SUPREME COURT OF QUEENSLAND

CITATION:	*R v Strbak* [2019] QCA 42
PARTIES:	**R** **v** **STRBAK, Heidi** (applicant)
FILE NO/S:	CA No 6 of 2018 SC No 1643 of 2016
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	Supreme Court at Brisbane – [2017] QSC 299 (Applegarth J)
DELIVERED ON:	12 March 2019
DELIVERED AT:	Brisbane
HEARING DATE:	6 November 2018
JUDGES:	Fraser and McMurdo JJA and Crow J
ORDER:	**Application for leave to appeal refused.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – OTHER MATTERS – PARTICULAR OFFENCES – OFFENCES AGAINST THE PERSON – HOMICIDE – MANSLAUGHTER – EVIDENCE – where the applicant pleaded guilty to manslaughter – where the manslaughter was of the applicant's four year old son – where the particular basis for the applicant's criminal responsibility was disputed – where the applicant admitted guilt on the basis that she failed to provide the necessaries of life by failing to seek medical treatment for her son – where the applicant did not admit that she applied the blunt force trauma that caused her son's death but the primary judge found so – where the case that the applicant inflicted the fatal injuries was entirely circumstantial – where there was also circumstantial evidence that another inflicted the fatal injuries – where that other person gave a s 13A statement – whether the primary judge erred by making a finding of fact that the applicant inflicted the fatal injuries – whether the primary judge erred by reasoning that the probability of the case against the applicant was affected by the relative probability of the case against another person – whether the primary judge erred by failing to approach the evidence of a s 13A witness with the required degree of circumspection

CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – GENERALLY – where the ground of appeal is that the sentencing judge exercised the sentencing discretion on a factual basis which was incorrect – whether the Court of Appeal must not interfere with a primary judge's finding of fact unless the Court concludes that the finding was not reasonably open or that it was the product of legal error – whether the Court of Appeal may interfere with a primary judge's finding of fact where the Court concludes that the primary judge made a mistake with regard to a particular factual finding

Criminal Code (Qld), s 668D, s 668E

Baxter v The Queen (2007) 173 A Crim R 284; [2007] NSWCCA 237, considered
Clarke v The Queen (2015) 254 A Crim R 150; [2015] NSWCCA 232, considered
Filippou v The Queen (2015) 256 CLR 47; [2015] HCA 29, considered
House v The King (1936) 55 CLR 499; [1936] HCA 40, considered
Kentwell v The Queen (2014) 252 CLR 601; [2014] HCA 37, considered
Lacey v Attorney-General (Qld) (2011) 242 CLR 573; [2011] HCA 10, considered
R v Carrall [2018] QCA 355, questioned
R v Miller [2004] 1 Qd R 548; [2003] QCA 404, distinguished
R v O'Donoghue (1988) 34 A Crim R 397, considered
Turnbull v Chief Executive of the Office of Environment and Heritage (2015) 213 LGERA 220; [2015] NSWCCA 278, considered
Willis v The Queen (2016) 261 A Crim R 151; [2016] VSCA 176, considered

COUNSEL: S Holt QC for the applicant
P McCarthy for the respondent

SOLICITORS: Bamberry Lawyers for the applicant
Director of Public Prosecutions (Queensland) for the respondent

[1] **FRASER JA:** I agree with the reasons for judgment of McMurdo JA and the order proposed by his Honour.

[2] **McMURDO JA:** The applicant was sentenced to a term of nine years' imprisonment for the manslaughter of her four year old son, Tyrell Cobb. She pleaded guilty to the offence, but the particular basis for her criminal responsibility was disputed.

[3] Tyrell died as a result of abdominal injuries caused by blunt force trauma. The prosecution alleged that she applied that force or alternatively, that she omitted to

provide the necessaries of life by failing to seek medical treatment for him. The applicant admitted her guilt only upon that second basis. After a six day hearing, the sentencing judge found that the applicant had applied the force which caused Tyrell's abdominal injuries and his death. By this application for leave to appeal, the applicant challenges that finding and says that her sentence should be reduced to a term of six years.

[4] The applicant was charged jointly with Matthew Scown, who at the time was her de facto partner. In October 2017, Scown pleaded guilty to the offence and was sentenced upon the basis that he had caused Tyrell's death by failing to obtain medical assistance for him. He was sentenced to four years' imprisonment which was suspended immediately, his having spent most of that term in pre-sentence custody.

[5] A few weeks later, the applicant pleaded guilty and there followed a lengthy hearing before the sentencing judge, after which his Honour delivered prompt and extensive reasons for judgment.[1] If the judge's critical finding, that the applicant inflicted the fatal blows, is not disturbed, there is no argument that there was some other error in the exercise of the sentencing discretion.

[6] There was no direct evidence that the applicant inflicted the fatal blows. There was evidence, which the judge accepted, that there were episodes in which the applicant acted abusively and aggressively towards Tyrell. But the case that the fatal blows were inflicted by her was wholly circumstantial.

[7] Although the precise timing of the fatal injuries was uncertain, the judge noted that there was "a broad consensus that the initial blunt force injury [or, in the view of one of the medical witnesses, the only blunt force injury] occurred a substantial time before death", which was on Sunday, 24 May 2009 at about 10 pm.[2] There were differing medical opinions as to whether the fatal injuries were caused in only one episode, but the preponderant view was that the injuries were the result of two distinct episodes: one occurring 24 to 48 hours prior to death and the second occurring closer to the time of death and causing a fresh haemorrhage.[3] There was no dispute that death was caused by a transected duodenum with an associated laceration of the mesentery, resulting in leakage of the child's stomach contents and bleeding in the abdominal cavity.[4]

[8] The sentencing judge discussed four possible causes of the critical injuries. One of them was that Tyrell had been injured accidentally, without any assault by any person. This was rejected by the judge, who said that by the time of his death, Tyrell had acquired a large number of injuries and "even an accident-prone child could not have acquired all the injuries which [he] did in the places which he did."[5] His Honour inferred from "the significant number of apparently non-accidental injuries" that Tyrell was physically abused.[6]

[9] Another possibility was that the injuries were inflicted by someone other than Scown or the applicant. There were three persons who were present on the

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1 *R v Strbak* [2017] QSC 299 ("Reasons").
2 Reasons [66].
3 Reasons [7].
4 Reasons [5].
5 Reasons [72].
6 Reasons [85].

weekend of 23 and 24 May 2009 at the house where Tyrell lived with the applicant and Scown, and where the injuries must have been inflicted. They were the applicant, Scown and the applicant's step-brother, Danial Allan. At times each of them was alone with Tyrell in the house. There was evidence from Allan that he was told by Tyrell on that weekend that Scown had punched him in the stomach.[7] The judge rejected that evidence and in that respect, found Allan to be "an extremely unimpressive witness".[8] But it seems that there was no suggestion that there was a real possibility, as distinct from a theoretical one, that it was Allan who killed Tyrell.

[10] Consequently, the judge reasoned that "[t]he evidence narrows the potential sources of the non-accidental injuries, including the fatal injuries, to [the applicant] and Scown."[9] Scown gave evidence in which he denied inflicting the injuries. The applicant did not give evidence and her version of events in which she denied doing so, came from what she told police.

[11] By s 132C of the *Evidence Act* 1977 (Qld), it was for the prosecution to prove that the fatal injuries were caused by the applicant, by satisfying the sentencing judge of that fact on the balance of probabilities, with a degree of satisfaction that was appropriate for the acknowledged consequences to the applicant of that finding. The judge reasoned in the terms of s 132C in finding that the disputed fact was proved to his satisfaction.

The grounds of appeal

[12] The three grounds of the proposed appeal are as follows:

1. the judge erred in his assessment of Scown's testimony by not considering Scown's motive to lie from the fact that he was giving evidence pursuant to an undertaking under s 13A of the *Penalties and Sentences Act* 1992 (Qld);

2. the judge erred in concluding that the applicant inflicted the fatal injury;

3. the judge erred in having regard to the fact that the applicant had not given evidence.

[13] The first and third of those grounds contend that there were errors by the judge in the process of fact finding. The second ground alleges an error in the judge's conclusion, in that the judge should have held that it was not proved that the applicant had caused the fatal injuries.

The nature of the appeal

[14] The Court's jurisdiction here is conferred by s 668D(1)(c) of the *Criminal Code*, which provides that a person convicted on indictment[10] may appeal to the Court, with the leave of the Court, against the sentence passed on the person's conviction. The Court's powers in the exercise of this jurisdiction are conferred by s 668E(3), which provides that if the Court is of the opinion that some other sentence, whether more or less severe, is warranted in law and should have been passed, the Court

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7 Reasons [133].
8 Reasons [135].
9 Reasons [237].
10 Or a person convicted of a summary offence by a court under s 651.

shall quash the sentence and pass such other sentence in substitution for it, and in any other case shall dismiss the appeal.

