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

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and

STATE OF TASMANIA

Respondent

APPELLANT'S SUBMISSIONS

20 Part I: Certification for Publication

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

Part II: Statement of the Issues

2. Does s 14 of the *Misuse of Drugs Act 2001* (Tas) exclude the exculpatory basis of honest and reasonable mistake of fact as to age?

3. More broadly, when an honest and reasonable mistake of fact excuses what would otherwise be criminal conduct (Schedule 1, s 14 *Criminal Code Act 1924* (Tas)), what does 'excuse', or, its synonym in this context 'innocence', mean?

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Part III: Certification concerning 78B *Judiciary Act 1903* (Cth)

4. Notices according to section 78B of the *Judiciary Act 1903* (Cth) are not required.

Part IV: Citation

5. The medium neutral citation for the Court of Criminal Appeal decision is *Bell v The Queen* [2019] TASSCA 19. The citation for the decision of the trial judge, Blow CJ, is [2019] TASC 34.

Part V: The Narrative

6. By way of indictment, the State of Tasmania charged the appellant with one count of rape and one count of the supply of a controlled drug to a child.[1] The latter is an offence under s 14 of the *Misuse of Drugs Act 2001* (Tas). The complainant, a female aged 15 years, visited the appellant's premises to purchase illicit drugs. While at the premises, the appellant injected the female with a controlled drug and subsequently engaged in sexual intercourse with her.[2] At the trial, the learned trial judge left an alternative offence to the jury concerning the rape charge. This alternative offence was the crime of sexual intercourse with a young person. As to the charge of sexual intercourse with a young person under the age of 17 years, the learned trial judge required the prosecution to prove that the appellant did not have an honest and reasonable belief that the female was 17 years or over. Counsel requested a similar direction in respect of the charge of the supply of a controlled drug to a child. His Honour considered, however, that such a direction would not relieve the appellant of criminal responsibility[3] and accordingly the learned trial judge directed the jury that the defence of honest and reasonable mistake as to age was not available in respect of the supply charge.[4] At trial, the jury returned a verdict of guilty to the offence of supply of a controlled drug to a child but was unable to reach a verdict on the sexual assault charge. On the retrial, the applicant was convicted of the offence of sexual intercourse with a person under the age of 17 years and not guilty of the charge of rape. This appeal is solely concerned with the conviction in the first trial of supplying a controlled drug to a child.

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[1] Core Appeal Book 5 [hereafter CAB].
[2] Appellant's Book of Further Materials 23 [hereafter ABFM].
[3] This is defined in Schedule 1, s 1 of the *Criminal Code Act 1924* (Tas) as: '*criminally responsible* means liable to punishment as for an offence; and the term *criminal responsibility* means liability to punishment as for an offence.' Offence is defined as follows: '*offence* means any breach of the law for which a person may be punished summarily or otherwise.' *Crime* is defined as an 'offence punishable on indictment.'
[4] The memorandum for the jury stated: 'If Mr Bell held a mistaken belief that [the female] was aged 18 years or more, that makes no difference.' [ABFM] 17.

The Legislative Context

Section 14 of the *Misuse of Drugs Act 2001* (Tas) provides:

- A person must not supply a controlled drug to a child.
- Penalty: Imprisonment for a term not exceeding 21 years.

Section 26 of this same Act provides:

- A person must not sell or supply a controlled drug to another person.
- Penalty: Fine not exceeding 100 penalty units or imprisonment for a term not exceeding 4 years.

In Tasmania, at the time of the offence, ss 13 and 14 of Schedule 1 of the *Criminal Code Act 1924* (Tas) stated as follows:

- 13. No person shall be criminally responsible for an act, unless it is voluntary and intentional; nor, except as hereinafter expressly provided, for an event which occurs by chance. …[5]
- 14. Whether criminal responsibility is entailed by an act or omission done or made under an honest and reasonable, but mistaken, belief in the existence of any state of facts the existence of which would excuse such act or omission, is a

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[5] It should be noted that s 13 of Schedule 1 of the *Criminal Code Act 1924* (Tas) was amended as of July 1, 2020 by the *Justice Legislation Amendments (Criminal Responsibility) Act 2020* (Tas).

