NOTE: PUBLICATION OF NAMES, ADDRESSES, OCCUPATIONS OR IDENTIFYING PARTICULARS OF COMPLAINANTS PROHIBITED BY SS 203 AND 204 OF THE CRIMINAL PROCEDURE ACT 2011.

IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA358/2023
[2024] NZCA 329

BETWEEN	BRUCE TIMOTHY MILLS Appellant
AND	THE KING Respondent

Hearing: 25 June 2024

Court: Palmer, Brewer and Downs JJ

Counsel: G H Vear and E E McClay for Appellant
I S Auld for Respondent

Judgment: 19 July 2024 at 10am

JUDGMENT OF THE COURT

The appeal is dismissed.

REASONS OF THE COURT

(Given by Brewer J)

Introduction

[1] On 9 September 2022, Mr Mills was convicted by a jury of two charges of doing an indecent act on a child and one charge of sexual violation by unlawful sexual

connection.[1] We will call the complainant "Ms S". Mr Mills was acquitted of one charge of doing an indecent act on a young person in relation to Ms S's elder sibling, A.[2] On 12 May 2023, Mr Mills was sentenced to three years' imprisonment.[3]

[2] Mr Mills did not give or call evidence at his trial. He contends his lawyer did not give him adequate advice and so he did not make a fully informed decision not to give or call evidence. He appeals his convictions on this ground.

[3] If we find that Mr Mills' election not to give or call evidence was not properly informed, then in the circumstances of this case we would find a miscarriage of justice had occurred and we would allow the appeal.[4]

Background

[4] Mr Mills was a friend of Ms S's parents. He would occasionally babysit Ms S, and her siblings. The alleged offending occurred in 2019 and early 2020 when Ms S was between eight and nine years old.

[5] In July 2020, Ms S's parents separated acrimoniously. Ms S's mother took her and A to a refuge, and then to a friend's home, leaving their other sibling with their father, Mr S.

[6] Ms S's mother gave evidence that, in July 2020, Ms S and A told her and Mr S that Mr Mills had "touched [them] on [their] privates". The mother said that, at this point, she did not believe it could be true.

[7] The mother's evidence was also that, having separated from Mr S and living with her friend, Ms S again told her that Mr Mills had touched her and A on the privates. This was on a Friday night. On the Monday morning (6 August 2020) she drove the children to a police station to report the offending.

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1 Crimes Act 1961, ss 132(3), 128(1)(b) and 128B.
2 Section 134(3).
3 *R v Mills* [2023] NZDC 9435.
4 *Chambers v R* [2011] NZCA 218 at [12] and [17]; *Tarring v R* [2016] NZCA 452 at [36]; and *Weston v R* [2019] NZCA 541 at [26].

[8] During an evidential video interview (EVI) with police on 12 August 2020, Ms S described a number of incidents which gave rise to charges against Mr Mills. Ms S described one of the incidents as occurring while she was sitting on Mr Mills' lap.

[9] During her EVI, Ms S provided the police with a letter handwritten by her. It was on children's stationery decorated with a panda bear cartoon (and became known at trial as the panda letter). Among other things, the panda letter contained one of Ms S's allegations against Mr Mills.

[10] Subsequently, Ms S went to live with Mr S. Mr S had become a supporter of Mr Mills because he did not believe the allegations.

[11] In the week before trial, Ms S wrote another letter, in which she stated that her mother had asked her to write the panda letter, and Mr Mills never did anything to her or A (retraction letter).

[12] Mr S provided the retraction letter to defence counsel, Mr Phelps, who disclosed it and filed it in Court.

[13] The trial commenced before Judge Collins and a jury on 7 September 2022.

[14] Ms S's EVI was played to the jury. In her subsequent oral evidence, she was consistent with the retraction letter. She said that her mother had told her to write the panda letter.

[15] Ms S said that she had not wanted to write the panda letter and wrote it only because her mother wanted her to and she did not want to be growled at. She said that her mother was with her when she wrote the panda letter and she did not remember the things she said in her EVI.