[15] Referring to the New South Wales equivalent of s 668E(3),[11] in *Kentwell v The Queen*,[12] French CJ, Hayne, Bell and Keane JJ said that the appellate court's authority to intervene under this provision is dependent upon demonstration of error, either a specific error of any of the kinds identified in *House v The King*,[13] or a conclusion of manifest excess or inadequacy of the sentence. In the case of specific error, it is the appellate court's duty to re-sentence unless, in the separate and independent exercise of its discretion, it concludes that no different sentence should be passed.[14] Their Honours there referred to the discussion by Hayne J in *AB v The Queen*,[15] who said that the task of the Courts of Criminal Appeal in hearing appeals against sentences is a limited task and is governed by well-established principles for which it is sufficient to refer to the commonly cited passages in the judgment of Dixon, Evatt and McTiernan JJ in *House*.[16]

[16] In the present case, where it is said that there are specific errors which are the basis for appellate intervention, it is the following passage from *House* which is relevant:[17]

> "If the judge acts upon a wrong principle, if he allows extraneous or irrelevant matters to guide or affect him, *if he mistakes the facts*, if he does not take into account some material consideration, then his determination should be reviewed and the appellate court may exercise its own discretion in substitution for his if it has the materials for doing so."
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> (Emphasis added.)

[17] In *Kentwell*, their Honours accepted the following analysis by Spigelman CJ in *Baxter v The Queen*:[18]

> "The import of [79] of *Simpson* was to ensure that submissions in the Court of Criminal Appeal did not proceed as if the identification of error created an entitlement on the part of an Applicant to a new sentence, for example, by merely adjusting the sentence actually passed to allow for the error identified. That would be to proceed on the assumption that the sentencing judge was presumptively correct, when the Court has determined that the exercise of the discretion had miscarried. Section 6(3) is directed to ensuring that the Court of Criminal Appeal does not proceed in that manner, but re-exercises the sentencing discretion taking into account all relevant statutory requirements and sentencing principles with a view to formulating the positive opinion for which the subsection provides."[19]

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11 *Criminal Appeal Act* 1912 (NSW) s 6(3).
12 [2014] HCA 37; (2014) 252 CLR 601.
13 [1936] HCA 40; (1936) 55 CLR 499.
14 [2014] HCA 37; (2014) 252 CLR 601, 615 [35].
15 [1999] HCA 46; (1999) 198 CLR 111 at 160 [130].
16 [1936] HCA 40; (1936) 55 CLR 499 at 504-505.
17 [1936] HCA 40; (1936) 55 CLR 499 at 505.
18 [2007] NSWCCA 237; (2017) 173 A Crim R 284 at 287 [19] cited in [2014] HCA 37; (2014) 252 CLR 601 at 617 [40].
19 Referring to *R v Simpson* [2001] NSWCCA 534; (2001) 53 NSWLR 704 at 720-721 [79].

[18] Their Honours continued:[20]

> "When a judge acts upon wrong principle, allows extraneous or irrelevant matters to guide or affect the determination, *mistakes the facts* or does not take into account some material consideration, the Court of Criminal Appeal does not assess whether and to what degree the error influenced the outcome. The discretion in such a case has miscarried and it is the duty of the Court of Criminal Appeal to exercise the discretion afresh taking into account the purposes of sentencing …"
>
> (Emphasis added. Footnotes omitted.)

[19] There are two points in these passages which are of particular relevance in the present case. The first is that the presently relevant ground of appeal is that the sentencing judge has mistaken the facts, that is to say he has exercised the sentencing discretion upon a factual basis which is incorrect. That is a different thing from saying that the judge has erred in the process of finding the facts. An error in the process of fact finding may explain how a judge has mistaken the facts, but unless the factual basis for the sentence was incorrect, such an error is not a ground for appellate intervention. Consequently, it is the second ground of appeal which must be established.

[20] The second point is that if it is shown that the sentencing judge has mistaken the facts, it is this Court's duty to exercise the sentencing discretion afresh. At one point in his oral argument, counsel for the applicant suggested that if the Court was persuaded that there was an error in the process of fact finding, this Court might remit the matter to a different judge to decide the critical factual question. That course would be impermissible. This Court may quash the sentence only if it finds that the facts were mistaken, which it could do only by identifying the findings which ought to have been made.

[21] In this Court, there is recent obiter dicta that an appeal against sentence is an appeal in the strict sense, in which the Court will not interfere with a judge's finding of fact unless it concludes that the finding was not reasonably open or that it was the product of legal error: *R v Carrall*.[21] The point was apparently not the subject of argument in that case and, in the present case, it was ventilated but counsel for the applicant accepted that it was necessary to demonstrate that the critical finding here was not "rationally or reasonably open". In my respectful view however, the scope for this Court's interference with a factual finding may be more extensive.

[22] Until 2015, the accepted view in New South Wales, under provisions in identical terms to s 668D(1)(c) and s 668E(3), was that as stated in *Carrall*. The scope of the appeal against sentence was according to the judgment of Hunt J in *R v O'Donoghue* as follows:[22]

> "It is important to emphasise that, unlike appeals to the Court of Appeal in civil cases, an appeal to this Court is not by way of rehearing. An appeal which is not by way of rehearing is no more than the right to have a superior court interpose to redress the error of the court below: *A-G v Sillem* (1864) 10 HLC 704 at 724; 11 ER 1200 at 1209; *Victorian*

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20 [2014] HCA 37; (2014) 252 CLR 601 at 617-618 [42].

21 [2018] QCA 355 at [10] per Sofronoff P with whom Jackson and Bowskill JJ agreed.

22 (1988) 34 A Crim R 397 at 401.

> *Stevedoring & General Contracting Co Pty Ltd v Dignan* (1931) 46 CLR 73 at 109. Error may be demonstrated if there is no evidence to support a particular finding, or if the evidence is all one way, or if the judge has misdirected himself. But this Court has no power to substitute its own findings for those of the trial judge. The members of this Court may individually disagree with the findings which were made, but the court cannot for that reason interfere with those findings. It is only where the very narrow basis upon which this Court can intervene in relation to a trial judge's findings of fact has been established that the conviction can be set aside, and then only if the error has led to a miscarriage of justice: see *Merritt and Rosa* (1985) 19 A Crim R 360 at 372-373; *Kyriakou* (1987) 29 A Crim R 50 at 60-61."

[23] However in *Clarke v The Queen*,[23] Basten JA said that this statement, which had been made in the context of a challenge to a finding by a trial judge on a voir dire, should not be applied to a challenge to a factual finding in an appeal against sentence. It is unnecessary to set out all of the reasoning of Basten JA on the question, but two points made by his Honour should be discussed. The first is the relevance of the High Court's judgment in *Lacey v Attorney-General (Qld)* to this question.[24] The question in that case was the nature of an appeal against sentence by the Attorney-General under s 669A(1) of the *Criminal Code* and, in particular, whether it conferred jurisdiction on this Court to vary a sentence only when it was determined that there was an error on the part of the sentencing judge. In holding that the jurisdiction was so limited, the majority (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ) described different classes of appeal, and the distinction between an appeal in the strict sense and an appeal by way of re-hearing.[25] Their Honours noted that by s 671B of the *Criminal Code*, this Court has certain supplemental powers, including the power to receive evidence.[26] They characterised the nature of the jurisdiction conferred by s 669A(1) "as creating an appeal *by way of re-hearing* and conferring appellate jurisdiction to determine only whether there has been some error on the part of the primary judge."[27]

[24] That being the nature of the Court's jurisdiction on an appeal by the Attorney-General against sentence, it is difficult to accept that the scope for appellate intervention is more limited in the case of an appeal under s 668D(1)(c). As was said in *Lacey*, under an appeal in the strict sense, the Court has jurisdiction to determine whether the decision under appeal was or was not erroneous on the evidence as it stood when the original decision was given.[28] But further to the power to receive evidence which is granted by s 671B, more generally there is a power to admit new or fresh evidence which would disclose an error at first instance: *Betts v The Queen*.[29]

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23 [2015] NSWCCA 232; (2015) 254 A Crim R 150 at 158-161 [26]-[36].

24 [2011] HCA 10; (2011) 242 CLR 573.

25 [2011] HCA 10; (2011) 242 CLR 573 at 596-597 [57]-[58].

