

SCOTLAND / JUDGMENT

Anderson v HMA [1995] ScotHC HCJAC_3 (01 December 1995)

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JISCBAILII_CASE_SCOT_CRIMINAL 01 December 1995 ANDERSON v. HM ADVOCATE The cause called before the High Court of Justiciary on 21 June 1995 when their Lordships remitted the cause to be heard before a bench of five Lords Commissioners of Justiciary. The cause thereafter called before the High Court of Justiciary, comprising the Lord Justice-General (Hope), the Lord Justice-Clerk (Ross), Lord Sutherland, Lord Cameron of Lochbroom and Lord Johnston for a hearing on 14 and 15 November 1995. On 15 November 1995 their Lordships made avizandum. At advising, on 1 December 1995, the opinion of the court was delivered by the Lord Justice-General (Hope). OPINION OF THE COURT—The appellant was found guilty in the High Court at Glasgow on two charges of assault and of a contravention of sec 3(3) of the Bail etc (Scotland) Act 1980. He was sentenced to a total of three years and nine months' imprisonment. The second of the two assault charges, which was the most serious charge on this indictment, related to an incident at the house then occupied by Patrick Hugh McHugh, senior, at 81 Berneray Street, Milton, Glasgow. The appellant was convicted of having forced his way into the house and assaulted Mr McHugh and his wife and three children by presenting a sawn off shotgun at them and committing various acts of physical violence against Mr McHugh to his severe injury and permanent disfigurement. The charge under sec 3(3) of the Bail Act was that he failed without reasonable excuse to appear at a diet at a sitting of the High Court of Justiciary in Glasgow at which he was to stand trial on the assault charges. In his note of appeal against conviction, which he prepared himself, the appellant stated that his ground of appeal was that he was misrepresented by his solicitor-advocate. The basis for this complaint is to be found in a written statement of his points of appeal which he lodged with the note of appeal. In this document he stated that tactics for his defence stipulated and agreed to, were ignored and changed by his solicitor-advocate without his agreement or any consultation. He maintained that he had insisted from the very beginning that it

was imperative that Mr McHugh's character was brought out at the trial, bearing in mind that the only evidence against him was evidence from the McHugh family. This was not done, and he suffered prejudice at his trial because Mr McHugh and his family told lies to the police and when they were in the witness box. In *McCarroll v HM Advocate* it was held that lack of skill and diligence in the preparation or conduct of the defence, whether the counsel or solicitor concerned was instructed in the usual way or assigned to the accused as a poor person under the statutory provisions then in force, could not be pleaded as a miscarriage of justice. It is clear that if this is a sound statement of the law on the matter, the appellant cannot succeed in his appeal. The Lord Justice-Clerk said in *Glasten v HM Advocate* that any alleged failure on the part of an appellant's legal advisers is not a good ground of appeal and does not support any suggestion that there was a miscarriage of justice. He made similar observations in *Holden v HM Advocate* and in *Farrell v HM Advocate*. In *Renton and Brown's Criminal Procedure* (5th edn), para 11–40 it is stated, under reference to *McCarroll*, that the inadequacy of the accused's solicitor is not a ground of appeal. In *Dolan v HM Advocate* the Lord Justice-General said that it was for the solicitor in the exercise of his professional judgment to decide which witnesses should be called and which witnesses should not be called, and that the court could not say that a miscarriage of justice arose out of the way in which the solicitor conducted the trial in the exercise of his own professional judgment. At the previous hearing of this appeal counsel submitted that an issue of law was raised in this case which required to be considered by a larger court. He said that, although the authority of *McCarroll* had not previously been called in question, there were reasons for thinking that it ought no longer to be followed in this court. It was decided to remit the appeal to a larger court so that the case of *McCarroll* could be reconsidered and the issue examined in detail in the light of guidance from other jurisdictions and, if appropriate, under reference to art 6.3 of the European Convention on Human Rights. We have now had the benefit of listening to a detailed argument on the whole matter, and we are grateful both to counsel and to the Lord Advocate for the care which has been taken in the preparation and presentation of the argument. The underlying rules and general principles The starting point for an examination of the whole issue is the accused's right to a fair trial and his statutory right under sec 228(2) of the Criminal Procedure (Scotland) Act 1975, if he is convicted, to bring the proceedings in which he was convicted under review. The right to a fair trial is an essential principle for any system of criminal justice. Every person who is accused of a crime before a Scottish court is entitled to a fair trial. So it is part of the system of criminal justice in this country that the accused has the right to be told what the accusation is which is to be brought against him, to be given sufficient notice of it to prepare his defence, and to have his defence presented to the court. The whole system of our rules of procedure and our practice in the conduct of criminal trials has been built upon these essential principles. Their counterpart is the right of appeal on the ground that there was a miscarriage of justice. Section 228(2) of the 1975 Act, as substituted by Sched 2 to the Criminal Justice (Scotland) Act 1980, provides that a person may bring under review any alleged miscarriage of justice in the proceedings in which he was convicted, including any alleged

miscarriage of justice on the basis of additional evidence which was not available and could not reasonably have been made available at the trial. We are not concerned with the second part of that subsection in this case. In *Church v HM Advocate* at p 609B, the Lord Justice-General said that the word 'any' in the first part was important because it meant that no limit was being set in this part of the subsection to the sort of miscarriages of justice which may be considered by the court, that the words used were all-embracing and that they were subject only to the requirement that the miscarriage of justice which was alleged must have arisen in the proceedings in which the person was convicted. In *Elliott v HM Advocate* at p 102, the Lord Justice-Clerk agreed that sec 228(2) could properly be divided into two parts, the first part being the general part which, at p 104 he said was expressed widely. The subsection is designed to enable the person to bring under review any alleged miscarriage of justice in the proceedings in which he was convicted by which he was deprived of his right to a fair trial. Among the rules of practice and procedure which flow from the essential principle are those which enable the accused person to obtain the services of counsel or a solicitor or, since the coming into effect of sec 25A of the Solicitors (Scotland) Act 1980 inserted by sec 24 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990, of a solicitor-advocate. In *Dobie's Law and Practice of the Sheriff Courts in Scotland*

