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

BETWEEN: **HEIDI STRBAK**
Appellant

and

THE QUEEN
Respondent

RESPONDENT'S SUBMISSIONS

Part I:

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

Part II:

2. The first question posed by the appellant reflects the sole ground of appeal in this Court. The second question posed reflects the third ground of appeal pursued in the Court of Appeal.

3. The respondent adopts the first question proposed by the appellant, but submits that is the only issue raised in this appeal. If the appellant does not succeed on that issue, the appeal must be dismissed without any consideration of the appellant's second posed question. If the appellant succeeds on that first issue, the appropriate course is to set aside the order of the Court of Appeal and order that court to consider the third ground raised before it.

4. However if that is incorrect, for the sake of clarity, the respondent suggests that the second question could be more accurately phrased (with the additional words underlined):

> "*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 <u>at the sentence hearing</u> on a relevant issue?*"

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Part III:

5. Notice under section 78B of the *Judiciary Act 1903 (Cth)* is not required.

Part IV:

6. The appellant's chronology is accurate, but the following dates can also be usefully added:

   a. Sunday 24 May 2009 – Tyrell Cobb declared deceased.[1]
   b. Monday 25 May 2009 - appellant twice interviewed by police.[2]
   c. 7 July 2009 – appellant provided statement to police.[3]
   d. 10 July 2015 – appellant interviewed by police.[4]
   e. 11 October 2017 – Scown pleaded guilty to manslaughter on the basis of criminal negligence in failing to obtain medical assistance.[5]

7. The respondent adopts the appellant's statement of relevant facts, save in one respect. The appellant has referred to the fact that Scown and 6 medical professionals were called by the Crown at sentence. For the sake of completeness, it should be noted that the prosecution called a total of 24 witnesses, including those nominated by the appellant (one of those medial witnesses was a defence witness), as well as others including Diane Strbak (the appellant's mother),[6] Danial Allan (the appellant's step-brother),[7] Jason Cobb (the deceased's father),[8] Warwick Spicer (Jason Cobbs' friend),[9] and various neighbours.[10]

8. The appellant's factual summary in her submissions is necessarily brief. It is noteworthy that the reasons of the primary judge, in which the factual allegations and his findings are contained were detailed,[11] and were commended by the appellant below for their "*impressive transparency*".[12]

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1 CAB 102 [7]; CAB 21 [65].
2 CAB 109 [40]; CAB 35 [136].
3 *ibid*
4 *ibid*
5 CAB 102 [4]; CAB 13 [2].
6 CAB 33 [123] - CAB 34 [126].
7 CAB 34 [127] – CAB 35 [135].
8 CAB 30 [106] – CAB 33 [122].
9 CAB 32 [118]
10 CAB 33 [122], CAB 43 [188] – CAB 44 [193].
11 CAB 116 [77].
12 CAB 116 [74]-[75].

Part V:

Overview

9. The respondent's primary position is that, having regard to the narrow allegation of a constructive failure to exercise jurisdiction, as opposed to a simple allegation of error, the appeal must be considered solely on the basis of (broadly) whether the Court of Appeal had understood the ground of appeal before it and engaged with that ground of appeal. If it did those things and still made an error, that will be an error within jurisdiction, and insufficient to allow the appeal.

10. The respondent will then argue that the Court of Appeal correctly analysed the approach of the sentencing judge to fact finding and the drawing of inferences, meaning that the second question posed by the appellant does not truly arise on the matter.

11. Finally, although the respondent contends that the argument is not properly raised and need not be considered in this appeal, in order to respond to an argument of the appellant it will be submitted that the approach of Holmes J in *R v Miller* is correct.

The sole ground of appeal and the first question - Constructive Failure

12. This ground requires consideration of when an intermediate appellate Court should overrule its own earlier decision. A plurality of this Court in *Nguyen v Nguyen*,[13] observed:

> "*The extent to which the Full Court of the Supreme Court of a State regards itself as free to depart from its own previous decisions must be a matter of practice for the court to determine for itself. ...*
>
> *Where a court of appeal holds itself free to depart from an earlier decision it should do so cautiously and only when compelled to the conclusion that the earlier decision is wrong. The occasions upon which the departure from previous authority is warranted are infrequent and exceptional and pose no real threat to the doctrine of precedent and the predictability of the law: see Queensland v. The Commonwealth, per Aickin J.*" (citation omitted)

It is an observation which has been cited favourably in almost all States, in the ACT and in the Federal Court.[14]

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[13] (1990) 169 CLR 245 at 268-269.

