IN THE HIGH COURT OF AUSTRALIA
BRISBANE REGISTRY **No. B 55 of 2019**

BETWEEN: **HEIDI STRBAK**
Appellant

and

10 **THE QUEEN**
Respondent

RESPONDENT'S OUTLINE OF ORAL ARGUMENT

Part I:

1. We certify that this outline is in a form suitable for publication on the internet.

Part II:

20 2. It has long been recognized that a fact finder may have regard to the lack of evidence from a defendant to explanation or deny allegations, when such an explanation or denial can reasonably be expected. The history of that recognition was traced in the various judgments in *Weissensteiner v The Queen* (1993) 178 CLR 217. Subsequent cases, especially *Azzopardi v The Queen* (2001) 205 CLR 50 identified limitations on the occasions when comment by a trial judge to the jury will be appropriate. None of those cases were concerned with fact finding on sentence in Queensland.

3. The decision in *R v Miller* [2004] 1 Qd. R. 548, was concerned with that scenario. The judgment of Holmes J (as her Honour then was) made a number of
30 observations (at [24]-[26]) concerning the differences between sentencing in Queensland and the conduct of a trial before concluding (at [27]) that the limitations imposed by the *Weissensteiner* line of authority do not restrict the fact finding process on sentence in Queensland.

4. However, the manner in which the sentencing judge both extracted the principle from *Miller*, and the manner in which dealt with the fact the appellant did not testify on the sentence hearing demonstrates that he did not apply *Weissensteiner* style reasoning to the fact finding process.

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5. The sole ground of appeal alleges that the Court of Appeal constructively failed to exercise its jurisdiction, by declining to reconsider one of its own decision in *R v Miller* [2004] 1 Qd. R. 548.

6. The Court of Appeal has power to overrule its own previous decisions, but will not do so lightly.[1] A constructive failure to exercise jurisdiction will not be established merely because the Court of Appeal did not undertake a detailed analysis of *Miller*.

7. In fact, the Court of Appeal here correctly analysed the approach taken by the sentencing judge to the fact that the appellant did not testify at the sentence hearing, and correctly considered that the present case was not one which called for a reconsideration of *Miller*. (CAB 113 – 114 [61]) If the Court was in error in so concluding, which is not conceded, it was an error within jurisdiction and the pleaded ground of appeal must fail.

8. The respondent submits that the resolution of that point is sufficient to dispose of the appeal to this Court.

9. However, in response to the appellant's submissions, it is further submitted that *Miller* was in any event correctly decided.

10. In particular, Holmes J (as her Honour then was) correct to observe:

    a. At sentence, in Queensland, the so-called right to silence is maintained[2] but the presumption of innocence no longer applies.[3] The contrary position in the United States[4] is distinguishable and of no real assistance to the resolution of this issue.

    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. It follows that there can be a legitimate expectation that a party to the proceeding might testify as to matters in dispute, where able.

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[1] *Nguyen v Nguyen* (1990) 169 CLR 245 at 268-269; *Green v The Queen* (2011) 244 CLR 462 at [83]-[85].
[2] See for example section 8 of the *Evidence Act 1977 (Qld)*.
[3] *R v Shropshire* 102 CCC (3d) 193 (1995) at [41]-[42]; *R v St-Cloud* [2015] 2 S.C.R. 328 at [111]-[117]; *R v Underwood* [2005] 1 Cr App R 13, [7]; Article 66 of the *1998 Statute of the International Criminal Court*.
[4] *Mitchell v United States* 526 US 314 (1999)

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.[5] There is also no risk of misuse of the real effect of the decision not to testify.[6]

Dated: 6 December 2019

Michael R. Byrne QC
Counsel

Philip McCarthy
Counsel

[5] *cf Azzopardi v The Queen* (2001) 205 CLR 50, [52].
[6] *supra* at [26].