(1948) at p 491, for example, it is stated that it is a recognised principle of judicial procedure in the courts of Scotland that free legal assistance should be afforded to those who are unable to pay for this in the usual way. The point is dealt with also in *Hume's Commentaries on the Law of Scotland Respecting Crimes* ii, 283. The solicitor whose diligence and competency were under attack in *McCarroll* had been provided to the accused under rules 158 and 159 of the First Schedule to the Sheriff Courts (Scotland) Act 1907. The poor's roll was abolished when legal aid was introduced, first for civil cases only and then for criminal cases also. Criminal legal aid is now available under Pt IV of the Legal Aid (Scotland) Act 1986. Section 21(4) of that Act provides that criminal legal aid shall consist of representation, on terms provided for by the Act, by a solicitor and, where appropriate, by counsel and that it shall include all such assistance as is usually given by a solicitor or counsel in the steps preliminary to or incidental to criminal proceedings. Thus an accused person in Scotland is entitled, if he wishes, to have his defence placed before the court by a solicitor or by counsel instructed on his behalf. By 'a solicitor' we mean a person who is qualified to practise as a solicitor in terms of sec 4 of the Solicitors (Scotland) Act 1980. By 'counsel' we mean a practising member of the Faculty of Advocates: see rule 1.3(1) of the Rules of the Court of Session 1994. The rights which we have described so far are the equivalent in Scotland of those described in arts 6.1 and 6.3(a) to (c) of the European Convention on Human Rights. The first sentence of art 6.1 states that in the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Article 6.3(a) to (c) is in these terms: '6.3 Everyone charged with a criminal offence has the following minimum rights: (a) to be informed

promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him; (b) to have adequate time and facilities for the preparation of his defence; (c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require.' These provisions are not part of our domestic law, but the principles which they describe have, for a long time, been established as part of the law of this country. We are not concerned in this case with a problem of statutory interpretation, so it has not been necessary for us to consider the observations of Lord Bridge of Harwich in *R v Secretary of State for the Home Department, ex p Brind* at p 747H, that it is well settled that, in construing any provision in domestic legislation which is ambiguous in the sense that it is capable of a meaning which either conforms to, or conflicts with, the Convention, the courts will presume that Parliament intended to legislate in conformity with the Convention, not in conflict with it. We were referred to *Granger v United Kingdom*, and *Boner v United Kingdom*; *Maxwell v United Kingdom*, which were concerned with the provision of legal aid for the hearing of appeals in the High Court of Justiciary and alleged violations of art 6.3(c) taken together with art 3.1 of the Convention. But we have not found anything in these cases which is relevant to the issue which is before us in this case, as we are concerned here with the principles of our own domestic law as they affect the right of the accused to a fair trial. We now turn to the principles which must guide counsel and solicitors in their representation of an accused person at his trial. In *Batchelor v Pattison and Mackersy* at p 918 Lord President Inglis laid down the principles which regulate the conduct of an advocate who, in undertaking the conduct of a cause, enters into no contract with his client, and of the agent who enters into a contract of employment with the client and, as a general rule, must follow his client's instructions. Of the advocate he said this: 'the nature of the advocate's office makes it clear that in the performance of his duty he must be entirely independent, and act according to his own discretion and judgment in the conduct of the cause for his client. His legal right is to conduct the cause without any regard to the wishes of his client, so long as his mandate is unrecalled, and what he does bona fide according to his own judgment will bind his client, and will not expose him to any action for what he has done, even if the client's interests are thereby prejudiced. These legal powers of counsel are seldom, if ever, exercised to the full extent, because counsel are restrained by consideration of propriety and expediency from doing so. But in such a case as this it is necessary to have in view what is the full extent of their legal powers'. As to the general rule that the agent must follow his client's instructions he said: 'But the general rule is subject to several qualifications. The agent, of course, cannot be asked to follow the client's instructions beyond what is lawful and proper. For the agent, as well as the counsel, owes a duty to the Court, and must conform himself to the rules and practice of the Court in the conduct of every suit. He is also bound by that unwritten law of his profession which embodies the honourable understanding of the individual members as to their bearing and conduct towards each other. But above all in importance, as affecting the present question, is the undoubted special rule that when the conduct of a cause is in the hands of counsel, the agent is bound to act according to his