[16] The following passage is taken from Ms S's examination-in-chief:

> Q. Do you remember Bruce touching your privates?
>
> A. No.

Q. Do you remember him touching your vagina?

A. No.

Q. Do you remember him swirling with his finger?

A. No.

Q. Do you remember him putting his hand up your shorts?

A. No.

Q. Do you remember him touching [A]?

A. No.

Q. Do you remember him tickling you?

A. Kind of.

Q. Do you remember him watching monster trucks?

A. Mhm.

Q. Do you remember him giving you a back massage?

A. Not really, no.

Q. Do you think it could have happened and you've just forgotten or you simply don't remember?

A. I don't remember.

[17] Later, Ms S confirmed it was her idea to write the retraction letter. We take the following from the Crown's submissions:[5]

> 30. Under cross-examination, [Ms S] accepted the following:
>
> 30.1 It was [the mother] who had "reminded" her that things had happened with Mr Mills, rather than she and [A] telling [the mother] that things had happened.
>
> 30.2 It was [the mother] who wanted her to say Mr Mills put his finger in her vagina. She did so because she did not want her mother getting angry at her.
>
> 30.3 At the time she made the complaint to the Police, she knew [the mother] wanted custody of her and [A].
>
> 30.4 She wrote the retraction letter because she was feeling bad about things and wanted to tell the truth without [the mother] around.

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[5] Footnotes omitted.

31. The key passages of cross-examination were as follows:

Q. And so when you said in there that Bruce Mills has done really bad things to me and [A], does that mean that Mum decided what should go in the letter?

A. Uh-huh.

Q. And so —

A. 'Cos Mum said he was a bad man, so — bad man, so, she told me to put that in the letter with the people.

Q. Yeah, and so would that mean that Mum also told you to put in the letter that "he has put his finger in my private"?

A. Mhm, probably, I can't remember. Think so.

Q. Because Bruce did not put his finger in your vagina, did he?

A. I don't think so.

Q. And so when you said to the redheaded police officer that he put his finger in your vagina, that was not the truth?

A. Mhm.

Q. And is that why in the letter that you recently wrote —

A. Mhm.

Q. — you said "I've said lies"?

A. Mhm, 'cos I think that's what I've said.

Q. So do you think maybe that you said that Bruce put his finger in your vagina because Mum wanted you to say that?

A. Mhm.

Q. And you just wanted to keep Mum happy at the time?

A. Yeah, I didn't want her to growl me off.

32. And further:

Q. And so, when you said to the redheaded police officer that Bruce had touched your privates, that was not true?

A. I don't think it's true.

Q. Because Bruce did not touch your privates did he?

A. No, I don't think so.

Q. And he did not put his hand up your shorts, did he?

> A. No.
>
> Q. And is your letter, that you wrote recently, is that because you were feeling bad about things?
>
> A. Uh-huh.
>
> Q. And you wanted to tell the truth?
>
> A. Without Mum around.

[18] Mr Phelps applied to Judge Collins, following Ms S's evidence, for the charges against Mr Mills to be dismissed pursuant to s 147 of the Criminal Procedure Act 2011. The Judge declined the application, finding there was sufficient evidence upon which the jury could reasonably convict Mr Mills if, despite Ms S's retraction, they believed her EVI represented the truth.[6] In the absence of the jury, but in the presence of Mr Mills, the Judge made comments said to have been influential to Mr Phelps and to Mr Mills in the subsequent decision for Mr Mills to neither give nor call evidence. We adopt the Crown's summary:

> 35. However, his Honour did note that [Ms S's] EVI "would be right at the end of the least compelling interviews [he had] seen". He also described the retraction letter as "a complete recantation of the allegations", and noted that, although [Ms S] could possibly be said to be equivocal in her evidence in court, in reality she had resiled from the allegations in her EVI. Finally, his Honour made a final observation that, in his view, although there was sufficient evidence to go to the jury, it was an extremely weak Crown case.

