HIGH COURT OF AUSTRALIA

KIEFEL CJ,
BELL, KEANE, NETTLE AND EDELMAN JJ

HEIDI STRBAK APPELLANT

AND

THE QUEEN RESPONDENT

Strbak v The Queen
[2020] HCA 10
Date of Hearing: 6 December 2019
Date of Judgment: 18 March 2020
B55/2019

ORDER

1. *Appeal allowed.*

2. *Set aside the order of the Court of Appeal of the Supreme Court of Queensland dated 12 March 2019 refusing leave to appeal and in lieu thereof order that:*

   (a) *leave to appeal be granted;*

   (b) *the appeal be allowed;*

   (c) *the sentence imposed by the Supreme Court of Queensland on 18 December 2017 be quashed; and*

   (d) *the proceeding be remitted to the Trial Division of the Supreme Court of Queensland for the appellant to be sentenced according to law.*

On appeal from the Supreme Court of Queensland

Representation

S C Holt QC with B P Dighton for the appellant (instructed by Bamberry Lawyers)

M R Byrne QC with P J McCarthy for the respondent (instructed by Director of Public Prosecutions (Qld))

CATCHWORDS

Strbak v The Queen

Criminal law – Sentence – Manslaughter – Where appellant pleaded guilty to manslaughter – Where hearing held to determine factual basis upon which appellant to be sentenced – Where acts comprising offence disputed – Where appellant failed to give evidence at sentencing hearing – Whether sentencing judge applied *R v Miller* [2004] 1 Qd R 548 – Whether sentencing judge drew adverse inferences from appellant's silence in making factual findings – Whether *R v Miller* [2004] 1 Qd R 548 wrongly decided – Whether sentencing judge permitted to more readily draw inferences adverse to appellant.

Words and phrases – "absence of contradictory evidence", "accusatorial proceeding", "adverse inference", "balance of probabilities", "beyond reasonable doubt", "burden of proof", "civil standard", "contested facts", "contradictory out of court statements", "criminal standard", "fact-finding", "failure to give evidence", "*Jones v Dunkel* inference", "plea of guilty", "presumption of innocence", "rare and exceptional circumstances", "right to silence", "sentencing hearing", "standard of proof".

Evidence Act 1977 (Qld), s 132C.

1 KIEFEL CJ, BELL, KEANE, NETTLE AND EDELMAN JJ. Under the common law of Australia, on the trial of a criminal allegation (save in rare and exceptional circumstances), no adverse inference should be drawn by the jury (or the judge in a trial without a jury) from the fact that the accused did not give evidence[1]. The question raised by the appeal is whether the same stricture applies to the resolution of a dispute as to the facts constituting the offence in sentencing. If it does, a further question is whether that position is modified by s 132C of the *Evidence Act 1977* (Qld) ("the Act"), which relevantly provides that, if an allegation of fact is not admitted or is challenged, the sentencing judge may act on the allegation if the judge is satisfied on the balance of probabilities that the allegation is true.

Procedural history

2 By an indictment dated 10 October 2016, the appellant and her partner, Matthew Scown, were jointly charged before the Supreme Court of Queensland with the manslaughter of the appellant's son, Tyrell. Tyrell, who was aged four years and three months, died on the evening of Sunday, 24 May 2009 as the result of blunt force trauma to his abdomen. The injuries were inflicted within 48 hours of the child's death. Scown and the appellant were both alone with Tyrell for intervals during the 48 hours before his death. The fatal injuries were inflicted by one of them.

3 Tyrell was vomiting on Saturday, 23 May 2009. He repeatedly vomited throughout the following day. Despite the fact that Tyrell was apparently severely unwell, neither the appellant nor Scown sought timely medical attention for him.

4 On 11 October 2017, Scown pleaded guilty to the manslaughter of Tyrell and was sentenced on the agreed footing that he was criminally negligent in failing to seek medical assistance for the child.

