IN THE SUPREME COURT OF NEW ZEALAND

SC 66/2005
[2006] NZSC 62

ROBERT JOHN CONDON

v

THE QUEEN

Hearing: 30 May 2006

Court: Elias CJ, Blanchard, Tipping, McGrath and Anderson JJ

Counsel: N J Sainsbury and M Snape for Appellant
B J Horsley and C Curran for Crown

Judgment: 23 August 2006

JUDGMENT OF THE COURT

A. The sentence appeal is dismissed for non-prosecution in accordance with s 383A(3) of the Crimes Act 1961.

B. The conviction appeal is allowed and the convictions are quashed.

C. There is to be no retrial.

REASONS

(Given by Blanchard J)

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No jurisdiction for sentence appeal

[1] Mr Condon was found guilty by a jury at his trial in the District Court at Timaru on counts of threatening to kill and attempting to pervert the course of justice. He was sentenced on 10 September 2003 to 18 months imprisonment. He has appealed against his sentence, which he has long since completed,[1] claiming that it was imposed in breach of s 30 of the Sentencing Act 2002 which reads:

> **30 No sentence of imprisonment to be imposed without opportunity for legal representation**
>
> (1) No court may impose a sentence of imprisonment on an offender who has not been legally represented at the stage of the proceedings at which the offender was at risk of conviction, except as provided in subsection (2).
>
> (2) Subsection (1) does not apply if the court is satisfied that the offender—

[1] The application for leave to appeal to this Court was not filed until 25 October 2005.

(a) was informed of his or her rights relating to legal representation, including, where appropriate, the right to apply for legal aid under the Legal Services Act 2000; and

(b) fully understood those rights; and

(c) had the opportunity to exercise those rights; and

(d) refused or failed to exercise those rights, or engaged counsel but subsequently dismissed him or her.

(3) If, on any appeal against sentence, a court finds that a sentence was imposed in contravention of subsection (1), the court must either—

(a) quash the sentence imposed and impose in substitution for it any other lawful sentence that the court thinks ought to have been imposed; or

(b) quash the conviction and direct a new hearing or trial, or make any other order that justice requires.

(4) For the purposes of this section, an offender refuses or fails to exercise his or her rights relating to legal representation if the offender—

(a) refuses or fails to apply for legal aid under the Legal Services Act 2000 or applies for it unsuccessfully; and

(b) refuses or fails to engage counsel by other means.

[2] It was not appreciated until the hearing in this Court that s 383A(3) of the Crimes Act 1961 provides that if an appeal to this Court by a convicted person against a decision of the Court of Appeal on an appeal under s 383 against a sentence of detention is not heard before the date on which the convicted person has completed serving the sentence, "on that date the appeal lapses, and must be treated as having been dismissed by the Supreme Court for non-prosecution". It is clear from the opening words of s 30(3) that a challenge to a sentence on the ground that it was imposed in breach of subs (1) is an appeal against sentence. Contrary to the submissions of counsel for the appellant, when in s 383(1) it is provided that there may be an appeal against conviction or sentence or "both", the legislature is simply making it explicit that a convicted person may appeal both against conviction and against sentence in the one appeal. It is not creating a third variety of appeal which, if brought to the Supreme Court, can avoid the bar in s 383A(3).[2]

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[2] The bar does not apply if the appeal under s 383 is, by leave, directly to the Supreme Court. Nor is there any such bar on appeal to the Court of Appeal by a convicted person.

[3] This Court therefore lacks any jurisdiction to set aside Mr Condon's sentence or conviction under s 30 if it concludes that the sentence was imposed unlawfully. That is unsatisfactory but there is no option, as the law stands, other than to record that the sentence appeal must be treated as dismissed for non-prosecution. The jurisdictional bar merits legislative consideration.

[4] The Court does, however, also have before it Mr Condon's appeal against conviction on the ground of an alleged miscarriage of justice. He says that his trial was unfair because he was not represented by a lawyer. An aspect of this appeal is that this situation is said to have resulted from the trial Judge's failure to be properly "satisfied" in terms of s 30(2). In s 30 Parliament has recognised the importance of legal representation in ensuring fair treatment of persons facing criminal charges for which, if convicted, a sentence of imprisonment would be merited. The provisions of the section are therefore an important consideration when a court has to determine whether the absence of representation may have given rise to a miscarriage of justice.

Facts

[5] A company which operated a nightclub in Timaru had gone into receivership. Mr Condon was a major shareholder. A Mr Pillidge had previously worked for the company. He had purchased the nightclub business from the receiver. Mr Condon was aggrieved and wished to regain control of the business.

[6] On the night of 7 February 2003 Mr Condon had an encounter with Mr Pillidge in the presence of a Ms Young during which, it was charged, he threatened to kill Mr Pillidge. Further threats to kill Mr Pillidge were said to have been made by Mr Condon the next night in a conversation between him and Ms Young and a Ms Ancell-Curtis. Mr Condon's defence at trial was that any threats were of litigation against Mr Pillidge regarding the nightclub.

[7] The threats were reported to the police and Mr Condon was charged with making them. On 19 February he went to a restaurant where Ms Ancell-Curtis was working. It was alleged that on that occasion the appellant asked her to change her

account of what she had heard on 8 February in exchange for payment of an unspecified sum of money. Mr Condon denied doing anything more than urging Ms Ancell-Curtis to tell the truth.

[8] On 6 April 2003 Mr Condon was charged with attempting to pervert the course of justice. On 10 April he represented himself at the preliminary hearing and was committed for trial on both charges, having elected trial by jury. On this occasion, as with his initial appearance on the charge of attempting to pervert the course of justice, he was firmly advised by the presiding Judge to obtain legal advice. Shortly afterwards he applied for legal aid. On 17 April Mr Michael Radford was assigned to act as his defence counsel.

[9] Mr Radford took instructions from Mr Condon, for whom he had previously acted, and in May undertook some preparation for the forthcoming trial including an extensive memorandum setting out the proposed defence and recording the advice which he had given to Mr Condon. In August, after the trial had twice been rescheduled, Mr Radford heard informally from court staff that Mr Condon was considering representing himself. On 8 August he wrote to Mr Condon recording what he had heard by way of "street rumour" and asking whether his representation was still required. The appellant's response was described by the Court of Appeal as "delphic". He said in a letter to Mr Radford of 9 August that he had not at this stage made any final decision to defend himself. It appears from the correspondence that Mr Condon's concern was that Mr Radford might not be prepared to put forward, as Mr Condon wished, a defence that various prosecution witnesses to the conversations on 7, 8 and 19 February were in a conspiracy against him to obtain his conviction and thereby deny him any chance of recovering the nightclub business.

[10] The trial was scheduled for the week of 18 August. Mr Condon suggested to Mr Radford in his letter that they meet prior to then to discuss his defence. Mr Radford decided, however, that he should seek leave to withdraw from the case. Without notifying Mr Condon, he appeared before a District Court Judge on 14 August but his application to withdraw was stood over. The case was called again on 18 August when both Mr Condon and Mr Radford were present. The application was not dealt with on that day and was heard by Judge Holderness at

9.15am on 19 August. There will be occasion later in this judgment to consider in more detail what transpired during that hearing, which was adjourned and eventually resumed at 4.15pm on the same day. The outcome was that Mr Radford was granted leave to withdraw and, after an interval of only one day, the trial commenced on 21 August and concluded with guilty verdicts on 22 August. Mr Condon had not endeavoured to obtain the appointment on legal aid of another counsel, nor had the Court suggested that he do so, and he represented himself. The Court of Appeal had this to say about Mr Condon's efforts at trial:[3]

> The appellant conducted his defence in a clumsy way, finding it difficult to ask questions of witnesses rather than make statements. His cross-examination was neither effective (in the sense of impacting adversely on the credibility of the Crown witnesses) nor deft (as he placed squarely before the jury his previous gang associations and criminal history). That said, the appellant cross-examined all the Crown witnesses and, in this way and in the evidence he gave, put his defence before the jury with considerable force. Having read the transcript of the evidence and the Judge's summing up we are satisfied that the key contentions of the appellant were before the jury.

The appeal to the Court of Appeal

[11] For the purpose of the appeal to the Court of Appeal, both Mr Condon and Mr Radford swore affidavits and a report was obtained from Judge Holderness as to the events on 19 August, with transcripts of the hearings on that day (where existing) and of those on 14 and 18 August being made available. Both deponents gave evidence before the Court of Appeal and were cross-examined. In its judgment, delivered on 21 July 2004, the Court said that Mr Condon faced the practical inevitability of a prison sentence if convicted on both counts, so that where the case stood in terms of s 30(1) was "plainly material to whether an adjournment ought to have been granted on 19 August 2003". Having traced the history of the section back to s 13A of the Criminal Justice Act 1954 and reviewed cases on the predecessor sections, *R v Long*[4] and *Parkhill v Ministry of Transport*,[5] to which reference will be made later in this judgment, the Court of Appeal was of the view that Mr Radford had represented Mr Condon in a way which was within the concept of legal representation contemplated in those cases. The availability of defences had

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3 *R v Condon* [2005] 1 NZLR 446 at [35].
4 [1977] 1 NZLR 169 (CA).
5 [1992] 1 NZLR 555 (CA).

been fully explored with him by counsel, together with the advantages that might follow pleas of guilty and the dangers which might be associated with possible defence strategies. The Court believed that it was clear that those responsible for framing s 30 would have been aware of the decisions in *Long* and *Parkhill*. If the legislature had intended to create a wider prohibition on imprisonment than that previously recognised it would, presumably, have made that clear by using a different form of words. Another practical consideration troubled the Court. For the last 12 years District Court and High Court Judges had been acting on the basis that *Parkhill* represented the law. In those circumstances, the Court decided that it should follow and apply *Parkhill*, holding that s 30(1) neither directly required an adjournment to be granted on 19 August nor invalidated the sentence of imprisonment subsequently imposed on Mr Condon.