Schedule 1 to the Principal Act is amended as follows:

(a) by omitting from section 13(1) "an event which occurs by chance." and substituting "an event –";

(b) by inserting the following paragraphs after subsection (1) in section 13 :

(a) that the person does not intend or foresee as a possible consequence; and

(b) that an ordinary person would not reasonably foresee as a possible consequence.

(c) by inserting the following subsection after subsection (1) in section 13 :

(1A) However, under subsection (1)(b), a person is not excused from criminal responsibility for death, or grievous bodily harm, that results to a victim because of a defect, weakness or abnormality of the victim.

(d) by inserting the following section after section 464:

465. Application of *Justice Legislation Amendments (Criminal Responsibility) Act 2020*

(1) In this section –

amending Act means the *Justice Legislation Amendments (Criminal Responsibility) Act 2020* ;

commencement day means the day on which the amending Act commences.

(2) The amendment, to section 13(1) of this Act, made by section 4 of the amending Act is not intended to alter the effect of section 13(1) as in force immediately before the commencement day.

(3) The amendment, to section 13(1) of this Act, made by section 4 of the amending Act does not apply in relation to an offence committed before the commencement day.

(4) Subsection (1A) of section 13, as that subsection is inserted by section 4 of the amending Act, does not apply in relation to an offence committed before the commencement day.

question of law, to be determined on the construction of the statute constituting the offence.

7. Sections 13 and 14 apply to the indictable offence of supply to a child, contrary to s 14 of the *Misuse of Drugs Act 2001* (Tas); (s 4 *Criminal Code Act 1924* (Tas)). Section 26 of the *Misuse of Drugs Act 2001* (Tas) creates a summary offence.

The Decisional History

8. The sole ground of appeal is that the Court of Criminal Appeal erred in law by upholding the learned trial judge's decision that the defence of honest and reasonable mistake as to age was not available to the appellant in respect of the charge of the supply of a controlled drug to a child.

The Judgment of Blow CJ.

9. His Honour considered that for the exculpatory basis of honest and reasonable mistake of fact to apply to the indictable offence of supply to a child, the accused had to be wholly innocent of any wrongdoing. His Honour reasoned that even if there were an honest and reasonable mistake as to the age of the female, he would still be guilty of the summary offence of supply to another person (contrary to s 26 of the *Misuse of Drugs Act 2001* (Tas)). In coming to this conclusion, his Honour placed considerable reliance[6] on the authorities of *R v Tolson,* [7] *Bank of New South Wales v Piper,*[8] and *CTM v The Queen.*[9]

The Court of Criminal Appeal

The Judgment of Brett J.

10. His Honour identified that mistake by the accused can affect a person's criminal responsibility in three ways. First, it can relate to the question of whether the prosecution has discharged its burden in respect of the mental element of an offence. Second, it might be

[6] [2019] TASC 34, [6], [13]-[14]; [ABFM] 19 (*Bell: Trial Judge).*
[7] (1889) 23 QBD 168 (*Tolson).*
[8] [1897] AC 383 *(Piper).*
[9] [2008] 236 CLR 440.

relevant to another criminal defence, such as self-defence. Third, and pertinent to the instant matter, it can operate independently as a ground of exculpation.[10]

11. The recognition that an honest and reasonable mistake of fact will lead to a finding that the accused is innocent (or in the language of s 14, excuse(d)) of the act or omission, forms the basis for this appeal - what is meant by 'innocent'? The matter remains unsettled, yet that very notion is central to a finding of criminal responsibility. As specifically noted by his Honour, '[It] is… apparent that the cases have not come to grips directly with the meaning of the word "innocent". Does it mean innocent of any legal wrongdoing, innocent of any wrongdoing of a criminal nature, or innocent of the crime charged?'[11]

10 12. His Honour was of the view that Australian High Court authorities have left the matter unanswered. In *Proudman v Dayman*[12] the judgment of Dixon J, as noted by Brett J in *Bell,*[13] endorsed two separate tests. The outcome can diverge depending on which test is adopted.

