will lead to the conclusion, in most cases, that a complaint that counsel's

conduct has resulted in an unfair trial will be considered by reference to an objective standard, and without investigation of the subjective reasons for that conduct.

Puan v R [2009] NSWCCA 194

In *Puan*, Howie J (Hodgson JA and Fullerton J agreeing) set out the principles concerning incompetence as follows, at [28]:

> A ground that asserts that defence counsel is incompetent must be considered, not upon a subjective view of the conduct of counsel, but on an objective determination of whether this Court is satisfied that there was a miscarriage of justice arising from the manner in which the defence was conducted. In *Clee v R* [2009] NSWCCA 18, a case where the allegation was that defence counsel was incompetent in a specific aspect of the trial, the following was stated in the judgment of Hislop J:
>
> > [27] The following principles are applicable:
> >
> > > (a) 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 the defence (Seymour v R [2006] NSWCCA 206; (2006) 162 A Crim R 576).
> > >
> > > (b) The "flagrant incompetence" of trial counsel may give rise to a miscarriage of justice (R v Birks (1990) 19 NSWLR 677).
> > >
> > > (c) The inquiry about miscarriage must be an objective inquiry – Nudd v R [2006] HCA 9; (2006) 226 ALR 161, per Gummow and Hayne JJ at [27].
> > >
> > > (d) The question is whether there could be a reasonable explanation for the course that was adopted at trial. If there could be such an explanation, it follows from the fundamental nature of a criminal trial as an adversarial and accusatorial process that no miscarriage of justice is shown to have occurred – Ali v R [2005] HCA 8; (2005) 214 ALR 1 per Hayne J (with whom Gummow J agreed) at [25].
> > >
> > > (e) The appellant must show that the failing or error of counsel was a material irregularity and there is a significant possibility that it affected the outcome of the trial – TKWJ v R [2002] HCA 46; (2002) 212 CLR 124 per McHugh J at [79].
> > >
> > > (f) 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 (TKWJ per Gleeson CJ at [16]).

(g) Regard may be had, inter alia, to the opening address of counsel for the appellant and statement of intention during the course of the trial to determine the tactical result sought to be achieved – Seymour at [37], [39].

Alkhair v R [2016] NSWCCA 4

In *Alkhair*, from [14]-[30], Macfarlan JA (Rothman and Bellew JJ agreeing) comprehensively reviewed the various authorities from *Birks* in 1990 to *Vella*[2] in 2015, and set out the following summary of relevant principles:

1. To the extent possible, an appellate court should determine an appeal involving complaints about a trial counsel's conduct of a case by examining the record of the trial to determine from the objective circumstances whether the accused has had a fair trial.

2. Ordinarily, an affirmative answer to this question is required where the impugned conduct is capable of being rationally explained as a step taken, or not taken, in the interests of the accused. This is so even if the accused alleges on appeal that he or she did not authorise the conduct because the nature of the adversarial system means that the client is bound by the manner in which the trial is conducted on his or her behalf.

3. Only in exceptional circumstances will an appellate court find it necessary to resort to subjective evidence concerning the appellant's legal representatives' reasoning at trial or to evidence as to communications between the appellant and those representatives.

4. The ultimate question for an appellate court is whether the appellant has established that what occurred at the trial gave rise to a miscarriage of justice is the sense that the appellant lost a chance of acquittal that was fairly open.

Quick Tips from the Authorities Regarding Competency

The purpose of this paper is not to provide a guide to preparing and running trials. Many lawyers, more qualified than I am, have written and presented on that topic. For guidance and suggested approaches in that space, I strongly recommend that you consider attending a workshop run by the Australian Advocacy Institute.[3]

The following quick tips on competency can be gleaned, however, from the above analysis of relevant authorities:

- Do not reveal admissions by your client to the tribunal of fact unless instructed to do so: *Tuckiar*.

