IN THE HIGH COURT OF AUSTRALIA
BRISBANE REGISTRY

No. B55 of 2019

BETWEEN:

HEIDI STRBAK
Appellant

and

THE QUEEN
Respondent

APPELLANT'S SUBMISSIONS

Part I: Certification

1. I certify that this submission is in a form suitable for publication on the internet.

Part II: Statement of the issues presented by the appeal

2. Was there a constructive failure by the Queensland Court of Appeal to exercise its jurisdiction when it declined to reconsider the effect of *R v Miller* [2004] 1 Qd R 548 on the sentencing process?

3. Does a sentencing judge impermissibly infringe on the right to silence by more readily drawing an inference in favour of the prosecution as a result of the defendant not giving evidence on a relevant issue?

Part III: Certification regarding *s 78B of the Judiciary Act 1903*

4. No notice should be given in compliance with s 78B of the *Judiciary Act 1903.*

Part IV: Citation of earlier decisions

5. *R v Strbak* [2017] QSC 299
6. *R v Strbak* [2019] QCA 42

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Part V: Relevant facts

7. A summary of the case is set out at [2] to [10] of the judgment of the Court of Appeal.[1] Briefly put, the relevant facts are as follows.

8. Tyrell Cobb, the four year old son of the appellant, died on Sunday 24 May 2009.[2] The appellant and her partner at the time, Matthew Scown, pleaded guilty to manslaughter.

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9. Mr Scown was sentenced on the basis that he was criminally negligent in failing to obtain medical assistance when the child was obviously and severely unwell.[3] He received a discounted sentence in return for providing a section 13A[4] statement against the appellant.

10. The charge of manslaughter against the appellant was particularised in the alternative:

    a. That the appellant applied force to the child's abdominal area causing his death; or

    b. That she omitted to provide the necessaries of life to her child by failing to seek medical
20 treatment for him.[5]

11. The appellant accepted the alternative basis of the charge, but contested the prosecution's allegation that she inflicted the fatal blows upon the child. The factual contest was reduced to a schedule, in which those allegations which were disputed were identified.[6]

12. The Crown called Mr Scown and six medical professionals[7] to attempt to prove that the appellant actually caused the injuries to the deceased. The appellant did not give evidence at her sentence, although the prosecution tendered her three interviews with police and a written statement she had provided.[8]

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[1] CAB: p 101, l 53.
[2] CAB: p 13, l 1.
[3] CAB: p 13, l 9.
[4] *Penalties and Sentences Act (Qld)* 1992.
[5] CAB: p 101, l 58.
[6] CAB: pp 120 to 126.
[7] CAB: p 144, l 38.
[8] CAB: p 19, l 7.

Part VI: Argument

The constructive failure to exercise jurisdiction:

13. At first instance, the appellant pleaded guilty to the charge on the basis that she was negligent in failing to get medical treatment for the deceased but denied that she caused the injuries.

14. In determining the factual basis on which to sentence the appellant, the learned sentencing judge applied – as his Honour was obliged to – *R v Miller* [2004] 1 Qd R 548 ("*Miller*") and directed himself that the presumption of innocence did not apply and that "in the absence of sworn evidence by the defendant about matters about which she could give evidence and be cross-examined, I can more readily accept prosecution evidence and draw inferences invited by the prosecution".[9] In a Crown case that relied on the acceptance of Mr Scown's evidence, who had a self protective motive to lie and had received a significant discount for giving evidence against the appellant[10], this approach was probably determinative.

15. On appeal to the Queensland Court of Appeal it was contended by the appellant that *Miller* is wrong and should be revisited, because it impermissibly infringes upon a key characteristic of the accusatorial process of criminal justice, specifically, a defendant's right to silence (or immunity from being compelled to give evidence) at sentence.

16. In the lead judgment, McMurdo JA (with whom Fraser JA and Crow J agreed) disposed of this ground of appeal on the basis that "this is not a case which calls for a reconsideration of *R v Miller*".[11] The Court did not engage, at all, with the substantive argument on the point.

