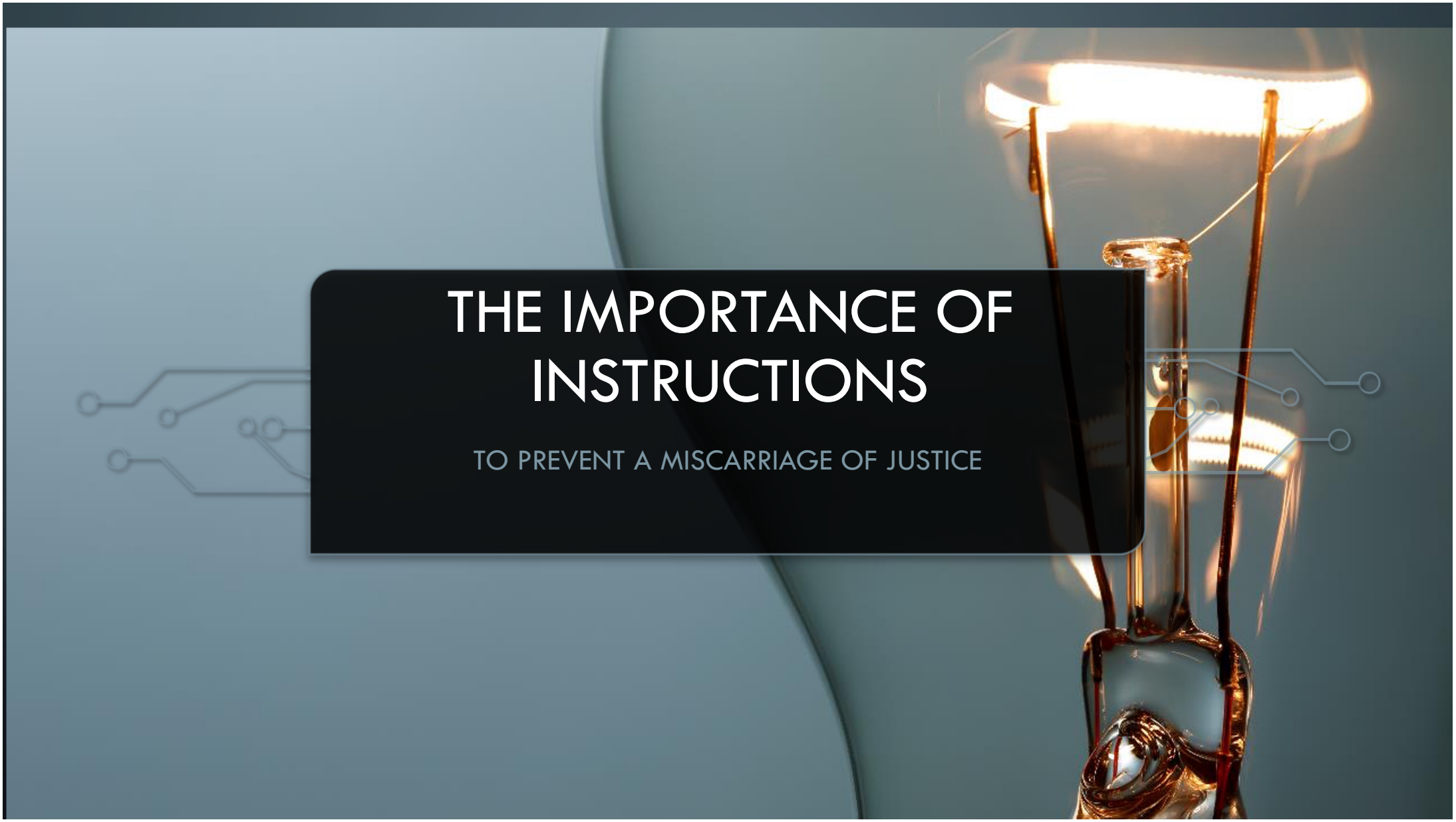
THE IMPORTANCE OF INSTRUCTIONS
TO PREVENT A MISCARRIAGE OF JUSTICE

R v Sitters [2018] QCA 35

- Mr Sitters was represented by a solicitor at his trial in the District Court. The jury convicted Mr Sitters of one count of rape and two counts of indecent treatment.
- In the Court of Appeal, various reports, which did not qualify as fresh evidence, were nevertheless received into evidence.
- The Crown conceded that the expert reports demonstrated the appellant may not have been fit to plead and stand trial, and that a miscarriage of justice had been established because there was a real and substantial question to be considered about the appellant's fitness.
- Section 613 of the *Criminal Code 1899* (Qld), which sets out the procedure to be followed where there is uncertainty about an accused person's fitness for trial, had not been followed. The issue of the appellant's fitness for trial was not raised by either party at any point until the commencement of the sentencing proceedings.

R v Sitters [2018] QCA 35

- At the sentence hearing, the appellant's solicitor informed the court that the appellant had cognitive difficulties and was in receipt of a disability pension. The solicitor had been unable to obtain any instructions directly from the appellant and had instead relied on information provided by family members.

Australian Solicitors' Conduct Rules

- Rule 8. Client instructions

    8.1 A solicitor must follow a client's lawful, proper and competent instructions.

R v Sheppard [2005] QCA 235

- The appellant was convicted of one count of grievous bodily harm.
- The sole ground of appeal was that there was a miscarriage of justice from the incompetent conduct of his case at trial.

The facts

- The complainant and the appellant were known to each other and were not on friendly terms. In the early hours of the morning, the drunken complainant left a nightclub with Mr Ball. He began to walk through a park and the next he could recall was that two people were helping him up from the ground. He thought he had lost consciousness. His jaw was broken. He again met with Mr Ball and together they began to look for a taxi. The appellant allegedly expressed a remark to the complainant which could be construed as an admission that he was the assailant. According to Mr Ball, the appellant, who he didn't know, admitted he was the person who hit the complainant. Mr Ball identified the appellant from a photo-board.

R v Sheppard [2005] QCA 235

- Mr Stenner worked with the appellant. Mr Stenner alleged that a few weeks later, the appellant said to him, "It's surprising what a punch to the back of the head can do … next time I see him, I'll go whack again."