13. McHugh J in *Green v The Queen*[15] made the following observations:

> *"[83] It is true that the Court of Criminal Appeal is not strictly speaking bound by its own earlier decisions. But whatever a later Court of Criminal Appeal thinks of one of its earlier decisions, that earlier decision is to be followed, not overruled, unless two conditions are satisfied.*
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> *[84] The first condition is that the later Court must do more than disagree with the earlier decision. The test has been put in various ways. One is that the earlier decision must be "manifestly wrong". Another is that the later Court entertains "a strong conviction as to the incorrectness of the earlier decision". Another way of putting the test lies in the following precept: "Where a court of appeal holds itself free to depart from an earlier decision it should do so cautiously and only when compelled to the conclusion that the earlier decision is wrong". In the Federal Court of Australia the Full Court often uses language like "clearly erroneous" or "plainly wrong". It has been said that those expressions require "the strong conviction of the later court that the earlier judgment was erroneous and not merely the choice of an approach which was open, but no longer preferred" and that they require that the error be one "that can be demonstrated with a degree of clarity by the application of correct legal analysis".*
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> *[85] The second condition is that there be a consideration of various factors stated in relation to the question of this Court overruling its own authorities in John v Federal Commissioner of Taxation. ..."* (citations omitted)

14. Regardless of what process is used, and what precise terminology is adopted in formulating the applicable test, it is clear that an intermediate appellate court will not, and should not, overrule one of its own earlier decisions lightly. It will only do so in the clearest of cases. This is not such a case.

15. Consistent with the principles of *stare decisis*, *R v Miller*[16] could only be overruled in a case where the issue was properly raised. The Court of Appeal (McMurdo JA, Fraser JA and Crow J agreeing, the latter with further observations) unanimously found[17] that this was not a case which called for a reconsideration of *Miller*. They were right to do so; the issue was not properly raised.

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[14] *R v Hood* [2005] 2 Qd. R. 54, [44]; *Gett v Tabet* [2009] NSWCA 76, [277]; *R v BDX* (2009) 24 VR 288, [125] – [152; *Re Shire of Swan; ex parte Saracen Properties Pty Ltd* [1999] WASCA 135, [44]; *Byrnes v Barry* (2004) 150 A Crim R 471, [102]-[103] (ACT); *R v Thaler & Gee (Question of Law Reserved)* [2001] SASC 14, [87], [107], [141]; *Transurban City Link Ltd v Allan* (1999) 95 FCR 553, [28]-[30] (Full Court of the Federal Court).

[15] (2011) 244 CLR 462 at [83]-[85].

[16] *R v Miller* [2004] 1 Qd. R. 548.

[17] CAB 101 [1]; 114 [61]; 119 [97].

16. In *Miller*, the fact in issue on sentence was whether the appellant knew that the complainant was a police officer at the time of the assault. Denial of that subjective consideration was something that was additional to the facts before the Court was a matter that was peculiarly within his knowledge.[18] He had given a rudimentary and entirely self-serving account to a friend. As such it was inadmissible, but was before the sentencing Court and was afforded little if any weight.[19] Thus the appeal in *Miller* was approached on the basis of no admissible evidential account of the appellant being before the Court. By contrast, in the present there were four substantial and admissible accounts before the Court that had been given to police.

10 17. In *Miller*, Holmes J. (as her Honour then was) at [24] framed the issue at hand against a consideration of the underlying rational for the decisions of this Court in *Weissensteiner v The Queen*,[20] *RPS v The Queen*[21] and *Azzopardi v The Queen*.[22] Each of those decisions were concerned with the jury directions, and the permissible process of fact finding by a jury, in a criminal trial where the standard of proof was beyond reasonable doubt. In the following paragraphs she noted the difference between the position at trial and on sentence in Queensland, namely

a. At sentence, the presumption of innocence no longer applies, although the right to silence is maintained. Hence the forensic decisions which might weigh against testifying no longer apply, or at least not to the same degree.