[12] Notwithstanding its decision on s 30(1), the Court then moved to consider s 30(2), saying that Mr Condon could only be regarded as within that subsection on the basis that he had "dismissed" Mr Radford. He had not done so in an explicit and formal way but it was at least open to argument that he did dismiss Mr Radford constructively. On balance, the Court was not prepared to conclude, however, that there was a constructive dismissal. Mr Condon's letter of 9 August was ambiguous. He had invited further discussion between himself and Mr Radford. But, by the time such further discussion occurred, Mr Radford had already decided that he would not continue to represent the appellant.

[13] The Court of Appeal then considered whether there had otherwise been a miscarriage of justice. It concluded that Mr Condon had long been contemplating representing himself and was prepared to do so in the week of 18 August. In his discussions with Judge Holderness on the morning of 19 August it may have been implicit that he might seek other legal advice if an adjournment were to be granted, but the drift of what he was saying, it seemed to the Court, was that he wanted an adjournment for the purpose of making arrangements for certain defence witnesses (who had not featured in the defence prepared by Mr Radford) to be called. Thus his primary concern was as to the practicality of securing the attendance of those witnesses rather than with the necessity to appear for himself. He had not represented himself at the trial with particular skill. But, on the other hand, he was

able to put what he wished to say before the jury, and the jury thus had a fair opportunity to evaluate the competing contentions of the Crown and the appellant. The Court of Appeal had seen nothing in the material placed before it to suggest that Mr Condon's case would materially have been advanced had other witnesses been called to give evidence. Nor was it suggested by appellant's counsel on the appeal that the witnesses in question (Mr Condon's sister and two senior police officers) could have provided evidence which would have been of relevance or real assistance to Mr Condon at trial. The Court of Appeal concluded that there had been no miscarriage of justice occasioned by the refusal of the adjournment of the trial and it dismissed the appeal.

Section 30 of the Sentencing Act 2002

[14] The first issue arising under s 30 is whether, in terms of subs (1), Mr Condon was "legally represented at the stage of the proceedings at which [he] was at risk of conviction". It might be thought that where someone has pleaded not guilty and has been convicted after a trial, the plain meaning of s 30(1) is that legal representation must have occurred at the trial, for that would seem to be the stage of the proceedings where there was the risk of conviction. However, referring to the history of the section, Mr Horsley submitted for the Crown (1) that there are only two stages in a criminal proceeding, namely a stage which encompasses everything up to and including the trial and, should there be a conviction, the further stage of the sentencing process and (2) that s 30(1) is complied with if the offender has had legal representation at any time during that first stage either in or out of court.

[15] The provision under which Parliament first mandated legal representation as a pre-requisite to a sentence of imprisonment was s 13A of the Criminal Justice Act 1954, which was introduced by amendment in 1975. It provided that no court should sentence to any form of detention, other than periodic detention, "any person who has not been legally represented in the Court" unless certain conditions relating to legal aid were met; and it defined "legal representation" to mean "in relation to any person in Court, the assistance in Court of a counsel or solicitor to represent that

person in the proceedings before the Court at some time before the person has pleaded guilty or has been found guilty".

[16] In *R v Long* the appellant had been advised by his solicitor to plead guilty to burglary offences. The solicitor was not present in the Court but a duty solicitor spoke with Mr Long and informed the Court that he had been advised to plead guilty. The Court of Appeal was of the opinion that the purpose of s 13A was, in the words of Cooke J:[6]

> …to ensure that a custodial sentence shall not be passed on a person not legally represented unless, being informed of his right to apply for legal aid or to engage legal representation, he has elected not to be represented.

The Court considered that the assistance of counsel, which under s 13A had to be "in Court", could relate to any aspect of the proceedings. Thus Cooke J expressed the view that even if counsel or a solicitor did no more than to apply for an adjournment, s 13A would be satisfied.[7] Richmond P said that representation in court would in practice provide sufficient protection for the purpose of the section because it was:[8]

> …highly unlikely that a defendant so represented will be in any ignorance as to his legal rights or that the court will not be informed if time is required to obtain further or other legal advice.

Advice to a defendant from a lawyer, even advice concerning the plea, would not suffice as representation if given without counsel actually appearing for the defendant in court.

[17] On the facts of the particular case, the Court in *Long* was divided. Cooke and Woodhouse JJ considered that the duty solicitor had not been representing Mr Long in court prior to his guilty plea so that the Court had lacked jurisdiction to impose a sentence of imprisonment. Woodhouse J recognised the distinction between advice and representation when he said:[9]

> The duty solicitor was not asked for advice, he was given no information which would have permitted it and he offered none. Nor was he requested to

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6 At 172. Richmond P (at 176) described the purpose in a similar way.
7 At 173.
8 At 176.
9 At 175.

> represent the appellant, either by appellant himself, or by the solicitor already instructed.

[18] By majority, the Court allowed the appeal, quashed the sentence and substituted periodic detention and probation. Richmond P's dissent rested on his view that there had been legal representation of Mr Long in court by the duty solicitor. Richmond P added something which appears to have been influential when the legislation was reconsidered. He said:[10]

> There is one important feature of this new section to which I feel that I should draw attention. Its effect is to restrict the power of the courts to impose a sentence of detention but it is not so worded as to invalidate a conviction, whether entered consequent upon a plea of guilty or after a defended hearing. We heard no argument on the point, but it is doubtful, to say the least, whether a court would have any power to set aside such a conviction. I would think it desirable, to remove any doubts, that an express discretionary power be conferred on the courts to set aside a conviction with the consequence that the defendant be called upon to plead a second time to the charge. Otherwise there is a risk that as a result of error or oversight the courts will find themselves powerless to impose a sentence of imprisonment in situations where such a sentence is unquestionably called for.

[19] When the Criminal Justice Act was re-enacted in 1985, s 13A was replaced by a provision which in all material respects is identical to s 30 of the Sentencing Act. In particular, s 10 of the 1985 Act contained the current prohibition on sentencing to imprisonment an offender who has not been legally represented "at the stage of proceedings at which the offender was at risk of conviction". Notably, the phrase "at *the* stage" appeared only after the Select Committee hearing. It had read "at *some* stage" in the Bill as introduced into the House. The definition of "legal representation" in s 13A was not brought forward, so that in s 10 there was no longer any express reference to "assistance in Court".

[20] *Parkhill v Ministry of Transport* was a decision on s 10. Mr Parkhill was facing repeat drink-driving charges and had been declined legal aid. A solicitor had discussed the charges with him and had recommended guilty pleas. Mr Parkhill accepted that advice and the solicitor conveyed that fact to the Ministry on his behalf. But when Mr Parkhill pleaded guilty in court the solicitor was not present

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10 At 176.

because Mr Parkhill was unable to afford to pay him. He was sentenced to imprisonment for six months. He appealed unsuccessfully to the High Court and then to the Court of Appeal. It was held that there had been no breach of s 10, but for differing reasons in each Court.

[21] In the High Court at Christchurch, Tipping J concluded that once Mr Parkhill had been refused legal aid he had to be deemed capable of engaging counsel privately and had, in terms of subs (3)(b) (now subs (4)(b)), failed to do so.[11] However, the Judge said that, but for that failure, he would have held that there was a breach of subs (1) because Mr Parkhill had not been represented in court. Tipping J considered that the draftsman was simply adopting a more economical style in s 10. The expression "legal representation" must of necessity denote representation in court and did not include advice or assistance out of court:[12]

> The word "represented" of itself suggests the presence of someone in Court representing the person charged. If the draftsman had meant legal advice or assistance out of Court to be sufficient I would have thought that the words "advised" or "assisted" would have been used rather than the word "represented".
>
> The next point which favours my construction is that the expression "legally represented" must be apt to cover not only a plea of guilty but also a finding of guilty after trial. It can hardly have been Parliament's intention in the latter case that out of Court advice or assistance before the trial should be regarded as a sufficient safeguard, as opposed to representation in Court at the trial. The expression "legally represented" can hardly mean different things for a plea of guilty and a finding of guilty after trial.

Tipping J observed that if out of court advice or assistance were to be sufficient to satisfy subs (1) (now s 30(2)) and enable a sentence of imprisonment to be imposed, a sentencing Judge would have to make inquiries in that respect. He also regarded his view of the section as more consistent with the rights to representation in s 24(c) and (f) of the New Zealand Bill of Rights Act 1990.

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11 *Parkhill v Ministry of Transport* (1991) 7 CRNZ 250 at 253.

12 At 254.

[22] The Court of Appeal[13] dismissed Mr Parkhill's appeal for three reasons.[14] First, he had by then completed his six month sentence so that "the issue has now become academic". Secondly, the available factual material was insufficient to determine whether there had been compliance with s 10. Thirdly, the Court did not agree with Tipping J that legal representation was limited to appearances by counsel or a solicitor in court. Delivering the judgment of the Court, Hardie Boys J said that the omission of the words "in the Court" must be treated as recognition that there may be "representation, extending beyond mere advice or assistance, out of Court".[15] In the instant case it was enough that the solicitor had represented Mr Parkhill in his communications with the Ministry of Transport. The Court accepted that the section required a Judge at the appropriate time to make inquiry of an unrepresented defendant who may be liable to imprisonment in order to be satisfied of the matters referred to in what is now s 30(2) of the Sentencing Act.