The Court of Appeal's reasoning:

17. The ground of appeal seeking to overturn *Miller* was disposed of in three paragraphs. Further concurring opinion is set out at [94] to [97] of the judgment. The brevity of that analysis follows from the threshold finding that *Miller* was not engaged by the circumstances of this case. Specifically, it was held that "this was not a case where the judge was asked to draw an inference more readily which was adverse to the applicant from the fact there was no evidence from her".[12]

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[9] CAB: p 18, l 43.
[10] The learned sentencing Judge's failure to direct himself as to the dangers of relying on Mr Scown's evidence in light of his motive to lie was a further ground of appeal in the Queensland Court of Appeal.
[11] CAB: p 114, l 9.
[12] CAB: p 113, l 53.

18. The premise of that conclusion was that "in this case there was evidence from the applicant by her statements to police. The applicant declined to confirm that evidence from the witness box and be subjected to the testing of that evidence by cross-examination."[13]

19. The conclusion was, with respect, plainly wrong. Not only did the sentencing judge specifically direct himself that he could "more readily accept prosecution evidence",[14] his Honour then drew just such inferences in the absence of evidence from the appellant while giving plain and precise reasons for so doing. There are examples of this process, as sanctioned by *Miller*, at [37], [121], [197] and [208] in the judgment at first instance.

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20. In particular example, the language used by the learned sentencing judge at [121] makes transparent the proper (if applying the principles in *Miller*) process of reasoning adopted by his Honour. He said "whilst Strbak contests the allegation... (the evidence) about such a request is not contradicted by evidence from her". This is a paragraph that cannot be reconciled with the Court of Appeal's conclusion that "this was not a case where the judge was asked to draw an inference more readily which was adverse to the applicant from the fact there was no evidence from her". Paragraph [121] must be read together with his Honour's earlier self-direction at [37] to make such inferences more readily.

20 21. The fact that the appellant gave accounts in interviews to the Police did not disentitle her from the right to silence on sentence. Nor did it, in any way, mean that inferences could be more readily drawn against her because she did not give evidence without recourse to *Miller*, which is the implication of the Court of Appeal's reasoning.

22. The Court of Appeal's refusal to engage further on the point, with the consequent finding that it was not a case that called for a reconsideration of *Miller*, was an error in law. It constituted a constructive failure to exercise the Court's appellate jurisdiction.[15]

23. In a case where there has been "a fundamental mistake at the threshold in expressing, and
30 therefore considering, the legal claim propounded by the applicant, the error will be classified as an error of jurisdiction".[16] The flaw must be so serious as to "undermine the lawfulness of the decision in question in a fundamental way".[17] To the extent that the judgment by the Court

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[13] CAB: p 113, l 51.
[14] CAB: p 18, l 43
[15] *Dranichnikov v Minister for Immigration and Multicultural Affairs* (2003) 214 CLR 496 at [24] – [34], [88].
[16] *Dranichnikov v Minister for Immigration and Multicultural Affairs* (2003) 214 CLR 496 at [87] and also applied in *Goodwin v Commissioner of Police* [2012] NSWCA 379 at [19] – [26], [66], [108].
[17] *Dranichnikov v Minister for Immigration and Multicultural Affairs* (2003) 214 CLR 496 at [88].

of Appeal failed to respond to "a substantial, clearly articulated argument relying upon established facts",[18] an irregularity arises that goes beyond procedural unfairness.

24. In this case, the ground of appeal was disposed of, without any functional consideration, on the basis of a preliminary, brief and inaccurate generalisation about the nature of the evidence and the learned sentencing judge's reasoning. That dismissal precluded any engagement with the substance of the propounded appeal, and denied the appellant a valid determination of the ground of appeal properly raised by her.

10 25. This case plainly engaged *Miller*. The learned sentencing judge considered himself bound by that decision in undertaking the exercise of fact-finding on the evidence. The Court of Appeal denied the appellant's entitlement to have that principle reconsidered.