directions, and will not be answerable to his client for what he does bona fide in obedience to such directions.' Three points require to be noted at this stage about these observations, which have regulated the professional conduct of advocates and law agents in this country for well over a century. The first is that, while that case was concerned with the conduct of an agent and counsel in a cause in the Court of Session, the observations apply also to the conduct of a case on behalf of an accused person in the criminal courts. Whether he is acting in a civil case or in a criminal case, counsel must be entirely independent in the performance of the duty which he owes to his client, to the court, to the members of his profession and to the public. The second point is that the Lord President did not have to deal in that case with the position where the agent is acting as an advocate. In the case of the solicitor-advocate that situation can arise either where he has accepted instructions to act as a solicitor-advocate on behalf of the client of another solicitor. We consider that in either case the position of the solicitor-advocate is indistinguishable in regard to the principle of independence as it affects the performance of his duty as advocate. Paragraph 1(5) of Sched 2 to the Code of Conduct (Scotland) Rules 1992, made by the Law Society of Scotland and approved by the Lord President of the Court of Session pursuant to sec 25A of the 1980 Act, provides: 'A solicitor-advocate may not accept instructions on any basis which would deprive him of the responsibility for the conduct of the case or fetter his discretion to act in consultation with a client in accordance with his professional judgment and public duty.' The same cannot be said of the solicitor, who when representing his client in court appears as his client's agent. But the general rule which affects the solicitor is, as the Lord President pointed out, subject to qualifications among which is that the agent cannot be asked to follow the client's instructions beyond what is lawful and proper. This means that he also must recognise that independence is essential to the performance of his functions as his client's solicitor: see para 1 of the Code of Conduct Rules. In *Rondel v Worsley* the view was expressed that the rule of public policy which requires that a barrister should be able to carry out his duty to the court independently, should apply also to solicitors, to give them immunity from suit for negligence in regard to work in litigation which would have been carried out by counsel if counsel had been acting in the case. Thus the solicitor when acting as his client's advocate is placed on the same footing as counsel in regard to the independence which he is entitled to exercise in the conduct of the case in court on his client's behalf. The third point about the Lord President's observations is that rules which regulate the relationship between the client and his counsel or solicitor form an essential part of the structure of the administration of justice in this country. When we say that an accused person is entitled to have the services of counsel or of a solicitor at his trial we mean that what he is entitled to is the services of counsel or a solicitor according to the rules of professional practice within which they perform their duty to their client and to the court. The accused's right to a fair trial does not imply any compromise with the principle of independence as it affects counsel, the solicitor-advocate or the solicitor. Then there is the principle of finality. In *Rondel v Worsley* at p 253D, Lord Morris of Borth-y-Gest said that the attainment of finality must be the aim of any legal system. The application of this

principle to criminal cases in Scotland has been described in *Beattie v HM Advocate* at p 279G–J, in regard to allegations that there was a miscarriage of justice on the ground of fresh evidence. We mention the point here because it serves as a reminder that the right to a fair trial should not be viewed as involving a right to a retrial simply because things might have been done differently by the accused's counsel or his solicitor. There is no ground, if that is the complaint, for saying that there has been a miscarriage of justice. There can be no miscarriage of justice if the advocate conducts the case within his instructions according to his own professional judgment as to what is proper for him to do in his client's best interests. A difference of view with the advocate on matters of detail as to how the defence should be presented cannot provide the accused who has been convicted with a right to a new trial. If that were so, there would be no end to the process of putting him on trial for his offence. Reconsideration of *McCarroll v HM Advocate* Counsel for the appellant submitted that the law as stated in *McCarroll* cannot now be accepted and that it should be disapproved. The Lord Advocate did not dissent from this view. He said that he was not seeking to support the decision because there were substantial reasons why it should now be regarded as unsound. As the law as stated in that case has not hitherto been called into question, however, it is necessary for us to examine the decision and to explain why we also are of the view that what was said in that case can no longer be accepted as a sound statement of the law and that *McCarroll* should now be overruled. Among the cases referred to in *McCarroll* was *Turnbull v HM Advocate*. That was a case where the appellant, as a poor person, was provided with a solicitor to conduct his defence in the sheriff court on a charge of assault to severe injury. He then dispensed with the services of his solicitor. The sheriff refused to adjourn the trial, the appellant conducted his own defence and was convicted. He appealed against his conviction on the ground that he was compelled to conduct his own defence as a result of the refusal of his request for an adjournment and that, in consequence of his being without skilled assistance in the conduct of his case, his special defence of alibi was not heard and there was a miscarriage of justice. In the course of his opinion, which was not fully reported but a copy of which has been shown to us, Lord Justice-General Cooper said this: 'The appellant now asks that his conviction should be quashed and that he should be discharged. If it be the case that he has a defence which was not properly presented in cross examination, in evidence, and in argument, or if there are witnesses who might have been but were not adduced and whose evidence might demonstrate his innocence, he can, if so disposed, so represent in another quarter. So far as this court is concerned we are not in a position to offer any remedy for we cannot order a retrial. Nothing short of retrial would suffice, and to set aside the whole proceedings on the ground alleged would be impossible.' It is not clear what the Lord Justice-General meant by saying that representation could be made in another quarter. It may be that he had in mind the making of representations to the Secretary of State for an exercise of the prerogative of mercy. But the problem which he saw in the fact that the court could not order a retrial has been removed by sec 254(1)(c) of the 1975 Act as substituted by Sched 2 to the Criminal Justice (Scotland) Act 1980, by which the court now has power to set aside the verdict of