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1 *RPS v The Queen* (2000) 199 CLR 620 at 632-633 [27]-[28] per Gaudron A-CJ, Gummow, Kirby and Hayne JJ; *Azzopardi v The Queen* (2001) 205 CLR 50 at 75 [68] per Gaudron, Gummow, Kirby and Hayne JJ; *Dyers v The Queen* (2002) 210 CLR 285 at 292 [9] per Gaudron and Hayne JJ, 305-306 [52] per Kirby J, 327-328 [120]-[121] per Callinan J.

5 On 1 November 2017, the appellant pleaded guilty to manslaughter. The matter was set down for a hearing in the Supreme Court of Queensland (Applegarth J) to determine the factual basis on which the appellant was to be sentenced for the offence. The prosecution's primary case was that the appellant inflicted the blunt force trauma that caused Tyrell's death. The prosecution's alternative case was that the appellant omitted to provide the necessaries of life[2] in that she, too, failed to seek medical assistance for the child. The appellant contested that she inflicted the fatal injuries but acknowledged liability for Tyrell's manslaughter on the alternative basis.

6 Scown gave evidence for the prosecution at the appellant's sentencing hearing, in which he denied that he inflicted the fatal injuries. He did not give direct evidence that the appellant inflicted those injuries but his evidence supported the prosecution's circumstantial case that she had done so. The appellant did not give evidence at the hearing. Her version of events was before the court in the form of the answers she gave to the police in three interviews; the first two interviews were conducted on 25 May 2009 and a further interview was conducted on 10 July 2015. She provided an "addendum statement" to the police on 7 July 2009, which was also before the court. In the initial interviews, the appellant said positive things about Scown's relationship with Tyrell. By 2015, she and Scown were no longer on good terms and in her last interview she made statements about him that were critical. However, she did not purport to have witnessed any acts of physical violence or verbal aggression by him towards Tyrell.

7 The hearing, which occupied six days, concluded on 17 November 2017. It was conducted with the assistance of a schedule of agreed and contested facts. On 11 December 2017, his Honour delivered comprehensive reasons for the determination of each of 22 contested facts. At the outset, his Honour explained his approach to fact-finding, stating that "[a] sentencing judge may proceed, as common sense dictates, more readily to accept evidence or draw inferences invited by the prosecution in the absence of contradictory evidence". This statement reflected the principles enunciated by the Court of Appeal of the Supreme Court of Queensland in *R v Miller*[3], which the parties accepted applied to the proceedings.

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2 *Criminal Code* (Qld), s 286.

3 [2004] 1 Qd R 548 at 554 [27].

8 His Honour made findings adversely to the appellant in relation to a number of contested circumstantial facts, taking into account that she had not given contradictory evidence. His Honour concluded that the appellant applied the blunt forces that were a substantial cause of Tyrell's fatal injury. The appellant was sentenced to a term of nine years' imprisonment. After taking into account a period of pre-sentence custody, his Honour ordered that the appellant be eligible for parole on 13 October 2021.

9 The appellant applied for leave to appeal to the Court of Appeal of the Supreme Court of Queensland (Fraser and McMurdo JJA and Crow J) against the sentence, contending, among other grounds, that the sentencing judge erred in having regard to the fact that she had not given evidence and inviting the Court of Appeal to depart from *Miller*[4].

10 McMurdo JA gave the leading judgment in the Court of Appeal. His Honour distinguished *Miller*[5] on the ground that *Miller* holds that a sentencing judge may more readily accept or draw inferences from prosecution evidence that is uncontradicted[6]. In this case, the appellant's contradictory account of events given to the police was in evidence. McMurdo JA said that the sentencing judge merely reasoned that the appellant's evidence was to be given less weight than it would have been given if it had been tested by cross-examination[7]. His Honour observed that this process of reasoning does not derogate from the right to silence[8]. The Court of Appeal found no error in the sentencing judge's findings. Leave to appeal was refused.

11 On 11 September 2019, Bell and Nettle JJ granted the appellant special leave to appeal. By her amended ground of appeal, the appellant contends that the Court of Appeal erred in concluding that the reasoning of the sentencing

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4 [2004] 1 Qd R 548.

5 [2004] 1 Qd R 548.

6 *R v Strbak* [2019] QCA 42 at [60].

7 [2019] QCA 42 at [61].