The right to silence at sentence:

26. Does the presumption of innocence, and its connected rights or privileges, continue to apply during the process of fact finding on sentencing, or is it extinguished at the moment a guilty plea is entered? To put it another way, is – as the Queensland Court of Appeal said in *Miller* – the fact finding process on sentencing more like a civil trial rather than having the hallmarks
20 of the accusatory nature of a criminal trial.

27. For the purposes of sentencing, a finding or admission of guilt is often not the end of the process. Where the evidence – or admission by plea of guilty – which establishes the elements of the offence leaves open the question of the mode and method of the offending, the criminal process is a long way short of its objective: to establish an appropriate sentence, which necessarily involves determining the factual basis for sentencing.

28. At this critical juncture, a defendant remains exposed to punishment by the State for conduct that the State has alleged but not yet proved.

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29. This case is a good example. The difference between negligence by failure to get medical attention for a child and assaulting that child is profound. It is profound both in moral culpability and in likely length of prison sentence. The disputed facts had a major bearing on the appellant's culpability, and the severity of any punishment to be imposed upon her.[19]

30. The process of deciding such disputed facts is – as this case shows – really important. It permits the State to punish in a way that it could not otherwise do and it conclusively determines as a matter of record the nature and extent of criminal offending. Even without

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[18] *Dranichnikov v Minister for Immigration and Multicultural Affairs* (2003) 214 CLR 496 at [24].
[19] In this case, the learned sentencing judge was expressly aware of that likelihood: CAB p 17, l 49.

further analysis, these characteristics powerfully suggest that the protections afforded at trial to an individual concerning the presumption of innocence and the right to silence apply with equal force to contested facts on sentence.

31. This Court has "affirmed the fundamental principle of common law that it is for the prosecution to prove the guilt of an accused person as an 'aspect of the accusatorial nature of a criminal trial in our system of criminal justice'".[20]

32. The companion rule to the fundamental principle is that an accused person cannot be required to testify. The prosecution cannot compel a person charged with a crime to assist in the discharge of its onus of proof.[21]

33. The genesis of these protections was considered in *Lee v New South Wales Crime Commission:*

> "The fundamental principle and the accusatorial system of criminal justice owe much to the reaction of the common law, and the people, to the interrogations conducted by the ecclesiastical courts and the Star Chamber. Those institutions claimed the power to summon a defendant with no warning of the charge to be made against him and to examine him on oath. In a notable case, decided even before the abolition of the Star Chamber, the Court of Common Pleas released a defendant who had been imprisoned for refusing to reply to questions put by the Court of High Commission on the principle that no-one is compelled to give himself away."[22]

34. The current effect of this was, in part, summarised by Hayne and Bell JJ in their joint judgment in *X7 v Australian Crime Commission*, when it was said that "the accusatorial process of criminal justice and the privilege against self-incrimination both reflect and assume the proposition that an accused person need never make any answer to any allegation of wrong-doing".[23]

35. In this respect, the term "right to silence" is used, although the term has broader application, to denote a particular immunity,[24] that is, the "specific immunity of an accused person at trial from being compelled to give evidence or answer questions, which reflects not only the

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[20] *R v Independent Broad-based Anti-corruption Commissioner* (2016) 256 CLR 459 at [44] citing *Lee v The Queen* (2014) 253 CLR 455 at 467.
[21] *Lee v The Queen* (2014) 253 CLR 455 at [33] citing *Lee v New South Wales Crime Commission* (2013) 251 CLR 196 at [20], [159], [176].
[22] *Lee v New South Wales Crime Commission* (2013) 251 CLR 196 at [178].
[23] *X7 v Australian Crime Commission* (2013) 248 CLR 92 per Hayne and Bell JJ at [104].
[24] *X7 v Australian Crime Commission* (2013) 248 CLR 92 at [41].

privilege against self-incrimination, but also the broader consideration that a criminal trial is 'an accusatorial process...'".[25]

36. Just as a prosecution cannot compel a person charged with a crime to testify, so too it cannot compel a person convicted of a crime to assist in the further discharge of the prosecution's onus of proof in relation to the nature and extent of that crime for the purpose of increasing the sentence to be imposed.