> One is that "innocent" means not guilty of a criminal offence. The other is that that the conduct must be "outside of the enactment"…In this State, all offences, including crimes, are defined by statute. If a person commits an offence defined by one statute, but under an honest and reasonable mistake of fact, which, if true, would amount to an offence under a different statute, then the outcome will be different according to the
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> 20 formulation.[14]

13. Further difficulties were also identified with the possibility of alternative tests. The Crown may charge a person with a serious offence. An accused might assert an honest and reasonable mistake, yet that excuse is not permitted because of the availability of another criminal offence, with this latter offence having less serious consequences. Brett J alludes to this problem in *Bell*[15] and considers the difference in penalty between the indictable offence of supply of a controlled drug to a child, and the summary drug offence of supply to a person as the 'most significant issue arising in terms of the just application [in the matter before him] of this ground of exculpation.'[16]

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[10] *Bell v State of Tasmania* [2019] TASCCA 19, [16] *(Bell);* [CAB] 44.
[11] Ibid [22] per Brett J; [CAB] 46.
[12] (1941) 67 CLR 536 *(Proudman).*
[13] *Bell* (n 10) [29]; [CAB] 48.
[14] Ibid per Brett J; [CAB] 48.
[15] Ibid [30]; [CAB] 48.
[16] *Bell* (n 10) [31]; [CAB] 48.

14. These complexities or nuances were not relevant to the High Court decisions: *CTM v The Queen,*[17] and *Bergin v Stack.*[18] In these matters, the 'alternative crimes postulated in the examples were within the same legislation and were offences of a cognate nature with the offence charged, and at a similar level of seriousness.'[19] Brett J wrote:

> The proposition that an accused person can be held criminally responsible for a serious offence, despite acting under an honest and reasonable belief in a state of affairs which would render him or her innocent of that crime, notwithstanding that another less serious crime may have been committed, is difficult to reconcile with fundamental concepts relevant to criminal justice, such as the presumption of innocence. Although the authorities accept that the mistake can be taken into account in the assessment of moral culpability when determining sentence, this does not seem to me to be a satisfactory response to a problem concerning attribution of criminal responsibility.[20]

15. In summary, Brett J considered that there were 'only two tests capable of consistent application.'[21] The first is that the mistaken belief, if established, would see the accused innocent of any criminal responsibility. If this test had been adopted the applicant would, most likely, have had a ground of exculpation open to him. The other test capable of application is that the accused must be innocent of any criminal charge whatsoever. Whereas the second test appears to be favoured by the existing authorities, undoubtedly the first test has the 'benefit of certainty, and seems to [his Honour] to be consistent with [an] accusatorial system of criminal justice, and fundament concepts related to it such as the presumption of innocence.'[22]

16. Despite his reservations, Brett J. adopted the second test that the accused must be innocent of any criminal charge.

The Judgments of Martin AJ, and Pearce J.

17. Both delivered individual judgments, though Pearce J agreed with the reasons of Martin AJ.[23]

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[17] (2008) 236 CLR 440 (*CTM*).
[18] (1953) 88 CLR 248 (*Bergin*).
[19] *Bell* (n 10) [30] per Brett J; [CAB] 48.
[20] Ibid [31] per Brett J; [CAB] 48.
[21] Ibid [37] per Brett J; [CAB] 50.
[22] Ibid.
[23] Ibid [1]; [CAB] 41.

