



HIGH COURT OF AUSTRALIA

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Details of Filing

File Number: H2/2020
File Title: Bell v. State of Tasmania
Registry: Hobart
Document filed: Form 27F - Outline of oral argument
Filing party: Appellant
Date filed: 03 Feb 2021

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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 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)

1. There is nothing in the wording of s 14 of the *Misuse of Drugs Act 2001* (Tas); the second reading speech introducing that legislation; or, with the exception of *Bergin v Stack*,¹ High Court authority that would suggest that honest and reasonable mistake of fact is excluded from applying to this indictable offence: *Proudman v Dayman*,² *Thomas v The King*,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. In addition, the absence of an alternative offence⁶ and the inapplicability of s 341 of the *Criminal Code Act 1924* (Tas) means that the accused's conviction could only stand if the

¹ (1953) 88 CLR 248 (*Bergin*).

² (1941) 67 CLR 536 (*Proudman*).

³ (1937) 59 CLR 279 (*Thomas*).

⁴ (2008) 236 CLR 440 (*CTM*).

⁵ *CTM* (n 4) 446, [5].

⁶ Section 36A of the *Misuse of Drugs Act 2001* (Tas) provides a range of alternative convictions for certain offences. There is no alternative listed for s 14 of the *Misuse of Drugs Act 2001* (Tas).

Crown proved all elements of the alleged offence beyond a reasonable doubt.⁷ Finally, the statutes are informed by the decision in *He Kaw Teh* which is no less applicable to a Code jurisdiction, and is recognised by way of statutory interpretation of ss 13 and 14 of the *Criminal Code Act 1924* (Tas).

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

A Subjective Notion of Criminal Responsibility

- 10 2. Subjective perceptions of fault are central to criminal responsibility.⁸ Criminal responsibility flows not just from the act, but also from the circumstances and the results that follow.⁹ In this context, the circumstances include the reasonableness and honesty of the belief held by the accused as to the age of the complainant. The application of this taxonomic structure provided by Brennan J. in *He Kaw Teh* is applicable to a Code jurisdiction.¹⁰

AWS [22]

Appellant's Reply (AR) [3]

The Broader Question: What does 'excuse,' or its synonym in this context, 'innocence' mean?

- 20 3. To excuse an act means to be innocent of the charge laid against the accused. To have a contrary view would be at odds with an accusatorial system of justice. A contrary interpretation would also be inconsistent with the common law understanding: *Thomas v The King*.¹¹ It was Parliament's intent to mirror the common law. Further, the common law understanding of s 14 of the *Criminal Code 1924* (Tas) supports the view that innocent, or to be excused of the act, means to be innocent of the charge laid against the accused. Brett J in the Court of Criminal Appeal in *Bell* recognised this very point.

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

AR [31]

4. *Bergin v Stack*¹² 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 offence, but this case, and the progeny that directly rely upon it, are at odds with the High

⁷ Section 341 of the *Criminal Code Act 1924* (Tas) is of no utility in this matter. The section only refers to crimes, and by definition (Schedule 1, s 1) this is 'an offence punishable upon indictment.' It can be noted that s 24 and s 26 of the *Misuse of Drugs Act 2001* (Tas) are summary offences. They are not punishable by indictment.

⁸ *He Kaw Teh v R* (1985) 157 CLR 523 (*He Kaw Teh*).

⁹ *He Kaw Teh* (n 8) 564-565 per Brennan J.

¹⁰ The matter is consistent with *Vallance v The Queen* (1961) 108 CLR 56 (*Vallance*).

¹¹ *Thomas* (n 3).

¹² *Bergin* (n 1).

Court authorities of *Thomas, Proudman* and, the more recent authority of *CTM*. It is an incorrect reading and understanding of *Thomas, Proudman* and *CTM* to suggest that honest and reasonable mistake of fact only operates where its application would make the act ‘completely innocent,’ or ‘morally innocent’ as distinct from simply innocent of the charge which has been laid. It is also inconsistent with the common law understanding of mistake of fact as reflected in *R v Tolson*. **AWS [26] - [31]**

AR [7]

10 5. 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. They have no applicability to an indictable offence where fault still plays a critical role in the determination of responsibility. It is a significant leap to move from strict liability or regulatory offences where honest and reasonable mistake has diminished in importance to a position where, based on these authorities, it should no longer apply to an indictable offence.¹³ To find that a person is guilty of an indictable offence based on a view 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 that it would succeed. It also evidences a distinct distrust in the tribunal of fact who are uniquely positioned to assess the

20 honesty and reasonableness of the accused’s belief. **AWS [31]-[34], [43]**

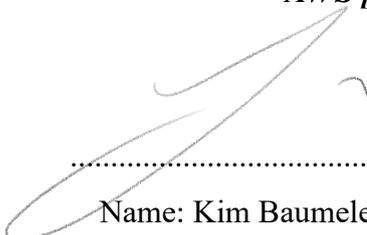
AR [2], [5], [9]

6. Statutory interpretation; the majority of High Court jurisprudence; the subjective view of criminal responsibility; the presumption of innocence, and, an accusatorial system of justice support a view that honest and reasonable mistake of fact should have been left to the jury.

AWS [31]

Dated: 2 February 2021

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Name: Kim Baumeler

¹³ 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.