20 b. Given the operation of section 132C of the *Evidence Act 1977 (Qld)*, the task of fact finding on sentence is more akin to a civil trial than in a criminal trial.

c. Where a judge is the fact finder, there is no risk of judicial comment or directions detracting from the jury's role as the tribunal of fact.

18. That led her Honour to conclude that the constraints from the line of authority including *Weissensteiner* did not apply to the acceptance of evidence or drawing of inferences invited by the prosecution "*in the absence of contradictory evidence*".[23]

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[18] See *Azzopardi v The Queen* (2001) 205 CLR 50, [64].
[19] *Miller, supra* at [32].
[20] (1993) 178 CLR 217.
[21] (2000) 199 CLR 620.
[22] *supra.*
[23] *Miller, supra* at [27].

19. The prosecution tendered at sentence the four accounts given by the appellant to police. They were "mixed statements" in that they contained admissions at least to a version of events giving rise to a liability for failing to provide the necessaries of life, if not for the offence of manslaughter on the basis of the breach of duty. Having been tendered at the election of the prosecution, the whole of the contents became evidence in the proceeding.[24] The weight to be given to the different assertions in the interviews was a matter for the tribunal of fact, here the sentencing judge.[25] But the fact remains, as identified specifically by McMurdo JA and Crow J (Fraser JA agreeing) there was contradictory (admissible) evidence before the sentencing judge. Aspects of that evidence were accepted by the sentencing judge, which was not the case in *Miller*. Hence, the correctness of the decision in *Miller* did not arise for reconsideration. In those circumstances, given the caution that must be exercised before a previous decision will be overruled, it was not appropriate to consider overruling *Miller* as the point was not properly engaged.

20. The appellant's use of the administrative law concept of a constructive failure to exercise jurisdiction is unusual in a criminal law context. The authority relied upon by the appellant, *Dranichnikov v Minister for Immigration and Multicultural Affairs*,[26] was an appeal to this Court which had as its genesis an allegation that a statutory administrative tribunal had constructively failed to exercise jurisdiction in a decision making process. That is, the asserted constructive failure occurred in the administrative phase with appeals arising from that decision, whereas here the allegation is a failure on the part of an intermediate Court of Appeal.

21. It is accepted that a failure to have regard to an issue of substance in a dispute before a court may amount to an error of law,[27] or perhaps a failure to afford natural justice or procedural fairness. But it is notable that the appellant has not cited any authority where that precise concept has been applied to the judgment of an intermediate appellate court considering a criminal appeal, as opposed to an application for prerogative relief or an appeal from a failure to grant prerogative relief.

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[24] *The Queen v Soma* (2003) 212 CLR 299, [31].
[25] *Mule v The Queen* (2005) 79 ALJR 1573, [22].
[26] (2003) 77 ALJR 1088.
[27] See for example *Goodwin v Commissioner of Police* [2012] NSWCA 379.

22. Nonetheless, this response will assume that the same principles are applicable to the dispute before this Court, or at least that concepts akin to those principles can be applied in this appeal. The narrow basis on which the appellant advances her case however means that if there has not been a constructive failure to exercise jurisdiction, the appeal must necessarily fail regardless of the merits of the complaint about the decision in *Miller*, even if the failure to reconsider that case was erroneous.

23. In *Re Minister for Immigration and Multicultural Affairs and another; ex parte Miah* Gaudron J stated:[28]

> "*The classic statement as to what constitutes constructive failure to exercise jurisdiction is that of Jordan CJ in Ex parte Hebburn Ltd; Re Kearsley Shire Council. That statement, which has been approved by this Court on numerous occasions identifies a constructive failure to exercise jurisdiction as occurring when a decision-maker "misunderstand[s] the nature of the jurisdiction which [he or she] is to exercise, and ... appl[ies] 'a wrong and inadmissible test' ... or ... 'misconceive[s his or her] duty,' ... or '[fails] to apply [himself or herself] to the question which the law prescribes' ... or ... 'misunderstand[s] the nature of the opinion which [he or she] is to form'*". (citations omitted)

24. The appellant relies on *Dranichnikov* to argue that in refusing to reconsider *Miller,* the Court of Appeal failed to exercise the jurisdiction required of it to it to hear and determine the appeal. It is effectively a reliance on the penultimate basis in the paragraph above. She accepts that the failure to consider the ground must be fundamental to the determination of the appeal before she can succeed.[29]

25. The focus, given the narrow allegation in the ground of appeal, is whether the Court of Appeal failed to engage[30] with the (presently relevant) argument before it, namely that *Miller* should be revisited and overruled. That is what the fundamental failure must be.[31] What was being asked of the Court below was clearly understood.[32] If there was error in failing to reconsider *Miller*, which is not conceded, it is an error within jurisdiction and does not fall within the narrow ground of appeal advanced.