[19] The trial resumed and Ms S's mother gave evidence. Again, adopting the Crown's description:[7]

> 36. As above, [the mother] gave evidence concerning the circumstances of the initial disclosure to her and her husband, and the second disclosure resulting in the report to the Police.
>
> 37. [The mother]'s evidence was that she was not aware that [Ms S] had written the panda letter, and not seen it before the trial.
>
> 38. Under cross-examination, [the mother] agreed that only she had gone away over Halloween in 2019 and she had left [Mr S] at home with the children.
>
> 39. Mr Mills' trial counsel, Mr Phelps, also put to her the sequence of events concerning the break-up of her marriage with [Mr S], which

[6] *R v Mills* [2022] NZDC 17379.
[7] Footnotes omitted.

> she agreed with. She agreed that she had not mentioned the disclosure by [Ms S] and [A] prior to the break-up in the affidavits filed in the Family Court proceedings, although she maintained that the disclosure had occurred.
>
> 40. [The mother] denied that she had told [Ms S] to write the panda letter, or what to write in it.
>
> 41. She accepted Mr Mills had accused her of having an affair, and being "annoyed" at him, but denied wanting to get revenge. She also admitted that, while the girls were in her care she had told them bad things about [Mr S], including that "dad has bad men friends". She also admitted that she "maybe" had adult conversations with her daughters and admitted talking about alleged abuse in front of other parents and children at their school.

[20] The mother was cross-examined extensively on whether she had asked Ms S to write the panda letter. Although she equivocated at times, her final position was a denial that she had asked Ms S to write the letter. The mother also denied she had instigated Ms S's complaints against Mr Mills.

[21] The officer-in-charge, Detective McGregor, gave evidence that Mr Mills exercised his right to silence after consulting a lawyer. But the detective said that when the allegations were put to him, Mr Mills responded, "no friggin … way, I wouldn't do that". He also said that Mr Mills acknowledged that he had been a babysitter for the children and that, on one occasion, had Ms S on his knee. He told the detective that he believed that the mother had instigated the disclosures.

[22] Mr Phelps prepared for the trial on the basis that Mr Mills and Mr S might very well give evidence. To that end, he prepared briefs of evidence and prepared Mr Mills and Mr S to give evidence.

[23] Mr Mills was briefed to deny the allegations, to say that he was babysitter to Ms S on only one occasion (18 February 2020) and that, on that occasion, at Ms S's request, he massaged her head while she sat on a pillow on his lap.

[24] Mr S's brief of evidence is summarised in the Crown's submissions:

> 48. In his brief of evidence, [Mr S] relevantly stated as follows:
>
> 48.1 Mr Mills did not babysit the children at all in 2019. In particular, he did not babysit on Halloween in 2019. Instead

[the mother] had gone away and [Mr S] had stayed with the children.

48.2 [Ms S] had never disclosed to him that Mr Mills had sexually abused her. If she had, he would have acted on the allegations.

48.3 The first he became aware of the allegations was when he read about [them] in the Family Court proceedings, but he did not know who they related to.

48.4 In the [period] leading up to trial, he had told [Ms S] to tell the truth.

48.5 When the Police arrived to serve [Ms S] a summons to attend the trial, she had said "I was told to do it". She then went silent, and [Mr S] did not ask her anything else.

48.6 The next day, [Ms S] told [Mr S] that the [allegations] were not true, and went away to her [bedroom] and wrote the retraction letter. He was not there when she wrote the retraction letter.

48.7 He had not forced [Ms S] to recant. He understands that making [Ms S] recant might result in the children being taken out of his [care], and he did not want [that] to … happen.

48.8 He agreed that he had always been sceptical about the allegations given that they were made when [Ms S] was in her mother's care.

The decision not to give or call evidence

[25] Mr Mills and Mr Phelps filed affidavits in the appeal and they gave evidence before us.

[26] Mr Mills, in his affidavit, deposes:

10 On [8] September 2022, after the Crown had closed their case, Mr Phelps came to see me in the cells. This was a relatively brief meeting.