26 [2011] HCA 10; (2011) 242 CLR 573 at 597 [59]. Although, their Honours noted that those powers were subject to the limitation in s 671B(2) that "in no case shall any sentence be increased by reason of or in consideration of any evidence that was not given at the trial."

27 [2011] HCA 10; (2011) 242 CLR 573 at 597-598 [60] (emphasis added).

28 [2011] HCA 10; (2011) 242 CLR 573 at 596 [57] citing *Victorian Stevedoring & General Contracting Co Pty Ltd v Dignan* [1931] HCA 34; (1931) 46 CLR 73 at 107 and *Builders Licensing Board v Sperway Constructions (Syd) Pty Ltd* [1976] HCA 62; (1976) 135 CLR 616 at 619.

29 [2016] HCA 25; (2016) 258 CLR 420 at 425-426 [10]-[11].

[25] The second point from the judgment of Basten JA is that the more restrictive approach (under which it must be shown that the finding was not reasonably open or was the product of legal error) is not easily reconciled with the relevant ground for appellate intervention as stated in *House v The King*, and recently re-stated in *Kentwell*, namely that the sentencing judge has "mistaken the facts".[30] As Basten JA said, the more restrictive approach would have the result that a factual error could only be found where there is, in effect, "an error of law or something very close to it."[31]

[26] In *Clarke*, Hamill J was inclined to agree with Basten JA, but Garling J did not. The view of Basten JA has not yet been generally accepted in that court: see *Turnbull v Chief Executive of the Office of Environment and Heritage*[32] and *Xiao v The Queen*.[33]

[27] In *Willis v The Queen*,[34] the Victorian Court of Appeal adopted the restrictive view of the scope of the jurisdiction.

[28] In *Turnbull v Chief Executive*, Button J observed:[35]

> "[I]n many, if not most, applications to this Court for leave to appeal against sentence, the subtle difference in meaning between a mistake of fact by a sentencing judge that was material to sentence and a finding of fact that was not open to a sentencing judge will have no effect on the result."

[29] For the reasons that follow, I conclude that even on the less restrictive view favoured by Basten JA, the applicant has failed to demonstrate an error by the judge in making the critical finding, and consequently has failed to establish the only relevant ground of appeal.

The evidence

[30] Many of the facts were agreed and the judge was provided with a schedule setting out what was agreed and what was contested. As the sentencing judge did, I will annex the schedule to this judgment, which will avoid the need for a more comprehensive statement of the relevant facts and circumstances. The contested facts were those which are shaded in the schedule.

[31] As the judge noted, there was no dispute that certain injuries to Tyrell's abdomen caused leakage of the contents of the stomach and bleeding into the abdominal cavity, and that by a combination of peritonitis and haemorrhage there was resultant shock and death.[36] The judge accepted the preponderance of the expert medical opinion, which was that the fatal injuries were the result of two separate applications of blunt force trauma, with the second application causing a fresh haemorrhage. He found that the second trauma probably occurred within hours of

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30 *Clarke v The Queen* [2015] NSWCCA 232; (2015) 254 A Crim R 150 at 160 [32].

31 Ibid cf *Australian Broadcasting Tribunal v Bond* [1990] HCA 33; (1990) 170 CLR 321 at 355-356 per Mason CJ.

32 [2015] NSWCCA 278; (2015) 213 LGERA 220 where Button J (Meagher JA agreeing) adhered to the *O'Donoghue* approach.

33 [2018] NSWCCA 4; (2018) 96 NSWLR 1 at 20-22 [118]-[125], where a court of five judges discussed but did not decide the question.

34 [2016] VSCA 176; (2016) 261 A Crim R 151 at 170 [94].

35 [2015] NSWCCA 278; (2015) 213 LGERA 220 at 225 [31].

36 Reasons [5].

death, whereas the first occurred at least a day, and probably between 24 and 48 hours prior to death.[37] There is no criticism of this part of the judge's reasoning.

[32] Scown's evidence proved, to the judge's satisfaction, many of the contested facts, such as those in paragraphs 17, 19, 25, 29, 38, 39, 40, 41, 42, 45, 49, 55 and 59 of the schedule of agreed and contested facts. Scown gave evidence in which he denied that he inflicted the fatal injuries, which the judge ultimately accepted.[38]

[33] Scown did not testify that he saw the applicant inflicting what must have been the fatal injuries. But he said he observed, in the few days before Tyrell's death, some physical aggression by the applicant towards her son which were the subject of contested facts 38 and 39. Soon after the events in question, Scown told police that on the Friday or Saturday night (the 22nd or 23rd of May), Tyrell was slapped in the face by the applicant leaving a bruise to his face. His evidence before the sentencing judge was that this happened when the applicant and Tyrell were sitting at the kitchen table and Tyrell either vomited or was keeping food in his mouth. Although this evidence was challenged in cross-examination, the judge accepted it and Scown's further evidence that the bruise was the reason given by the applicant for not taking Tyrell to hospital.

[34] The incident which was the subject of contested fact 39, described by the judge as the "frogmarching incident",[39] was found to have occurred a day or two before that slapping incident. The judge accepted Scown's testimony that the applicant lost her temper with Tyrell, grabbed him by the wrist and frogmarched him to his room, at the same time slapping him in the area of his ribs.[40]

[35] An earlier injury, which was demonstrated by the medical evidence, was a scar to Tyrell's leg, referred to in some evidence as a "smiley face" scar. The judge said the evidence convincingly proved that the scar had been caused by the application of the heated metal at the end of a cigarette lighter to the child's leg. The age of the scar could not be precisely quantified, but the judge apparently accepted evidence that it may have been at least four to six weeks old.[41] Tyrell's father gave evidence that when he lived with the applicant, he had seen her inflict such a scar upon herself and the judge found that this evidence was convincing.[42] The judge concluded that it was the applicant who had probably caused this injury to her son.[43]

[36] There had been two incidents on the Saturday in which Tyrell had fallen over. In one of them, Tyrell was with Scown, downstairs from the unit in which they lived, whilst the applicant was upstairs. As Tyrell was coming up the stairs, he fell forwards on the stairs over his stomach. He told his mother that he had fallen and hurt his legs and belly. Scown reported the same incident to her. His evidence was that Tyrell missed a step, tripped and fell forward and ended up lying on the stairs, before getting up and going inside and telling his mother what had happened. The other was in the evening. Scown said that after the applicant went out to obtain cannabis for herself, Scown left Tyrell alone in the shower, whilst he was cooking in the kitchen, and then he heard a bang. Scown went to the bathroom and found

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37 Reasons [7]-[9].
38 Reasons [242].
39 Reasons [167].
40 Reasons [208].
41 Reasons [83].
42 Reasons [225].
43 Reasons [232].

Tyrell on the floor. The judge accepted Scown's evidence about this incident, observing that it was consistent with what the applicant told police was Tyrell's report of the incident to her.[44]

[37] There had been injuries to Tyrell earlier in the month. On 11 May 2009, Tyrell was injured at a child care centre, from which he was collected by the applicant and taken home. When Scown arrived home, the judge found, he encouraged the applicant to take Tyrell to the hospital for a sore arm, which the applicant said she would do later because she wanted to buy some cannabis first. The applicant did take Tyrell to an after-hours medical service later that evening and then to the emergency department of a hospital. He was diagnosed with a possible fracture to his right arm and an arm cast was applied. Then on 14 May 2009, Tyrell's hand was accidentally jammed in a toy box, injuring the skin to a finger, for which he was prescribed antibiotics. A couple of days later, a radiograph showed that Tyrell had an undisplaced fracture at the base of the finger. At the same time the plaster on his arm was removed after an x-ray excluded a fracture. Tyrell was hospitalised for a couple of days.

[38] Evidence was given by Tyrell's father of a telephone call which he received from the applicant on the weekend in question, in which the applicant telephoned and asked him to take Tyrell from her. The judge noted that the father had not mentioned this conversation when he was interviewed by police on the Tuesday after Tyrell's death. But the judge said that this omission was explicable on the basis that he was a grief-stricken father who "may not have suspected the worst of [the applicant]."[45] The judge discussed other evidence which the father had given on the point, at the committal hearing and in a hearing conducted by the Crime and Corruption Commission. The father's evidence was supported by telephone records, including calls which the applicant made from a nearby payphone. The father impressed the judge as an honest witness, from whom the judge could detect no malice directed towards the applicant or Scown.[46]

[39] There was evidence from the applicant's step-mother that when she telephoned the applicant on the Saturday of that weekend, she was told that Tyrell had vomited some clear fluids, and that, when the witness spoke to Tyrell by telephone on the Sunday, he sounded tired. The judge found that the applicant concealed from her the extent of Tyrell's illness, and the bruises and other injuries that he then carried, and that the applicant's withholding of the information from the woman she treated as her mother was suspicious since the step-mother was a nurse from whom the applicant often sought advice.[47]

[40] The applicant's version of events came from her interviews by police on the day after Tyrell's death and further interviews in July 2009 and in July 2015. The judge noted that in her interviews on 25 May 2009, although she told police that she and Scown were not on good terms and said adverse things about him, at no stage did she say that she had seen acts of physical violence or verbal aggression by Scown towards Tyrell.[48]

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44 Reasons [216].
45 Reasons [106].
46 Reasons [114].
47 Reasons [126].
48 Reasons [137].