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28 (2001) 206 CLR 57, [80].
29 See paragraph 23 of the appellant's submissions.
30 *MZYPW v Minister for Immigration and Citizenship* [2012] FCAFC 99, per Yates J at [35].
31 *Dranichnikov, supra* per Kirby J at [87].
32 CAB 103 [12]-[13]; CAB 113 [60]-[61]; CAB 119 [97].

The Court of Appeal correctly analysed the approach of the sentencing judge.

26. As noted above, the statement at [27] of *Miller* resulted from an analysis that concluded that the restrictions imposed by the *Weissensteiner* line of authority are not applicable to fact finding on sentence in Queensland. However the passage quoted by the sentencing judge does no more than refer to the fact that the finding of fact or drawing of inference may occur "*more readily*"[33] in the absence of sworn evidence from the accused. It does not refer to the prosecution case being "*strengthened*" by the failure to give evidence,[34] or the "*strengthening*" of the inference of guilt arising from the fact of that failure to testify,[35] each of which signifying that there is evidential value attached to the decision not to testify.

27. The statement, which was recounted by the sentencing judge,[36] in fact re-states what has been described as "*almost a truism*",[37] namely that uncontradicted evidence is easier or safer to accept than contradicted evidence. This was not a case where the sentencing judge used the failure to testify to add weight to or strengthen the fact finding or inferences sought by the prosecution.

28. The sentencing judge comprehensively outlined how he approached the evidential account of the appellant at CAB 36 [138] – [142]. Notably it included the following:

> "*[140] ... I remind myself that my rejection of parts of her evidence or disinclination to accept it when it conflicts with other, more reliable evidence, does not necessarily lead to the conclusion that the contested facts are thereby proven. The onus remains upon the prosecution to prove the contested facts, if it can. In addition, my reservations about the credibility and reliability of parts of her account of events does not automatically bolster the credibility and reliability of certain prosecution witnesses, such as Scown. The evidence relied upon by the prosecution must warrant acceptance in its own right.*
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> *[141] In addition, the decision of Strbak not to give sworn evidence and to verify contentious parts of her statements to police means that I accord that evidence less weight than I would accord it if given on oath, and tested by cross-examination.*" (emphasis added)

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[33] It is also expressed as "more comfortably" at paragraph 28.
[34] *Weissensteiner, supra* per Mason CJ, Deane and Dawson JJ at 228.
[35] *Weissensteiner, supra* per Brennan and Toohey JJ at 237.
[36] CAB 18 [36].
[37] *Weissensteiner, supra* per Mason CJ, Deane and Dawson JJ at 227.

29. The appellant attempts to categorise the approach of the sentencing judge as one of attributing weight to the prosecution allegations via the decision to not testify. The passage above evidences the fact that this is not correct.

30. There were seven occasions in which the judge identified a lack of testimony from the appellant in the course of the reasons for fact finding (apart from when he recognized the judgment in *Miller*) and noted that the parties agreed that was the correct approach.[38] On no occasion did he attribute weight from the fact of the decision to not testify. The Court of Appeal correctly identified that such an approach was not sought from the sentencing judge; rather the judge reasoned that the appellant's account should be given less weight than it would be given if tested by cross-examination.[39]

Miller was correctly decided

31. The respondent will respond to the appellant's submissions as to the correctness of *Miller*, but maintains that the argument need not progress this far.

32. Historically, there has on occasion been some conflation of the rights, privileges or immunities often referred to as the presumption of innocence, the right to silence and the privilege against self-incrimination. They are separate and distinct, although in practice their spheres of operation may, and often do overlap. Further, the right to silence has been said to refer to "*a disparate group of immunities, which differ in nature, origin, incidence and importance, and also as to the extent to which they have already encroached upon by statute.*"[40] Of the categories that Lord Mustill there listed, categories 4 and 6 are of present relevance.