The defence strategy

- The appellant did not give or call evidence. The defence approach was to try to make the complainant and Mr Ball seem unreliable, an approach which had some promise. There was some attempt to highlight discrepancies between the respective accounts of the complainant and Mr Ball. The possibility that the complainant broke his jaw in some other way was also explored. More importantly, the evidence of Mr Stenner was hardly challenged. Mr Stenner had only provided his statement to police on the eve of trial. Both on voir dire and in evidence before the jury, no promising line of cross examination emerged. It was never suggested to Mr Stenner that the appellant had not said those words, although it was suggested that whatever was said was said between friends in a jocular way, such that the words could not be taken seriously.

R v Sheppard [2005] QCA 235

The appellant's instructions

- The appellant's instructions to his solicitors and counsel were that he hit complainant but that he acted in self defence. The solicitor's file and the instructions to counsel recorded those instructions. The appellant gave evidence in the Court of Appeal to the effect that he was confronted by an irate complainant who took a swing at him, and the appellant's immediate response was to punch him. The appellant said that he conveyed all of this to his solicitor. But according to the solicitor's affidavit, the appellant's instructions were that the complainant had shaped up to the appellant and the appellant struck him by way of a pre-emptive strike. The appellant did not instruct him that the complainant had thrown a punch first.
- The Court of Appeal observed that unfortunately the solicitor did not take more detailed notes. His particular recollection as to a 'pre-emptive strike' was unsupported by any note.

R v Sheppard [2005] QCA 235

- The Court of Appeal found other deficiencies in the instructions. During the appeal, the appellant testified that the complainant and Mr Stenner were older men, who formed a distinct group at work and were intent on bullying him. Mr Stenner had previously head-butted and assaulted him. The Court of Appeal found that the lawyers did not endeavour to obtain any detailed instructions from which the Stenner evidence could have been substantially challenged. In particular, information was not sought as to why Mr Stenner would volunteer untruthful evidence against the appellant.
- The Court of Appeal found that Mr Stenner's evidence, and the absence of any real challenge to it, was highly prejudicial to the defence case.

