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 (A-G NSW)
Filing party:	Interveners
Date filed:	05 Oct 2021

Important Information

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IN THE HIGH COURT OF AUSTRALIA
HOBART REGISTRY

H2/2020

BETWEEN: **CHAUNCEY AARON BELL**
Appellant

and

STATE OF TASMANIA
Respondent

OUTLINE OF ORAL SUBMISSIONS OF THE ATTORNEY GENERAL FOR NEW SOUTH WALES

Part I: Certification

1. This submission is in a form suitable for publication on the internet.

Part II: Outline of oral argument

2. The Attorney General for New South Wales submits that the common law ground of exculpation on the basis of an honest and reasonable mistake of fact excuses an accused from criminal liability where the believed state of facts would, if they existed, make the accused innocent of any criminal offence. The appellant accepts that this is the "traditional orthodoxy" following *Bergin v Stack* (1953) 88 CLR 248 (JBA vol 3, tab 7) (Appellant's Further Submissions (**AFS**) at [13]).

3. The appellant's criticisms of the reasoning of Fullagar J are unjustified (AFS [15]) and are not such as would persuade this Court to decline to follow *Bergin v Stack*.

   a. Justice Fullagar's invocation of the "*minimum* requirement" from *R v Price* (1875) LR 2 CCR 154 (JBA vol 6, tab 39) is not objectionable: see *Prince* at 157, 159, 170 per Brett J. To the extent of that minimum requirement, *Prince* is consistent with the understanding of the ground of exculpation at common law.

   b. *Bergin v Stack* was not an outlier in the development of the common law. The general rule had been stated in terms of "the existence of [a] fact mistakenly believed" which would have rendered "the act an innocent act": *Bank of New South Wales v Piper* [1897] AC 383 (JBA vol 6, tab 26) at 389-390; *R v Tolson* [1889] 23 QBD 168 (JBA vol 6, tab 40) at 181 per Cave J. Justice Fullagar held that an

"innocent act" meant one that would not constitute a criminal offence. This holding did not depart from:

i. *Tolson*, to the extent that Stephen J endorsed (at 190) the reasoning of Brett J in *Prince*;

ii. *Thomas v The King* (1937) 59 CLR 279 (JBA vol 5, tab 19), which approved *Tolson:* see at 292 per Latham CJ, 304 per Dixon J (Rich J agreeing);

iii. Stephen's *Digest of the Criminal Law* (Further JBA vol 4, tab 34) at 28-29;

iv. Kenny's *Outlines of Criminal law* (Further JBA vol 4, tab 32) at 65.

c. *Bergin v Stack* was not contrary to principle.

4. The reasoning of Fullagar J has been adopted and applied in cases since *Bergin v Stack*:

a. *CTM v The Queen* (2008) 236 CLR 440 (JBA vol 3, tab 9) at [8], [27] per Gleeson CJ, Gummow, Crennan and Kiefel JJ, [174] per Hayne J, [199] per Heydon J.

b. See also the decisions of State courts at [13]-[16] of our written submissions.

5. Justice Dixon in *Proudman v Dayman* (1941) 67 CLR 536 (JBA vol 4, tab 16) (at 541) and the plurality in *CTM* (at [8]) should not be understood as stating two separate tests. Only one enactment was relevant in those cases. The reasoning of their Honours does not support a conclusion that the ground of exculpation requires an honest and reasonable, but mistaken, belief of facts that, if correct, would mean that the accused's conduct was not otherwise an offence against (only) the Act in question, or did not otherwise constitute an offence of some degree of similarity to the offence charged.

Dated: 5 October 2021

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