11 He told me I didn't need to give evidence and that [Mr S] didn't need to give evidence. He said that he had done enough with [the mother], and that he didn't want the trial to go over the weekend. He said he had done enough for me to walk free and there was no need for us to testify. I understood this to be [a] direction that neither I nor [Mr S] were to give evidence. I did not understand that I had a choice (i.e. that I could choose not to follow the advice and still give evidence).

12 He asked me to sign two pieces of paper, with four signatures, where he pointed. I did so because I trusted him.

> 13 Mr Phelps did not discuss the pros and cons of me giving and calling evidence or of just [Mr S] giving evidence.
>
> 14 He did not warn me that if I did not give or call evidence, my side of events would not be before the jury.
>
> 15 I wanted to give evidence so that I could repeat my denial under oath in front of the jury and explain the circumstances of the limited times when I did babysit (which was less then what [the mother] had stated).

[27] Later, he deposes:

> 18 I trusted Mr Phelps and believed him when he told me not to give or call evidence and that I would walk free. I did not understand that it was my decision to make, and that I could give evidence and call [Mr S] to give evidence, despite his advice.

[28] In his oral evidence, Mr Mills explained to Ms Vear, counsel for the appellant, that the meeting with Mr Phelps to which he refers in paragraphs 10 and 11 of his affidavit occurred in the adjournment after Detective McGregor had given evidence and was the only meeting he had with Mr Phelps that day.

[29] In cross-examination before this Court:

(a) Mr Mills confirmed that he knew he did not have to make a decision prior to trial whether to give evidence; he could make that decision at the end of the Crown's case.

(b) He confirmed he had received the advice contained in paragraph three of a document prepared pre-trial by Mr Phelps headed, "Final Written Instructions – Bruce Timothy Mills":

> 3. I have been advised that I do not have to call or give evidence. I understand this. I did not give a formal statement to the police other than saying "no friggin way, I wouldn't do that, I know what it's like to be abused". A draft brief of evidence has been prepared for me and I have been briefed to give evidence in the event that I decide to do so. At this stage I will give evidence.

(c) Mr Mills retracted an assertion that Mr Phelps told him not to give evidence:

> Q. Well, I put it to you that he didn't tell you not to he advised you it wasn't a good idea but left the decision to you. Do you accept that?
>
> A. Yes, I accept that. I didn't know any difference.

(d) Mr Mills agreed that after Ms S and her mother had given evidence, the Crown case was not looking good.

[30] The cross-examination then turned to handwritten instructions which Mr Phelps had referred to in his affidavit as having been prepared by him and signed by Mr Mills recording Mr Mills' instructions on his decision not to give or call evidence:[8]

> Instructions to Counsel
>
> I, Bruce Timothy Mills, confirm my instructions to my counsel as follows
>
> (i) The Crown case has now concluded and I must decide if I give or call evidence.
>
> (ii) I have been briefed to give evidence and it was anticipated that I will give evidence in my trial.
>
> (iii) The position has changed given the way the evidence has come out.
>
> (iv) I have discussed with Mr Phelps as to whether I will give evidence or call evidence. We have discussed the pros and cons and I am aware it is a decision for me.
>
> (v) I confirm that ~~I do~~/do not want to give evidence.
>
> (vi) I confirm that ~~I do~~/do not wish for [Mr S] to be called to give evidence given the way the evidence has emerged.
>
> [Signature]
>
> B T Mills
>
> 08/09/2022

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[8] Where "I do" has been crossed out at (v) and (vi), Mr Mills' signature appears immediately above the crossing out.

[31] Surprisingly, Mr Mills said that he had not signed the instructions. He said that Mr Phelps had given him "some bits of blank paper" and he signed where Mr Phelps pointed. Mr Mills said that Mr Phelps told him he (Mr Phelps) would fill the paper out later.

[32] In re-examination, Mr Mills reiterated that he followed Mr Phelps' advice and that Mr Phelps told him not to give evidence and said that Mr S was not to give evidence.