the trial court, and to grant authority to bring a new prosecution in accordance with sec 255 of the 1975 Act as amended. In McCarroll also the appellant had been provided with a solicitor for the poor to conduct his defence in the sheriff court on charges which he faced there on indictment. He was convicted and then appealed on the ground that there had been a miscarriage of justice in respect that the defence case was not competently presented and that he had not received a fair trial. In the reasons of appeal it was stated that the solicitor was not instructed until two days before the trial and that in consequence none of the appellant's witnesses were precognosced, none of them were cited, his special defence of alibi was not properly intimated to the Crown, the Crown witnesses were not competently cross examined and the case for the defence was not competently placed before the court and jury. The solicitor was also criticised for having failed to apply to the court for an adjournment to permit the appellant's case to be properly prepared and presented. It was said in the argument on his behalf that, as he was a poor person who was unable to pay for the services of another solicitor, the failure to present the defence case could not be imputed to his own fault. For the Crown it was contended that by the ordinary law of principal and agent any fault on the part of the solicitor must be imputed to the client, and that it made no difference that the accused person was a poor person employing the services of a solicitor for nothing. Lord Justice-Clerk Thomson said at p 14 that in effect the grounds on which the application was based amounted to an attack on the diligence and competency of the solicitor in charge of the case. The reasons for appeal showed that a competent and diligent solicitor could have applied for an adjournment, so the reasons of appeal could be taken as based on lack of competence and diligence and on that alone. He then went on to say this: 'It seems to me to be clear that no question of miscarriage of justice can arise where the suggestion is that either the counsel or the agent of the accused was lacking in skill or diligence in preparation of the case, or in the handling of the case. If the accused had employed counsel and agent on the ordinary terms, Mr Daiches could not have taken this point at all.... It seems to me to be perfectly impossible to draw any such distinction between the counsel and agents employed in the ordinary way and those who are called upon to defend a poor person according to our accepted practice. The same duties and the same obligations and the same standard of professional skill and professional care apply to agents and counsel into whichever of these two categories they fall.' He concluded his opinion at p 15 by saying that, even on the assumption that the appellant had ground of complaint, the matter was not one for the court. He referred to Lord Justice-General Cooper's observations in Turnbull which he saw as raising a note dissimilar point and countering Mr Daiches' proposition. Lord Mackay at p 16 appeared to suggest that the ground of appeal might have been made good by a complete and accurate specification of the solicitor's failure. But at p 17 he said that as a broad principle the client and the agent or counsel who represented him are one, and that it was impossible therefore to direct any court to investigate any alleged incompetency or error in the conduct of a case of defence counsel or solicitor. Lord Keith at p 19 was equally uncompromising promising. He said that he was clear in his opinion that there could be no miscarriage of justice, within the meaning of the 1926 Act, which flows from

conduct, or actings or omissions, of an accused or his solicitor. It is clear from these opinions that the decision did not depend on the absence of provision for a new trial. The ratio of the decision was that the position of the poor person's solicitor could not be distinguished from that of counsel or an agent employed on the ordinary terms, and that in the ordinary case the conduct of the defence by counsel or the solicitor must be attributed to the person on whose behalf they had been employed. The decision that no distinction could be drawn between the solicitor for the poor and counsel or a solicitor employed on the ordinary terms is unsurprising. What is difficult to understand is the assertion by the Lord Justice Clerk at p 14 that, if the accused had employed counsel and agent on ordinary terms, the point that there was a miscarriage of justice because they were lacking in skill and diligence could not have been taken at all, together with Lord Keith's equally broad rejection of the argument at p 19. It may be that these points were not fully tested in the argument, but there is a lack of reasoning here which suggests that the implications of these observations were not fully considered by the court. As we have said earlier, an essential principle for any system of criminal justice is the accused's right to a fair trial. That right involves the right of the accused to have his defence presented to the court. The breadth of the observations in McCarroll seems to us to involve that, even if the conduct of counsel or the solicitor is such as to deprive the accused of these rights with the result that the defence is not presented, the court cannot interfere on the ground that there was a miscarriage of justice. We regard that proposition as unacceptable. The terms on which counsel or the solicitor are employed, and the principles which regulate their conduct and their capacity to bind their client, are of course part of the system by which the accused person is provided with representation for his defence. But the purpose of that representation is to enable his defence to be presented to the court. If the system breaks down to such an extent that the defence is not presented, it would be a denial of justice for the court not to intervene in order to set aside the conviction and allow a new trial. The difficult question, to which we now turn, is how these cases where it is proper for the court to intervene on the ground of a miscarriage of justice can be identified. The position in other countries We were referred to a large number of decisions in England, New Zealand, South Africa, the United States, Canada and Australia in order to illustrate the position which has been adopted in these countries on the question whether the conduct of the accused's legal advisers can lead to a miscarriage of justice. We were referred also to two cases decided recently in the Privy Council. We do not propose to go over all these cases, nor do we propose to examine the position in South Africa, as it appears from *S v Bennett* at p 399 that the law there is still in a state of uncertainty on this point. In general, however, it may be said that in all the other jurisdictions the position has been reached that the right to a fair trial involves the recognition that, if that right is denied by the incompetency or some other failure by counsel, the court should intervene on the ground that there was a miscarriage of justice. It has also been recognised that care must be taken to restrict the remedy to cases where the accused has been denied his right to a fair trial. No encouragement has been given to the idea that the court should become involved in criticism of the way in which the defence was presented. The essential point