[41] The judge was unimpressed by the applicant's statements to police. His Honour said that the applicant's account of how ill Tyrell had been did not align well with observations made by Scown and the evidence of the medical experts about how ill Tyrell must have been by late on the Sunday. His Honour noted that her plea of guilty to manslaughter, on the basis that Tyrell was obviously unwell and required urgent medical treatment such that she was criminally negligent in failing to obtain it thereby causing his death, could not be easily reconciled with her statements to police, which tended to minimise how sick Tyrell was on that day.[49] The judge also referred to evidence of an intercepted telephone call, on 11 June 2015, between the applicant and another step-brother, Bradley Allan, in which they discussed what they should say to the Crime and Corruption Commission about this matter and joked about lying about it.[50]

[42] The judge found that by the weekend in question, the applicant had become exasperated by the numerous injuries to Tyrell.[51] When interviewed by police, she recounted what she had said when told by Scown that Tyrell had fallen over in the shower. She told police:

> "I said 'What are we going to bloody do with ya?' They were my words 'cause he, just, the last week, if it hasn't been something, it's been something else. For the last two weeks, if it hasn't been his arm, it's been his finger. If it hasn't been his finger, it's been falling up the stairs. If it hasn't been the stairs, it's been the shower."

[43] About that evidence, the judge said that the passage:[52]

> "conveniently summarises what must have been the accumulated stress and frustration which [the applicant] experienced in the days leading up to Tyrell's death: a trip to the hospital where his arm was placed in a cast; a finger injury which became infected, necessitating admission to hospital for days; a fall up the stairs on the Saturday morning and then a fall in the shower on Saturday evening."

[44] The judge remarked on the decision of the applicant not to give sworn evidence to verify contentious parts of her statements to police as follows, by saying that it meant that "I accord that evidence less weight than I would accord it if given on oath, and tested by cross-examination."[53]

[45] His Honour summarised his view of the evidence from the applicant as follows:[54]

> "To the extent that there is a conflict between the sworn evidence of Scown and the unsworn evidence of [the applicant], including about the course of events that weekend, I prefer the evidence of Scown. That is not only because it was tested by cross-examination. It is because it accords with the medical evidence of Tyrell's probable condition on that weekend, including his condition late on Sunday. I also have reservations about the credibility and reliability of [the applicant's] account of events to police because the evidence shows that she lied

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49 Reasons [138].
50 Reasons [139].
51 Reasons [253].
52 Reasons [254].
53 Reasons [141].
54 Reasons [142].

> 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 CCC."

[46] His Honour added that the applicant's concealment from her step-mother of Tyrell's true condition was "a significant piece of circumstantial evidence in the prosecution case against her."[55]

The circumstantial case against the applicant

[47] The sentencing judge identified seven matters upon which the prosecution relied which were as follows:[56]

1. the infliction by the applicant of non-fatal injuries, including two particular acts of violence observed by Scown and the infliction of the "smiley" burn injury to Tyrell's leg;
2. the applicant's demonstrated aggressiveness towards Tyrell on occasions;
3. the evidence that the applicant was aggressive when not sedated by cannabis, which she had sought but not obtained on that weekend;
4. the exasperation expressed by the applicant in parts of her police interview over recent events involving Tyrell;
5. the fact that she concealed Tyrell's true condition that weekend from both her step-mother and from the child's father when they spoke to her by telephone;
6. the fact that the applicant deliberately refrained from seeking medical assistance for Tyrell, despite his state, and despite Scown's suggestion that she do so;
7. the applicant's unexplained request to the father that weekend that he take Tyrell from her, which was a request which suggested that she "could not handle him".

[48] The judge considered each of those circumstances before concluding that there was a "compelling circumstantial case" that the applicant inflicted the fatal injuries.[57] At the same time, the judge acknowledged that there were some matters which might be said to weigh against the prosecution's case. Those matters included the evidence that Tyrell was well-presented and well-fed when he attended pre-school, the applicant was described by Scown as a good mother, at least when she was using cannabis as a means of addressing her anxiety,[58] and that this was "not a case in which there [was] a lengthy history of physical violence and neglect by a mother of an infant."[59] The judge thought that it was revealing that, with encouragement from Scown, the applicant did seek medical assistance for Tyrell's injuries on 11 and 16 May 2009 and that, by contrast, she did not seek treatment for Tyrell's injuries and his acute and prolonged vomiting on the relevant weekend.[60] The judge inferred that she did not seek treatment on the Sunday because she knew that

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55 Reasons [143].
56 Reasons [243].
57 Reasons [268].
58 Reasons [269].
59 Reasons [245].
60 Reasons [271].

investigation of Tyrell's injuries would implicate her as the person who perpetrated them.[61]

The circumstantial case against Scown

[49] Noting that the applicant carried no burden of proving a case against Scown, his Honour considered the strength of a circumstantial case that Scown inflicted the fatal injury. The elements of that case included an instance where Tyrell was kicked in the backside by Scown in mid-April 2009 and what the judge described as "inconclusive evidence of an open-handed smack" by Scown to Tyrell's head on another occasion.[62] There were also the facts of Scown's aggressive acts towards adults, suspicions that might be held about the shower incident and other accidents, a possibility that the second blunt force trauma to the abdomen occurred when Scown was alone with Tyrell on the Sunday night, and what the applicant's then counsel submitted was the greater propensity of men than women to punch somebody in the stomach. That last circumstance was rejected by his Honour.[63] And as to the suggested aggression by Scown towards Tyrell, his Honour noted that the applicant had told police that Scown treated Tyrell well and that Tyrell liked him.[64]

The judge's assessment of the possibilities

[50] The judge concluded that there was "no compelling case that Scown inflicted the fatal injuries"[65] and that by contrast, the circumstantial case against the applicant was a strong one.[66] His Honour said that the case against Scown was weakened by the compelling circumstantial case against the applicant.[67] His Honour said that he was conscious of the seriousness of concluding that the applicant had inflicted injuries to her son, which included the fatal abdominal injuries, but that he was satisfied that the prosecution had proved its case on the balance of probabilities.[68]

The applicant's submissions

[51] In essence, it is submitted for the applicant that the circumstantial case against her was not a compelling one and that even if it was stronger case than that against Scown, it did not follow that the case against the applicant was proved to the "requisite standard". By that second point, it is contended that this was a case where it was not possible for the prosecution to "rationally exclude Mr Scown as the person who inflicted the fatal injuries", a contention that appears to suggest that the criminal standard of proof is to be applied.

[52] It is submitted that the case against the applicant, taken at its highest, was that she had the opportunity to inflict the injury on the child, and a propensity to do so as indicated by the level of injury on the child. To those factors, it is accepted, it was necessary to add the circumstance that she refused to take the child to hospital over the course of the weekend, concealed her child's true condition from her step-mother and left the unit on the Saturday and Sunday nights in attempts to find

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61 Reasons [272].
62 Reasons [273](2).
63 Reasons [295].
64 Reasons [280].
65 Reasons [296].
66 Reasons [297].
67 Reasons [304].
68 Reasons [310].

cannabis. The relevance of her request to Tyrell's father to take Tyrell because she could not cope with him, is also acknowledged. It is submitted that the only direct evidence of violence by her towards the child, proximate to the weekend in question, was provided by Scown and that, as a s 13A witness, his evidence needed to be treated with great care.

[53] As I have discussed, there were other circumstances which the judge accepted as contributing to the prosecution case, such as the exasperation she expressed in parts of her police interview and the fact that she was aggressive when not sedated by cannabis, which she had been unable to obtain that weekend.