8 [2019] QCA 42 at [61], citing *Mule v The Queen* (2005) 79 ALJR 1573 at 1578-1579 [20]-[23]; 221 ALR 85 at 92-94.

judge did not involve more readily drawing adverse inferences, and accepting prosecution evidence, by reason of her decision not to give sworn evidence.

12 For the reasons to be given, *Miller*[9] was wrongly decided and, contrary to the analysis below, when the sentencing judge's reasons are read as a whole, it is evident that his Honour applied the principles stated in *Miller* to the determination of at least some contested facts.

13 When sentencing an offender where there is a dispute as to the facts constituting the offence, the judge should not draw an adverse inference by reason of the offender's failure to give evidence save in the rare and exceptional circumstances explained in the joint reasons in *Azzopardi v The Queen*[10]. It follows that the appeal must be allowed, the appellant's sentence quashed and the matter remitted to the Trial Division of the Supreme Court of Queensland for the appellant to be sentenced according to law.

Section 132C

14 Before turning to the sentencing judge's reasons, it is convenient to refer to s 132C of the Act and the analysis of the principles in *Miller*[11].

15 Section 132C relevantly provides:

"**Fact finding on sentencing**

(1) This section applies to any sentencing procedure in a criminal proceeding.

(2) The sentencing judge or magistrate may act on an allegation of fact that is admitted or not challenged.

(3) If an allegation of fact is not admitted or is challenged, the sentencing judge or magistrate may act on the allegation if the

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9 [2004] 1 Qd R 548.

10 (2001) 205 CLR 50 at 70 [52], 73 [61]-[62], 74 [64], 75 [68] per Gaudron, Gummow, Kirby and Hayne JJ; see also at 123 [210] per Callinan J.

11 [2004] 1 Qd R 548.

judge or magistrate is satisfied on the balance of probabilities that the allegation is true.

(4) For subsection (3), the degree of satisfaction required varies according to the consequences, adverse to the person being sentenced, of finding the allegation to be true."

Miller

16 Miller pleaded guilty to assault occasioning actual bodily harm[12]. The prosecution invited the sentencing judge to find that the assault was motivated by Miller's knowledge that the complainant was a police officer[13]. Because the motive for the assault was in issue, the prosecution adduced evidence going to the issue[14]. The complainant gave evidence that Miller and a co-offender had set upon him and that one of them had said "[t]his will teach you cunts for picking on black fellas"[15]. The senior police officer at the watch house when Miller was charged gave evidence that, in the course of the charging process, Miller had said that he would "do it again and that it was his job to sort out coppers"[16]. Miller's former girlfriend, Ms Lambourne, gave evidence that she had seen him in the pool-playing area and cautioned him to behave himself because there was a police officer in the hotel[17]. After the incident she said that Miller had told her that he did not know that the men he was fighting with were police officers and claimed that the assault was provoked by a racial slur[18]. Miller did not give

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12 *R v Miller* [2004] 1 Qd R 548 at 549 [7] per Holmes J.

13 [2004] 1 Qd R 548 at 549-550 [9].

14 [2004] 1 Qd R 548 at 550 [10].

15 [2004] 1 Qd R 548 at 550 [10].

16 [2004] 1 Qd R 548 at 550 [12].

17 [2004] 1 Qd R 548 at 550 [11].

18 [2004] 1 Qd R 548 at 550 [11].

evidence. It was submitted on his behalf that he had no recollection of events because he was intoxicated[19].

17 Section 15 of the *Penalties and Sentences Act 1992* (Qld) provides that, in imposing a sentence, a court may receive any information it considers appropriate. Ms Lambourne's evidence of the statements made by Miller to her was received. The sentencing judge accepted that the statements were made but gave them little weight by reason that they were out of court, self-serving statements[20]. His Honour rejected that the assault was provoked by a racial slur. His Honour was satisfied that Miller knew the complainant was a police officer[21]. Miller sought leave to challenge the finding in the Court of Appeal of the Supreme Court of Queensland.