[23] We are, with respect, unable to agree with the interpretation which attracted the Court of Appeal in *Parkhill*. In *Long* "legal representation" was held to mean representation in court by a lawyer. Although the express reference to "in Court" was dropped in s 10, the term "legally represented" was retained. As the Court in *Long* had recognised, a representative is someone who does more than merely give advice privately. The Court of Appeal in *Parkhill* drew attention to the fact that Mr Parkhill's lawyer had been his voice in communications with the Ministry. But the question is whether an out of court representation of that nature suffices under s 30(1). In considering whether it does, it is pertinent to notice that in 1985 Parliament appears to have rejected the proposition by Cooke J in *Long* that it could be enough if the defendant's lawyer had represented him in court in applying for an adjournment. It replaced "at some time before the person has pleaded guilty or has been found guilty" with "at the stage of the proceedings at which the offender was at risk of conviction". We find unconvincing the suggestion of Mr Horsley, for the Crown, that no change could have been intended because a defendant is at risk of conviction the moment a charge is laid. No-one can be convicted except after

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13 Cooke P, Hardie Boys and Holland JJ.
14 At 558.
15 At 559.

pleading guilty or being found guilty, both of which events can occur only in court. The stage of proceedings to which the section refers is therefore the entry of the guilty plea or, where the plea is one of not guilty, the ensuing trial. In our view, the Court of Appeal in *Parkhill* was wrong. Section 30 actually tightens the requirements of the former s 13A as interpreted in *Long*, rather than loosening them. Subject to subs (2), as expanded upon in subs (4), it forbids the imposition of a sentence of imprisonment unless a lawyer was present on behalf of a convicted person on the entry of the guilty plea or at the trial.[16]

[24] It may be that, as a result of the courts acting upon the erroneous interpretation in *Parkhill*, some sentences may have been imposed in breach of s 30 (or its predecessor, s 10), particularly following guilty pleas. But the language of s 30(1) is too plain, in our view, for this Court to be able to reach any other conclusion. As it happens, good practice will have required Judges to inquire of a self-represented defendant, as subs (2) obliges them to do, whether the defendant knew of and fully understood his or her rights to representation and had the opportunity to exercise those rights. This inquiry could not sensibly be conducted without asking the defendant if he or she had already taken legal advice and whether he or she wanted legal representation for the taking of the plea and, if necessary, at trial. So long as the answers to such questions properly "satisfy" the Court in terms of s 30(2), there is no difficulty under s 30 with an accused entering a guilty plea or, if it comes to that, proceeding with the trial without representation.

[25] There is no doubt, then, that as Mr Condon was not legally represented at his trial there has been a breach of s 30(1) in the imposition of his sentence unless it did not apply because the District Court at Timaru was, as Judge Holderness concluded, properly satisfied in terms of subs (2).

[26] Mr Condon can be taken to have been generally informed of his rights relating to legal representation, including his right to apply for legal aid. He was no

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[16] In the United States the Sixth Amendment to the Constitution, which gives a right to the assistance of counsel, has been held by the Supreme Court to apply to the "critical stages" in a criminal prosecution where the substantial rights of the accused may be affected: *Mempa v Rhay,* 389 US 128 (1967). The trial is one "critical stage," but so is the entry of a guilty plea: *Von Moltke v Gillies,* 332 US 708 (1948).

stranger to the justice system in that respect. Furthermore, in this case he had actually applied successfully for legal aid and for some months had available to him the services of assigned counsel, Mr Radford. The first question which arises is therefore whether he can be said to have "engaged counsel but subsequently dismissed him", in the language of the second limb of subs (2)(d). If the Court of Appeal's view that there was no dismissal of counsel is correct, the further questions are whether Mr Condon understood that he had the right to seek the assignment of a replacement counsel on legal aid and, if so, whether he was afforded an adequate opportunity of exercising that right before trial. There is no question that Mr Condon "failed", in the neutral sense, to re-engage Mr Radford or engage alternative counsel, but the applicability of the first limb of subs 2(d) ("refused or failed to exercise those rights") depends on his having had at least an opportunity, as mandated by subs (2)(c), to attempt to do so.[17]

[27] The Court of Appeal considered that it was open to argument that the appellant dismissed Mr Radford constructively. It concluded, however, that he had not. We proceed to consider that issue. Had Mr Condon by his behaviour towards Mr Radford made Mr Radford's position as his legal representative untenable and so forced his withdrawal from the case? We agree with the Court of Appeal that the material available to us concerning what occurred between Mr Condon and Mr Radford does not go that far. It could perhaps be suggested, although Mr Horsley did not put the matter in this way in argument, that Mr Condon was intent on manipulating the system and would have dismissed his lawyer, Mr Radford, on the morning of the trial and then sought an adjournment, likely to be for some months, to put off the day when he would be confronted by the prosecution witnesses and face the probability of conviction, in the hope that in the meantime they might change their minds about testifying. We have carefully considered that possibility but do not find it to be consistent with what subsequently occurred. If it were so, one would have expected Mr Condon to push much harder for an adjournment than he did at the hearing before Judge Holderness after Mr Radford

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[17] See in this respect O'Higgins CJ in *The State (Healy) v Donoghue* [1976] IR 325 at 352: "…it seems to me that when a person faces a possible prison sentence and has no lawyer, and cannot provide for one, he ought to be informed of his right to legal aid. If the person charged does not know of his right, he cannot exercise it; if he cannot exercise it, his right is violated."

was granted leave to withdraw and for him to have renewed his efforts in that direction at the beginning of the trial. We have come to the conclusion that, instead, this was a case of a defendant who had convinced himself that he had a solid conspiracy defence when any objective observer, and certainly a competent lawyer, would take a different view, as Mr Radford did.

[28] Clearly Mr Condon was a difficult client who was seriously considering dismissing his assigned counsel. But, according to Mr Radford, he had indicated in the week of the trial that he was still to make up his mind. Understandably, Mr Radford was reluctant to run the conspiracy defence. He considered Mr Condon would do better for himself in the end if he pleaded guilty. But that is not an uncommon experience for defence counsel with a stubborn and perhaps unrealistic client. The significant point is that Mr Radford had an obligation to present the defence Mr Condon wanted to run unless there was an ethical or other impediment to doing so. None is apparent. It is true that when Judge Holderness was hearing Mr Radford's application to withdraw and the Judge asked him if his position was "untenable" (usually an inquiry about whether any ethical problem has arisen), Mr Radford responded affirmatively. But a reading of the transcript, in which Mr Radford gave a description of what had occurred between him and his client, reveals nothing to suggest any such problem. Nor was it revealed by the cross-examination before the Court of Appeal. Indeed, it seems that what Mr Radford earlier called "an impossible position" was merely that he was being put in the situation of preparing a case and being ready for a trial in circumstances where the client might be minded to dismiss him at the last moment. Whilst one can sympathise with counsel to some degree, his obligation to his client required that he should not withdraw from the assigned brief for that reason.[18] In our view, the Judge should not have released Mr Radford from that obligation in the absence of any ethical difficulty in the undertaking of the defence or a situation in which the relationship between counsel and client had completely broken down. Matters had

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[18] As in *R v De Bruin* CA168/04 7 March 2005, continuing to act would not have caused relevant "professional embarrassment". In that case the Court of Appeal made reference, at [28], to the Code of Conduct of the Bar of England and Wales. The Code's definition of professional embarrassment mentions, *inter alia*, counsel's lack of experience, availability or resources, instructions in conflict with the Code, matters in which the barrister is personally involved, risks of conflict of interest or disclosure of confidential information and certain difficulties in obtaining payment of fees.

not reached that stage. We agree with the Court of Appeal that Mr Condon cannot be said in the circumstances to have dismissed his counsel.

[29] Throughout the discussion on Mr Radford's application Mr Condon appears to have been of the belief that the Judge would certainly grant it. He stated that he was "in a position now where I will have to defend myself in this matter", pointing out that "however I had been asked by the previous Judges [on earlier appearances in the case] to instruct a solicitor". He said he was "not sure it is in my best interests to have this matter dealt with now that I am left to defend myself". He asked for one further adjournment. The Crown opposed this because the trial had been twice previously adjourned. Judge Holderness said that in his view there was really no reason why the trial should not go ahead that week because "the present trial should be completed tomorrow". Later in the day (19 August) there was a continued hearing at which Mr Condon's adjournment application was discussed. The Judge said that it bothered him that the case was "to proceed to trial on 29 May and you were representing yourself at that stage".[19] This remark by the Judge is of some moment because it reveals that he was labouring under a misconception about Mr Condon's earlier willingness to represent himself. Once Mr Condon had been committed for trial, he had taken the advice given to him by the District Court and had sought the assignment of counsel. Mr Radford had been assigned since April and was to have appeared if the trial had proceeded on 29 May.

[30] Mr Condon told the Judge that he was "quite happy to proceed and get it out of the way on Thursday". But that remark cannot be read in isolation. It appears to us that Mr Condon was at that point simply acquiescing in the obvious desire of the prosecutor and the Court to have the trial proceed. The Judge encouraged this acquiescence by observing that otherwise Mr Condon might have to put up with bail conditions that, as the Judge understood, "you are not particularly happy with", for several months. There followed a discussion about the calling and examination of witnesses. The Judge then suggested to Mr Condon that, although Mr Radford (who was not present at the resumed hearing) had been granted leave to withdraw, it might be worth Mr Condon's while exploring whether there was still some basis on which

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[19] The trial had not proceeded because there was not enough time in the District Court's schedule.

Mr Radford would be prepared to do the trial. When Mr Condon responded by inquiring whether Mr Radford would be entitled to consider "what I understand to be a McKenzie's friend position", the Judge clarified that "if he is going to get involved again, and who knows whether he is prepared to… it would be on the basis of being counsel. He is not going to be wanting to sit holding your hand and whispering advice and so forth… ." It seems that Mr Condon did not pursue the possibility of re-engaging Mr Radford.

[31] Significantly, at no stage was Mr Condon told by the Judge that he should consider applying for a new legal aid assignment or (which would probably have been a vain hope) trying to get another lawyer to appear privately. It may be that the absence of any such advice was a tacit recognition that the likelihood of obtaining in the course of the next 24 hours a new lawyer, willing to undertake the trial, was very small. For his part, Mr Condon had reason to think that any further application for adjournment so that he could receive legal assistance, for example at the commencement of the trial two days later, was unlikely to be granted.

[32] The conclusion which we reach is that in the circumstances which developed after the hearing on 19 August and the withdrawal of Mr Radford, Mr Condon cannot be said to have been informed of his right to apply for another counsel to be assigned on legal aid or to have fully understood that right. And, if that be wrong, it cannot be said that he had an adequate opportunity to exercise his right in the very short time remaining before the trial. As a consequence, had the sentence appeal been able to be dealt with by this Court we would have concluded that the District Court could not be satisfied in terms of subs (2), and accordingly subs (1) did apply. As Mr Condon was not legally represented at the trial, his sentence of imprisonment was imposed in breach of s 30(1) of the Sentencing Act.