which emerges from these decisions is that it is only where it can be said that the accused was deprived of his defence that the court can say that a miscarriage of justice has occurred. The words which have been used to express these points vary from one jurisdiction to another. The following selection from the cases to which we were referred is designed to identify those expressions which we have found most helpful in our consideration of the approach which we should adopt in this country. The leading case in England on this issue is *R v Clinton*. In that case the appellant, who had been convicted of kidnapping and indecent assault, appealed against his conviction on the ground that he was not advised by his counsel to give evidence, and that as he had not done so, important discrepancies between his actual appearance and the complainant's description of her attacker were not put before the jury and no explanation was given for his comments on interview. It was held that the nature of the prosecution evidence made it essential for the appellant to be advised to give evidence, that the failure of his counsel to do so had been a grave error and that he had a strong positive defence which had never been presented to the jury. The conviction was quashed on the ground that the verdict was unsafe and unsatisfactory. The opinion of the court was delivered by Rougier J. He referred to *R v Gautam* in which Taylor J, as he then was, said: 'It should be clearly understood that if defending counsel in the course of his conduct of the case makes a decision, or takes a course which later appears to have been mistaken or unwise, that generally speaking has never been regarded as a proper ground for an appeal.' He also referred to *R v Ensor* in which the court approved the approach taken in that case, subject only to the qualification that if the court had any lurking doubt that the appellant might have suffered some injustice as a result of flagrantly incompetent advocacy by his counsel, then it would quash the conviction. That principle had been repeated in *R v Wellings*, where Lord Lane CJ said that a mistaken decision at the trial by counsel is seldom a proper ground of appeal and that generally speaking it is only when counsel's conduct of the case can be described as flagrantly incompetent advocacy that the court would be minded to intervene. Rougier J then went on to say this at pp 1187H-1188B: 'We think that the proper interpretation of the cases to which we have referred is that the court was doing no more than providing general guidelines as to the correct approach. The court was rightly concerned to emphasise that where counsel had made decisions in good faith after proper consideration of the competing arguments, and, where appropriate, after due discussion with his client, such decisions could not possibly be said to render a subsequent verdict unsafe or unsatisfactory. Particularly does this apply to the decision as to whether or not to call the defendant. Conversely and, we stress, exceptionally, where it is shown that the decision was taken either in defiance of or without proper instructions, or when all the promptings of reason and good sense pointed the other way, it may be open to an appellate court to set aside the verdict by reason of the terms of sec 2(1)(a) of the Act. It is probably less helpful to approach the problem via the somewhat semantic exercise of trying to assess the qualitative value of counsel's alleged ineptitude, but rather to seek to assess its effect on the trial and the verdict according to the terms of the subsection.' We find some assistance in Rougier J's observation that it is the effect of the conduct of the

trial, rather than the qualitative description which is to be applied to it, which should be examined in order to see whether there was a miscarriage of justice. Phrases such as 'flagrant incompetence' may be of some value in order to show the exceptional nature of the circumstances where it would be proper for the court to intervene. The underlying question however is whether the appellant was deprived of his right to a fair trial because the effect of the conduct which is complained of is that his defence was not put to the court. Of the cases from New Zealand, the most helpful is *R v McLoughlin*. The appellant who had been charged with rape denied any knowledge of the matter, and two witnesses were prepared to give evidence to confirm his alibi. His counsel thought that the proposed evidence from the witnesses was unreliable and he sought the appellant's approval not to call them. The appellant refused to agree to this. The barrister, who had begun to rely on the defence of alibi, then decided to take it no further. He sought instead to rely on the inconsistent defence that the complainant had consented to intercourse, and he elected to call no evidence. The appeal against conviction was allowed, and a new trial was ordered on the ground that the accused had been deprived of an opportunity to put his defence and justice had been denied to him. In delivering the opinion of the court, Hardie Boys J said at p 107: 'It is not for this court to question counsel's judgment about that, or to comment upon the evidence for ourselves. But the plain unvarnished fact is that counsel most certainly had no right to disregard his instructions. Following any advice he thought it proper to give to his client, his duty was either to act on the instructions he then received or to withdraw from the case. It does happen from time to time that a barrister will find himself unable or unwilling to act in accordance with his client's wishes. They may, for example, be incompatible with his duty to the court or with his professional obligations; or he may consider that compliance would be prejudicial to his client's best interests. Should such a circumstance arise, then he must inform the client that unless the instructions are changed he will be unable to act further. If the difficulty arises during a trial he should immediately inform the judge and seek leave to withdraw. It will then be the judge's responsibility to determine what should be done, whether in terms of arranging for an adjournment or otherwise. But certainly counsel may not take it upon himself to disregard his instructions and then to conduct the case as he himself thinks best. 'It is basic in our law that an accused person receive a full and fair trial. That principle requires that the accused be afforded every opportunity to put his defence to the jury (cf sec 354 of the Crimes Act 1961). The present appellant has been deprived of that opportunity and justice has therefore been denied to him. Such a denial can be made good only by the ordering of a new trial.' We find in this passage a useful statement of the duty of counsel in such circumstances, and of the application of the principle that the accused is entitled to a fair trial. No attempt was made to assess in qualitative terms the flagrancy or gravity of the barrister's conduct or the degree of his incompetence. What was examined was the effect which his conduct had on the appellant's right to a fair trial. As to what was said here about the duty of counsel, there may at first sight seem to be a conflict between the statement that counsel has no right to disregard his instructions and to conduct the case as he himself thinks best, and Lord President Inglis' statement in