33. Holmes J in *Miller* observed that the presumption of innocence did not apply at a sentence hearing. At trial, one of the mechanisms used to respect the presumption of innocence is the combination of the criminal onus and standard of proof. The lessening of the standard of proof by legislative intervention is an indicator that the presumption does not apply at that stage.

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[38] CAB 33 [121]; 36 [140]-[141]; 44 [197]; 46 [207] & [208]; 50 [232]; 56 [267]; 64 [307].
[39] CAB 113 [61]. See also the passage from the sentencing judge at CAB 36 [141].
[40] *R v Director of Serious Fraud Office; ex parte Smith* [1993] AC 1, per Mustill LJ at 30 cited favourably in *RPS v The Queen* (2000) 199 CLR 620, [22].

34. On sentence in Queensland, there are three presently relevant legislative provisions, namely sections 8, 15 and 132C of the *Evidence Act 1977 (Qld)*. ("EA")

35. Section 8(1) of the EA represents a legislative acknowledgement of the first limb of category four of Lord Mustill's aspects of the "the right to silence",[41] which may also incorporate aspects of "the right (or privilege) against self-incrimination". It applies to any "*criminal proceeding*", including sentence hearings. Lord Mustill did not at any point suggest that this aspect of the right to silence applied outside of a trial, so the extension of this right to a sentence hearing must be seen as a legislative intervention rather than a reflection of the common law understanding of the extent of the "*specific immunity*". An aspect of the privilege against self-incrimination is reflected in the second limb of Lord Mustill's fourth category. These aspects of the so-called right to silence and the privilege against self-incrimination are each related to, but separate from, the presumption of innocence.

36. Section 15 of the EA is a legislative intervention that specifically abrogates the privilege against self-incrimination where a defendant in a criminal proceeding elects to testify. It is a statutory encroachment upon the second aspect of Lord Mustill's fourth category. The combined effect of sections 8 and 15 is unsurprising. If it were otherwise a defendant could elect to testify but only be compelled to answer questions that shined favourably on him or her. The privilege against self-incrimination is otherwise a free roaming privilege that is held by all witnesses, regardless of whether they otherwise can exercise a right to silence or not.

37. The respondent accepts that fact finding on sentence may result in a more severe sentence than if another, less blameworthy, set of facts were found to have existed. That was recognized by the sentencing judge in the present matter.[42] When sentencing after trial, a judge is only bound to sentence on a version of events that is consistent with the jury's verdict (including any special verdict that may have been returned). The judge is not bound to sentence on the basis of facts that he or she thinks the jury may have found.[43]

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41 *ibid.*
42 CAB 17 [33].
43 *R v Isaacs* (1997) 41 NSWLR 374 at 377-378; *Cheung v The Queen* (2001) 209 CLR 1, [13]-[14], [36], [161]-[163, [166].

38. Hence the approach taken by the jury, including directions as to how they are to approach and use evidence, does not necessarily bind the sentencing judge on sentence. In the absence of a specific legislative provision or accepted legal principle, there is no reason in principle why a sentencing judge finding the factual basis for sentence is necessarily bound by any directions as to use of evidence that were or would have been given if the matter had proceeded to trial. The application of section 132C of the EA exemplifies that this may be the case, in requiring satisfaction on the balance of probabilities, with *Briginshaw* considerations applying.

39. The appellant has taken specific issue with Justice Holmes' proposition reproduced at 17 a. above.[44] The mere fact that the legislature has intervened[45] to require proof on the lesser *Briginshaw* standard suggests that the presumption of innocence does not apply in sentence proceedings.

40. The suggestion that the presumption of innocence is extinguished on conviction for the offence, rather than for the precise conduct underlying the commission of the offence, is not novel. It is consistent with Article 66 of the *1998 Statute of the International Criminal Court*. **(The Rome Statute)** Australia ratified the treaty and became a party to the International Criminal Court, for practical purposes, effective 26 September 2002.[46]

41. Further, it was noted by de Jersey CJ (without citing authority) in *R v McQuire and Porter,*[47] and is the settled position in Canada.[48] In Queensland the contrary proposition is considerably diluted by the lesser standard of proof attaching to proof of aggravating facts by the prosecution by virtue of section 132C of the EA.