18 Miller's argument in the Court of Appeal did not contend that the sentencing judge was wrong to give Ms Lambourne's evidence of his statements – including that he did not know the complainant was a police officer – less weight because they were "out of court self-serving statements"[22]. The focus of his challenge was the sentencing judge's statement that, in the absence of evidence from Miller, he was entitled to be "somewhat bold" in drawing inferences that were available on the evidence[23]. His argument was that, in determining factual disputes on sentence, a sentencing judge is not entitled to use the offender's failure to give evidence to reinforce an adverse finding[24]. The issue of whether he knew that the complainant was a police officer, in Miller's submission, was not one on which "failing to offer an explanation at sentence fell

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19 [2004] 1 Qd R 548 at 550 [13].

20 [2004] 1 Qd R 548 at 555 [32].

21 [2004] 1 Qd R 548 at 550 [14].

22 [2004] 1 Qd R 548 at 555 [32].

23 [2004] 1 Qd R 548 at 550 [14].

24 [2004] 1 Qd R 548 at 551 [15].

within the 'rare and exceptional' class of cases referred to in *Azzopardi v R* as warranting comment"[25].

19 Leave to appeal was refused. The analysis in *Miller* proceeds upon the view that the common thread in *Weissensteiner v The Queen*[26], *RPS v The Queen*[27] and *Azzopardi*[28] is that the presumption of innocence underlies consideration of what may be drawn from the accused's failure to give evidence[29]. At the stage of sentencing it was said to be self-evident that there is no longer a presumption of innocence which might be infringed by the expectation that the offender will give evidence[30]. While the offender maintains the right to silence, exercise of the right was held not to be infringed by drawing an inference in favour of the prosecution[31].

20 Holmes J, giving the leading judgment, explained the principles in this way[32]:

> "At the stage at which fact-finding on the sentence occurs, the situation, at least in Queensland, is more akin to that in a civil trial than that in the criminal trial which may have preceded it. The fact-finder is, of course, a judge, not a jury. Although the prosecution still carries an onus, it is, by virtue of s 132C of the *Evidence Act* 1977, to satisfy the sentencing judge on the balance of probabilities, with allowance for the *Briginshaw* standard by requiring a variation of the degree of

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25 [2004] 1 Qd R 548 at 551 [15], citing *Azzopardi v The Queen* (2001) 205 CLR 50 at 75 [68].

26 (1993) 178 CLR 217.

27 (2000) 199 CLR 620.

28 (2001) 205 CLR 50.

29 *R v Miller* [2004] 1 Qd R 548 at 553 [24].

30 [2004] 1 Qd R 548 at 553 [25].

31 [2004] 1 Qd R 548 at 553 [25].

32 [2004] 1 Qd R 548 at 553-554 [26].

satisfaction according to the consequences. In those circumstances the distinction drawn by the majority in *RPS* and *Azzopardi* between criminal and civil trials is no longer valid. Nor, where a judge is himself or herself the fact-finder, is there any risk of detracting from the jury's role as tribunal of fact, of the kind identified in *Dyers* and *Azzopardi*." (footnotes omitted)

21 Nothing, her Honour said, constrains a sentencing judge[33]:

"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".

***Miller* – the parties' submissions**

22 The appellant challenges the characterisation of fact-finding in sentence proceedings under Queensland law as being akin to fact-finding in civil proceedings. Where the evidence at trial, or the admissions inherent in the plea of guilty, leaves open "the mode and method of the offending", she argues, the defendant remains exposed to punishment by the State for conduct that the State has not proved. She proposes her case as a prime example, submitting that the difference between the negligent failure to seek medical attention for a child and the infliction of fatal violence on a child is profound and sounds in the likely length of any sentence. Her essential submission is that criminal proceedings retain their accusatorial character, notwithstanding the entry of a plea of guilty, in relation to the determination of the facts of the offence and, for that reason, the failure to give evidence should not generally give rise to any adverse inference.

23 The respondent adopts Holmes J's reasoning and submits that the characterisation of fact-finding on sentence as being more akin to a civil trial than a criminal one is apt given that, on this analysis, the major distinguishing features between criminal and civil proceedings are the presumption of innocence and the standard of proof. The statements in *Azzopardi*[34], emphasising the distinctive character of criminal proceedings, are concerned with the conduct of

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33 [2004] 1 Qd R 548 at 554 [27].