18. While Martin AJ recognised that the English cases had understood the notion that an honest and reasonable mistake would operate as a defence and is 'deeply embedded in our criminal law',[24] the operation of the Code when enacted in 1924 and the context and text of s 14 of that legislation, must mean that 'excuse' within s 14 means excused from any criminal responsibility. To this extent, he disagreed with the reasoning of Brett J.[25]

19. Martin AJ did recognise, however, the inadequacies of the current legislation. The meaning of 'outside of the enactment' as mentioned by Dixon J in *Proudman v Dayman*[26] has 'not been explored.'[27] His Honour preferred to rely on what he saw as the 'essential principle' enunciated by Fullagar J in *Bergin v Stack,*[28] and confirmed, in his opinion, by the majority in *CTM v The Queen.*[29] This principle is that for the belief to operate, the act must not amount to any criminal offence.[30]

Part VI: The Appellant's Arguments

20. Fundamental to the criminal law is that criminal responsibility is to be determined on a subjective basis. That is, the accused must have some relevant mens rea to commit the offence. The rule of law requires this.[31]

21. In a Code jurisdiction such as Tasmania, the common law concept of mens rea has no application.[32]

22. Even though the common law concept of mens rea has no application in Tasmania, no liability without fault remains central to criminal responsibility in Tasmania. In Tasmania, direct support for the requirement of fault is to be found in s 13(1) and s 14, Schedule 1 of the *Criminal Code Act 1924* (Tas). In *Vallance v The Queen,* [33] the majority determined that the voluntary and intentional nature of the act required by s 13 only extended to the actions of the accused, and not to any consequences that follow. The High Court rejected the notion, akin to

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[24] Ibid [48], referencing Dixon J in *Thomas v The King* (1937) 59 CLR 279, 300 *(Thomas);* [CAB] 52.
[25] *Bell* (n 10) [57] per Martin AJ; [CAB] 54.
[26] *Proudman,* (n 12).
[27] *Bell* (n 10) [64] per Martin AJ; [CAB] 55.
[28] *Bergin* (n 18).
[29] *CTM* (n 17).
[30] *Bell* (n 10) [56] per Martin AJ; [CAB] 54.
[31] See the discussion of this in the context of child sexual assault and mistake as to age defences in Kate Warner, Warner, K., 'Setting the Boundaries of Child Sexual Assault: Consent and Mistake as to Age Defences' (2013) 36(3) *Melbourne University Law Review* 1010. The importance of the rule of law operating with meaning was discussed by the High Court in *Taikato v The Queen* (1996) 186 CLR 454, 465-466 per Brennan CJ, Toohey, McHugh and Gummow JJ. 'The function of ordinary judicial work is to protect the rule of law', *Momcilovic v The Queen and Others* (2011) 254 CLR 1, 184 [455].
[32] *Bennett v The Queen* [1991] Tas. R. 11, 18 *(Bennett).*
[33] *Vallance v R* (1961) 108 CLR 56 *(Vallance).*

the idea of a 'compound offence' expressed by Dixon J in *The Queen v Reynhoudt*[34] that the mental element extended to all elements of the offence. With this narrow interpretation of s 13, s 14 of Schedule 1 of the *Criminal Code Act 1924* (Tas) becomes central to ensuring that criminal liability is appropriately placed on those who have, or at least should have, 'adverted to the wrongness of what they are doing.'[35] This balance or intersection between mens rea and an honest and reasonable mistake of fact has been historically critical to the development of appropriate notions of criminal responsibility. For example in *Thomas v McEather*[36], with this case noted in the 1936 Reprint of the Public Acts of Tasmania as reflective of the accepted understanding of s 14 of the *Criminal Code Act 1924* (Tas), a six-member Queensland Court of Appeal split 3:3 as to whether an honest and reasonable mistake of fact could be successfully alleged by the accused. Critically though, the court did appear to favour the prima facie availability of honest and reasonable mistake of fact; they merely differed on whether it could be applied to the particular by-law in question.[37]

23. Today, mistake of fact is less spoken of in terms of its intersection with mens rea, and is now seen as an independent ground of exculpation, or perhaps less appropriately as a defence to the charge.[38] In the present matter, the submission is that the principle of honest and reasonable mistake of fact operates independently of the concept of mens rea.[39]

24. A starting point for analysis is the suggestion that to remove mistake of fact from operation means that the offence becomes one of absolute liability as to the age of the complainant. To promote this lesser form of liability when the offence carries a potential prison term of 21 years[40] can only be done under the most explicit of circumstances - none of which, we submit, apply here.