42. The presently relevant aspect of the right to silence is a product of the presumption of innocence. Lord Mustill in *Serious Fraud Office* had confined the existence of the "right" at common law of the right to silence to the trial itself, consistent with the proposition that the presumption of innocence is extinguished after trial. The legislative encroachment in Queensland effected by sections 8 and 15 of the EA does

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[44] See paragraph 30 of the appellant's submissions.
[45] Since the decision of the Queensland Court of Appeal in *R v Morrison* [1999] 1 Qd. R. 397.
[46] *International Criminal Court Act 2002 (Cth)* and *International Criminal Court (Consequential Amendments) Act 2002 (Cth)*.
[47] (2000) 110 A Crim R 348, [42].
[48] *R v Shropshire* 102 CCC (3d) 193 at [41] and [42]; *R v St-Cloud* [2015] 2 S.C.R. 328 at [111] and [117]. The proposition is also consistent with the recently passed *Human Rights Act 2019 (Qld)*. The relevant provision, section 32(1) has been proclaimed to commence on 1 January 2020.

not affect the proposition that the presumption of innocence was extinguished in this case, and in *Miller*.

43. The appellant has also taken specific issue with Justice Holmes' proposition reproduced at 17 b. above.[49] The reasons that her Honour reached that conclusion are self-evident from the judgment, but it must be emphasized that her conclusion was that the fact finding on sentence was more akin to that in a civil trial. She did not consider them to be completely analogous.

44. The respondent adopts her Honour's reasoning in reaching that conclusion. The extinguishing of the presumption of innocence is a significant reason for reaching the conclusion. It is one of the major distinguishing features between a civil and criminal trial, as is the standard of proof. Comments in *Azzopardi* and other cases emphasizing the difference between civil and criminal hearings[50] were necessarily made in the context of a criminal trial where both of those features were prominent, and at the usual criminal standard. They are therefore of little assistance.

45. Once it is accepted that the presumption does not apply, considerations militating against an expectation that an accused in a criminal trial would testify to challenge evidence presented against them disappear, or are at least considerably lessened.[51] The lesser standard of proof, the lack of a presumption of innocence and the consequences that flow from that are key indicia that sentencing in Queensland is more akin to a civil trial or hearing.[52]

46. That does not mean that the right or privilege against self-incrimination does not apply; it clearly does. But it is a right which may be exercised or waived at the instance of the possessor; the accused. Either decision, that is to testify or not, may have consequences. That does not mean that the right/privilege has been eroded, it is just the consequence of that decision.[53] Exercising the right will often have, as a minimum, the following outcomes:

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[49] See paragraphs 26, 65 and 68 of the appellant's submissions.
[50] See paragraph 66 of the appellant's submissions.
[51] *Miller, supra* at [25] presumably referring to *RPS, supra* at [33]-[34] and *Azzopardi, supra* at [212]-[214].
[52] See Holmes J in *Miller, supra* at [26].
[53] *Weissensteiner, supra* per Mason CJ, Deane and Dawson JJ at 229; *Azzopardi, supra* per Gleeson CJ at [8]-[9].

a. The evidence adduced in the prosecution case will not be challenged by any sworn evidence from the accused, with the consequence that the prosecution case may be more readily accepted. This is not a consequence of the drawing of any inference but simply the result of the overall state of the evidence; and

b. Any account of the accused admitted into evidence will not be sworn nor tested by cross-examination, with the consequence that the tribunal of fact may legitimately not afford it the same weight as contrary sworn evidence which has been so tested;[54]

and at trial, depending on the state of the evidence, the finding of fact or inference sought by the prosecution may be strengthened by the exercise of the right.

47. The appellant does not suggest that the *Weissensteiner* line of authority is wrongly decided. She accepts therefore that in appropriate circumstances, the fact or inference sought by the prosecution may be strengthened by the exercise of the right against self-incrimination. Her issue is with the proposition that it may more readily occur in the context of a sentence hearing, and that accordingly the use of principle is not necessarily limited to rare circumstances.[55] For reasons already discussed, it is submitted that process of reasoning did not in fact occur in this matter, but if it did there was no error.