34 (2001) 205 CLR 50 at 64-65 [34]-[38] per Gaudron, Gummow, Kirby and Hayne JJ.

the trial and, the respondent submits, are of little assistance in the context of post-conviction fact-finding.

24 The respondent calls s 132C in aid, submitting that the fact that the legislature has intervened to provide the lesser civil standard of proof for sentence proceedings suggests that, in Queensland, the presumption of innocence has no application in those proceedings. At the level of common law principle, the respondent observes that, in sentencing following conviction at trial, the judge is only bound to sentence on a version of facts that is consistent with the jury's verdict[35]. There is no sound reason, so the argument goes, to constrain the judge sentencing an offender on a plea of guilty by directions as to the use of evidence that would have been given had the matter proceeded to trial.

25 *Azzopardi*[36] is concerned with the directions given to the jury at a trial at which the accused does not give evidence. Nonetheless, it is clear from the majority's analysis that, save for rare and exceptional cases, it is not open to a judge trying a criminal case without a jury to draw a *Jones v Dunkel* inference[37] against the accused. The question of whether, in determining a dispute as to the facts constituting the offence for the purpose of sentencing, it is open to the judge to draw a *Jones v Dunkel* inference, is not one that this Court has previously addressed. The last-mentioned submission does not assist in answering it: either the drawing of the inference is an available process of reasoning or it is not, and that is so regardless of whether the judge is determining a contested fact or facts following trial or upon a plea of guilty.

The overseas authorities

26 The parties sought to support their respective positions by reference to overseas authority. The appellant relied on the majority's analysis in *Mitchell v*

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35 *R v Isaacs* (1997) 41 NSWLR 374 at 377-378; *Cheung v The Queen* (2001) 209 CLR 1 at 12-13 [13]-[14], 19 [36], 52-53 [161]-[163], [166].

36 (2001) 205 CLR 50.

37 (1959) 101 CLR 298 at 320-321 per Windeyer J.

United States[38], while the respondent looked to the approach adopted in England and Canada, reflected in *R v Underwood*[39] and *R v Shropshire*[40] respectively.

27 *Mitchell* holds that the sentencing court is not to draw an inference adverse to the defendant from his or her silence in determining the facts of a crime following conviction[41]. It is to be noted, however, that the majority's reasons are grounded in the guarantee under the Fifth Amendment of the Constitution of the United States, that no person "shall be compelled in any criminal case to be a witness against himself"[42]. Critical to their Honours' analysis is the conclusion that sentencing proceedings fall squarely within the constitutional expression "any criminal case"[43].

28 By contrast, in *Underwood*, the Court of Appeal of England and Wales held that the sentencing court may draw an inference adverse to the offender with respect to contested factual issues in relation to a matter within the exclusive knowledge of the offender in the event that he or she does not give evidence[44]. It is not apparent that the requirement that the matter be within the exclusive knowledge of the offender is confined to the rare and exceptional category of case illustrated by *Weissensteiner*[45]. Any consideration of the approach adopted in England, however, needs to have regard to the modification of the right to silence effected by the enactment of s 35 of the *Criminal Justice and Public Order Act 1994* (UK), which permits adverse inferences to be drawn from an accused person's silence at trial save in specified circumstances.

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38 (1999) 526 US 314.

39 [2005] 1 Cr App R 13.

40 [1995] 4 SCR 227.

41 (1999) 526 US 314 at 316-317, 328.

42 (1999) 526 US 314 at 327.

43 (1999) 526 US 314 at 328-329.

44 [2005] 1 Cr App R 13 at 182 [7].

45 (1993) 178 CLR 217.

29 In *Shropshire*, the significance of the offender's post-conviction silence arose in the context of the determination to extend the statutory minimum term of parole ineligibility pursuant to the discretion conferred by s 744 of the *Criminal Code* (Can)[46]. Exercise of the discretion required the sentencing judge to consider, among other factors, "the circumstances surrounding the commission of the offence". The sentencing judge took into account Shropshire's unwillingness or inability to explain the reasons for the commission of an apparently senseless killing[47]. Iacobucci J, giving the judgment of the Supreme Court, rejected Shropshire's challenge that the sentencing judge erred in so doing. His Lordship found that Shropshire's silence was "readily assimilable within the 'circumstances surrounding the offence' criterion"[48]. His Lordship went on to express his agreement with the reasons of Goldie JA in the court below 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"[49].

