IN THE HIGH COURT OF AUSTRALIA
BRISBANE REGISTRY **No. B55 of 2019**

BETWEEN: **HEIDI STRBAK**
Appellant

HIGH COURT OF AUSTRALIA
FILED IN COURT
- 6 DEC 2019
No.
THE REGISTRY CANBERRA

and

10 **THE QUEEN**
Respondent

APPELLANT'S OUTLINE OF ORAL SUBMISSIONS

Part I: Certification

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

20 ### Part II: Outline

The ratio and reasoning of *R v Miller* [2004] 1 Qd R 548

2. The constraints in the "*Weissensteiner* line of authorities" do not apply to fact finding on sentencing because:

    a. It is "self-evident that the presumption of innocence does not apply".

    b. The right to silence – while applying – is not infringed by drawing adverse
30 inferences from its exercise.

3. It follows that a sentencing judge is permitted to more readily "accept prosecution evidence" and "draw inferences invited by the prosecution".

The Court of Appeal was wrong to hold that the sentencing judge did not apply *Miller*

4. The sentencing Judge said he was going to apply *Miller* and then did.

    a. Discussed at [36];

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    b. Applied (at least) at [121], [197], [207] and [208].

The Court of Appeal failed to exercise the jurisdiction it was obliged to exercise

5. A court is obliged to exercise its jurisdiction when lawfully called upon to do so.

6. The ground of appeal called for a reconsideration of *Miller*.

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7. The Court of Appeal wrongly held that it did not and by so doing failed to exercise a jurisdiction it was bound to exercise.

This Court should itself determine whether *Miller* is good law

8. By section 37 of the *Judiciary Act 1993* (Cth) this Court has jurisdiction to "give such judgment as ought to have been given in the first instance".

9. The question of the correctness of *Miller* is important, squarely raised, fully argued and should be determined.

No adverse inference can be drawn from the defendant's failure to give evidence on a disputed fact hearing on sentencing

10. The restriction on drawing adverse inferences from the exercise of the right to silence in a criminal trial stems from the accusatorial nature of criminal proceedings.

11. The protection that the contemporary common law of Australia gives to the bundle of entitlements that flow from that accusatorial nature is firm and yields only to clear statutory diminution.

12. A contested adverse fact hearing on sentencing has the same features as a criminal trial for these purposes:

    a. It is accusatorial;
    b. The right to silence and the privilege against self-incrimination apply;
    c. The consequence is – or at least can be – exposure to criminal punishment for acts not admitted;
    d. The consequence can be at least as significant to a defendant as a finding of guilt per se.

13. This case is the quintessential example.

14. This conclusion is not altered by section 132C of the *Evidence Act 1977* (Qld).

Remedy

15. The appellant should have the question of whether she applied sufficient force to her child's abdomen to transect his duodenum determined without enlisting her silence against her.

Dated: 6 December 2019

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Saul Holt QC and Benjamin Dighton