Batchelor v Pattison and Mackersy that the legal right of counsel is to conduct the cause without any regard to the wishes of his client, so long as his mandate is unrecalled. But we consider that this description of counsel's duty is a sound one in the context of the conduct by counsel of the defence of his client in a criminal trial. Counsel who represents an accused person in a criminal trial must first obtain instructions from his client about his intended defence. Just as counsel may not tender a plea of guilty unless he has instructions to do so on his client's behalf, so also he may not conduct a defence for a client who pleads not guilty which is contrary to the instructions which he has received as to the basic nature of it. His duty is to act on the instructions which he has been given. How he acts on those instructions is a matter for him, as he is entitled to exercise his own discretion and judgment in the conduct of the defence. What he cannot do is deprive his client of his intended defence by acting contrary to his instructions in this matter. The only case from the United States to which we were referred was *Strickland v Washington*. In that case, which was taken to the United States Supreme Court, the defendant contended that his death sentence for murder should be set aside because counsel's assistance at the sentencing hearing was ineffective. The argument was presented under reference to the Sixth Amendment to the Constitution of the United States, which provides that in all criminal prosecutions the accused shall enjoy the right, among other things, 'to have the assistance of counsel for his defence'. It was held that the right to counsel under the Sixth Amendment was the right to the effective assistance of counsel, that the benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial could not be relied on as having produced a just result, and that the same principle applied to a capital sentencing proceeding. Justice O'Connor, who delivered the opinion of the court, said at p 692 that in giving meaning to the requirement the court must take its purpose—to ensure a fair trial—as the guide. At p 694 she said that judicial scrutiny of counsel's performance must be highly deferential, that a fair assessment requires that every effort be made to eliminate the distorting effects of hindsight and that the court must indulge in a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. In a later passage at p 697 she said that attorney errors come in an infinite variety and are as likely to be utterly harmless in a particular case and that, even if a defendant showed that particular errors of counsel were unreasonable, he must show that they actually had an adverse effect on the defence. Although the Supreme Court in that case were examining the extent of the defendant's constitutional right under the Sixth Amendment, it is of interest to see that the approach which was taken was a purposive one. The purpose of the Sixth Amendment was seen as not being to improve the quality of legal representation. Its purpose was simply to ensure that criminal defendants received a fair trial. Thus the right to counsel was the right to effective assistance so that a fair trial was what he received. Here again we find an approach which examines the effect of the conduct on the right to a fair trial. What matters is not the quality of the conduct of the legal representative but its prejudicial effect on the defence which was to be adopted at the trial. The principle in *Strickland v Washington* has been held to be applicable also in

Canada. In *R v Garofoli* the Ontario Court of Appeal refused an appeal which had been based on the ground that defence counsel was incompetent, contrary to the appellant's constitutional right to effective assistance of counsel under sees 7,10(b) and 11(d) of the Canadian Charter of Rights and Freedoms. Applying *Strickland v Washington* it was held that it had not been shown that counsel lacked professional competence or that alleged errors of defence counsel prejudiced the appellant's right to a fair trial. Martin JA also observed at p 152 that, apart altogether from constitutional considerations, if, in any case, the court considered that there was a real possibility that any miscarriage of justice had occurred due to the flagrant incompetency of counsel, the court would be entitled to intervene. The test of flagrant incompetency was applied also by the Saskatchewan Court of Appeal in *EGB v R*, where it was held that counsel's course of action could not have been said to have been necessarily erroneous, and if it was, certainly not incompetent. Of the several Australian cases to which we were referred, the most helpful is *R v Birks*. In that case the Court of Criminal Appeal of New South Wales held that there had been a serious miscarriage of justice warranting a new trial where counsel for the accused had neglected to cross examine the complainant on various matters of importance with the result that part of the defence case was not put to the jury. Not only had counsel failed to cross examine on matters about which he had instructions to cross examine, he had failed to take steps to deal with the situation after it had become obvious before the conclusion of the evidence. In his opinion, Gleeson CJ examined the nature of the adversarial system of justice, the rights and duties of counsel, and the accused's right to a fair trial. He noted at p 683 that, as a general rule, a party is bound by the conduct of his or her counsel, and that counsel have a wide discretion as to the manner in which proceedings are conducted. He then said this at p 684: 'There is an evident tension between those principles, on the one hand, and on the other hand, the power and duty of a Court of Criminal Appeal to correct a miscarriage of justice. It would be wrong, however, simply to regard these as two competing considerations which must from time to time yield to some compromise. The principles as to the role of counsel, and the capacity of counsel to bind the client, are fundamental to the operation of the adversary system, and form part of the practical content of our notions of justice. It sometimes happens that a person who has been convicted of a crime seeks to have the conviction set aside on the ground that counsel at their trial has acted incompetently, or contrary to instructions. It is well settled that neither of these circumstances will, of itself, attract appellate intervention. At the same time the courts acknowledge the existence of a power and duty to quash a conviction in some cases. The difficulty is to find, in the authorities, a formula which adequately and accurately defines the class of case in which a Court of Criminal Appeal will intervene. A common theme running through the cases however, is that such intervention is a matter about which the courts are extremely cautious.' After examining dicta in a number of cases in New South Wales and Victoria and the recent English cases— *R v Clinton* had not yet come before the appeal court—he summarised the relevant principles at p 685 as follows: '1. A Court of Criminal Appeal has a power and a duty to intervene in the case of miscarriage of justice, but what amounts to a miscarriage of justice is something that has