30 The facts of the killing were not in issue and it would seem that Shropshire's silence with respect to his reasons for committing it was treated as a failure to adduce evidence in mitigation. Iacobucci J said that it was not for the sentencing judge "to speculate [as to] what [Shropshire] might have said to mitigate the severity of the offence"[50]. In certain circumstances, such as those presented in *Shropshire*, his Lordship said, it is "proper to take into account the absence of an explanation of attenuating factors"[51]. The decision is at a considerable remove from the present. The issue in this appeal is the significance of the offender's silence to the determination of a dispute as to the act or omission constituting the offence for which a sentence is to be imposed.

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46 [1995] 4 SCR 227.

47 [1995] 4 SCR 227 at 245 [35], 246 [38].

48 [1995] 4 SCR 227 at 246 [38].

49 [1995] 4 SCR 227 at 247 [39].

50 [1995] 4 SCR 227 at 247 [39].

51 [1995] 4 SCR 227 at 247 [40].

Miller wrongly decided

31 To return to *Miller*[52], it will be recalled that the rationale for holding that the line of authority culminating in *Azzopardi*[53] does not apply to fact-finding on sentence is two-fold: the presumption of innocence does not apply and the standard of proof in Queensland is the civil standard[54]. The presumption of innocence and the requirement of proof beyond reasonable doubt are attributes of a criminal trial but the analysis in *Azzopardi*[55], distinguishing the criminal trial from its civil counterpart, proceeds from a more fundamental proposition, which is the accusatorial character of the former. It is because a criminal trial is an accusatorial proceeding in which the prosecution bears the burden of proving the allegations it makes that, as a general rule, there can be no expectation that the accused will give evidence. Absent such an expectation, no inference can be drawn from the choice not to do so[56]. It is also to be noted that the "companion rule", that the accused cannot be compelled to assist the prosecution in the discharge of its onus of proof, is an aspect of the accusatorial nature of the proceeding and not of the standard of proof[57].

32 A plea of guilty is the formal admission of each of the legal ingredients of the offence[58]. For this reason, as the joint reasons in *R v Olbrich* explain, references to the onus of proof in the context of sentencing may be misleading if they are taken to suggest that some general issue is joined between prosecution

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52 [2004] 1 Qd R 548.

53 (2001) 205 CLR 50.

54 [2004] 1 Qd R 548 at 553-554 [25]-[27].

55 (2001) 205 CLR 50.

56 *Azzopardi v The Queen* (2001) 205 CLR 50 at 64 [34] per Gaudron, Gummow, Kirby and Hayne JJ.

57 *Construction, Forestry, Mining and Energy Union v Boral Resources (Vic) Pty Ltd* (2015) 256 CLR 375 at 387-388 [36]-[38] per French CJ, Kiefel, Bell, Gageler and Keane JJ.

58 *Maxwell v The Queen* (1996) 184 CLR 501 at 508-510.

and defence[59]. Nonetheless, where the prosecution seeks to have the court sentence on a factual basis that goes beyond the facts admitted by the plea, and which is disputed, it is incumbent on the prosecution to adduce evidence to establish that basis[60]. Absent contrary statutory provision, the prosecution is required to prove matters on which it relies that are adverse to the interests of the offender to the criminal standard[61]. The adoption of the lesser, civil standard for proof of facts in sentencing under s 132C of the Act says nothing as to onus of proving a fact that is not admitted or is disputed.