48. There is precedent for the position that the fact of silence may be put to different uses, or prohibited from particular uses, in the course of a criminal trial. For example, the pre-trial exercise of the right to silence cannot be used to infer a consciousness of guilt,[56] but the exercise of that same right during trial may, in certain circumstances, permit a strengthening of the factual inference sought by the prosecution on the basis of the *Weissensteiner* line of authority. This, perhaps subtle, distinction was noted and accepted by three members of the Court in *Weissensteiner*,[57] whilst two other members considered that the fact that a pre-trial exercise of the right to silence occurs in circumstances which are not amenable to judicial supervision, whilst the exercise of that right during the trial was amenable to

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[54] *Mule v The Queen, supra.*
[55] See paragraph 53 of the appellant's submissions.
[56] *The Queen v Petty; The Queen v Maiden* (1991) 173 CLR 95, especially per Mason CJ, Deane, Toohey and McHugh JJ at 99.
[57] *Weissensteiner, supra* per Mason CJ, Deane and Dawson JJ at 228.

judicial supervision was an important distinction.[58] The adoption of the less restrictive test proposed by Holmes J is not inconsistent with the different uses that can be made of silence by an accused person.

49. Integral to the appellant's argument is reliance on the majority decision of the US Supreme Court in *Mitchell v United States*.[59] In that case the majority of the US Supreme Court firstly rejected the notion that the entry of the plea of guilty or the defendant's statements at the sentence hearing amount to a waiver of the right to remain silent.[60] The respondent accepts that to be the case in Queensland too. Secondly, the majority noted the distinction between the conduct of civil and criminal cases and concluded that the protection afforded by the Fifth Amendment to the US Constitution should be afforded at all phases of a criminal case[61] and that to allow inferences to be drawn from silence would amount to compelling the defendant to testify.[62] The majority specifically noted the "normal rule" that no adverse inference may be drawn from a defendant's silence in criminal proceedings,[63] indicating that the inferences available in Australia from the *Weissensteiner* line of authority would not normally be permitted in the United States at trial.[64] In a strong dissent delivered by Scalia J, the minority considered that the defendant had the right to invoke the Fifth Amendment privilege, but exposed herself to any inference that might properly flow from that decision once guilt had been established.[65]

50. It should not be though that *Mitchell* is authority for the proposition that silence is completely irrelevant. The majority expressly confined the inability to draw an adverse inference to the finding of "*the specifics of the crime*"[66] and "*the acts of which he is accused*".[67] They declined to determine whether silence bears upon a finding of remorse or acceptance of responsibility for the purposes of downward adjustment of the sentencing guidelines. Lower appeals courts have held that

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58 *Weissensteiner, supra* per Brennan and Toohey JJ at 231.
59 526 US 314 (1999) at 317.
60 *Mitchell v US, supra* at 325.
61 *Mitchell v US, supra* at 328.
62 *Mitchell v US, supra* at 327.
63 *Mitchell v US, supra* at 329-330.
64 In this respect see also *Griffin v California* 380 U.S. 609 (1965) at 614 cited in *Mitchell* at 327-328 and 330.
65 *Mitchell v US, supra* at 331.
66 *Mitchell v US, supra* at 329.
67 *Mitchell v US, supra* at 330.

practical consequences may flow from a decision to invoke the right to silence, notwithstanding *Mitchell* and the Fifth Amendment.

51. In *Lee v Crouse*[68] the 10th Circuit of the US Court of Appeals held that *Mitchell* applied only to the facts of the offending conduct and the lower court did not err in drawing an adverse inference from the failure to submit to a psychological evaluation for the purposes of determining the likelihood of future offending and amenability to rehabilitation. Similarly, in *United States v Boothe*[69] the 6th Circuit agreed that *Mitchell* applied only to "*the risk of enhancement of his sentence*". In *United States v Constantine*[70] the 10th Circuit held that the failure to testify may mean that a defendant is unable to carry the burden he or she carries of proving an entitlement to "*downward departure (from sentencing guidelines)*".

52. The position in the United Kingdom is as outlined in *R v Underwood*,[71] and outlined at paragraphs 61-62 of the appellant's outline. It is consistent with the approach of Holmes J in *Miller*.