[54] Even if the circumstantial case against the applicant was stronger than that against Scown, it is submitted that it was insufficient to justify the ultimate finding. It is argued that the judge wrongly applied a binary approach by effectively reasoning that, if it was not Scown who inflicted the injuries, it must have been the applicant. It is said that this was impermissible having regard to what the majority of High Court said in *Filippou v The Queen*.[69]

[55] In the appeal against sentence in that case, there was a factual question whether the gun by which the appellant killed the deceased had been brought to the scene by the appellant or by the deceased, the relevance of which was that the moral culpability of the appellant would have been greater if he had brought the gun than if the offences had been wholly spontaneous.[70] Under the relevant legislation in New South Wales, it was for the prosecution to prove any aggravating factor beyond reasonable doubt, and it was for the offender to prove any mitigating factor on the balance of probabilities. The trial judge in that case found that although it was likely that the accused had brought the gun to the scene of the killing, she could not be satisfied of that fact beyond reasonable doubt. Consequently, neither the prosecution nor the accused proved, to the requisite standard (which differed between them), that the gun was or was not brought to the scene by the accused. French CJ, Bell, Keane and Nettle JJ said:[71]

> "Certainly, a sentencing judge must do his or her best to find the facts which determine the nature and gravity of the offending, including the facts which inform the offender's moral culpability. Even so, it is sometimes not possible for the judge to ascertain everything which is relevant, especially where the offender chooses not to offer any evidence on the plea. Where that occurs, the judge must proceed on the basis of which is proved and leave to one side what is not proved to the requisite standard."

Consideration

[56] In the present case, the prosecution was required to prove the critical fact on the balance of probabilities. This was the standard of proof although, according to s 132C, the judge was to have regard to the consequences of the finding for the applicant.

[57] There is no criticism of the judge excluding, as realistic possibilities, that the fatal injuries were the result of accidents or that they were inflicted by some third person.

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69 [2015] HCA 29; (2015) 256 CLR 47.
70 [2015] HCA 29; (2015) 256 CLR 47 at 69 [63].
71 [2015] HCA 29; (2015) 256 CLR 47 at 72 [70].

And although the judge did consider (and rejected) the possibility that the two episodes of blunt force trauma may not have been inflicted by the same person, neither side submitted to the judge or in this Court that this was a real possibility. Consequently, the judge was correct in reasoning that the probability of the case against the applicant was affected by the relative probability of the only realistic alternative, which was that Scown inflicted the fatal injuries.

[58] There is the further consideration that the judge saw and heard Scown's testimony, an advantage not enjoyed by this Court. I am not persuaded that the judge misused that advantage or that, more particularly, he failed to approach Scown's evidence with the required degree of circumspection having regard to Scown's interest as a s 13A witness. The judge conducted a review of the case ahead of the hearing itself, in which he granted counsel access to documents which had been placed in an envelope according to the practice direction for the operation of s 13A. Further, after Mr Scown had given evidence, the judge made a point of placing it on the record that counsel had been given access to that material. There was an extensive discussion which followed, in which the judge expressed disappointment with some media criticism of Scown's sentence because it had not revealed the impact of s 13A. The applicant's counsel reminded the judge that in cross-examination, he had raised with Scown the fact that he had provided a statement for the purposes of obtaining a reduced sentence.

[59] In my conclusion, there is no demonstrated error in the judge's critical finding. It was supported by the circumstantial case with the elements as detailed by the judge, and also by Scown's testimony that he had not inflicted the injuries. All of this made it much more probable than the only other realistic possibility, that Scown had done so.

[60] Lastly, the applicant's argument seeks to have this Court depart from its decision in *R v Miller*.[72] It was there held that a sentencing judge may more readily accept or draw inferences from prosecution evidence which is uncontradicted.

[61] But 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. 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 that there was no evidence from her. Rather, the judge's reasoning was that her evidence should be given less weight than it would be given if tested by cross-examination.[73] Even on a trial, it is not improper for a jury to be instructed that the accused's exculpatory statements made out of court, if tendered by the prosecution, might be given less weight for the reasons that they were not sworn testimony and were given out of court. In *Mule v The Queen*,[74] the High Court said that there was no derogation from the accused's right to silence for the trial judge to point out that the out of court statements in that case were made in the course of a police interview and were not on oath.[75] This is not a case which calls for a reconsideration of *R v Miller*.

Conclusions and order

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72 [2003] QCA 404; [2004] 1 Qd R 548.
73 Reasons [141].
74 [2005] HCA 49; (2005) 79 ALJR 1573 at 1578-1579 [20]-[23].
75 See also *R v Bagley* [2014] QCA 271 [39]-[42].

[62] For these reasons, neither the first nor the third grounds of appeal is established. The judge's reasoning contains no evident error. Nor is the conclusion so glaringly improbable, that it must be thought that the judge has misused the advantage of hearing and seeing the evidence as it was given. Consequently, there is no demonstrated error in the judge's conclusion and the second ground of appeal must be rejected. There is no basis for interfering with the exercise of the sentencing discretion.

[63] I would order that the application for leave to appeal be refused.

[64] **CROW J:** I have had the advantage of reading the reasons of McMurdo JA. I agree with his Honour's analysis and with the conclusions reached. I add some observations of my own.

[65] Tyrell Cobb was born on 25 February 2005. Tyrell was the son of Jason Cobb and the applicant, Ms Heidi Strbak. In 2008, Mr Cobb and the applicant separated and the applicant moved to the Gold Coast with Tyrell. On 16 May 2009, the applicant and Tyrell moved into a unit at Biggera Waters along with Mr Scown. At 10.25 pm on Sunday 29 May 2009, Tyrell was declared deceased at the Gold Coast Hospital. Doctors at the Hospital noted numerous bruises "all over" Tyrell's body.[76]

[66] Six medical experts provided evidence as to the nature, extent and timing of the injuries inflicted upon Tyrell. Medical evidence showed that Tyrell had suffered from 81 injuries as set out in the second schedule, pages 64 to 67 of the primary judgement.[77] The injuries which caused Tyrell's death were identified as:

1. injury 77, near transection of the small intestine (only 1 cm of the 4 cm circumference attached from the location of the injury, being about 8 cm from the antrum of the stomach); and

2. injury 78 (a 3 cm tear of the mesentery of the small intestine, the location of that injury being near its attachment to the small intestine (lies directly above the ruptured portion of the duodenum)).

[67] The six medical experts differed as to whether the abdominal injuries were caused by one or two applications of blunt force to the abdomen. The time estimates varied as to the timing of the first (or only) blow as being probably within 48 hours prior to the death of Tyrell.

[68] The significance of that time estimate was that Tyrell was, in that 48 hour period (from Friday night to Sunday night 26 May 2009) in the care of only the applicant, Mr Scown, or the applicant's older step brother, Daniel Allan.

[69] Mr Scown's evidence was that Tyrell commenced vomiting on the morning of Saturday 23 May 2009 and continued to be ill throughout that day. By the morning of Sunday 24 May 2009, Mr Scown observed that Tyrell was quiet and unable to sit up properly. During the course of the Sunday, and as he was concerned, Mr Scown told the applicant that Tyrell ought to be taken to the doctor. The applicant said to Mr Scown that she refused to take Tyrell to the doctor because he had bruises on his face and she would "get done for neglect". Mr Scown did not further intervene. Later on Sunday evening when the applicant left the unit at Biggera Waters again to

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76 Reasons [7].

77 Reasons pages 64 – 67.

obtain cannabis, Tyrell was in the bedroom with a bucket. Mr Scown was in the living area downstairs when he heard an unusual "gargling" sound and went to check on Tyrell and found him with vomit around his nose and mouth. Mr Scown immediately put Tyrell into the shower, attempted to telephone the applicant but could not raise her so he immediately called 000.

[70] On 11 October 2017, Mr Scown pleaded guilty to the manslaughter of Tyrell and was sentenced on the basis that he omitted to obtain medical assistance for Tyrell on 24 May 2009 when he observed Tyrell to be obviously and severely unwell. Mr Scown's failure to obtain medical assistance made him criminally liable for Tyrell's death.

[71] On 1 November 2017 the applicant pleaded guilty to manslaughter, accepting as a matter of fact that she was guilty for the manslaughter of her son because she also omitted to obtain medical assistance for Tyrell on 24 May 2009 when Tyrell was obviously and severely unwell. The prosecution did not accept the factual basis of the applicant's plea of guilty to manslaughter, alleging that it was the applicant who applied the blunt traumatic force to Tyrell's abdominal area causing Tyrell's death. The matter therefore proceeded to a contested sentence with evidence being taken over four days, with a further two days of submissions.

[72] On 11 December 2017 the primary judge delivered his reasons in writing concluding that it was the applicant that applied the blunt forces that were a substantial cause of Tyrell's fatal abdominal injuries. On 18 December 2017, the applicant was sentenced to nine years' imprisonment.