33 This Court has acknowledged that the process by which the court arrives at the sentence has as much significance for the offender as the process by which guilt is determined[62]. Here, by her plea of guilty, the appellant admitted that her act or omission substantially contributed to the unlawful death of her son. Her plea was not an admission of inflicting the blunt force trauma that caused Tyrell's death. The plea of guilty to manslaughter, an offence which may be committed in a notoriously wide range of circumstances, did not relieve the prosecution of the obligation to prove the facts of the primary case on which it sought to have the appellant sentenced without assistance from her[63]. There is no principled reason for holding that the determination of whether, as the prosecution alleged, this was a voluntary manslaughter ceased to be accusatorial upon the entry of the plea of guilty. *Miller*[64] was wrongly decided and, to the extent that the sentencing judge determined contested facts applying the principles stated in *Miller* (as his Honour was obliged to do), he erred.

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59 (1999) 199 CLR 270 at 281 [25] per Gleeson CJ, Gaudron, Hayne and Callinan JJ.

60 *R v Olbrich* (1999) 199 CLR 270 at 281 [25].

61 *R v Olbrich* (1999) 199 CLR 270 at 281 [27] per Gleeson CJ, Gaudron, Hayne and Callinan JJ, citing *R v Storey* [1998] 1 VR 359 at 369 per Winneke P, Brooking and Hayne JJA and Southwell A-JA.

62 *R v Olbrich* (1999) 199 CLR 270 at 274 [1] per Gleeson CJ, Gaudron, Hayne and Callinan JJ.

63 *Lee v The Queen* (2014) 253 CLR 455 at 466-467 [32] per French CJ, Crennan, Kiefel, Bell and Keane JJ.

64 [2004] 1 Qd R 548.

Did the sentencing judge apply *Miller*?

34 The respondent adopts McMurdo JA's analysis that the sentencing judge did not draw an adverse inference from the fact the appellant did not give evidence; rather his Honour gave less weight to the appellant's contradictory out of court statements[65]. The respondent draws attention to the sentencing judge's express acknowledgement that the prosecution bore the onus of proving the contested facts of its primary case and that there was a "real difference" between the punishment that the appellant might reasonably expect depending upon whether it succeeded in this endeavour.

35 Critical to McMurdo JA's conclusion as to the sentencing judge's mode of reasoning is para [141] of the sentencing judge's reasons for decision, which appears in a section under the heading "[the appellant's] unsworn evidence". It is appropriate to set out that paragraph and those surrounding it in full:

> "[140] Despite the reservations which I have about [the appellant's] credibility and the reliability of many of the things which she told police, 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 [the appellant] 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.
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> [142] To the extent that there is a conflict between the sworn evidence of Scown and the unsworn evidence of [the appellant], including about the course of events that weekend, I prefer the evidence of Scown. This is not only because it was tested by cross-examination. It is because it accords

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65 *R v Strbak* [2019] QCA 42 at [60]-[61].

> with the medical evidence of Tyrell's probable condition that weekend, including his condition late on Sunday. I also have reservations about the credibility and reliability of [the appellant's] account of events to police because the evidence shows that she lied to police about what she did and where she went that weekend, and in 2015 spoke to her brother, Bradley Allan, about lying to the [Crime and Corruption Commission]."

36 As the appellant submits, this impeccable analysis is directed to the use to be made of the appellant's out of court statements. It does not gainsay that his Honour determined at least some contested facts consistently with the principles set out in *Miller*, which were extracted earlier in his reasons under the heading "[t]he onus of proof, the standard of proof and the degree of satisfaction required". It was under this heading that his Honour stated:

> "The presumption of innocence does not apply. 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."

37 Moreover, on a number of occasions, his Honour stated in terms his acceptance of prosecution evidence, or an inference adverse to the appellant, taking into account her failure to give evidence contradicting the evidence on which the prosecution relied.

38 The determination of contested fact 37 – that the appellant requested Tyrell's father, Jason Cobb, to take Tyrell from her on the weekend of Tyrell's death – provides one example. His Honour stated:

> "Whilst [the appellant] contests the allegation that, over the weekend, she requested Jason Cobb to take Tyrell from her, his evidence and the evidence of Mr Spicer about such a request is not contradicted by evidence from her. In the circumstances, I find contested fact numbered 37 proved."

39 The determination of contested fact 19 – that Scown encouraged the appellant to take Tyrell to hospital (following an injury to his arm at the day-care centre) and the appellant said she would do it later as she wanted time to obtain cannabis from her supplier, Brett Archer – is a second example. His Honour accepted Scown's evidence of this incident, taking into account that:

> "The evidence of Scown, which is uncontradicted by evidence from [the appellant] or any other evidence, is that [the appellant] used to buy cannabis from Brett Archer."