[33] Mr Phelps' affidavit deposes to two meetings with Mr Mills on 8 September 2022 to discuss the issue of giving and calling evidence. The first was during the luncheon adjournment which followed immediately after Judge Collins declined the s 147 application for dismissal. He deposes:

> 30. During the luncheon adjournment I met with Mr Mills and suggested to him that we would need to seriously consider and discuss whether, considering [Ms S's] evidence, it was in his interests to give or call evidence. I indicated to Mr Mills that I was thinking he should not be giving or calling evidence, but we should review this again when the Crown case concluded.

[34] The second meeting was after the mother and Detective McGregor had given their evidence and the Crown had closed its case. Mr Phelps obtained an adjournment from Judge Collins to take instructions from Mr Mills on his election.

[35] Mr Phelps deposes he told Mr Mills that while he could give evidence, there was not much he could add which would further assist his case. There was a discussion of the advantages and disadvantages. Mr Phelps denies he told Mr Mills he had "done enough" for him to "walk free". He deposes that he does not speak like that and is careful not to promise a client any particular outcome.

[36] Mr Phelps deposes:

> 41. Rather, I advised Mr Mills of my view: the Crown case had been undermined and his giving evidence would only serve to give the Crown an opportunity to resuscitate the case against him. For example, I told him that the Crown would rehearse their closing through their cross-examination including putting to him all the things that [Ms S] got right in her interview (including sitting in his lap and getting a massage), the regularity of the babysitting (and creating an

> inconsistency with [the mother] over the frequency), an exploration of his knowledge and involvement of the retraction and the lack of a motive for her to make this up.
>
> 42. In relation to [Mr S], I told Mr Mills that calling [Mr S] would allow the Crown to cross-examine him on any involvement he had in preparing [Ms S's] retraction letter and on his general lack of cooperation with the police investigation. Both topics would only be unhelpful to the defence case. Whereas the evidence to that point was helpful to the defence: my interpretation of [Ms S's] evidence was that [Mr S] was not involved in preparing her retraction letter.

[37] Mr Phelps deposes further:

> 46. But, as I do with all clients, I explained to him that giving or calling evidence was a decision for him to make. I believed Mr Mills understood this. He had played a very proactive role in preparing the trial and was very engaged in the process. I did not place him under any pressure to sign the instructions and there was ample time for him to talk through any misunderstandings or matters of concern with me.

[38] And, as to preparedness to call evidence:

> 51. I would have called Mr Mills to give evidence if Mr Mills had told me he wanted to give evidence. I would have had no difficulty doing so:
>
> 51.1 I had gone into the trial prepared to call defence evidence;
>
> 51.2 Briefs of evidence had been drafted for Mr Mills and [Mr S];
>
> 51.3 I had practiced the evidence with Mr Mills and [Mr S] before the trial;
>
> 51.4 I have had clients give evidence against my advice in previous cases where they want to give evidence.

[39] In his oral evidence-in-chief, Mr Phelps said that at the end of the discussion he had with Mr Mills during the luncheon adjournment, the position was that the final decision on election would be made after the close of the Crown's case.

[40] Mr Phelps said he further discussed the matter with Mr Mills during the afternoon adjournment, something to which he had not adverted in his affidavit.

[41] Mr Auld, for the Crown, pointed out to Mr Phelps that according to the courtroom log, the final adjournment for Mr Phelps to take instructions took about 12 minutes. Mr Phelps said he was under no time pressure and that the taking of

instructions was the culmination of the decision-making process following the two earlier discussions.

[42] In cross-examination, Mr Phelps reiterated there had been three meetings with Mr Mills that afternoon and that Mr Mills was wrong to say there was only the one after the end of the Crown case.

[43] Mr Phelps agreed that when he met with Mr Mills after the end of the Crown case, he had the firm view that Mr Mills should not give or call evidence. He agreed also that this was not based on any impression that either Mr Mills or Mr S would be bad witnesses.