The characteristics of the sentencing process:

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37. The rationale of the privilege remains relevant to, and is coextensive with, the exposure of the individual to penalty because of allegations about which the prosecution retains the onus of proof. There are a range of readily conceivable circumstances where allegations made by the prosecution would, if established on the evidence, expose a defendant to substantially greater punishment for the offence to which they have already pleaded guilty.

38. Using this case as an example: just as the Crown had to establish the elements of manslaughter (here by admission through guilty plea) so too it must then establish to the requisite standard, and without assistance from the defendant in discharging that onus, that she applied force to
20 the child's abdominal area causing his death.

39. For that reason, the contest over the latter allegation occurring during sentencing rather than at trial should not displace the defendant's right to silence. This is consistent, as a matter of principle, with this Court's holding in *R v Olbrich*, that "a court may not take facts into account in a way that is adverse to the interests of the accused unless those facts have been established beyond reasonable doubt."[26] As discussed below, in Queensland, this position is modified by statute, but only in respect of the standard of proof, not the onus.

The statutory position:

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40. Section 132C(3) of the *Evidence Act 1977* (Qld) provides that "if an allegation of fact is not admitted or is challenged, the sentencing judge or magistrate may act on the allegation if the judge or magistrate is satisfied on the balance of probabilities that the allegation is true".[27]

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[25] *X7 v Australian Crime Commission* (2013) 248 CLR 92 at [42]. See also *X7 v Australian Crime Commission* (2013) 248 CLR 92 at [105]; *RPS v R* (2000) 199 CLR 620 at [22];
[26] (1999) 199 CLR 270 at [27], and as applied in, for example, *Sawyer-Thompson v R* [2018] VSCA 161 at [117], *Tago v The State of Western Australia* [2018] WASCA 59 at [25]. Affirmed in *Cheung v The Queen* (2001) 209 CLR 1 at [13] and *Filippou v The Queen* (2015) 256 CLR 47 at [64].
[27] Section 132C(4) imports the *Briginshaw* test (*Briginshaw v Briginshaw* (1938) 60 CLR 336) into that fact-finding exercise.

41. Section 132C does not provide any textual basis to extrapolate a limitation on the right to silence from the change that it makes to the standard of proof. Properly characterised, s 132C amends the standard of proof only, not the onus. That the prosecution may establish something by reference to a lesser standard during sentencing does not translate into any part of the burden of that proof shifting to the defendant, by either requiring them to adduce evidence to disprove the allegation or suffering from an adverse inference should she fail to do so.

42. Properly characterised, the process of contested fact-finding at sentence to establish how an offence was committed remains accusatorial.

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43. In *Azzopardi v R*, the majority started from the "fundamental proposition... that a criminal trial is an accusatorial process" and that because of this "a criminal trial differs radically from a civil proceeding".[28]

44. In *R v Olbrich*, the majority observed that "the process by which a court arrives at the sentence to be imposed on an offender has just as much significance for the offender as the process by which guilt or innocence is determined".[29] Decisions as to the type and magnitude of the penalty to be imposed will "be very much affected by the factual basis from which the judge proceeds".[30]

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45. In a dissenting judgment, Kirby J expanded upon the part sentencing plays in wider criminal procedure. His Honour stated that:

> "However, sentencing proceedings remain part of the criminal trial. They do not cease to be so upon the conviction of the accused, either following a jury's verdict or a plea of guilty... It is fundamental that in any such proceeding, without clear statutory authority, the accused person cannot be obliged to prove a fact. The criminal trial process does not cease to be accusatorial after the conviction is recorded and during the proceedings relevant to the determination of the sentence".[31]

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46. Applying the premises from *Olbrich*, changing the standard of proof required at sentence does not lower or remove the need for the constraints that preserve a defendant's right to silence (or, more precisely, immunity from being compelled to give evidence[32]).