R v Sheppard [2005] QCA 235

Giving evidence

- It was common ground that the consistent advice was that the appellant should not give evidence. That advice did not change once Mr Stenner was cross examined on the voir dire. There was no advice given to the effect that the strategy of not giving or calling evidence should be reconsidered, although the lawyers had no apparent basis for effectively challenging Mr Stenner's evidence.
- The Court of Appeal considered that had Mr Stenner not been called, there was a real prospect of making a sufficient impact upon the prosecution case by cross examining as defence counsel did and by not calling evidence.
- The Court of Appeal found that counsel had no reason to expect that Mr Stenner's evidence could be discredited, and a realisation of that should have called for a re-consideration of the defence strategy.

R v Sheppard [2005] QCA 235

Incompetence

- The Court of Appeal held that there was no reasonable explanation for conducting the case as defence counsel did, because a conviction was at least highly likely, whereas the alternative course provided what was at least a significant chance of acquittal.

- In that way, there was what McHugh J described in *TKWJ* v R as a material irregularity in the trial from which there was a significant possibility that the outcome was affected. Ultimately, there was a miscarriage of justice.

General observations on incompetence

- Gleeson CJ observed in *R v Birks* (1990) 19 NSWLR 677 at 684, that appeal courts are extremely cautious about intervening where the ground of appeal is a miscarriage of justice by the incompetent conduct of the defence case. As his Honour said at 685:

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

- Be that as it may, in my view, one should take instructions on significant or fundamental matters of trial strategy, within the constraints of the ethical rules.

Miscarriage of justice because of a failure to adduce evidence in accordance with instructions

R v Baggaley [2023] QCA 249

- The Crown case at trial was that Dru and Nathan Baggaley attempted to import more than 650 kilograms of powder containing cocaine. Dru Baggaley appealed.
- The Crown tendered footage of Dru and one Draper on a boat, meeting a large ship at a point 360 kilometres off the east coast of Australia. Containers were loaded onto the boat, and it proceeded back towards Australia. The Crown tendered footage of Dru and Draper on the boat attempting to outpace a Navy vessel, which it eventually did. The footage showed Dru throwing all the containers, which were later found to contain cocaine, off the boat during this pursuit. The boat was later intercepted by Queensland Police.

- Draper pleaded guilty and was called as a witness at Dru's trial. Draper testified that he had been asked by Dru Baggaley to drive a boat for a fee to pick up 'some smoko'. He alleged that all arrangements were made by Dru.
- Dru testified that Draper had a plan to illegally import tobacco. Dru agreed to procure a boat that Draper was to pay for. He organised the boat through Nathan and made it available for Draper and one Stuart to take out to sea. Dru waited at the boat ramp for Draper and Stuart to arrive, but they did not. Draper requested to be picked up from the airport. Dru collected Draper from the airport and, with some stops on the way, drove Draper to the boat ramp. Draper 'turned' on Dru. He told him Stuart was not coming and insisted that Dru was going out to sea with him. Dru refused but was threatened. Dru thought he reached a compromise with Draper. Dru would drive the boat out to the river mouth and would then be set down on a beach. Draper would continue alone out to sea.

- Dru drove the boat down the river as agreed. At the mouth, Draper took over driving and suddenly accelerated so that Dru went flying backwards. The sea was rough and dangerous. By the time Dru could remonstrate with Draper they were a kilometre out to sea. At that point, Draper told him that if he did not co-operate "you're dead, your family's dead".
- Dru was extremely sea-sick through the entire voyage. He did not help collect the containers which he thought contained tobacco. He did help throw containers off the boat, but at Draper's request, to make the boat lighter and faster.
- Appeal ground 5 related to the '720 phone' which was found by police on the boat. It was argued that a miscarriage of justice occurred due to trial counsel's failure to adduce evidence (including by cross examination) in accordance with instructions in respect of the 720 phone.