[33] Although this Court cannot on the present appeal grant any relief to Mr Condon under s 30, we should say something about the normal consequence of such a finding. Any sentence of imprisonment imposed in breach of s 30(1) is an unlawful sentence, though effective until quashed. As a minimum, the appeal Court

is obliged, by subs (3), to quash it. The Court of Appeal in *R v Page*[20] was in error when it considered that it could leave both sentence and conviction intact and merely make an order by way of declaration that there had been a breach of s 10(1) of the 1985 Act. The appeal Court has a basic choice between quashing the sentence (subs (3)(a)) and going further and quashing the conviction (subs (3)(b)). It is only if the Court elects to quash the conviction that it can decide between directing a new trial and making "any other order that justice requires". If the Court elects not to quash the conviction, it must substitute for the current sentence "any other lawful sentence that [it] thinks ought to have been imposed" by the trial Court. As Richmond P highlighted in *Long*, this necessarily excludes a sentence of imprisonment, which could not have been lawfully imposed by the trial Court. "No court" may impose a sentence contrary to subs (1). As the High Court recognised in *Parkhill*, the predecessor of subs 3(b), which gives the Court the ability to quash the conviction, was inserted primarily to remove the risk that someone whose rights under (now) s 30(1) had been breached might avoid a richly deserved imprisonment. The amendment was intended to operate in the interests of justice, not to enable the courts effectively to validate an unlawful sentence without the safeguard of a new trial.

Legal representation and the right to a fair trial

[34] The issue on the conviction appeal is whether, because Mr Condon had no legal representation at his trial, a miscarriage of justice has occurred. As a preliminary point, we reiterate that s 30, which is directed at sentence only, does not itself mandate an automatic overturning of a conviction when the trial Court could not have been satisfied on the matters listed in subs (2).

[35] The question of miscarriage arising from lack of legal representation for an accused who faces a sentence of imprisonment if convicted has, as one might expect, been the subject of much judicial consideration in other jurisdictions, as well as in earlier New Zealand cases.

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[20] CA 4/00 6 June 2000.

(a) *Europe*

[36] The European Convention on Human Rights provides in art 6(1) that "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)(c) affirms for everyone charged with a criminal offence the minimum right "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". In considering the approach of the European Court of Human Rights to these provisions it is to be remembered that it has no power to quash any conviction.

[37] Generally, the Court considers the right to legal assistance as a particular aspect, or constituent element, of the right to a fair trial guaranteed by art 6(1).[21] The Court has said that where any deprivation of liberty is at stake the interests of justice in principle call for legal representation.[22] The purpose of art 6(3)(c), which is regarded as fundamental but not absolute,[23] is to ensure that a defendant has the opportunity of presenting an effective defence.[24] While its application depends on the nature of the proceedings in question,[25] and may be explicitly waived,[26] it is clear that States may not force someone to present a defence in person,[27] and that an accused need not show prejudice as a result of the absence of legal representation for a breach to have occurred.[28]

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21 See eg *Artico v Italy* (1980) 3 EHRR 1 at [32]; *Balliu v Albania*, Application No 44727/01, 30 November 2005 at [25]; *Benham v United Kingdom* (1996) 22 EHRR 293 at [52]; *Goddi v Italy* (1984) 6 EHRR 457 at [28]; *Õcalan v Turkey*, Application No 46221/99, 12 May 2005 at [130]-[148].

22 *Benham v United Kingdom* at [61].

23 See eg *Poitrimol v France* (1993) 18 EHRR 130 at [34].

24 See eg *Artico v Italy*; *Goddi v Italy*; *Pakelli v Germany* (1983) 6 EHRR 1 at [31].

25 See eg *Imbrioscia v Switzerland* (1993) 17 EHRR 441 at [38].

26 See eg *Melin v France* (1993) 17 EHRR 1 at [23]-[25]; *Thompson v United Kingdom*, Application No 36256/97, 15 June 2004 at [43]-[45].

27 *Pakelli v Germany* at [31]; *Campbell & Fell v United Kingdom* (1984) 7 EHRR 165 at [99]; *Balliu v Albania* at [32].

28 *Artico v Italy* at [35]; *Alimena v Italy*, Application No 11910/85, 19 February 1991 at [20]; *Boner v United Kingdom* (1994) 19 EHRR 246 (concurring opinion of Sir John Freeland); *McLean v Buchanan* [2001] 1 WLR 2425 at [62] (PC) (Lord Clyde).

(b) *United Kingdom/Privy Council*

[38] In decisions in the United Kingdom, including those of the Privy Council, the right to legal representation has been treated as not itself absolute, but as a constituent of the right to a fair trial, which is absolute.[29] A conviction will be regarded as unsafe and will not be allowed to stand once the Court concludes that for any reason there has been an unfair trial.[30] In *Randall v R* the Privy Council commented:[31]

> [T]he right of a criminal defendant to a fair trial is absolute. There will come a point when the departure from good practice is so gross, or so persistent, or so prejudicial, or so irremediable that an appellate court will have no choice but to condemn a trial as unfair and quash a conviction as unsafe, however strong the grounds for believing the defendant to be guilty. The right to a fair trial is one to be enjoyed by the guilty as well as the innocent, for a defendant is presumed to be innocent until proved to be otherwise in a fairly conducted trial.

On the other hand, even if an accused's right to representation is found to have been breached (for example through the wrongful refusal of an adjournment), it is only if the Court concludes that this breach rendered the trial unfair that the conviction will be quashed on that ground alone.

[39] In determining whether in particular circumstances a defendant had a right to legal representation and whether any breach of that right affected the fairness of the trial, close attention is paid to the facts of each case and differences of degree are recognised. A balancing between the general interest of the community and the personal rights of an individual may be carried out.[32]

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29 *Brown v Stott* [2003] 1 AC 681 (PC) at 704 (Lord Bingham) and 708 (Lord Steyn). In *R v Forbes* [2001] 1 AC 473 at [24], with the agreement of the other Law Lords, Lord Bingham said that "the subsidiary rights…are not absolute, and it is always necessary to consider all the facts and the whole history of the proceedings in a particular case to judge whether a defendant's right to a fair trial has been infringed". In contrast, in *Brown* Lord Hope of Craighead considered (at 719) that the constituent rights expressed in the European Convention are absolute, although implied rights are not. He regarded the rights listed in art 6(3) of the Convention, which include the right to representation, as constituent and therefore absolute minimum rights.

30 *Mohammed v The State* [1999] 2 AC 111 (PC); *R v Howse* [2006] 1 NZLR 433 (PC).

31 [2002] 1 WLR 2237 at [28].

32 *Brown v Stott* at 708 (Lord Steyn); *Robinson v R* [1985] AC 956 (PC). Compare *Dunkley v R* [1995] 1 AC 419 (PC).

[40] In *Hinds v Attorney-General of Barbados*,[33] where an accused with a psychiatric history had faced a charge of arson and been denied legal aid, the Privy Council found that there was insufficient evidence to conclude that denial had deprived him of a fair hearing. It also considered that any defect at trial was cured by representation on appeal against the conviction to the Court of Appeal, a view to which we should not be taken to assent, at least as a general principle. We mention the decision because Lord Bingham, who delivered the reasons of the Board dismissing the appeal, made the following general observation about the preconditions for a fair trial in the context of a comparison between the Constitution of Barbados and art 6 of the European Convention:[34]

> …questions of degree are relevant, as are the facts of a particular case and the circumstances of a particular defendant. A case cannot properly be assessed objectively, without taking account of the particular defendant and the difficulties which he or she may face in cross-examining prosecution witnesses, seeking to exclude evidence, giving evidence, obtaining and calling any necessary evidence and advancing any available defence. A defendant in custody is likely to be at a disadvantage when preparing for trial, particularly if his educational attainments are limited. In one case the lack of legal assistance may not deprive a defendant of a fair hearing even if it would have been desirable that he be represented; in another lack of legal representation may properly be held to deprive the hearing of its essential quality of fairness to the defendant.

Earlier Lord Bingham had remarked that there would be very many cases which might fairly be heard without representation of the defendant:[35]

> The less serious the charge, the more straightforward the facts and the more modest the potential penalty, the likelier this is to be true. But the contrary is true also: the more serious the charge, the more complex the case and the greater the potential penalty the more likely it is that legal representation of the defendant (if he wishes it) will be needed if the hearing is to be fair to him.

[41] The Privy Council has said that where counsel representing or intending to represent the defendant seeks to withdraw, that should be permitted only if the defendant will not suffer significant prejudice.[36] In *Mitchell v R*[37] counsel had sought to withdraw on the second day of a murder trial because the accused was

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33 [2002] 1 AC 854 (PC).
34 At [18].
35 At [17].
36 *Dunkley* at 428.
37 [1999] 1 WLR 1679 (PC).

insisting on personally cross-examining witnesses. He considered that counsel was not conducting the defence in a proper manner. The trial Judge did not suggest that the accused obtain new counsel; indeed, he indicated that would not be arranged. The case was adjourned for two days to allow the accused to prepare his cross-examination. The Privy Council set aside the conviction. Their Lordships considered that in a number of areas skilled cross-examination by counsel might have affected the outcome of the case. The accused had little or no opportunity to obtain proofs and witnesses in support of his alibi defence. Errors of law in the summing up had not been pointed out to the Judge. Their Lordships concluded that the Judge could not have been satisfied that the accused would not, or at any rate might not, suffer prejudice by the withdrawal of counsel. Nor had the Judge considered whether, and if so for how long, the trial should be adjourned to enable the accused to try to obtain alternative counsel. This had been mandated, at least in capital cases, in all but the "most exceptional" circumstances in *Dunkley v R.*[38]

[42] In some instances it is the defendant's own fault that he or she was unrepresented. In those circumstances there has been no breach of the right to legal representation. But the Privy Council has said that it will nevertheless be necessary to consider whether as a result of the absence of representation a miscarriage of justice may have occurred.[39]

(c) *Ireland*

[43] The right to counsel has also been recognised in Ireland.[40] It arises there from the combination of several provisions of the Constitution of 1937, including art 38.1(1) which provides that "[n]o person shall be tried on any criminal charge save in due course of law".[41] Where a breach of the constitutional right to legal assistance is found, the trial is rendered void for want of jurisdiction and the

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38 [1995] 1 AC 419 at 428 (PC).