The Appeal

[73] The applicant appeals the decision of the primary judge, arguing the sentence is manifestly excessive and that the sentence ought to have been six years' imprisonment. The applicant argues that the primary judge erred in concluding that she had applied the blunt forces that were a substantial cause of her son's fatal abdominal injuries, and that she ought to have been sentenced for manslaughter on the same basis as Mr Scown, namely that she had been criminally negligent in omitting to obtain medical assistance for Tyrell on 24 May 2009. The three grounds of appeal are set out in paragraph 12 of McMurdo JA's reasons.

Ground One

[74] The applicant's complaint is that the learned sentencing judge placed determinative weight on Mr Scown's evidence without taking into account:

> "most significant features of Mr Scown's evidence: the strong incentive he had to implicate the applicant, and absolve himself, while giving evidence. His Honour did not explicitly warn himself as to the incentive, whereas his Honour's reasons otherwise reveal an impressive transparency as to the reasoning in which he engaged or did not engage."[78]

[75] The concession by senior counsel for the applicant that there was impressive transparency in the reasons is a concession well made; the text of the primary judgement runs to 311 paragraphs over 54 pages. The complaint made is that the primary judge did not "warn himself" of Mr Scown's incentive to lie to protect himself.

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78 Applicant's Outline of Argument ("AOA") at [10].

[76] The applicant's senior counsel references the standard direction provided by a trial judge to a jury contained in the Supreme and District Courts Criminal Directions Benchbook page 63.1:

> "You can see therefore, that there may be a strong incentive for a person in that position to implicate the defendant when giving evidence. You should therefore scrutinize his evidence with great care. You should only act on it after considering it and all the other evidence in this case, if you are convinced of its truth and accuracy."

[77] It is accurate that the primary judge did not, in his detailed judgment, make reference to s 13A of the *Penalties and Sentences Act* 1992 (Qld) or otherwise "warn himself".

[78] With respect to the appellant's s 13A argument, it is to be borne in mind that in four days of evidence, only one question was directed towards s 13A. After making reference to Mr Scown's s 13A statement[79] a single question was asked concerning the statement, namely that when providing the statement Mr Scown did so:

> "MR McGUIRE: With a view to getting some benefit for yourself for that; Correct?
>
> MR SCOWN: Correct."

[79] The s 13A statement or issue was not otherwise mentioned at all until at the commencement of day four of the hearing, the primary judge directly raised the s 13A issue with counsel for the defendant, stating:[80]

> "HIS HONOUR: … I note that Mr Scown's reliability and credibility will be an issue. I just wanted to note that the sentence that he received and the matters to which you had access by virtue of that order weren't raised with him in cross-examination. I just wanted to check that wasn't an oversight.
>
> MR McGUIRE: No, your Honour. I raised it with him the fact that that last statement was done for the purpose of a reduced sentence. …"

[80] The applicant's argument therefore is that the primary judge ought to have reminded himself of something that he was well aware of and had expressly raised with defence counsel on the last day of the contested hearing sentence.[81] I would reject the suggestion that it is incumbent upon an experienced judge to remind himself or herself of what that judge already full well knows.

[81] Despite a comprehensive primary address (recorded in 111 pages of transcript)[82], the s 13A issue wasn't raised by defence counsel. Nor was it raised in a comprehensive address (recorded in 52 pages of transcript)[83] by crown counsel nor was it raised in defence counsels address in reply, itself a further 24 pages of transcript.[84] There is no criticism of defence (or crown) counsel in this regard; there is

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79 Dated 28 September 2017.
80 AB 331/4 - 10.
81 AB 203/34 – 40.
82 AB 423 – AB 534.
83 AB 535 – AB 587.
84 AB 588 to AB 612.

little point to reminding an experienced judge of what the experienced judge has directly raised with counsel.

[82] Ground One cannot succeed.

Ground Two

[83] The applicant complains that the primary judge's conclusion that the applicant inflicted the fatal injury resulted from an impermissible "binary approach to the finding of fact"[85] that is, in comparing the circumstantial case against the applicant with the circumstantial case against Mr Scown. The applicant complains that such binary approach "masked a third conclusion compelled by the evidence, namely that the prosecution evidence was incapable of proving to the required standard which of them caused the fatal injuries."[86]

[84] This, the applicant concedes, is the same argument brought and rejected at sentence. The argument is best put as it was by defence counsel during the very last paragraph of his oral submissions:[87]

> "In a nutshell, it is this. There's no direct evidence against either of them. There is a circumstantial case against each of them. Without going through all those circumstances again, my submission is the circumstantial case against Matthew Scown is far stronger than it is against Ms Strbak, and that simply demonstrates that your Honour couldn't be satisfied to the requisite standard."

[85] The difficulty for the applicant is that, as analysed by the primary judge, the crown proved a strong circumstantial case against her.[88] By contrast it was shown that there was a weak circumstantial case against Mr Scown.[89] The primary judge went further, however, commenting upon the respective strengths of the circumstantial cases:

> "These two matters are not independent. The strong circumstantial case against Strbak necessarily reflects a weak circumstantial case against Scown. However, even a relatively weak circumstantial case against Scown might have been sufficient to not have the degree of satisfaction required to find the prosecution case proven, even on the balance of probabilities."[90]

[86] As may be observed, the primary judge was compelled to consider the respective strength of the circumstantial cases against the applicant and Mr Scown and as the applicant counsel concedes:

> "[H]is Honour's reasons otherwise reveal an impressive transparency as to the reasoning in which he engaged or did not engage."[91]

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85 AOA at [17].
86 AOA at [18].
87 AB 534/39 – 44.
88 Reasons [242] and [297].
89 Reasons [296].
90 Reasons [242].
91 AOA [10].

[87] Furthermore, as is made plain by Paragraph 85 above, the primary judge did not allow a binary task to mask a third conclusion. Rather, as expressly stated by his Honour, his Honour considered and rejected the third conclusion, which essentially was that the prosecution failed to prove a factual basis to the required standard. In this regard, the primary judge firmly had in mind the situation noted by the plurality of the High Court:[92]

> "[70] […] it is sometimes not possible for the judge to ascertain everything which is relevant, especially where an offender chooses not to offer any evidence on the plea. Where that occurs, the judge must proceed on the basis of what is proved and leave to one side what is not proved to the requisite standard […]"

[88] Section 132C(3) and (4) of the *Evidence Act* 1977 (Qld) provide as follows:

> "**132C Fact finding on sentencing**
>
> (3) 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.
>
> (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."

[89] As the primary judge reflected, there was no direct evidence as to who inflicted the injuries upon Tyrell. With respect to s 132C(3) and (4) the primary judge's conclusions[93] were that:

> "I am conscious of the seriousness of concluding that Strbak inflicted injuries to her son in the days prior to his death, including the fatal abdominal injuries. There is, however, a compelling circumstantial case that she did so, and I am satisfied to the degree required that the prosecution has proven its case on the balance of probabilities."

[90] In concluding that the circumstantial case against the applicant was compelling, the primary judge[94] identified seven matters as important parts of the prosecution case. Those seven matters are set out in paragraph 47 of the reasons of McMurdo JA.

[91] As the primary judge observed, the applicant denied inflicting any injury upon Tyrell, when the medical evidence showed that 81 injuries were detected upon Tyrell during pathological examination.

[92] It was further the unchallenged expert evidence from Dr Kerry Sullivan, paediatrician, that if an assessment of the injuries to a child produces a score of 40 or above, then the empirical test suggests a 99 per cent probability that a child has been abused. Upon Dr Sullivan's assessment, Tyrell's injuries were scored at 268.[95] Whilst Dr Sullivan's assessments cannot prove who was abusing Tyrell, they did prove that Tyrell was subjected to a horrific amount of abuse. The medical evidence showed

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92 *Filippou v The Queen* (2015) 256 CLR 47, 72 [70].
93 Reasons [310].
94 Reasons [244].
95 AB 76/16 – 17.

that the fatal injuries were inflicted almost 48 hours prior to Tyrell's death on Sunday evening and in all probability within 36 hours of the death. In that period from the evening of Friday 22 May 2009 until the time of death on Sunday evening 24 May 2009, Tyrell was being cared for by the applicant, Mr Scown and the applicant's elder step-brother Daniel Allan. There was no suggestion, let alone evidence that Mr Allan had inflicted any injury at any point, thus the need for the primary judge to carefully consider the strength of the circumstantial cases against the applicant and against Mr Scown. That is what the primary judge did, accurately and with "impressive transparency".

[93] It has not been shown that the learned sentencing judge erred in concluding the applicant inflicted the fatal injuries.