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[28] (2001) 205 CLR 50 at [34].
[29] *R v Olbrich* (1999) 199 CLR 270 at [1].
[30] *R v Olbrich* (1999) 199 CLR 270 at [1].
[31] *R v Olbrich* (1999) 199 CLR 270 at [52].
[32] *Azzopardi v R* (2001) 205 CLR 50 at [7]; *X7 v Australian Crime Commission* (2013) 248 CLR 92 per Hayne and Bell JJ.

47. In *Azzopardi,* the majority described the cases in which the failure of an accused to offer an explanation warrants comment from the judge will be "rare and exceptional".[33] Consistent with the rationale expressed in *Azzopardi*, that which can only be rare and exceptional at trial in order to preserve an essential safeguard, cannot then become the norm at sentence simply by virtue of the operation of section 132C.

48. In so submitting, we do not lose sight of the fact that electing to remain silent carries consequences that may naturally flow as a result of that decision.[34] A defendant is not inoculated against all adversity that might stem from exercising the right to say nothing about the facts alleged against them during their trial or sentence.[35] But any direction about a defendant declining to give evidence about an allegation should not become an incursion upon the process of fact-finding such that it undermines a fundamental right.

The reasoning in Miller:

49. In *R v Miller*, Holmes J (as her Honour then was, with Williams JA and Muir J agreeing) considered the effect of s 132C on fact-finding at sentence. Her Honour held that the process in Queensland "is more akin to that in a civil trial than that in the criminal trial which may have preceded it".[36] It followed, according to her Honour, that "there is nothing, in my view, which would constrain a sentencing judge from proceeding, as common sense dictates, more readily to accept prosecution evidence or draw inferences invited by the prosecution in the absence of contradictory evidence".[37]

50. Her Honour also observed that the accused "has a right to maintain his silence and that he cannot be compelled to give evidence on sentence; but those entitlements are not infringed by the drawing of an inference in favour of the prosecution case if he does not do so".[38] It was added by Williams JA that the "presumption of innocence is not relevant" to sentencing.[39]

51. The learned sentencing judge in this case applied *Miller*, by which he was bound, in relation to issues that were within the knowledge of the appellant but about which she had not offered any evidence at sentence or previously.[40]

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[33] (2001) 205 CLR 50 at [68].
[34] *Azzopardi v R* (2001) 205 CLR 50 at [7].
[35] *Azzopardi v R* (2001) 205 CLR 50 at [8].
[36] [2004] 1 Qd R 548 at [26].
[37] [2004] 1 Qd R 548 at [27].
[38] [2004] 1 Qd R 548 at [25] and [27]. See also the formulation incorporating "more readily' referred to in *Weissensteiner v R* (1993) 178 CLR 217 at 227.
[39] *Miller*, at [3].
[40] *R v Strbak* [2017] QSC 299 at [37].

52. The principles in *Miller* form the basis upon which contested sentences are conducted in Queensland. It is respectfully submitted that *Miller* was wrongly decided, in that:

    a. The presumption of innocence, and the privileges and immunities against self-incrimination and the right to silence that follow, should continue to apply at sentence in relation to unproven allegations of fact; and that

    b. These principles should constrain sentencing judges from directing themselves to "more readily" accept prosecution evidence or draw inferences invited by the prosecution in the absence of contradictory evidence.

53. There was no qualification in *Miller* as to "rare" or "limited" circumstances in which such a direction should be acted upon, as the sentencing process was held not to be accusatory. But if the sentencing process is in fact accusatory, then a preparedness to more readily draw an adverse inference or finding of fact as a consequence of exercising the right to silence at sentence is wholly inconsistent with that status. Either sentencing is an accusatory process, in which case the refusal to give evidence should not generally in itself be the subject of inference at all, or it is not, in which case there is could be no bar to any adverse inference being drawn.