39 *Robinson*; *Dunkley*; *Jahree v State of Mauritius* [2005] 1 WLR 1952 (PC). In *Jahree* the Board said (at [20]) that the consequential issue was whether the degree of prejudice suffered by the appellant through the absence of representation was sufficient to give rise to a miscarriage of justice.

40 *The State (Healy) v Donoghue* [1976] IR 325.

41 See *The State (Holland) v Kennedy* [1977] IR 193 at 201.

conviction must therefore be quashed.[42] Although the trial Judge's decision whether to grant an adjournment is discretionary and will not be interfered with lightly,[43] appeal courts will intervene where a defendant facing imprisonment has been denied representation. Thus, in *Stephens v Connellan*,[44] the defendant's convictions for importation and possession of firearms were quashed after his lawyer withdrew on the last working day before the trial because the defendant refused to accept his advice. This was despite the fact that there had already been several adjournments over a period of a year and three lawyers had withdrawn at earlier stages. The Court held that a further adjournment for the purpose of retaining new counsel had been improperly refused by the trial Judge. It emphasised that in the particular circumstances of the case the defendant had, through no fault of his own, been placed in an "impossible position" by his counsel's withdrawal.[45]

(d) *United States*

[44] In the United States of America a right to counsel is found in the Sixth Amendment to the Constitution:

> In all criminal prosecutions, the accused shall enjoy the right to…have the Assistance of Counsel for his defence.

The Supreme Court has declared that unless there has been a waiver or forfeiture of the right, a criminal defendant has a right to counsel in all felony cases,[46] as well as in all misdemeanour cases in which a sentence of imprisonment is actually imposed.[47] A deprivation of the right creates a jurisdictional bar to conviction.[48] The conviction must therefore be quashed. Any waiver by a defendant must be made "knowingly, intelligently and voluntarily".[49]

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42 *The State (Healy) v Donoghue*.
43 *O'Callaghan v District Judge Clifford* [1993] 3 IR 603 at 611.
44 [2002] 4 IR 321.
45 At [22].
46 *Gideon v Wainwright*, 375 US 335 (1962).
47 *Scott v Illinois*, 440 US 367 (1979).
48 *Johnston v Zerbst*, 304 US 458 at 468 (1938). See 5 Am Jur 2d § 727.
49 *United States v Cash*, 47 F 3d 1083 (11th Circ 1995); *Johnston v Zerbst* at 463-468 ("competently and intelligently").

[45] Delivering the opinion of the Court in *Gideon v Wainwright*, Justice Black articulated the importance of the right to representation:[50]

> [I]n our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him. This seems to us to be an obvious truth. Governments, both state and federal, quite properly spend vast sums of money to establish machinery to try defendants accused of crime. Lawyers to prosecute are everywhere deemed essential to protect the public's interest in an orderly society. Similarly, there are few defendants charged with crime, few indeed, who fail to hire the best lawyers they can get to prepare and present their defenses. That government hires lawyers to prosecute and defendants who have the money hire lawyers to defend are the strongest indications of the widespread belief that lawyers in criminal courts are necessities, not luxuries. The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours. From the very beginning, our state and national constitutions and laws have laid great emphasis on procedural and substantive safeguards designed to assure fair trials before impartial tribunals in which every defendant stands equal before the law. This noble ideal cannot be realized if the poor man charged with crime has to face his accusers without a lawyer to assist him. A defendant's need for a lawyer is nowhere better stated than in the moving words of Mr. Justice Sutherland in *Powell v. Alabama*:[51]
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> > The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence.

[46] In *Powell*, an episode in the sad history of the youths who came to be known as the Scottsboro Boys, Justice Sutherland, for the Court, had recognised that the right to counsel required the allowance of adequate time to retain counsel:[52]

> It is true that great and inexcusable delay in the enforcement of our criminal law is one of the grave evils of our time. Continuances are frequently granted for unnecessarily long periods of time, and delays incident to the disposition of motions for new trial and hearings upon appeal have come in many cases to be a distinct reproach to the administration of justice. The

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50 At 344-345.

51 287 US 45 at 68-69 (1932) (footnote added).

52 At 59.

> prompt disposition of criminal cases is to be commended and encouraged. But in reaching that result a defendant, charged with a serious crime, must not be stripped of his right to have sufficient time to advise with counsel and prepare his defense. To do that is not to proceed promptly in the calm spirit of regulated justice but to go forward with the haste of the mob.

[47] A defendant who elects to defend himself must in the United States be warned of the dangers and disadvantages of doing so without legal experience.[53] But it is generally recognised that a defendant can forfeit the right to counsel if the absence of counsel is due to the defendant's negligence, indifference, or purposeful delaying tactics.[54]

[48] A trial Judge's discretion whether to grant an adjournment (known as a continuance) is susceptible to appellate review. In some cases a denial of a continuance will be held to have violated the Sixth Amendment right to counsel but, even when that is not so, the trial Judge may still on occasion be found to have abused the discretion with resulting prejudice to the defendant.[55]

(e) *Canada*

[49] The Canadian Charter of Rights and Freedoms makes no express reference to any right to counsel. It does, however, contain in s 11(d) a right to a fair hearing and in s 7 a right not to be deprived of liberty except in accordance with the principles of fundamental justice. There is also in s 10(b), in materially the same terms as s 23(1)(b) of our Bill of Rights, a right of a person arrested or detained to consult and instruct a lawyer and to be informed of that right. Reading these provisions together, Canadian courts have ordered the provision of counsel where the representation of an accused is considered essential to his or her fair trial. Having distinguished between the right to be represented by counsel and the right to have that representation

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53 *Faretta v California*, 422 US 806 (1975).

54 LaFave, Israel and King *Criminal Procedure* (2d) § 11.3(c).

55 73 ALR 3d 725, § 21. LaFave, Israel and King (at § 11.4(c)) have described the factors to be taken into account in this assessment as including, *inter alia*: the length and practical implications (both for the accused and others such as witnesses and the Court) of the continuance sought; whether the continuance had become necessary, or was sought, primarily because of the defendant's negligence or delaying tactics; whether the defendant's dissatisfaction with counsel was legitimate and whether counsel was fully prepared for trial; whether continuances had previously been granted to the defendant; and whether refusing the continuance would likely result in substantial prejudice to the defendant's case.

provided at State expense,[56] the Ontario Court of Appeal said in *R v Rowbotham* that:[57]

> In our opinion, those who framed the Charter did not expressly constitutionalize the right of an indigent accused to be provided with counsel, because they considered that, generally speaking, the provincial legal aid systems were adequate to provide counsel for persons charged with serious crimes who lacked the means to employ counsel. However, in cases not falling within provincial legal aid plans, ss. 7 and 11(d) of the Charter, which guarantee an accused a fair trial in accordance with the principles of fundamental justice, require funded counsel to be provided if the accused wishes counsel, but cannot pay a lawyer, and representation of the accused by counsel is essential to a fair trial.

[50] Representation by a lawyer, even where an accused desires it, is not necessarily regarded as a prerequisite of a fair trial.[58] The absence of legal representation at trial is not, therefore, viewed as automatically giving rise to a miscarriage of justice. Where it does, that is because of an appearance of unfairness in the trial.[59]

[51] Whether representation is essential for a fair trial is a fact-driven, case-specific question for the trial Judge (or, if the issue is first raised on appeal, for the appeal Court).[60] It requires consideration of the seriousness of the offence, the length and complexity of the trial and the particular circumstances and abilities of the accused (including his or her level of education, general ability to conduct a defence, and any language difficulties).[61] Careful account is also taken, on appeal, of the manner in which the Judge conducted the trial.[62] If an appeal Court concludes that representation was necessary and it is also satisfied that the unrepresented accused did not have the financial means to retain counsel, there will have been a miscarriage of justice and the conviction will be quashed.[63] If the determination is

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56 See further *R v Robinson* (1989) 51 CCC (3d) 452.
57 (1988) 41 CCC (3d) 1 at 66.
58 *R v Phillips* (2003) 172 CCC (3d) 285 at [10]; *New Brunswick (Ministry of Health and Community Services) v G(J)* [1999] 3 SCR 46 at [86].
59 *Rowbotham* at 69; *R v McCallen* (1999) 131 CCC (3d) 518 at [38]; *R v Drury and Hazard* (2000) MBCA 100 at [20].
60 See eg *R v Nichols* (2001) 46 CR (5th) 294 at [23]; *Phillips* at [10].
61 See eg *R v Rain* (1998) 130 CCC (3d) 167; *New Brunswick v G(J)* at [75] and following.
62 See eg *Rain*; *Phillips.*
63 *Drury and Hazard* at [20]-[25].

made before trial the most appropriate remedy under the Charter is a stay of proceedings until legal counsel has been obtained.[64]

[52] In *R v McGibbon*[65] the defendant's counsel had obtained leave to withdraw after a disagreement with the defendant. Notwithstanding withdrawal, the same counsel subsequently appeared twice more for the defendant at hearings to fix a trial date. But at the trial the defendant appeared without counsel. He requested an adjournment for the purpose of summoning witnesses. After the trial Judge accepted the Crown's objection that the defendant had already had "ample" time to prepare to defend himself, the defendant indicated that he was prepared to proceed that afternoon. The Judge did not then ask the defendant whether he wanted trial counsel. It was apparent to the Ontario Court of Appeal that the appellant did not have the competence of legal counsel and that some of his theories and notions about the case bordered on the bizarre. On the other hand, in his cross-examination of the child complainant he posed helpful and rational questions which were relevant to him and which promoted his theory of defence. The Court, having referred to *Rowbotham*, dismissed the appeal. It said that it was patent on the record that the defendant had wished to defend himself and that in the circumstances of the case the trial Judge was under no obligation to inquire whether he wished to be defended by counsel or to urge him to retain counsel. It would not be in the interests of justice to permit someone who had made a decision to proceed without the assistance of counsel to now have a new trial because he was convicted.