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[34] (1962) 107 CLR 381,387 per Dixon J (n.b. Dixon J. was in dissent).
[35] Warner (n 31) 11.
[36] [1920] St. R. Qd 166; [1920] QWN 37.
[37] Though there are differences in wording between the Tasmanian Criminal Code, and the equivalent provisions in the Queensland and Western Australian codes, it is not submitted that the differences are material to this matter. The Tasmanian Code was drafted by Justice Ewing of the then Tasmanian Supreme Court with his Honour placing a heavy reliance on the 1879 English criminal code drafted by Sir James Stephen, the already passed Griffith Criminal Code of Queensland, and the common law. The 1879 Code contained a somewhat differently worded mistake of fact provision, including making it unavailable if the accused was 'negligently ignorant of such fact.' Attorney-General of Tasmania, Criminal Code Bill, *The Mercury, 29th* February 1924, 3. (It was not possible to locate the original source of the Second Reading Speech). A discussion of the antecedents to criminal responsibility, and how the principles of s 13 came to be in the Tasmanian Criminal Code can be located in *Regina v Vallance* [1960] Tas. S.R. 51, 81-86 per Crisp J.
[38] The shortcomings of these expressions of how the ground is labelled was noted by the High Court in *CTM* (n 17) 446 [6] per Gleeson CJ, Gummow, Crennan and Kiefel JJ.
[39] Bell (n 10) [16] per Brett J; [CAB] 44.
[40] We do acknowledge that the Criminal Code carries only maximum penalties (this being 21 years), and that the judiciary has set the appropriate reference points for penalty ranges for each particular offence.

25. As the High Court noted in *Pickett v Western Australia*[41] the appropriate analysis is to focus upon the text of the legislation in the context in which that text sits, and then to reference the common law only where the language is doubtful or it has acquired some technical meaning.[42] In the context of honest and reasonable mistake of fact, it has been accepted that the Code provisions do replicate, subject to any statutory changes, the common law.[43] The defendant also has the evidential burden to raise the matter.[44] Once that matter is raised, the onus then moves to the prosecution to prove beyond reasonable doubt the absence of an honest and reasonable mistake of fact.[45] There are both subjective and objective elements to the exculpatory ground of honest and reasonable mistake of fact. Honesty is determined on the subjective knowledge of the accused,[46] whereas the reasonableness criterion is cloaked by what that accused would have reasonably done, not by what a reasonable person would have done.[47]

26. The natural starting point[48] for consideration of honest and reasonable mistake of fact begins with an analysis of the High Court decision of *Proudman v Dayman.*[49] The context was the availability of the exculpatory basis of honest and reasonable mistake where there was an allegation of a breach of road traffic legislation. The accusation was that the defendant had permitted a person, who was not the holder of a licence, to drive a motor vehicle. Her appeal to the High Court was based on her assertion that she had an honest and reasonable belief that the person she allowed to drive was appropriately licensed. While the appeal was not allowed, on reasons not particularly germane to this matter, Dixon J. stated, with words that have been elevated to the status of a 'prima facie rule or a general rule or a rule of presumption or a rule of construction.'[50]

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[41] [2020] HCA 20 (*Pickett).*
[42] Ibid [22]-[24] per Kiefel CJ, Bell, Keane and Gordon JJ.
[43] *He Kaw Teh v R* (1985) 157 CLR 523, 572-3 per Brennan J (*He Kaw Teh)*; *CTM* (n 17) 445 [3] per Gleeson CJ, Gummow, Crennan and Kiefel JJ.
[44] *WCW v Western Australia* (2008) 191 A Crim R 22 (referring to *Stingel v R* (1990) 171 CLR 312, 334).
[45] *CTM v R* (2008) 236 CLR 440, [147] per Kirby J. *R v Singh* [2012] QCA 130, [23] per Lyons J referring to *Sancoff v Holford; Ex parte Holford* [1973] Qd R 25, 33. In the instant matter and towards the conclusion of the trial, Blow CJ raised the possibility with both defence and prosecution that the exculpatory ground of mistake should not be left to the jury for consideration in respect of the supply charge. This led to the argument by the appellant ([ABFM] 4) and the subsequent decision of Blow CJ [ABFM] 19. *He Kaw Teh* was followed in Tasmania in *Attorney-General's Reference No 1 of 1989; R v Brown* [1990] Tas R 46.
[46] *DPP v Morgan* [1976] AC 182.
[47] *R v Wilson* [2009] 1 Qd R 476, 482 [20] per McMurdo P.
[48] As noted in *Director of Public Prosecutions v Bone* (2005) 64 NSWLR 735, 741 [17].
[49] *Proudman* (n 12).
[50] As noted by Heydon J in *CTM* (n 17) 497 [200] – citations deleted.