54. For the reasons set out above it is submitted that the right or immunity, as a necessary function of the presumption of innocence, should be preserved until the sentence has actually been imposed. This is the position adopted by the Supreme Court in the United States, as analysed in the leading authority of *Mitchell v United States*.[41]

The United States Position:

55. In a 5 to 4 decision,[42] the Supreme Court in *Mitchell v United States* held that in determining facts about the crime after conviction which bear upon the severity of the sentence, a court may not draw an adverse inference from the defendant's silence.[43] The Court rejected the notion that "the entry of the guilty plea completes the incrimination of the defendant, thus extinguishing the privilege [against self-incrimination]".[44]

56. The majority took the view that "where the sentence has not yet been imposed a defendant may have a legitimate fear of adverse consequences", and cited the "basic constitutional principle" that the State which "proposes to convict *and punish* an individual produce the evidence

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[41] 526 US 314 (1999).
[42] Justice Scalia wrote a strong dissent expressing reasons that are similar, in part, to those of the Court of Appeal in *Miller*.
[43] 526 US 314 (1999) at 317.
[44] 526 US 314 (1999) at 325.

against him by the independent labor of its officers, not by the simple, cruel expedient of forcing it from his own lips".[45]

57. In applying the Fifth Amendment, the majority held that it "must accord the privilege the same protection in the sentencing phase of 'any criminal case' as that which is due in the trial phase of the same case". Its reason for doing so was that "the Government often has a motive to demand a severe sentence, so the central purpose of the privilege – to protect a defendant from being the unwilling instrument of his or her own condemnation – remains of vital importance".[46]

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58. The majority also considered the dichotomy between fact-finding in civil and criminal cases, and contrary to the position reached in *Miller*, concluded that there were sound reasons to specifically distinguish them in this context.[47]

59. In a dissenting opinion, Scalia J adopted a different construction of the Fifth Amendment, and wrote that "the threat of an adverse inference does not 'compel' anyone to testify. It is one of the natural (and not governmentally imposed) consequences of failing to testify – as is the fact-finder's increased readiness to believe the incriminating testimony that the defendant chooses not to contradict".[48]

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The Position the United Kingdom and Canada:

60. In the United Kingdom, the Court of Appeal developed a fact-finding process upon conviction and embodied the procedure in the *Criminal Practice Directions* [2013] EWCA Crim 1631. In *R v Underwood,*[49] it was held that where a defendant pleads guilty but disputes the basis of the offending then the court will invite such further representations or evidence as it may require to resolve the dispute.

61. It was added that at such a hearing "the defence advocate should similarly call any relevant
30 evidence and, in particular, where the issue arises from facts which are within the exclusive knowledge of the defendant and the defendant is willing to give evidence in support of his case, be prepared to call him. If he is not, and subject to any explanation which may be proffered, the judge may draw such inferences as he thinks fit from that fact" (at [7]).

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[45] 526 US 314 (1999) at 326.
[46] 526 US 314 (1999) at 329.
[47] See *Mitchell* at 328. Cf. *Miller* at [26].
[48] 526 US 314 (1999) at 331.
[49] [2005] 1 Cr App Rep (S) 90.

62. The Supreme Court of Canada considered the application of the privilege in *R v Shropshire,*[50] and held that "the right to silence, which is fully operative in the investigative and prosecutorial stages of the criminal process, wanes in importance in the post-conviction phase when sentencing is at issue".

63. The Court concluded that it was proper that the absence of evidence from the defendant was taken into account in relation to any attenuating, or mitigating, factors at sentence. However, the Court's judgment did not extend to a specific conclusion as to whether a judge was entitled to make an adverse inference on the failure to offer evidence alone.