[53] On the other hand, in a recent decision of the Court of Appeal for British Columbia,[66] an elderly defendant who was considered to have the means to pay for a lawyer but had elected to defend himself had his conviction set aside because, notwithstanding that the trial Judge had acted properly in refusing an adjournment and attempting to assist him in court, the record of the trial demonstrated his incapacity to present an effective defence.

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64 *Drury and Hazard* at [18]-[19].
65 (1998) 45 CCC (3d) 334.
66 *R v PHLW* (2004) BCCA 522.

(f) *Australia*

[54] The leading Australian case on the right to legal representation is the decision of the High Court in 1992 in *Dietrich v R.*[67] The appellant was found guilty of a charge of importation of a large quantity of heroin into Australia after a jury trial lasting approximately 40 days during which he was unrepresented after being denied legal aid. His appeal succeeded. In the absence of a Bill of Rights, *Dietrich* was a decision made under the common law. The headnote succinctly summarises the conclusions of the five Judges in the majority:[68]

> The common law of Australia does not recognize the right of an accused to be provided with counsel at the public expense. However, the courts have power to stay criminal proceedings that will result in an unfair trial. The power to grant a stay extends to a case in which representation of the accused by counsel is essential to a fair trial, as it is in most cases in which an accused is charged with a serious offence. In the absence of exceptional circumstances, a judge faced with an application for an adjournment or a stay by an indigent accused charged with a serious offence who, through no fault is unable to obtain legal representation, should adjourn, postpone or stay the trial until legal representation is available. If the application is refused and, by reason of the lack of representation, the trial is not fair, a conviction must be quashed by an appellate court for the reason that there has been a miscarriage of justice in that the accused has been convicted without a fair trial.

[55] Mason CJ and McHugh J, in a joint judgment, said that Australian law acknowledged that an accused had a right to a fair trial and that, depending on all the circumstances of the particular case, lack of representation might mean that an accused was unable to receive, or did not receive, a fair trial. Such an inquiry was, however, inextricably linked to the facts of the case and the background of the accused:[69]

> A trial judge faced with an application for an adjournment or a stay by an unrepresented accused is therefore not bound to accede to the application in order that representation can be secured; a fortiori, the judge is not required to appoint counsel. The decision whether to grant an adjournment or a stay is to be made in the exercise of the trial judge's discretion, by asking whether the trial is likely to be unfair if the accused is forced on unrepresented. For our part, the desirability of an accused charged with a serious offence being represented is so great that we consider that the trial should proceed without representation for the accused in exceptional cases only. In all other cases of

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67 (1992) 177 CLR 292.

68 Mason CJ, Deane, Toohey, Gaudron and McHugh JJ; Brennan and Dawson JJ dissenting.

69 At 311.

> serious crimes, the remedy of an adjournment should be granted in order that representation can be obtained.

Mr Dietrich had not wanted to go to trial unrepresented. His application for an adjournment had been refused. That resulted in an unfair trial. The joint judgment noted that there had been a not guilty verdict on another count. The Court could not conclude that, even with the benefit of counsel, the appellant would not have had any prospect of acquittal on the count on which he was convicted. His defence had been "so disorganised and haphazard as to lack cogency".[70]

[56] In his judgment, Deane J said that the common law did not impose upon the government or any section or member of the community an enforceable duty to provide free legal advice or representation to anyone. What the common law required was that, if the government saw fit to subject an accused person to a criminal trial, that trial must be a fair one.[71] Deane J's remarks about the realities of a criminal trial bear repetition:[72]

> A criminal trial in this country is essentially an adversarial process. Where the charge is of a serious crime, the prosecution will ordinarily be in the hands of counsel with knowledge and experience of the criminal law and its administration. The substantive criminal law and the rules of procedure and evidence governing the conduct of a criminal trial are, from the viewpoint of an ordinary accused, complicated and obscure. While the prosecution has a duty to act fairly and part of the function of a presiding judge is to seek to ensure that a criminal trial is fair, neither prosecutor nor judge can or should provide the advice, guidance and representation which an accused must ordinarily have if his case is to be properly presented. Thus, it is no part of the function of a prosecutor or trial judge to advise an accused before the commencement of a trial about the legal issues which might arise on the trial, about what evidence will or will not be admissible in relation to them, about what inquiries should be made to ascertain what evidence is available, about what available evidence should be called, about possible defences, about the possible consequences of cross-examination, about the desirability or otherwise of giving sworn evidence or about any of a multitude of other questions which counsel appearing for an accused must consider and in respect of which such counsel must advise in the course of the preparation of a criminal trial. Nor is it consistent with the function of prosecutor or trial judge to conduct, or advise on the conduct of, the case for the defence at the trial. Nor, in the ordinary case, is an accused capable of presenting his own case to the jury as effectively as can a trained lawyer.

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70 At 315.
71 At 330.
72 At 334-335.

> An accused is brought involuntarily to the field in which he is required to answer a charge of serious crime. Against him, the prosecution has available all the resources of government. If an ordinary accused lacks the means to secure legal representation for himself and such legal representation is not available from any other source, he will, almost inevitably, be brought to face a trial process for which he will be insufficiently prepared and with which he will be unable effectively to cope. In such a case, the adversarial process is unbalanced and inappropriate and the likelihood is that, regardless of the efforts of the trial judge, the forms and formalities of legal procedures will conceal the substance of oppression.

[57] Deane J accepted that regard must be had to the interests of the Crown, acting on behalf of the community, and that there are circumstances in which a criminal trial will be relevantly fair notwithstanding that the accused is unrepresented.[73] The most obvious category of case in which that is so is one where an accused desires to be unrepresented or persistently neglects or refuses to take advantage of legal representation which is available. Another category is where the accused has the financial means but decides not to incur the expense. It is also arguable, Deane J said, that there are categories of criminal proceedings where inability to obtain legal representation would not have the effect that the trial was unfair. He instanced a Judge-alone trial for a non-serious offence – one where there was no real threat of deprivation of personal liberty. But "as a general proposition and in the absence of exceptional circumstances", in a case of an accusation of serious crime, a trial of an indigent person would be unfair if, by reason of lack of means and the unavailability of other assistance, that person was denied legal representation.[74] A conviction without fair trial necessarily involved a substantial miscarriage of justice.

[58] Toohey J said it was the loss of a chance of acquittal fairly open to an accused, rather than the unfairness of the trial, that led to a conviction being set aside. In the context of a serious criminal charge, an appellate court would be slow to conclude that the absence of legal representation for an accused was not likely to have led to the loss of a chance of acquittal.[75]

[59] In her judgment Gaudron J stated:[76]

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73 At 335-336.
74 At 337.
75 At 362.
76 At 369.

> Once it is acknowledged that an accused person has a right to be legally represented, that legal representation is the norm, and that a person who is not represented is bound to face difficulties arising from his lack of knowledge and from the stress of the occasion – difficulties which are probably exacerbated by his personal circumstances – it is difficult to accept that trial without representation does not involve a risk of the accused being improperly convicted, at least for serious offences. In other words, it is difficult to accept that, these matters notwithstanding, trial without legal representation is a fair trial.

In Gaudron J's view, "at least in so far as serious offences are concerned, legal representation, where it is desired, is essential for a fair trial".[77]

[60] In *Craig v State of South Australia*, the High Court accepted that not every instance of misbehaviour, improvidence or other fault on the part of the accused contributing to lack of representation would automatically preclude entitlement to a stay.[78] However, the state courts have not taken a narrow view of what constitutes sufficient fault on the part of an accused to disentitle him or her to have trial postponed or stayed until legal representation is available.

[61] In *R v Karounos*, the Court of Criminal Appeal of South Australia observed that an opportunity of legal representation, irrespective of means, is a necessary incident of a fair trial but that it is the accused's responsibility to arrange it.[79] A person cannot be said to be deprived of a fair trial by reason of lack of legal representation if, despite desiring representation, he or she refuses to take necessary and reasonable steps to obtain it (which may include compliance with the reasonable requirements of a legal aid authority). The Court said that to force such an accused to trial unrepresented cannot be regarded as the denial of a fair trial even in a complex case.

[62] In *R v Small*, the New South Wales Court of Criminal Appeal referred to the "well-known and frequently encountered phenomenon that some accused persons are psychologically quite unable to face up to the fact that their trial is to proceed" and

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77 At 371.
78 (1995) 184 CLR 163 at 184.
79 (1995) 63 SASR 451 at 458.

so "put off applying for legal aid until it is far too late for their case to be prepared adequately". The Court said that the criminal justice system:[80]

> …would be crippled if such persons had either the absolute right to an adjournment in order finally to arrange legal representation or the right to a new trial if the trial is unsatisfactory as a result of the absence of such representation when they are solely responsible or at fault for that state of affairs.

[63] The Court in *Small* tempered these statements by saying later in its judgment,[81] following the High Court's decision in *McInnis v R*,[82] that even where the accused is himself at fault for the absence of legal representation, the trial Judge should exercise his or her discretion as to whether to grant an adjournment in order to obtain such representation by balancing the broader interests of justice (including the interests of witnesses and of the Crown) with those of the accused. In doing so the Judge should have regard to the principle that it is in the best interests of both the accused and the administration of justice that the accused should be represented. In particular, the trial Judge should very seriously consider whether the accused should be forced on unrepresented in any case where there is a reasonable possibility that he may obtain representation without unacceptable delay.