> As a general rule an honest and reasonable belief in a state of facts which, if they existed, would make the defendant's act innocent affords an excuse for doing what would otherwise be an offence,'[51] but that this could be excluded where in matters of police, of health, of safety or the like the legislature adopts penal measures in order to cast on the individual the responsibility of so conducting his affairs that the general welfare will not be prejudiced… it is probably still true that, unless from the words, context, subject matter, or general nature of the enactment some reason to the contrary appears, you are to treat honest and reasonable mistake as a ground of exculpation, even from a summary offence.[52]

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27. Today, these words must be aligned with the authority of *He Kaw Teh*. More fundamentally, however, what *Proudman* does not decide is what innocence means in this context. When Dixon J was referring to this, did he mean innocent of all wrongdoing, or innocent of the offence of which the accused has been charged? Later decisions have placed much reliance on his words asking whether the accused 'had reasonable grounds for believing in the existence of a state of facts, which, if true, would take his act *outside the operation of the enactment* and that on those grounds he did so believe.'[53] This phrasing has attracted considerable attention,[54] most notably in the appellate court in *Bell,* with the judgment of Martin AJ referencing the High Court's deliberations in *CTM* where the same

20 phrase is mentioned. It will be suggested that this reliance on this phrase has been misplaced. At this point, it is also relevant to note the judgement of Dixon J in the somewhat earlier decision of *Thomas v The King,*[55] where he explicitly articulates his opinion on the role of honest and reasonable mistake in the field of criminal responsibility:

> In this court it had been enunciated by *Griffith* C.J. in *Hardgrave v. The King* as follows:—"The general rule is that a person is not criminally responsible for an act which is done independently of the exercise of his will or by accident. It is also a general rule that a person who does an act under reasonable misapprehension of fact is not criminally responsible for it even if the facts which

30 he believed did not exist. I do not think the first rule has ever been excluded by

[51] *Proudman* (n 12) 540 per Dixon J.
[52] Ibid.
[53] Ibid 541 per Dixon J (emphasis supplied).
[54] *Bell* (n 10) [53]; [CAB] 53-54.
[55] *Thomas* (n 24) 305-309 per Dixon J.

> any statute." No doubt, in the application of the principle of interpretation to modern statutes, particularly those dealing with police and social and industrial regulation, a marked tendency has been exhibited to hold that the prima facie rule has been wholly or partly rebutted by indications appearing from the subject matter or character of the legislation. … But the general rule has not been and could not be impaired in its application to the general criminal law… The rule or rules have been embodied in the three criminal codes of Australia—Queensland, secs. 22 and 24, Tasmania, secs. 12 and 14, and Western Australia, secs. 22 and 24, These provisions, which are in the same terms, state, in my opinion, the common law with complete accuracy. They are as follows:—Ignorance of the law does not afford any excuse for an act or omission which would otherwise constitute an offence, unless knowledge of the law by the offender is expressly declared to be an element of the offence…
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> Through a feeling that, if the law allows such a defence to be submitted to the jury, prisoners may too readily escape by deposing to conditions of mind and describing sources of information, matters upon which their evidence cannot be adequately tested and contradicted, judges have been misled into a failure steadily to adhere to principle. It is not difficult to understand such tendencies, but a lack of confidence in the ability of a tribunal correctly to estimate evidence of states of mind and the like can never be sufficient ground for excluding from inquiry the most fundamental element in a rational and humane criminal code.