40 The determination of contested fact 38 – that, on the Friday or Saturday night prior to his death, the appellant slapped Tyrell's face leaving a bruise – provides a further example. So, too, does contested fact 39 – that, on the same weekend, when Tyrell vomited, the appellant grabbed his wrist and struck the back of his ribcage as she walked him to his room. These contested facts were referred to as "the slapping incident" and "the frogmarching incident" respectively. His Honour accepted Scown's evidence of each, stating:

> "Scown reported the slapping incident to police soon after the event and I am persuaded that such an incident occurred that weekend when Tyrell either refused to eat or was unable to eat.
>
> [The appellant] did not give sworn, oral evidence denying that such a slapping incident occurred that weekend.
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> ...
>
> I am also persuaded that a day or two before the slapping incident, quite possibly after Tyrell had vomited or was playing with food in his mouth, [the appellant] lost her temper, grabbed him by the wrist, and frogmarched him to his room. This fact is proven by Scown's evidence and is uncontradicted by evidence given by [the appellant]."

41 Tyrell had a scar on his ankle which was consistent with having been caused by the heated end of a cigarette lighter ("the smiley injury"). The smiley injury was at least four to six weeks old. Contested fact 76 was that the appellant caused the smiley injury. There was no direct evidence of the circumstances in which the smiley injury was sustained. His Honour found contested fact 76 proven, stating:

> "[The appellant] had an opportunity over weeks to observe the scar and to inquire of Tyrell how he sustained it. It is probable that she observed the scar when she showered him or on some other occasion. There is no evidence from [the appellant] to displace the probability that she saw the scar. There is no evidence from [the appellant] about how, when and why Tyrell sustained this scar. The circumstantial evidence, together with the absence of evidence from [the appellant], leads me to conclude that she probably caused the 'smiley' injury to her son."

42 There can be no question that, in determining contested fact 76 adversely to the appellant, his Honour was drawing a *Jones v Dunkel*[66] inference as distinct from giving less weight to some contradictory out of court statement.

43 His Honour observed that there was a circumstantial case against each of the appellant and Scown as the person who inflicted the fatal injuries on Tyrell. Each had the opportunity to do so and each had committed at least one act of physical aggression towards him. Despite these common features, his Honour identified important differences in the two cases. These differences included that Scown admitted to having kicked Tyrell in the backside whereas the appellant did not admit to inflicting the smiley injury or to slapping Tyrell. Explaining his ultimate conclusion, his Honour observed:

> "The sworn evidence given about [the appellant] slapping her son's face on the night before he died [contested fact 38], and of previously frogmarching him into his room [contested fact 39], was not contradicted by sworn evidence from her."

44 Notwithstanding his Honour's meticulous review of a large body of evidence, the determination of at least some contested facts adversely to the appellant took into account her failure to give sworn evidence at the sentence hearing. It is not suggested that the case is within the rare and exceptional category in which the trier of fact might properly take such a failure into account[67]. It cannot be said that the findings respecting the appellant's callous failure to seek prompt treatment for Tyrell's arm injury and instances in which she subjected him to physical violence were not material to the ultimate conclusion that she inflicted the fatal injuries. In the circumstances, the appeal must be allowed.

45 The parties are agreed that, in this event, the appropriate order is to remit the matter to the Trial Division. For these reasons there will be the following orders:

1. Appeal allowed.

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66 (1959) 101 CLR 298.

67 *Azzopardi v The Queen* (2001) 205 CLR 50 at 75 [68] per Gaudron, Gummow, Kirby and Hayne JJ.

2. Set aside the order of the Court of Appeal of the Supreme Court of Queensland refusing leave to appeal and in lieu thereof order that leave to appeal be granted, the appeal allowed, quash the sentence imposed by the Supreme Court of Queensland on 18 December 2017, and remit the proceeding to the Trial Division of the Supreme Court of Queensland for the appellant to be sentenced according to law.