[2] *Vella v R* [2015] NSWCCA 148.
[3] https://advocacy.com.au.

- Ensure that inadmissible evidence sought to be led by the Crown is objected to and raise anything inappropriate in the Crown's addresses and examinations with the trial judge: *Tuckiar*, *Lawson*, *Nudd, RE*, *Holmes*, *Savic*, and *Gillies*.

- Take care to ask questions in cross-examination that: advance the defence case; do not inadvertently result in worse evidence for your client or simply reinforce the Crown case; are not overly repetitive or long; and do not introduce inadmissible and/or prejudicial evidence: *Lawson,* and *Stern*.

- Take proper instructions; read and understand the relevant statutory provisions, and the caselaw interpreting same: *Nudd*.

- Prepare pre-trial applications thoroughly and be prepared to make appropriate submissions on the applicable law as it relates to the facts of the case: *Taylor*.

- Properly investigate whether defence witnesses might be called to give exculpatory evidence: *Kho*.

- Do not substitute brevity for abdication and capitulation when it comes to your cross-examination and closing address: *Madden*.

- Do not be a mere mouthpiece for your client; do not take every objection *just* because it is open; and do not pursue every line of defence just because your client asks it of you: *Ali*, *Name Suppressed*, *AK*, and *ZBJ.*

- Tread very carefully before adducing any evidence adverse to your client that they insist upon raising in their defence: *Clee*.

- If you are junior counsel being led in the trial, be prepared to run it at short notice should your leader become unavailable: *Gillespie*.

- Ensure you advise your client about the pros and cons of giving sworn evidence in their own defence; do so in a way that is tailored to the evidence and circumstances in their case; and obtain signed written instructions in respect of that, and all critical issues upon which the accused must decide: *AA*.

Conclusion

In conclusion, practising criminal law competently is a complex endeavour replete with obstacles and pitfalls. Criminal lawyers are routinely called upon to make forensic decisions in high-pressure and time-sensitive circumstances, within an adversarial environment. That adversarial environment sometimes features friction with opponents and the bench, and tension with the demands and expectations of the client (sometimes

reasonable, and sometimes not). And within that context mistakes can easily be made in the cut and thrust of a busy practice, and especially when one is inexperienced generally, or in a particular area.

I hope that this paper, and its accompanying presentation, provides you with some objective tools by which to measure your competence as a trial advocate, and to ensure that you never fall afoul of a substantiated claim of incompetence.

Some comforting judicial observations

I will conclude by providing the following sage observations of eminent jurists which I hope will be of some comfort to those of us who might tend to anxiety over the various ways in which complaints of incompetence might be made.

Regina v Lawson [2000] NSWCCA 214, per Dunford J at [37]:

> … Advocates are of varying standards, particularly in relation to cross-examination, and I believe this Court should be reluctant, with the benefit of hindsight, to judge the standard and competency of cross-examinations, particularly without evidence as to the instructions that the cross-examiner had from the client…

And per Sperling J at [55]-[56]:

> … There are good reasons for such reluctance which go much deeper than mere considerations of delicacy. First, we were informed from the bar table that counsel received the brief only the day before the trial. Secondly, counsel who appeared at the trial has not been heard. In the nature of things, that cannot be done because counsel's interests in defending himself against criticism would conflict with the interests of his client in relying on alleged incompetence as a ground of appeal… Counsel's professional standing is therefore unaffected by what is said in this judgment concerning the conduct of the appellant's defence at trial.

Nudd v The Queen [2006] HCA 9, per Callinan and Heydon JJ at [162]:

> … However, just as in medicine there may be terminal cases which not even the most brilliant surgeon can remedy, there will be prosecution cases which an accused could not successfully defend with the aid of the most resourceful and competent of counsel…

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[4] *Please note that, while I am a member of Black Chambers in Sydney, I reside near Newcastle and run a statewide criminal practice as both defence counsel and as a non-salaried Crown Prosecutor.*