When the judgments of Dixon J in *Thomas* and *Proudman* are read together, the phrase 'outside of the enactment' diminishes in importance.

28. The second significant High Court decision is that of *Bergin v Stack*.[56] In this case, in the context of a sale of liquor by an unlicensed person, the relationship of mens rea to an honest and reasonable mistake of fact was very much to the fore. While the ratio decidendi of the High Court was that mens rea was not an essential ingredient of the offence, the Court, and specifically the judgment of Fullagar J, expanded on their understanding of this ground of exculpation. Significantly, and specifically important given the later reliance on the phrase 'outside of the enactment', the judgment of Fullagar J does not refer to this. It is difficult to

[56] (1953) 88 CLR 248 (*Bergin*).

see how *Proudman* and *Bergin* can be reconciled. Fullagar J appears to prefer a far more blunt view of the operation of honest and reasonable mistake of fact – that is, that it will only apply where the accused is innocent of any or all potential wrongdoing.[57]

> There was, I think, great force in the Solicitor-General's argument that even honest and reasonable mistake should be held excluded by s. 161…
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> … if it could be said that he entertained an honest and reasonable belief that the club was a registered club entitled under the Act to sell liquor to its members, it could not in this case, in my opinion, be an answer to the charge… If his belief had been true, the only result would have been that he was guilty of an offence under [another provision]. The rule as to the effect of an honest and reasonable mistake of fact means, I think, that such a belief excuses if its truth would have meant that no offence was being committed, not if its truth would have meant that some other and different offence was being committed.

29. The submission is that *Bergin* can no longer apply. Dixon J in *Proudman* and *Thomas* allowed the exculpatory ground of honest and reasonable mistake to apply, either generally, or where the conduct takes it outside of the enactment, (whatever that may mean), whereas Fullagar J preferred a stricter view that honest and reasonable mistake can only operate where the person is innocent of any wrongdoing. It is respectfully suggested that Fullagar J's view cannot stand in the light of subsequent authorities, most notably *He Kaw Teh*,[58] and even *CTM*, despite the reservations with this decision as noted below.

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[57] Fullagar J. did reference (ibid 261) Dixon J in *Proudman v Dayman.* Fullagar J commented: 'For, although to-day, in the case of such statutory offences as that created by s. 161, any presumption that guilty knowledge is an element in the offence must be taken to be at best a very weak presumption, it seems generally to be held, in the absence of express provision or clear implication to the contrary, that an affirmative answer is made to a charge of such an offence if the defendant proves that he honestly and reasonably believed in the existence of facts which would make his act innocent. In *Proudman v. Dayman* …Dixon J. observed that it is one thing to deny that a necessary ingredient of the offence is positive knowledge, and quite another thing to say that an honest belief founded on reasonable grounds cannot exculpate. A little later his Honour said: - "But, although it has been said that in construing a modern statute a presumption as to mens rea does not exist (per Kennedy L.J., Hobbs v. Winchester Corporation)…, it is probably still true that, unless from the words, context, subject matter, or general nature of the enactment some reason to the contrary appears, you are to treat honest and reasonable mistake as a ground of exculpation, even from a summary offence' (citations deleted).

[58] In *He Kaw Teh* ((n 43) 534-535) Gibbs J, with the emphasis on mens rea, noted the problems with *Proudman v Dayman* as well as *Bergin v Stack.* 'I should say immediately that if s.233B(1)(b) does not require the prosecution to prove guilty knowledge, but has the effect that an accused is entitled to be acquitted if he acted with the honest and reasonable belief that his baggage contained no narcotic goods, in my opinion the onus of proving the absence of any such belief lies on the prosecution. *Maher v. Musson* suggests the contrary, but that case was decided before *Woolmington v. The Director of Public Prosecutions…* In *Proudman v. Dayman,*…Dixon J. may have intended to say that the accused bore only an evidentiary onus, but his words were somewhat equivocal, and in *Sweet v. Parsley* Lord Pearce …and Lord Diplock … understood them in