- In leading evidence in chief, Dru's counsel took him through his dealings with Draper, including what phones were provided by Draper. Dru's factual instructions to his solicitors included more evidence as to phones than what was led in chief.
- The instructions included the fact that Draper (for complex reasons) sent Dru the 720 phone in the mail a few days before his arrival in Coolangatta. When the phone arrived, Draper asked Dru to buy a prepaid credit voucher and activate the phone so that it would be ready for Draper to use when he arrived.
- In leading the chronological narrative of Dru's dealings with Draper, trial counsel failed to ask questions to elicit evidence that a few days before Draper flew to Coolangatta, he had posted the 720 phone to Dru and asked Dru to buy a SIM card and charge card for that phone. No questions were asked as to Dru's having done that, or as to his having inserted the SIM card and the charge card into the 720 phone at his parents' house.

- Dalton JA found that this omission was significant because the ownership of the 720 phone was crucial to the Crown case against the appellant.
- The Crown relied on messages on the 720 phone to show that someone (the Crown said Nathan Baggaley) was waiting onshore to assist when the boat returned. Thus, whoever owned the phone was a willing participant in the enterprise.
- The Crown case was that the 720 phone belonged to Dru. There were a number of formal admissions which supported this, to the effect that Dru had purchased the recharge voucher.
- It was conceded on appeal that when defence counsel broached the topic of the 720 phone with Dru, counsel received an answer which was not in accordance with his factual instructions and exercised prudence in failing to revisit this topic for fear of a further departure from instructions.

- Nonetheless, Dalton JA found that it was possible for counsel to come back to the topic of ownership from a different factual departure point, either then or later in evidence in chief, or in re-examination. More needed to be done to put the factual instructions which distanced Dru from the 720 phone.
- Dalton JA held that the failure to lead the exculpatory version of events (1) was a material irregularity inconsistent with a fair trial of the accused, and (2) must have been "prejudicial in the sense that there was a 'real chance that it affected the jury's verdict…' or 'realistically [could] have affected the verdict of guilt'… 'or had the capacity for practical injustice' or was 'capable of affecting the result of the trial'". On either test, there was a miscarriage of justice. A re-trial was ordered.

Miscarriage of justice

- At [42], Dalton JA summarised the relevant principles:
- "The case law makes it clear that counsel have a wide discretion as to how a trial is conducted. "Decisions as to what witnesses to call, what questions to ask or not to ask, what lines of argument to pursue and what points to abandon, are all matters within the discretion of counsel and frequently involve difficult problems of judgment, including judgment as to tactics." There will be no miscarriage of justice unless the conduct of counsel deprived the person convicted of a significant possibility of acquittal, or the conduct of counsel deprived the accused of a fair trial according to law. The first of those tests will not be satisfied where the decision taken is one which "involved both advantages and disadvantages for an accused person"; where the decision did not produce "the hoped-for result", or where hindsight shows that the decision was wrong." (footnotes omitted)

The rule in *Browne v Dunn*

- McMurdo JA stated in *R v JAE* [2021] QCA 287 at [45], "The rule in *Browne v Dunn* (1893) 6 R 97 is a general rule of practice by which a cross examiner should put to an opponent's witness matters that are inconsistent with what that witness says and which are intended to be asserted in due course". (This decision contains a thorough analysis of the rule and the consequences of its breach.)
- In *R v Foley* [2000] 1 Qd R 290, it was stated: Where defence counsel in a criminal trial failed to put his or her case to Crown witnesses, the judge in summing up ordinarily should point out that:
  - the particular matter was not put to the relevant witness;
  - it should have been put, so that the witness could have the opportunity of dealing with the suggestion; and
  - the witness has been deprived of the opportunity to give that evidence and the court had similarly been deprived of receiving it.

  In exceptional cases, such as where there seems to be a tenable case of recent invention, it is appropriate for the judge to instruct the jury in a way which would permit an adverse inference to be drawn against the credibility of the accused.

Katarina Prskalo KC
23 March 2024