[64] Where an adjournment or stay has been properly refused because of the accused's contribution to his or her situation, the appeal Court nonetheless scrutinises the conduct of the trial by the Judge to ensure that everything possible was done to ensure it was "as fair as it could be in the circumstances created by the appellant's conduct".[83] Neglect or fault by the accused is one factor to be considered in the overall determination of whether there has been a miscarriage of justice.[84]

[65] Even if a trial Judge has erred in refusing an adjournment and the accused goes to trial without counsel, there is authority in Australia that an appeal on that ground may not succeed unless the resulting unfairness of the trial was such that it

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80 (1994) 33 NSWLR 575 at 588.

81 At 591.

82 (1979) 143 CLR 575, particularly at 579 (Barwick CJ) and 581-582 (Mason J). See *R v Kerbatieh* (2005) 155 A Crim R 367.

83 *Karounos* at 460. See *R v Frawley* (1993) 69 A Crim R 208.

84 *Small* at 587-588.

deprived the accused of a real chance of acquittal.[85] But the High Court has said as a general proposition that any radical or fundamental error in a trial will preclude the trial from being a fair one, necessitating the overturning of the conviction.[86] Gleeson CJ has emphasised that a failure of process which deprives the appeal Court of the capacity justly to assess the strength of a case against the accused "cannot be denied the character of a miscarriage of justice".[87] While there has been no definitive consideration of the parameters of "radical or fundamental" trial error in the present context, it has been suggested that denial of an adjournment that would have given an accused a reasonable opportunity to obtain counsel without unacceptable delay could qualify.[88] It is clear that Australian courts will be slow to find that an accused who is not relevantly at fault for his or her lack of representation could not have benefited from the assistance of competent counsel.

(g) *New Zealand*

[66] Section 25(a) of the New Zealand Bill of Rights Act 1990 guarantees to every person charged with an offence the right to a fair hearing. Such a person also has the rights under s 24(c), (d) and (f) to consult and instruct a lawyer, to adequate time and facilities to prepare a defence and to receive legal assistance without cost if the interests of justice so require and the person does not have sufficient means to provide for that assistance. The provisions of the Legal Services Act 2000 pertaining to criminal matters are the means chosen by Parliament to fulfil the Crown's obligation under s 24(f).

[67] The Court of Appeal has several times overturned convictions because a defendant was left unrepresented. In *R v Shaw*[89] counsel withdrew shortly before a trial at which the defendant faced and was convicted of charges of carrying an offensive weapon, threatening to kill and assault. An adjournment had been refused on the morning of the trial. Cooke P said, for the Court, that counsel's withdrawal

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85 See eg *McInnis* at 453; *R v Osborne* [2002] VSCA 156 at [29].

86 *Wilde v R* (1988) 164 CLR 365. See *Weiss v R* (2005) 223 ALR 662; *Nudd v R* (2006) 225 ALR 161.

87 *Nudd* at [6]-[7].

88 See *McInnis* at 591 (Murphy J, dissenting); *Dietrich* (reasons of Dawson J and Gaudron J); *Begg v Police* [2005] SASC 131.

89 [1992] 1 NZLR 652.

on a Friday would leave too short a time to engage other counsel and enable other counsel to prepare adequately for a trial commencing the following Wednesday. The Court did not apportion blame but said, referring to s 24(c) and (d), that it was clear the defendant had been deprived of his rights. It said each case of an alleged breach of those rights must be considered on its own facts. The case was one in which it was:[90]

> …conceivable that representation by counsel would have had significant benefit to the accused in that it was a case of some complexity in which an understanding of the defences available in law and the skills of a professional cross-examiner could have been of assistance.

[68] In *R v Ru*[91] the appellant's lawyer had told him at the start of his trial for possession for supply of cannabis and methamphetamine that he was not ready to conduct the trial because the appellant had not made witnesses available and had failed to give instructions. At the lawyer's suggestion the appellant had sacked the lawyer, who was then given leave to withdraw. The Court of Appeal said[92] that the question of whose fault it was that Mr Ru ended up without counsel on the morning of the trial was "an interesting inquiry (and one which must be given some attention, because of the danger of any person seeking to manipulate the system by uncooperative behaviour)" but the fundamental issue was whether as a result of whatever happened there was the substantial possibility of a miscarriage of justice having occurred. The Court was of the view that there was a clear obligation for the Judge to provide the accused an opportunity for adjournment to obtain alternative counsel or at least to marshal his forces and to be ready to represent himself in the Court. The appellant's attempted defence was "unfocused messy and unhelpful".[93] In concluding that the trial was not fair and quashing the convictions, the Court commented:[94]

> Although no accused person should imagine that they can with impunity fail to take steps to protect themselves by undertaking adequate preparation for trial, or to [sic] summarily dismiss counsel immediately before a trial starts as a ploy to obtain an adjournment, the Court must still be vigilant to ensure that a person who is convicted has been found guilty at the end of a process which has integrity and the hallmarks of fairness.

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90 At 654.
91 (2001) 19 CRNZ 447.
92 At [14].
93 At [26].
94 At [28].

[69] The appellants in *R v Hill*,[95] Mr Hill and Ms Turton, had been convicted of offences under the Insolvency Act 1967 and the Crimes Act 1961 arising from the bankruptcy of Mr Hill. Neither received a sentence of imprisonment, although Mr Hill was sentenced to periodic detention. Counsel were assigned on legal aid for both defendants. The trial was fixed for 15 October. On 9 October Ms Turton dismissed her counsel. Mr Hill advised his assigned counsel on about 12 October that he wished to represent himself. On the trial day both counsel were granted leave to withdraw and the appellants sought an adjournment for various purposes, including, in the case of Ms Turton, so that her counsel of choice could be available on a private retainer. The Judge considered that the situation was very much of the appellants' making. He declined to defer the trial, which commenced on 17 October after the rest of 15 October and the whole of 16 October were devoted to argument on pre-trial issues concerning evidence and severance. Ms Turton was granted bail after the first week of the trial. Mr Hill remained in custody. The trial took four weeks.

[70] In respect of Mr Hill, the Court of Appeal was of the opinion that his lack of representation arose from his own conduct. The Judge had properly exercised his discretion to refuse him an adjournment:[96]

> He had the opportunity for normal legal representation on legal aid and chose not to avail himself of it. Effectively, he waived his right to such representation and cannot now be heard to complain of it.

The Court proceeded to consider whether, in any event, Mr Hill had received a fair trial and decided that he had. His appeal therefore failed.

[71] In respect of Ms Turton, the position was found to be different. She had made it clear she wished to be represented by her chosen counsel who had withdrawn some weeks earlier only because he was not available on the date on which it was anticipated the trial would begin. There were understandably some fundamental differences between Ms Turton and counsel then assigned to her

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95 [2004] 2 NZLR 145.
96 At [45].

because his advice on important issues differed from that of counsel of choice. The Court of Appeal was not persuaded that any fault on her part was such that she should be treated as waiving her ordinary right to legal representation. The Judge was therefore plainly wrong in refusing her an adjournment. The lack of legal representation had led to a real possibility of a miscarriage of justice in her case. The advice of a lawyer in relation to issues where her case as a party was different from that of Mr Hill, on whom she relied primarily for the conduct of their joint defence, could have been crucial. So Ms Turton's appeal succeeded.

[72] In *R v Pue,*[97] counsel for one of the accused had withdrawn during the trial on ethical grounds. The Court considered whether that accused's right to a fair trial was impaired. The Court said:

> [30] Whether these rights have been breached in a case such as the present must be determined having regard to all the circumstances of the trial, including the events that resulted in the loss of legal representation during its course. These circumstances may include who was responsible for counsel withdrawing, and in particular whether the accused person was seeking to manipulate the justice system through uncooperative behaviour. The public interest in the prompt, as well as fair administration of justice will usually be relevant.
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> [31] Where leave to withdraw is given to defence counsel during a trial, the right to a fair trial will usually require the trial judge to allow the defendant an adjournment, to obtain other counsel or at least to take advice in order to become ready to conduct the defence personally for the remainder of the trial. If the trial proceeds with the accused unrepresented and the outcome is a conviction the ultimate question on appeal will always be whether the way in which the trial judge dealt with the situation gives rise to a substantial possibility of there having been a miscarriage of justice.

In the particular circumstances, the Court considered that the Judge's decision to allow only a short adjournment after withdrawal of counsel was not "in breach of his fair trial rights".[98] It was satisfied no miscarriage of justice had resulted.

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97 CA 78/04 19 May 2005.

98 At [40].

The jurisprudence in summary

[73] The common premise in the jurisprudence is that representation by a lawyer at trial is nearly always necessary in order for a trial for a serious offence to be fair. Hence the accused must have legal representation or at least have been afforded a reasonable opportunity of obtaining it.

[74] In the United States and Ireland this concern is dealt with by automatically quashing a conviction if there is a denial of the right to representation at trial. The courts are prepared on occasion to find that a refusal of an adjournment by the trial Judge has not necessarily created a breach of the right in the particular case. It is accepted that an accused can waive or forfeit by conduct the right to have representation.

[75] In other jurisdictions, and under existing New Zealand case law, a breach of the right to representation does not have an automatic consequence. In Australia, the trial of an accused charged with a serious offence who, through no personal fault, was unable to obtain legal representation will be held to have been unfair in all but exceptional cases. In that jurisdiction too there can be waiver or forfeiture by conduct of the entitlement to defence counsel. However, even in such cases the appeal Court examines the record of the trial and will set the conviction aside if it considers that, in all the circumstances, the accused has been deprived of a real possibility of acquittal. In the United Kingdom and Canada a conviction is not quashed unless lack of legal representation has actually caused an unfair trial. This is much more likely to be found to have occurred in complex trials or those involving serious offences. The courts in those jurisdictions do appear at times to take a somewhat less strict position than the High Court of Australia took in *Dietrich*. But, even where it is the accused's own fault that he or she was unrepresented, the courts will quash the conviction if they detect prejudice to the accused to an extent which has created a miscarriage of justice.