Ground Three

[94] As Brennan J said in *Hammond v The Commonwealth*[96] a person committed to stand trial on a criminal charge is not amenable to compulsory interrogation designed to obtain from him information as to issues to be litigated at his trial; the Latin maxim "*nemo tenetur, seipsum prodere/accursore*" or "no one is obliged to produce [evidence against] accused/himself" is accepted as part of a longer canon law rule said to express the privilege against self-incrimination and has been recognised both in the common law courts and chancery from the 17th century onwards.

[95] Common law rights and privileges, the presumption of innocence, the right to due process, and the right to silence was considered by the High Court in *X7 v Australian Crime Commission*.[97]

[96] In *R v Miller*, Holmes J (as she then was) said:

> "[27] … 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."

[97] The applicant argues that the primary judge has undermined the privilege against self-incrimination, by "more readily" accepting the prosecution evidence in circumstances where the defendant had exercised her right to silence. Senior counsel for the applicant concedes that on the authority of *R v Miller*[98] that the primary judge was compelled to take this view. It was then argued that *R v Miller* is incorrect and ought to be reconsidered. As explained by McMurdo JA at paragraph 61, *R v Miller* was not engaged as there was contradictory evidence from the applicant in her statement to police.

[98] I would refuse the application for leave to appeal.

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96 (1982) 152 CLR 188 at 202.
97 (2013) 248 CLR 92; [2013] HCA 29.
98 [2004] 1 Qd R 548, 554 at [27].

ANNEXURE

Schedule of Agreed and Contested Facts

□ Agreed facts
□ Contested facts

Introduction

1. The deceased child Tyrell Cobb was 4 years and 3 months old at the time of his death.

2. At 9:37pm on 24 May 2009 Matthew Scown, then in a relationship with Tyrell's mother the defendant Heidi Strbak, made a 000 call in which he stated Tyrell was vomiting and it was coming out of his nose. Scown stated Tyrell had "gone all limp and it's like he's just not there" and "looks like he's gonna die on me. He's just woken up he had spew coming out of his nose and his mouth." He later reported Tyrell had no pulse and he was doing mouth to mouth on him. An ambulance was dispatched to the address.

3. During the call Tyrell's mother, Strbak arrived at the address. Neighbours also attended the unit and assisted in rendering first aid to the child. Tyrell was observed to be wet and only clothed in shorts.

4. At approximately 9:45pm the ambulance arrived at the address. Scown waved them down in the street and indicated "he's not breathing, he's not breathing" and "hurry up, hurry up, he's turning blue, he's not breathing". Paramedics told Scown to bring Tyrell down. Scown left and returned with Tyrell in his arms. Scown indicated to paramedics that Tyrell had been "vomiting green stuff."

5. Paramedics examined Tyrell and noted the following:

    a. He was wet;
    b. He was limp;
    c. His eyes were open and non-responsive;
    d. His facial skin was pale and cyanosed;
    e. He had marks on forehead and arms;
    f. He had dark rings around eyes;
    g. There was no blueness around mouth; and
    h. He had no heart rhythm.

6. Paramedics started CPR. At that time Strbak approached and the paramedics asked her what had happened. Strbak responded that the child "had a fall in the shower Saturday night that she kept him awake all night so he wouldn't suffer from concussion and that he had been vomiting all day." Scown reported that Tyrell had been vomiting and "just become unconscious."

7. Tyrell was transported to Gold Coast Hospital by ambulance with Strbak. The child was examined at the hospital and found to have no pulse. At 10:25pm the child was declared deceased. Doctors noted numerous bruises on the child all over his body.

8. Tyrell was born on 25 February 2005 and was the biological son of Heidi Strbak and Jason Cobb. Tyrell was born in the Gold Coast Hospital, Southport. After Tyrell's birth his parents returned to Lightening Ridge with their child. Strbak and Cobb separated in 2008 and Strbak moved to the Gold Coast.

9. Whilst Strbak and Cobb lived together in Lightening Ridge, Strbak would take Tyrell to the family doctor when ill and his vaccinations were maintained.

10. Tyrell did not suffer from any known allergies.

11. Whilst Strbak and Cobb lived together in Lightening Ridge, both parents would on occasion discipline Tyrell with an open hand smack to the buttock. No other physical discipline was implemented by either parent upon their child.

Relationship between Scown and Strbak

12. Scown met Strbak through her brother Danial Allan whom Scown had known for about 10 years. Their relationship commenced around November 2008. At that time Strbak had Tyrell who was 4 years of age. Scown also had son Haydyn, who was also 5 years old, from a previous relationship. His son resided with his ex-partner.

13. When their relationship commenced Strbak was residing at 5/76 Brighton Street, Biggera Waters. Scown would at times visit or stay with Strbak at the unit. Scown was not residing there with her and Tyrell during that first period she lived at that residence nor when she later lived at 6/45 Bayview Street, Runaway Bay.

14. Prior to Tyrell's death both Strbak and Scown had been residing together at 5/76 Brighton Street, Biggera Waters. Strbak had moved back into that unit on 16 May 2009 and the unit was owned by Strbak's parents.

Timeline of Events

15. In December 2008 Strbak moved into 5/76 Brighton Street, Biggera Waters with Tyrell. Tyrell commenced attending Kindyland at Harbour Town on Monday, Tuesday and Fridays.

16. On or about 17 February 2009 Strbak moved into 6/45 Bayview Street, Runaway Bay.

17. During the time Strbak was residing at Bayview Street, other residents observed her to act abusively and aggressively towards Tyrell. They would hear her yell at the child and also observe her grab his arm and drag him. They also heard Tyrell screaming and crying and the sounds of smacking or hitting coming from inside their unit.

18. On 11 May 2009, Tyrell was attending the Kindyland centre and told staff he had a sore arm and indicated to the fort area of the playground. This was reported to Strbak who collected him from the centre shortly after 4.00pm.

19. Scown attended Strbak's unit at Bayview Street. Scown manufactured a sling for Tyrell using a pillow case. Scown encouraged Strbak to take Tyrell to the hospital.

Strbak told him she would do it later as she wanted time to obtain cannabis from Brett Archer.

20. Scown contacted Jason Cobb and advised him of Tyrell's incident at childcare.

21. Strbak attended Chevron After Hours Medical Service at Nerang Street, Southport with Tyrell at 7:28pm. There was swelling and pain to his right elbow and forearm, with a reduced range of movement. A fracture was suspected and referral made to the Gold Coast Hospital.

22. Strbak then took the child to the Emergency Department of the Gold Coast Hospital at 7:36pm. Tyrell had pain at his right elbow and was unable to extend his arm. He was diagnosed with a possible fracture to his right arm and a long arm cast was applied. He was discharged with instructions to attend the fracture clinic on 15 May 2009.

23. Strbak spoke to Tyrell's teacher, Timothy Smith on 12 May 2009 and advised that Tyrell would not be back at the centre until the following Monday, 18 May 2009.

24. On 14 May 2009, Scown and Strbak were packing up her belongings at her unit in preparation of her move back to 5/76 Brighton Street, Biggera Waters.

25. That afternoon Scown had propped open Tyrell's toy box with a toy so that Tyrell could reach in to take toys. Tyrell jammed his hand in the toy box. Scown assisted Tyrell and he reported to his mother that he had hurt his hand in the toy box.

26. Strbak attended the Biggera Waters Medical Centre with Tyrell on 15 May 2009 at 3:09pm. Tyrell was noted to have a "skin injury" to his left hand and the area was "swollen". It was reported that the child's finger was caught in the lid of a toy box. He was prescribed the same antibiotics he had been provided on earlier occasions at the medical centre in April 2009.

27. On that same day, 15 May 2009, Strbak and Tyrell failed to attend the appointment at the fracture clinic at the Gold Coast Hospital.

28. On 16 May 2009 Strbak moved into 5/76 Brighton Street, Biggera Waters. Scown was staying with her at the address.

29. At 6:19pm that night a call was placed by Scown to the Medcall (a locum medical service) about Tyrell's finger injury. A doctor responded and attended the unit and noted the left hand of Tyrell was swollen with ring finger "highly inflamed – weeping and blistery". They were referred to the hospital.

30. At 8:45pm that night Strbak, Scown and Tyrell went to the Emergency Department of the Gold Coast Hospital. A radiograph taken indicated that Tyrell had an undisplaced fracture at the base of his finger (the fourth digit of his left hand). During his overall initial examination his abdomen was noted to be soft and non-tender and his bowel sounds normal. Tyrell was admitted to hospital and given intravenous antibiotics. The long arm plaster on Tyrell's right arm was removed after an x-ray excluded a fracture.

31. Tyrell vomited food at 7:20pm on 19 May 2009. It was the only recorded time he vomited during his stay at the hospital. It was recorded as an isolated episode.