53. In Canada, it is not permissible for the tribunal of fact in a trial "*to use the failure to testify as a piece of evidence contributing to a finding of guilt beyond reasonable doubt where such a finding would not exist without considering the failure to testify*".[72] In an earlier case it was said that "*[i]t is not so much that the failure to testify justifies an inference of guilt; it is rather that it fails to provide any basis to conclude otherwise*".[73] It is submitted this is a particularly apposite statement to the approach of the sentencing judge in the present matter, which was correctly understood by the Court below. A case in which the same approach, albeit at trial on fact finding, was adopted as it was here can be found in *R v Hall*.[74]

54. On sentence in Canada, section 724(3)(d) and (e) of the Canadian Criminal Code[75] requires that the sentencing court must be satisfied of a disputed fact on the balance of probabilities unless it is an aggravating fact in which case it must be established by the prosecution beyond reasonable doubt. This might suggest that adverse

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68 451 F. 3d 598; [2006] USCA10 171 at [34].
69 335 F. 3d 522; [2003] USCA6 316 at [14].
70 263 F. 3d 1122; [2001] USCA10 222 at [27].
71 [2005] 1 Cr App R 13, [7].
72 *R v Noble* [1997] 1 SCR 874 at 925 and see also at 927.
73 *R v Lepage* [1995] 1 SCR 654 at 670-671, cited favourably in *Noble* at 925-926.
74 83 O.R. (3d) 641 (2007).
75 *Criminal Code*. R.S.C., 1985, c. C-46.

inferences could not be drawn from silence at sentence, but the Court in *Noble* did not mention nor criticize the observations made in the earlier case of *R v Shropshire*[76] where it was observed that "*the right to silence ... wanes in importance in the post-conviction phase when sentencing is at issue*",[77] that previous recognition of the extension of certain procedural rights to sentencing proceedings did not include the right to silence[78] and that the right to silence is a manifestation of the presumption of innocence which no longer existed once the individual had been convicted of the offence.[79] Similar observations have more recently been made by the same Court[80] since the decision in *Noble*, suggesting that the restrictions at trial do not apply on sentence.

55. Although the respondent has not yet located any statement of principle from the Canadian Supreme Court dealing with the proposition that an adverse inference may more readily be drawn if the defendant is silent on the issue, a single judge of the Supreme Court of British Columbia has indicated a belief that an adverse inference can be drawn from silence, relying on observations in *Shropshire*.[81]

56. The New Zealand jurisprudence permits the drawing of inferences by the tribunal of fact at trial from the silence of the defendant, depending on the state of the evidence and what inference sensibly arises from the silence.[82] It is accepted that such a direction to the jury is given sparingly.[83] Nonetheless is would be odd if an inference could be drawn by a jury in relation to silence when a response would be expected during the trial phase of a prosecution but could not be drawn during the sentencing phase when the same standard of proof applied to each phase.

57. In that country, the conduct of contested facts hearings on sentence are regulated by section 24 of the *Sentencing Act 2002 (NZ)*, which too requires proof of facts adverse to the defendant by the prosecution beyond reasonable doubt. Prior to the enactment of that provision, the New Zealand Court of Appeal observed that a sentencing judge

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76 102 CCC (3d) 193 (1995).
77 *R v Shropshire, supra* at [39].
78 *R v Shropshire, supra* at [41].
79 *R v Shropshire, supra* at [42].
80 *R v St-Cloud* [2005] 2 S.C.R. 328 at [111] and [117].
81 *R v Doerksen* [2011] BCSC 1912, [32]-[35].
82 *Trompert v Police* [1985] 1 NZLR 357 (cited by the respondent in argument in Weissensteiner, but not cited in the judgment); *R v Gunthorp* [2003] 2 NZLR 433, [38]-[42] and *The Queen v Haig* (2006) 22 CRNZ 814; [2006] NZCA 226 at [101].
83 *The Queen v Haig, supra* at [104](d).

will often be entitled to infer that a firearm used in the course of a robbery was loaded unless the accused or some other witness gave evidence to the contrary.[84] No subsequent authority has been located doubting the continuing correctness of that decision.

Part VI:

58. Not applicable.

Part VII:

59. The respondent anticipates that about an hour may be required to present oral argument.

Dated 14 November 2019.

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[84] *R v Moananui* [1983] NZLR 537, 543.