to be considered in the light of the way in which the system of criminal justice operates. 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 a 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.' It is clear that the wording of the last of these three principles was influenced by the dicta in the recent English cases. The three propositions taken together are in line with these dicta . But they may be criticised as lacking a clear explanation of the principle that what is in issue is the effect of counsel's conduct on the accused's right to a fair trial, and the second principle is at variance with some of the views expressed by Hardie Boys J in *R v McLoughlin* . In *R v Sandford* , however, at p 119, Smart J said that the question was whether the accused had a fair trial according to law, that is, one in which his interests were sufficiently protected and represented. Lastly we were referred to two cases decided in the Privy Council. In *Sankar v The State of Trinidad and Tobago* it was alleged that the behaviour of the defendant's advocate had deprived him of the opportunity to give evidence in a case where his evidence was essential if he was to have any opportunity of avoiding being convicted. The appeal was upheld on this ground and the conviction was quashed. Lord Woolf, who delivered the judgment of the Judicial Committee, referred, at p 200, to the New Zealand case of *R v McLoughlin* and said that, although the facts were different, the principle to which Hardie Boys J referred at p 107, applied equally here. He also referred with approval to Rougier J's observation in *R v Clinton* at p 1188 that it is probably less helpful to approach the problem via the somewhat semantic exercise of trying to assess the qualitative value of counsel's alleged incompetence, but rather to seek to assess its effect on the trial. In *Mills v The Queen* , on appeal from the Court of Appeal of Jamaica, an appeal against conviction on the ground that counsel who represented all the defendants was inhibited in acting for the fourth defendant by a conflict of interest and that he failed to put the fourth defendant's case was refused. Lord Steyn referred at p 524 with approval to the submission by counsel, relying on *R v Clinton* , that the critical question was whether the effect of that failure was to render the conviction unsafe and unsatisfactory and added that that approach had been endorsed by the Privy Council in *Sankar* . We can take it therefore that the position which has now been reached, as a result of a consideration of the authorities, in England and in the Privy Council, is that the question depends not upon a qualitative assessment of the degree of incompetency by counsel of the nature of his conduct, but upon the effect of the failure on the accused's right to a fair trial. The Scottish approach We can now return to Scotland, in order to define the approach which should be taken to this problem here in the light of our decision that *McCarroll v HM Advocate* should be overruled. The basic principles are not in doubt. On

the one hand there is the right of the accused to a fair trial. That right includes the right to have his defence presented to the court. Whether he is represented by counsel, by a solicitor-advocate or by a solicitor, his right is to representation in such a way that his defence will be presented to the court. This is in order that he may receive a fair trial on the charge which has been brought against him. On the other hand counsel or the solicitor who represents him is not subject to direction by the client as to how that defence is to be presented. He must act according to his instructions as to what the defence is. He cannot disregard those instructions and conduct the case as he himself thinks best. But the way in which he conducts the defence within the instructions which he has been given is a matter for him. And as a general rule the accused is bound by the way in which the defence is conducted on his behalf. There is, as Gleeson CJ observed in *R v Birks* at p 684, a tension between the principles which give a wide discretion to counsel to conduct the defence as he thinks fit, and the duty of a court of criminal appeal to correct a miscarriage of justice on the ground that the accused did not have a fair trial. On the one hand the accused cannot be deprived of his right to a fair trial. If he is deprived of that right, there will be a miscarriage of justice in the proceedings within the meaning of sec 228(2) of the 1975 Act which must be corrected by the appeal court. On the other hand the principles which affect the position of counsel are fundamental to the administration of justice in this country. Counsel's independence must be preserved if he is to fulfil his duty to the court and to act in the public interest upon his professional responsibility. Any erosion of this principle would be bound to lead to uncertainty, and with it, to the risk of delay and confusion in the conduct of criminal trials, which rely to a substantial extent for their fairness and efficiency on the right of counsel to exercise their own judgment as to the way in which the defence is conducted. Accordingly it cannot be asserted as an absolute rule that the conduct of the defence by the accused's counsel or his solicitor will not be a ground of appeal. But the circumstances in which it will provide a ground of appeal must be defined narrowly. The conduct must be such as to have resulted in a miscarriage of justice, otherwise sec 228(2) of the 1975 Act will not apply. It can only be said to have resulted in a miscarriage of justice if it has deprived the accused of his right to a fair trial. That can only be said to have occurred where the conduct was such that the accused's defence was not presented to the court. This may be because the accused was deprived of the opportunity to present his defence, or because his counsel or solicitor acted contrary to his instructions as to the defence which he wished to be put or because of other conduct which had the effect that, because his defence was not presented to the court, a fair trial was denied to him. Questions of fact may arise as to the nature of the defence which is in issue in the appeal or the effect on that defence of the conduct of the appellant's counsel or solicitor. In such cases the court may require to hear evidence in the exercise of its power under sec 252(b) of the 1975 Act or to remit to any fit person to inquire and report in regard to these matters. Before it will exercise these powers, however, it must first be satisfied that the complaint which is made in the grounds of appeal is of a kind which would be likely to satisfy the test which we have described in the preceding paragraph. The court's function at this stage is similar to that which it performs in the case of appeals

on the ground of additional evidence as described by the Lord Justice-Clerk in *Maitland v HM Advocate* at p 648; see also *Brodie v HM Advocate* at p 379B–D. It may then be clear that the complaint is not of a kind which will pass this test, in which event the court will decline to examine the facts and will dismiss the appeal. Difficult questions of professional practice may arise where allegations of this kind are made against counsel or a solicitor. It is essential therefore that those against whom the allegations are made are given a fair opportunity to respond in writing to these allegations before the court hears the appeal. The advocate or solicitor may, if he feels able to do so, provide a statement to the solicitor acting for the appellant to assist him and counsel in the drafting of the grounds of appeal. But he is under no obligation to provide any such statement. He may, if he prefers to do this, wait until the appeal is lodged and then lodge his statement with the Clerk of Justiciary. In all cases where a complaint is made against counsel or the solicitor who represented an appellant at his trial for which leave to appeal has been granted, the Clerk of Justiciary will provide him with a copy of the ground of appeal so that he may respond to the allegation if he has not already done so. Once again we emphasise that he is under no obligation to respond at this stage to the allegations. But the court is likely to find it helpful to know whether the complaint is disputed, and if so on what grounds, before it reaches a decision as to whether an inquiry into the facts will be necessary to enable it to decide the appeal. The present case The appellant's criticisms of his solicitor-advocate in his points of appeal are that he failed, contrary to what had previously been agreed and without his agreement or any consultation with him, to cross examine Mr McHugh, who was the principal complainer on the charge of assault to severe injury, about his character; that he made an inept reference to Mr McHugh's character in his address to the jury which had to be corrected by the trial judge; and that he failed to call a number of police officers whom he wished to be called in support of his special defence to this charge which was alibi. We have been shown an affidavit by the appellant in which he provides further detail about the factual background to these criticisms. We also have before us a report by the solicitor-advocate which describes the circumstances in which he was instructed to represent the circumstances in which he was instructed to represent the appellant at the trial and the reasons for the decisions which he took in the course of his conduct of the defence case. Counsel did not seek to make anything of the criticism that the solicitor-advocate had failed to call the police officers in support of the appellant's alibi, so we need to say no more about that aspect of the case. The appellant states in his affidavit that he had made it clear on numerous occasions, both before and after the solicitor advocate was instructed, that he wished Mr McHugh's criminal record brought out in court. He says that to his mind his whole defence rested on this. He says that he knew that Mr McHugh had a record for violence because he had served a sentence of imprisonment with him in Perth prison in 1987. His explanation for his failure to appear for his trial on the first occasion, which was the subject of the charge under sec 3(3) of the Bail Act, was that he had been threatened by Mr McHugh and his brother in the weeks prior to the trial diet and a petrol bomb had been thrown against his house. He waited throughout Mr McHugh's cross examination for his previous convictions to be brought out, but this did not happen. When