The proper approach in New Zealand

[76] The approach taken in the United States would not be appropriate in New Zealand, where the relevant rights in s 24 of the Bill of Rights are what in Europe are treated as constituent elements of the right to a fair trial and are of a kind which have been called subsidiary rights by the Privy Council.[99] Section 24 does not guarantee the provision of a lawyer for the defence in all cases, even when the charge being faced by the accused is of a serious crime. An accused has the right to employ a lawyer, but the State does not guarantee to provide the lawyer's services – in this respect its role is passive, in the sense that it must not impede the exercise of the right by the accused.[100] The exception is under s 24(f) when the accused does not have sufficient means to provide for legal assistance. Even in such a case, however, it is the accused who must take the necessary steps to obtain assistance under the Legal Services Act.

[77] In contrast, the right to a fair trial, affirmed by s 25(a), is an absolute right. If, because the accused had no lawyer or for any other reason, the trial is fundamentally flawed, the accused will not have had a fair trial and the conviction must be quashed.[101] A substantial miscarriage of justice will have occurred. There can be no resort to the proviso to s 385(1) of the Crimes Act. It is worth recalling the words of Deane J in the High Court of Australia in *Jago v The District Court of New South Wales*:[102]

> The central prescript of our criminal law is that no person shall be convicted of crime otherwise than after a fair trial according to law. A conviction cannot stand if irregularity or prejudicial occurrence has permeated or affected proceedings to an extent that the overall trial has been rendered unfair or has lost its character as a trial according to law. As a matter of ordinary language, it is customary to refer in compendious terms to an accused's "right to a fair trial"…. Strictly speaking, however, there is no such directly enforceable "right" since no person has the right to insist upon being prosecuted or tried by the State. What is involved is more accurately expressed in negative terms as a right not to be tried unfairly or as an immunity against conviction otherwise than after a fair trial.

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99 See [36] and [37] and fn 29 above.

100 To similar effect is s 354 of the Crimes Act 1961 ("Every person accused of any crime may make his full defence thereto by himself or by counsel.").

101 *R v Howse* [2006] 1 NZLR 433 (PC).

102 (1989) 168 CLR 23 at 56-57.

Deane J added:[103]

> An unfair trial is not a nullity. An acquittal after such a trial is ordinarily final and decisive. So, unless it is impeached on an appeal, is a conviction. Nonetheless, an unfair trial represents a miscarriage of the curial process.

[78] It is important to remember that, as Deane J observes, the assessment of the fairness of a trial is to be made in relation to the trial overall. A verdict will not be set aside merely because there has been irregularity in one, or even more than one, facet of the trial. It is not every departure from good practice which renders a trial unfair, as Lord Bingham made clear in a passage in *Randall*, which was referred to with approval in *Howse*. He said[104] that it is at the point when the departure from good practice is "so gross, or so persistent, or so prejudicial, or so irremediable" that an appellate court will have no choice but to condemn a trial as unfair and quash the conviction as unsafe. In *Howse* it was said[105] that this approach is one of general application.

[79] So the appropriate question in a case like the present is whether the accused's lack of the proper opportunity to have legal representation made or contributed to making the trial, looked at as a whole, unfair so that there has been a substantial miscarriage of justice. In our view, the High Court of Australia in *Dietrich* was right to conclude that in the great majority of cases, that is, other than in exceptional circumstances, an accused who conducts his or her own defence to a serious charge, without having declined or failed to exercise the right to legal representation, will not have had a fair trial. That is the reason why s 30 of the Sentencing Act exists, with its policy of ensuring that those facing imprisonment if convicted are afforded the opportunity of being represented by a lawyer. Where, in the absence of waiver or forfeiture as explicitly contemplated by Parliament in subss (2) and (4) of s 30 of the Sentencing Act, legal counsel was not available at trial there will have been a breach of one or more of the subsidiary rights in s 24 of the Bill of Rights and prima facie an unfair trial will have resulted from that breach. The conviction will then be quashed unless the Crown is able to satisfy the appeal Court that the trial was

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103 At 57.

104 At [28]. See [38] of the present judgment.

105 At [36].

actually fair in terms of s 25(a). The conclusion that the trial was fair is not one to which a court will easily be drawn.

[80] In contrast, if the accused makes an informed choice to go to trial without a lawyer, or is rightly refused legal aid, or by conduct creates a situation in which, on a proper balancing of the various interests, further delay in the holding of the trial is not to be tolerated, there will have been no breach of the s 24 rights. But even in such circumstances an appeal Court must still examine the overall fairness of the trial, as was done in the New Zealand cases cited earlier, because the right to a fair trial cannot be compromised – an accused is not validly convicted if the trial is for any reason unfair. If there has been no breach of the appellant's right to representation, because the trial Court was properly "satisfied" in terms of s 30(2) of the Sentencing Act, the conviction will not be set aside unless the appellant can persuade the Court that the trial was unfair because the defence could not, in the particular case, have been adequately conducted without the assistance of counsel. In some circumstances the manner in which the accused through his or her own choice or conduct came to be unrepresented may be relevant to the assessment of fairness. It is unnecessary to say more about that in the present case.

[81] At the outset of its consideration of fairness the appeal Court must make a determination concerning the circumstances in which the accused came to be tried without a lawyer. That is because if the appellant has been denied a reasonable opportunity of legal representation, the onus will be on the Crown to satisfy the Court that in all the circumstances the absence of representation did not result in an unfair trial. Bearing that in mind, the Court must carefully consider what occurred at the trial and during the earlier period when the accused was preparing to conduct the defence.

[82] The Court should examine the manner in which the Judge presided over the trial, especially whether the Judge clearly explained the court procedures to the accused and thereby minimised the disadvantage of being unfamiliar with the trial process and with rules of evidence. It will be relevant also whether the accused had the benefit of guidance from a lawyer or an amicus at any time prior to or during the trial. The Court must have regard to the personal characteristics of the appellant,

such as level of intelligence and education, previous experience in a courtroom and ability to express him or herself clearly and sensibly in that setting. It must look to see whether the case involved any difficult legal issues or had other complexities which might have benefited from analysis by a trained legal mind. It should also look at the nature of the Crown case and at how effectively the accused in fact managed to convey the nature of the defence in cross-examination of Crown witnesses, examining defence witnesses, giving evidence (if the accused chose to do so) and addressing submissions to the Court. Mason J pointed out in *McInnis* that the calibre of the accused's forensic performance is a relevant but not a critical factor in the determination of fairness.[106] The appeal Court should not be too ready to conclude from a reading of the transcript that the defence has been conducted as competently as counsel, with professional skill and detachment, would likely have done. A transcript does not necessarily convey the full atmosphere of the courtroom and in particular the demeanour of the accused before the jury. *A fortiori*, if the full transcript, including addresses, is not available.

Mr Condon's case

[83] It follows from the findings concerning the failure to grant an adjournment to Mr Condon that he was denied his right to legal assistance in breach of s 24(c), (d) and (f) of the Bill of Rights. He neither waived those specific rights nor forfeited them by his conduct. It is therefore incumbent on the Crown to satisfy the Court that Mr Condon's trial was fair despite the fact that he was not afforded a proper opportunity for legal representation.

[84] The Judge does not appear to have inquired of Mr Condon what prior experience he had of representing himself or to have given him any explanation of trial processes other than a brief description at the hearing on 19 August of the issues likely to be at the centre of the trial and a short explanation of the collateral issue rule and its consequence that on certain matters Mr Condon would not be able to call evidence to contradict answers he had received. The Judge gave some limited assistance during the trial with clarification of Mr Condon's questions and seems to

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106 At 583.

have given him latitude which he might not have given to counsel. He warned Mr Condon about the consequence of cross-examining a prosecution witness about his criminal convictions if and when Mr Condon came to give evidence.

[85] The Court has little material concerning Mr Condon's level of education. He seems to be of at least average intelligence. He had apparently been studying commercial law at a Polytech before the trial. He certainly had some experience of the courtroom and had previously acted for himself in criminal and civil matters. However, while he conceded his memory might be affected by drug abuse in the past, he claimed to have no recollection of having been tried before a jury. The Crown has not suggested that his memory was unreliable in this respect.

[86] The case was not particularly complicated, nor did it raise difficult legal questions or evidentiary issues.

[87] There were five witnesses of what Mr Condon said or of the circumstances in which conversations were occurring concerning three separate incidents. Nonetheless, the case against him depended entirely on the word of those witnesses. None of the incidents were witnessed by all of them. The possibility cannot be dismissed that a skilled cross-examiner could have made some headway with them, thereby raising a reasonable doubt. That, it seems to us, is the most important consideration.

[88] But the trial transcript also raises some concerns. The Court of Appeal found, rightly in our view, that Mr Condon conducted his defence in a clumsy way and that his cross-examination was neither effective nor deft.[107] That is certainly an impression we share from a reading of the transcript. Mr Condon did have the benefit over the weeks before the trial of advice both oral and written from his assigned counsel, Mr Radford. But he does not seem to have been willing or able to take advantage of it in the courtroom. A competent defence lawyer may well have been able to avoid mention by Mr Condon of his previous convictions, which must have done him no good in the eyes of the jury. A more subtle approach to his conspiracy theory and to the manner of questioning witnesses would have involved

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[107] At [35].

less risk of alienating the jury. There was, for example, some unfortunate questioning by Mr Condon about a personal situation of one of the female witnesses which was almost bound to have disturbed the jury and was seemingly irrelevant or inessential to the defence. Finally, Mr Condon did not seek an adjournment after giving evidence in order to have time to prepare a closing address because, he says, he was not told he could do so. He asserts that his address was, as a consequence, not focused, logical or persuasive and there is nothing in the available record to controvert that assertion.

[89] After considering all of these matters, we have not been persuaded that the outcome of the trial would necessarily have been the same if Mr Condon had been legally represented. In our view there was therefore unfairness in the trial and accordingly a substantial miscarriage of justice has occurred.

Result

[90] We quash the convictions. In the circumstances, where the sentence has been served, there is no good reason to order a new trial.

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