



HIGH COURT OF AUSTRALIA

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Details of Filing

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IN THE HIGH COURT OF AUSTRALIA
HOBART REGISTRY

ON APPEAL FROM THE COURT OF
CRIMINAL APPEAL OF TASMANIA

BETWEEN:

CHAUNCEY AARON BELL

Appellant

and

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STATE OF TASMANIA

Respondent

APPELLANT'S FURTHER OUTLINE OF ORAL SUBMISSIONS

Part I: Certification

1. These submissions are in a form that is suitable for publication on the Internet.

Part II: Outline of Argument

The Specific Question: Does Honest and Reasonable Mistake of Fact apply to s 14 of the Misuse of Drugs Act 2001 (Tas)

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2. There is nothing in the wording of s 14 of the *Misuse of Drugs Act 2001* (Tas); the second reading speech; or, with the exception of *Bergin v Stack*,¹ High Court authority to exclude honest and reasonable mistake of fact: *Thomas v The King*,² *Proudman v Dayman*,³ *CTM v The Queen*.⁴ When determining criminal responsibility the language of the statute is 'controlling', and 'may be excluded by sufficiently plain manifestation of legislative intention.'⁵ In the instant matter, there is no 'sufficiently plain manifestation' to exclude honest and reasonable mistake of fact. The interaction between ss 14 and 26 of the *Misuse of Drugs Act 2001* (Tas) supports a view that honest and reasonable mistake of fact is available for s 14. *R v Martin*⁶ implicitly supports this.

Appellant's Written Submission (AWS) [6], [26]-[31], [39]

¹ (1953) 88 CLR 248 (*Bergin*).

² (1937) 59 CLR 279 (*Thomas*).

³ (1941) 67 CLR 536 (*Proudman*).

⁴ (2008) 236 CLR 440 (*CTM*).

⁵ *CTM* (n 4) 446, [5].

⁶ *R v Martin* [1963] Tas SR 103.

Appellant's Supplementary Reply (ASR) [2]

Appellant's Further Written Submission (AFWS) [16]-[24]

A Subjective Notion of Criminal Responsibility

3. Subjective perceptions of fault are central to criminal responsibility.⁷ Act, circumstances, and results, determine criminal responsibility.⁸ In this context, the circumstances include the reasonableness and honesty of the belief held by the accused as to the age of the complainant. These principles apply to a Code jurisdiction.⁹

Appellant's Reply (AR) [3]

AWS [22]

10 *The Broader Question: What does 'innocence' mean?*

4. The legal error made by the Trial Judge,¹⁰ and which was uncorrected by the Court of Appeal¹¹ was to conflate the meaning of 'innocence' with the availability of the exculpatory ground of mistake. That they are separate matters is clear from *CTM*.

ASR [2]

5. To excuse an act means to be innocent of the charge laid against the accused. A different view is at odds with an accusatorial system of justice and a rational and humane system of criminal responsibility that must specify and identify the charge laid against the accused. A contrary interpretation would also be inconsistent with the common law understanding: *Thomas v The King*.¹² Further, and critically, statutory interpretation supports the view that innocent means to be innocent of the charge laid against the accused.

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AR [31]

AWS [10]-[16], [26]-[31]

6. *Bergin v Stack*¹³ suggests that for honest and reasonable mistake to be available for consideration by the jury, the actions of the accused must be innocent of any possible offence, but this case, and its progeny, is at odds with the High Court authorities of *Thomas*, *Proudman*, and *CTM*. In addition, the ancestry to this case¹⁴ is clearly unsound. As noted by Queensland, rebuttal of mens rea was the focus of the early cases rather

⁷ *He Kaw Teh v R* (1985) 157 CLR 523 (*He Kaw Teh*).

⁸ *He Kaw Teh* (n 7) 564-565 (Brennan J).

⁹ The matter is consistent with *Vallance v The Queen* (1961) 108 CLR 56 (*Vallance*).

¹⁰ *Bell v Tasmania* [2019] TASSCA 19.

¹¹ *Tasmanian v Bell* [2019] TASC 34

¹² *Thomas* (n 2).

¹³ *Bergin* (n 1).

¹⁴ *R v Prince* [1875] LR 2 CCR 154.

than mistake of fact as a ground of exculpation. These early cases did not involve any secondary offence. It is inconsistent with the common law understanding of mistake of fact as reflected in *R v Tolson*. To overturn *Bergin* is a small step consistent with ‘20th century legal developments regarding criminal responsibility.’¹⁵

AFWS [15]

AR [7]

Qld [55]

ASR [4]

AWS [26]-[31]

10 7. Cases subsequent to, or reliant upon the High Court authority of *Bergin v Stack* are inconsistent with other High Court authorities, or can be distinguished as reflective of criminal responsibility within the context of strict liability or minor offences. It is a significant leap to extend a principle applied in strict liability or regulatory offences where honest and reasonable mistake has diminished in importance to a position where it should no longer apply to an indictable offence.¹⁶ To remove the ground of exculpation from the jury, based on a view by the presiding judge that the acts of the accused meet the elements of a summary offence, which the legislature has failed to provide as an alternative, is to merge the availability of the ground of exculpation with the likelihood of its success. Contrary to *Thomas*, it also evidences a distinct distrust in the tribunal of fact. The accused displayed neither ‘subjective nor objective blameworthiness’ for the charge laid against him.¹⁷ Liability for an offence without corresponding culpability for all the elements of that offence should not routinely form part of criminal responsibility.

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AR [2], [5], [9]

AWS [31]-[34], [43]

Dated: 5 October 2021

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Name: Kim Baumeler

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¹⁵ Andrew Dyer, ‘A “Rational and Humane Criminal Code”? *Bell v Tasmania* and the Reach of Honest and Reasonable Mistake of Fact’ (021) 43(3) *Sydney Law Review* (forthcoming). Advance copy accessible at <https://www.sydney.edu.au/law/our-research/publications/sydney-law-review.html>.

¹⁶ Cases in this category include *Stanojlovic v Director of Public Prosecutions* (2018) 273 A Crim R 215; *Director of Public Prosecutions v Bone* [2005] NSWLR 735.5 O

¹⁷ Dyer, (n 15) 10 of online version.