Discussion

[44] We have set out the events, and summarised the competing evidence about them, leading to Mr Mills' election not to give or call evidence at some length. There are two reasons for this. The first is that a decision whether or not to give evidence is a fundamental trial decision. If there is error then, generally, there will be a miscarriage of justice.[9] The second is that it is necessarily an intensely fact-specific inquiry for an appellate court deciding whether there was such an error.

[45] As this Court said in *Weston v R*:[10]

> [25] It follows that the decision whether or not to give evidence is for the defendant to make him or herself, and that the obligation on counsel is to advise the defendant so that, in the relevant circumstances, that decision is a properly informed one. That is, one that considers in the particular circumstances of a defendant's trial the potential benefits and risks associated with the defendant giving evidence.[11]

[46] In *Bullock v R*, this Court recited applicable legal principles set out in the Crown's submissions.[12] It is helpful to do so again:[13]

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9 *Hall v R* [2015] NZCA 403, [2018] 2 NZLR 26 at [65].
10 *Weston v R*, above n 4.
11 *Nightingale v R* [2010] NZCA 473 at [12].
12 *Bullock v R* [2024] NZCA 3.
13 At [37].

104. In terms of defence counsel's duties around their client's election, the following principles can be distilled from the cases:

104.1 Counsel must ensure the defendant can make an informed decision as to whether to give evidence: counsel must "ensure that the client has the necessary information, conveyed in an appropriate and timely way, to make the decision".[14]

104.2 Any advice must take into account not only whether the defendant will be a good witness but whether the defendant's case can be effectively advanced without his or her testimony.[15]

104.3 While counsel may recommend a course of action, it must be made clear the defendant is free to reject that advice.[16]

104.4 Where there were reasonable grounds for the defendant's election not to give evidence, then ordinarily there will be no miscarriage.[17]

104.5 If the client acquiesced in counsel's advice not to go into the witness box it would be difficult to show that any miscarriage of justice resulted.[18] Indeed if it is asserted that counsel ought to have advised their client to give evidence (as is effectively the submission here), the test has been described as whether "the circumstances in their entirety [required] counsel to advise [the accused] that evidence should be given because otherwise conviction was inevitable".[19]

104.6 In practice, where there is an allegation that there is a miscarriage of justice relating to the election the appellant should state the substance of the evidence they would have given.[20] The absence of such evidence tells against the success of this type of appeal.[21]

104.7 Failure to prepare a brief is a departure from best practice only and does not lead inevitably to the conclusion that there has been a miscarriage of justice.[22] Relevant to this inquiry is whether trial counsel understood the defendant's version of

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14 *Tarring v R*, above n 4, at [26].

15 *Chambers v R*, above n 4, at [15].

16 *Nightingale v R*, above n 11, at [12].

17 *Gosnell v R* [2014] NZCA 217, [2014] 3 NZLR 168 at [16]; *Bushby v R* [2017] NZCA 192 at [50]; and *R v Pointon* [1985] 1 NZLR 109 (CA) at 114 per Cooke J ("A mere mistake in tactics in the conduct of the defence does not of course afford ground for a new trial.… An accused who has acquiesced in his counsel's advice not to go into the witness box himself or not to call other witnesses will usually have great difficulty in showing any miscarriage of justice on that account.")

18 *W (CA702/2010) v R* [2011] NZCA 529 at [55(c)] citing *R v Pointon*, above n 17, at 114, and *R v Sungsuwan* [2005] NZSC 57, [2006] 1 NZLR 730 at [45].

19 *R v Timmins* CA250/02, 23 June 2003 at [19]; and *Z (CA589/2011) v R* [2013] NZCA 118 at [21].

20 *R v Pointon,* above n 17.

21 At 114.

22 *R v Wilkie* CA6/05, 27 April 2005 at [29].

> events through other means whether by notes of attendances or statements to Police.[23]

[47] Our view of the evidence is that Mr Phelps prepared diligently for trial. He anticipated he would call both Mr Mills and Mr S to give evidence. He prepared briefs of evidence for them. He engaged with them and prepared them to give their evidence.