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The need to preserve the right to silence at sentence:

64. In *Miller*, Holmes J considered whether the principles established by the decisions of this Court in *Weissensteiner v R*,[51] *RPS v R*[52] and *Azzopardi v R*[53] were relevant to the exercise of fact finding on sentence. In reasoning that they are, her Honour noted that the forensic considerations militating against any adverse inference at trial "are no longer applicable, or at least not to the same degree" on sentence.[54]

65. The analogy between criminal sentencing and a civil trial, as drawn in in *Miller*, finds no
20 support in the text of s 132C.

66. Even after the point of conviction, there remains the prospect at sentence of exposure to allegations of aggravating conduct and increased criminal penalty. As noted above, this case is a example in point, but there are others: whether the possession of dangerous drugs was for personal use or a commercial purpose; whether a criminal act was reckless or deliberate; whether a drug trafficker was a courier or a principal in the enterprise. As discussed in *Mitchell*, the privilege against self-incrimination must be co-extensive with the prospect of an elevated penalty based on further allegations of culpability by the prosecution. Many of the "forensic considerations"[55] in a trial continue to apply at sentence when the facts of the offending are
30 being established, and to the extent they differ in degree, are not such to warrant abrogating a fundamental characteristic of the accusatorial process.

67. The starting point at sentence remains that stated by the majority in *Azzopardi*:

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[50] 102 CCC (3d) 193 at [39].
[51] (1993) 178 CLR 217.
[52] (2000) 199 CLR 620.
[53] (2001) 205 CLR 50.
[54] *Miller*, at [26].
[55] *Miller*, at [25].

> "It is, therefore, clear beyond doubt that the fact that an accused does not give evidence at trial is not of itself evidence against the accused. It is not an admission of guilt by conduct; it cannot fill in any gaps in the prosecution case; it cannot be used as a make-weight in considering whether the prosecution has proved the accusation beyond reasonable doubt. Further, because the process is accusatorial and it is the prosecution that always bears the burden of proving the accusation made, as a general rule an accused cannot be expected to give evidence at trial. In this respect, a criminal trial differs radically from a civil proceeding."[56]

10 68. The distinction drawn between criminal and civil trials by this court in *Azzopardi*, and by the Supreme Court in *Mitchell*, remains essential. Sentencing is not akin to a civil proceeding, and on the basis of a finding to the contrary the result in *Miller* has fundamentally altered the criminal process in Queensland.

69. By "more readily" accepting the prosecution evidence and inferences as a result of the defendant exercising her right to silence about a critical aspect of the alleged offence, instead of merely applying the procedure and test in s 132C, the learned sentencing judge undermined the privilege against self-incrimination.[57] Although his Honour was correct to do so because he was bound by *Miller*, the principle sanctions an inappropriate infringement on the right to
20 silence, or the immunity from being compelled to give evidence, that should be overturned by this Court.

70. Ms Strbak is entitled to have the critical assessment of whether or not she actually caused severe internal injuries to her young son determined without any abrogation of her right to silence or interference with the accusatorial nature of the process of proof.

Part VII: Orders sought

71. Appeal allowed.

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72. The appellant's sentence be set aside.

73. Remit the matter to the Queensland Court of Appeal for determination of the appeal against sentence in accordance with law.

Part VIII: Time estimate for presentation of the appellant's case

74. One and a half hours.

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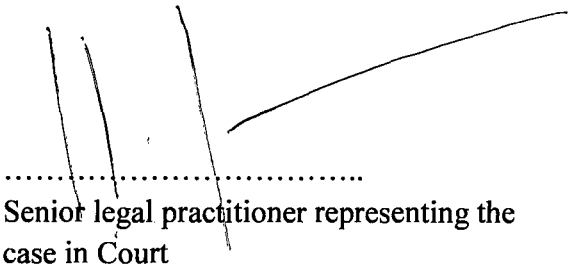
[56] (2001) 205 CLR 50 at [34].
[57] For example, see [121], [197] and [208] of the judgment at first instance.



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Dated: 21 October 2019

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ANNEXURE

LIST OF STATUTES REFERRED TO IN WRITTEN SUBMISSIONS

1. *Evidence Act* 1977 (Qld) s 132C (current as at 27/10/17)

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