32. At midday on Wednesday, 20 May 2009 Tyrell was discharged from hospital. Tyrell was observed to be well by physicians at the hospital. There was a follow up appointment booked for Orthopaedic clinic on 22 May 2009.

33. On 22 May 2009, Tyrell attended Kindyland. Strbak reported Tyrell's hand injury to staff. Staff noted no other injuries to Tyrell through the day of his attendance.

34. Strbak collected Tyrell from the centre at around 4:00pm that afternoon.

35. There was no attendance to the scheduled Orthopaedic hospital appointment on 22 May 2009. Strbak did not take Tyrell to the appointment as she had been informed that there was no fracture by the Hospital Staff.

36. Tyrell remained at the unit at Brighton Street until his death in the evening of 24 May 2009. During his last days in the unit he was in the care of Strbak and Scown.

37. Over that weekend, Strbak contacted Jason Cobb and requested that Cobb take Tyrell from her.

38. On the Friday or Saturday night, Tyrell was slapped in his face by his mother, leaving a bruise to his face.

39. On the same weekend, when Tyrell had vomited, Strbak grabbed his wrist and struck Tyrell to the back side of his rib cage as she walked him to his room.

40. Over the weekend Scown had told Strbak to take Tyrell to the hospital or to a doctor. Strbak refused to do so as she would be blamed for the bruise to her son's face.

41. Strbak told Scown that others would think she was neglectful in the care of her child.

42. That morning, Saturday, 23 May 2009, Tyrell was downstairs from the unit with Scown. Strbak was inside of the home. As Tyrell made his way back up the stairs to the unit he fell forwards on the stairs over his stomach. Scown was following Tyrell up the stairs. Tyrell told his mother that he had fallen and hurt his legs and belly.

43. At around lunch time on 23 May 2009, Strbak's brother Danial Allan attended and observed Tyrell to lack energy and not be his "usual happy self." He noted Tyrell to have bruising on his head, ear and arms. Stbrak indicated to him that the bruises were from Kindy. Tyrell and Allan watched a movie in the lounge room and then Allan left at about 5.30pm.

44. That evening Strbak left the home to obtain cannabis from Brett Archer.

45. Scown took Tyrell to have a shower that evening whilst Strbak was out. Scown left Tyrell alone in the shower and heard a bang. Tyrell was on the floor of the shower.

46. When Strbak returned to the home, Scown told her that Tyrell had hurt himself in the shower.

47. Strbak noticed that Tyrell was still vomiting, as he had been earlier that day. Tyrell continued to vomit through the night.

48. After showering Tyrell on Sunday morning, 24 May 2009, Strbak showed Scown a large bruise above Tyrell's groin.

49. Tyrell told Scown that "it was OK for Mr Timmy to touch him".

50. Strbak applied bruise cream to her son.

51. Tyrell repeatedly vomited through the day of Sunday, 24 May 2009. His vomit was green/dark green in colour. Tyrell could not sit up. Tyrell could not keep food or liquids down through the day.

52. At sunset on 24 May 2009, the evening of Tyrell's death, Allan attended the unit again.

53. Allan noticed that Tyrell was vomiting and throwing up "Teenage Mutant Ninja Turtle" green into a red bucket. Allan saw Tyrell do this three or four times. Strbak told Allan that Tyrell was sick from the antibiotics he was taking for his hand injury.

54. Allan observed further bruises to Tyrell than from the day before.

55. Scown drew Allan's attention to a large bruise that was above Tyrell's groin area. Tyrell told Allan that "it was OK for 'his teacher' to touch me". They watched another movie.

56. Allan heard Strbak and Scown arguing on the veranda. Allan heard Strbak say she was going to the phone box and she left the unit. A call was placed by Strbak to Jason Cobb from the payphone at 7.48pm.

57. At approximately 8:30pm Strbak asked Allan if he wanted to go for a drive to their brothers to get cigarettes. They then left the unit together. Tyrell was left sleeping in the bedroom and Scown was on the couch in the lounge room.

58. After Tyrell's death, Strbak later informed Jason Cobb that she and Allan had gone to Brad's to "score a fifty" of cannabis. Stbrak had gone to her brother's to get cannabis leaving Scown home alone with Tyrell.

59. Scown was watching TV and heard a "gargling noise" coming from Tyrell's room. Scown checked on Tyrell and he was limp. Scown took Tyrell into the shower and turned the shower on. Tyrell was not responding. Scown placed Tyrell on the floor and tried to call Strbak. Scown contacted 000 and started administering CPR. Strbak arrived home with Allan whilst Scown was assisting Tyrell and on line with 000.

60. The day following Tyrell's death police conducted an examination at the unit. Green/black coloured vomit was located on the carpet in the hallway in front of the linen cupboard. A similar coloured stain was observed on the bottom area of the linen cupboard door.

61. A red bucket was located in the bedroom where Tyrell slept and there were numerous drying green/black stains on the inside bottom of the bucket. One of these

stains tested presumptively positive for blood. A red coloured stain was located on the bottom of the bedroom door which tested presumptively positive for blood.

62. Subsequent DNA analysis confirmed samples taken from the above stains to match the DNA of the deceased child.

63. Police also located a tube of Lanosil ointment beside a handbag on a table near the dining room. Lanosil ointment can be used to reduce inflammation, relieve pain and aid in the healing of bruises.

Tyrell's injuries

64. An autopsy was performed on Tyrell. The injuries noted are detailed on an attached schedule.

65. Tyrell's cause of death was found to be a transected duodenum in the abdomen of the child with associated laceration of the mesentery. Those injuries caused leakage of the child's stomach contents and bleeding in the abdominal cavity.

66. The combination of both the haemorrhage (bleeding) and peritonitis (caused from the leaking stomach contents) resulted in shock and the eventual death of the child.

67. The cause of the abdominal injuries was blunt force trauma of at least a moderate degree of force from one or more impacts. Possible mechanisms include a blow from a fist, foot, or blunt object.

68. Another opinion indicated the internal injuries are consistent with a small perforation to the duodenum with an extension of that injury shortly (hours) prior to the death. (two episodes of trauma). The initial injury would require severe force but that a moderate force would only be required to exacerbate the injury.

69. There was a bruise near the belly button of the child noted to be directly in front of the abdominal injuries.

70. Strbak had applied blunt force trauma to her son causing the abdominal injuries substantially resulting in Tyrell's death.

71. Dr Roy Kimble, a Paediatric Surgeon, opined leading up to his death Tyrell would have been in extreme pain and have been very sick from the time of injury until death. Every movement including breathing and vomiting would have caused extreme pain. He would have been sore from the time of the injury and would have progressively got worse over the first 24 hours. He would not have taken any significant food or water after the first 12 hours. He may have felt thirsty due to dehydration and would have been lethargic. Vomiting would have been bile-stained (green) as his condition got progressively worse. He would have developed a fever at around 24 hours which would have persisted until his death. His symptoms would have been easily recognised as requiring urgent medical treatment by any lay period from around 12-24 hours post injury. He would have difficulty moving around after 24 hours and would have stopped being able to communicate around 48 hours.

72. The injuries Tyrell sustained were treatable and he would have survived if he had received treatment when he first became symptomatic.

73. There were 53 bruises and 17 abrasions to the child (a total of 70) located on his head including ear, chest, stomach, back, bottom, groin and legs. Some bruising was consistent with fingertip pressure. Dr Sullivan opined that a significant number of injuries to the lower legs were consistent with those seen through normal childhood activities.

74. Strbak was the author of the identified injuries to Tyrell with the exclusion of those accepted by Dr Sullivan as potentially accidental.

75. In particular Tyrell had a scar to his ankle which was consistent with that left by applying the heated end of a cigarette lighter to his skin.

76. Strbak had caused this "smiley" injury to her son, Tyrell.

Police Investigation

77. Police attended the hospital and spoke to both Scown and Strbak.

78. Both Scown and Strbak agreed to attend police station and both subsequently participated interviews.

79. Whilst at the police station, Strbak told Scown that she was "going to get done for neglect".

Arrest history

80. Scown was charged with the murder of Tyrell on 25 May 2009.

81. That charge was struck out at the conclusion of a committal hearing on 3 February 2010.

82. On 13 August 2015 both Scown and Strbak were charged with the murder and torture of Tyrell.

83. A committal hearing was conducted in the Brisbane Magistrates Court on 2 November 2016 with the ODPP withdrawing the charge of torture prior to the hearing.

84. The charge of murder was withdrawn prior to a no case submission listed for 4 November 2016 at the conclusion of the hearing. Both Scown and Strbak were committed on the now indicted charge of manslaughter.