[48] We find that Mr Phelps fully involved Mr Mills in the trial preparation process. Mr Mills does not suggest otherwise.

[49] The retraction letter came shortly before the start of the trial. It was certainly a development favouring the defence. It caused Mr Phelps to advise Mr Mills that they would have to be flexible on whether he should give or call evidence. There was no error in that.

[50] We find that Mr Mills knew from before the trial that the election decision was for him to make. The trial instructions quoted at [30] reinforce this finding.

[51] The events at trial clearly favoured the defence. Ms S's recanting of her allegations was a major blow to the Crown's case. Mr Phelps did not succeed with his application for a dismissal, but the comments by Judge Collins, a very experienced judge, show how tenuous the Crown's case had become.

[52] After the luncheon adjournment the mother gave evidence. Going by the record, although she did not recant, her performance can be described as lacklustre at best. Detective McGregor's evidence conveyed to the jury Mr Mills' vehement denial of the allegations and his belief that Ms S had made the allegations at the instigation of the mother.

[53] We find that the view formed by Mr Phelps that little could be gained by Mr Mills or Mr S giving evidence was reasonable in these circumstances. And, as Mr Phelps appreciated, there are always risks to a defendant if he exposes himself to cross-examination.

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23 At [16].

[54] We accept Mr Phelps' evidence that he met with Mr Mills on three occasions over the course of the day. It would be contrary to the careful and methodical approach to his role as counsel evidenced by his preparation for, and participation in, the trial if he had not.

[55] We find:

(a) Mr Phelps ensured Mr Mills made an informed decision whether to give or call evidence. His advice included possible positive aspects to giving evidence, but we accept that the focus of the advice was Mr Phelps' firm view that there was little to be gained from giving evidence.

(b) We accept that during the final meeting there was no time pressure. Mr Phelps had obtained an adjournment to take instructions and there was no time limit. We accept Mr Phelps' evidence that no more time was needed because this was the culmination of the earlier discussions.

(c) Mr Phelps had prepared Mr Mills and Mr S to give evidence. He did not give his advice with the view they would be bad witnesses. His view was that there was no advantage to risking Mr Mills and Mr S by exposing them to cross-examination and there was little to be gained by having them give evidence. That was a reasonable view in the circumstances.

(d) Mr Phelps did not advise Mr Mills in the terms to which Mr Mills deposes and which we quote at [26]. That is not language responsible counsel would use and we accept Mr Phelps's evidence that it is not language he would use.

(e) Mr Mills knew whether to give evidence was his decision to make. The final instructions make that clear. We do not accept Mr Mills' evidence that Mr Phelps had him put his signature at indicated places on blank sheets of paper. That would be extraordinary, unnecessary given there

was no time constraint, and against our assessment of Mr Phelps' credibility.

(f) Mr Mills accepted Mr Phelps' advice because he agreed with it.

[56] Ms Vear made submissions on the live issues which, arguably, led to the jury's verdicts. Putting aside the benefit of hindsight, their existence does not mean there were no reasonable grounds for the election not to give evidence. This was certainly not a case where conviction was inevitable if the defendant did not give evidence.

[57] We conclude there was no error on the part of Mr Phelps. Mr Mills regrets his decision because of the outcome of the trial. As this Court observed in *R v Pointon*:[24]

> This Court has to be on guard against any tendency of accused persons who have been properly and deservedly convicted to put the result down, not to the crime committed, but to the incompetence of counsel. *An accused who has acquiesced in his counsel's advice not to go into the witness box himself or not to call other witnesses will usually have great difficulty in showing any miscarriage of justice on that account.*

Result

[58] The appeal is dismissed.

Solicitors:
Public Defence Service | Ratonga Wawao ā-Ture Tūmatanui, Tauranga for Appellant
Te Tari Ture o te Karauna | Crown Law Office, Wellington for Respondent

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24 *R v Pointon*, above n 17, at 114 (emphasis added). See also *Wright v R* [2018] NZCA 589 at [26].