he came to give evidence he put his own previous convictions for dishonesty before the jury as he had all along intended, to make it clear to them that, while he was a thief and a liar, he was not a man of violence. In his address to the jury his solicitor-advocate raised the question of Mr McHugh's previous convictions by asking them whether it would have been a good question to put to Mr McHugh whether he had previous convictions for dishonesty. This attracted criticism from the trial judge, who at p 5D-E of his charge told the jury that as this observation had no evidence to support it they should not speculate on the matter. The solicitor-advocate makes no reference in his report to his comment to the jury about Mr McHugh's character or to the observation by the trial judge. The trial judge has, however, dealt with this matter in his report. From what he has told us it is clear that the solicitor-advocate's comment in his speech about Mr McHugh's character was without any foundation in the evidence. The trial judge was fully justified in saying what he did about this in his charge. When addressing a jury an advocate should base his submissions on the evidence. He should not invite the jury to speculate on matters of fact for which no foundation has been laid in evidence. These important rules apply equally to a solicitor-advocate, and the solicitor-advocate in this case was plainly in breach of them. But it cannot be said that this misconduct deprived the appellant of a fair trial, and counsel did not seek to submit that this was so. The point to which he directed his submission that there had been a miscarriage of justice was the failure by the solicitor-advocate to put to Mr McHugh that he had previous convictions which would have brought out that he was a man of bad character. We are in no doubt that this criticism of the solicitor-advocate is ill founded and that the solicitor-advocate was fully justified in his decision not to attack Mr McHugh's character. The appellant's wish was that this attack should be made to show that Mr McHugh had previous convictions for crimes of violence. But his assertion that he knew that Mr McHugh had a record for violence because he had served a sentence of imprisonment with him in Perth prison in 1987 does not fit with Mr McHugh's record, which we have seen but was not available to the solicitor-advocate. It shows that he had only two convictions for assault which were in 1973 and 1977 respectively, and that the only sentences of imprisonment which he received were in 1977 when he received sentences of three months and 60 days' imprisonment. It does not appear from this record that he was in Perth prison in 1987, nor does the record suggest that Mr McHugh was a man of violence for over 15 years prior to the incidents which were the subject of this trial. Furthermore the appellant's defence to the charge that he had assaulted Mr McHugh to his severe injury was one of alibi. Even if Mr McHugh was a man of violence, this would have been irrelevant to the appellant's defence on this charge. There might have been more to say for attempting to show that Mr McHugh had convictions for dishonesty, as it is clear that credibility was sharply in issue in this case. But this was not the purpose which the appellant had in mind when he said that he wished his record to be put to him, and in any event it is clear that any challenge to Mr McHugh's character on this ground would have been ineffective as he had only two convictions for dishonesty. These were in 1982 and 1983 for which small fines were imposed. This contrasts unfavourably with the appellant's record, which reveals that he has numerous previous convictions for crimes of dishonesty

for several of which he has received periods of imprisonment. He was sentenced to three months' imprisonment for theft in 1986, to two years' imprisonment in 1987, following his conviction on six charges of theft by housebreaking and analogous offences, and to 180 hours community service in 1990 for a further charge of theft by housebreaking. The details of his record of previous convictions were available to the prosecutor. There can be no doubt that it would have been unhelpful to the appellant's case for these details to be put to him in his cross examination by the advocate-depute, as he would have been entitled to do under sec 141(1)(f)(ii) of the 1975 Act. For all these reasons the solicitor-advocate exercised a wise discretion in not putting Mr McHugh's character in issue when he was in the witness box. In any event decisions as to whether or not to attack the character of a Crown witness are for the advocate to take, not the accused. This is a matter on which the advocate is entitled to, and must, exercise his own professional judgment. He cannot attack the witness's character unless he has the information which enables him to do this. But he is not subject to his client's direction on the matter. He is entitled to take his decision as the trial develops without further consultation with him, as the client's agreement to this is not required. The best that can be said of this case is that it illustrates clearly the kind of case where the conduct of the advocate does not provide a ground of appeal. The criticisms which have been made of the solicitor-advocate in this case fall far short of an allegation that he deprived the appellant of his right to a fair trial. They relate to the manner in which the defence was conducted and to decisions which were exclusively within the province of the advocate. For these reasons we consider that there is no substance in the submission that there was a miscarriage of justice in this case. We must refuse this appeal.

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