30. The final High Court decision to consider is that of *CTM v The Queen.*[59] The allegation was that the complainant, then 15 years old, had attended the accused's house, where intoxicated, she passed out or fell asleep. She woke to find the accused having non-consensual sexual intercourse with her. The accused was charged with sexual intercourse without consent as well as sexual intercourse with a person aged between the ages of 14 and 16 years. The accused was acquitted on those charges where consent was an issue but was convicted of the alternative charge of sexual intercourse with a person aged between 14 and 16 years. Section 66C of the *Crimes Act 1900* (NSW), as it then was, provide a term of imprisonment of up to 10 years for any person who has sexual intercourse with a person aged between 14 and 16. The statutory provision did not refer to the availability of honest and reasonable mistake of fact nor the requisite mens rea. The accused, while not giving evidence at the trial, had suggested to police that he thought the complainant was 16. The Court held, (Gleeson CJ, Gummow, Crennan and Kiefel JJ in one judgment, Hayne J. in a separate judgment), that the 'evidential burden [of putting forward honest and reasonable mistake] was not satisfied,'[60] and accordingly, while the direction of the trial judge was in error, no substantial miscarriage of justice had occurred. Heydon J. dismissed the appeal on different grounds. His Honour's view was that extraneous materials, such as the second reading speech indicated that mistake of age was to be excluded as a ground of exculpation. Kirby J effectively agreed with the majority judgments but differed as to whether there had been a miscarriage of justice. His Honour would have ordered a retrial. Importantly for the current matter, the judgment of Gleeson CJ, Gummow, Crennan and Kiefel JJ endorsed a view that honest and reasonable mistake of fact within the criminal codes of Western Australia, Queensland and Tasmania were reflective of the common law.[61] The plurality quote from *R v Tolson:* "At common law an honest and reasonable belief in the existence of circumstances, which, if true, would make the act for which a prisoner is indicted an innocent act has always

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different senses. In some later cases judges still spoke as though the onus of proof lay on the accused: see *Dowling v. Bowie… Bergin v. Stack*, at p 261 and *Reg. v. Reynhoudt*, at pp 395-396, 399-400. However it has now become more generally recognized, consistently with principle, that provided that there is evidence which raises the question the jury cannot convict unless they are satisfied that the accused did not act under the honest and reasonable mistake… This view has also been accepted in New Zealand: *Reg. v. Strawbridge*… As I have said, it is in my opinion the correct view.' [15] (citations deleted).

[59] *CTM* (n 17). The High Court decision in *Jiminez v R* (1992) 173 CLR 572 also briefly discusses *Proudman v Dayman,* though nothing said added to what is already being discussed

[60] *CTM* (n 17) 457 [39] per Gleeson CJ, Gummow, Crennan and Kiefel JJ.

[61] Ibid 445-447 [3]-[7] per Gleeson CJ, Gummow, Crennan and Kiefel JJ.

been held to be a good defence."[62] This broad basis of exculpation was, however, seemingly qualified:

> Where it is a ground of exculpation, the law in Australia requires that the honest and reasonable, but mistaken, belief be in a state of affairs such that, if the belief were correct, the conduct of the accused would be innocent. In that context, the word "innocent" means not guilty of a criminal offence. In the case of an offence, or a series of offences, defined by statute, it means that, if the belief were true, the conduct of the accused would be "outside the operation of the enactment." [63]

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31. With respect, it is difficult to see that the latter paragraph aligns with the earlier provisions. The submission is that the word 'innocent', in this context, means innocent of the offence of which they are charged. To do so provides certainty in an accusatorial system of criminal justice and underpins the rule of law, as well as provides substance to notions of the presumption of innocence,[64] the right to be informed of the charge one is facing,[65] to exercise the right to silence,[66] and to adhere to the principle of trial by jury.[67] Any concern that mistake of fact would be used as a means to eliminate responsibility for otherwise egregious conduct can easily be countered by appropriate legislative drafting, and the enabling of

20 alternative offences, as well as the limitations imposed directly on mistake of fact – that it be honest and reasonable. As the plurality pointed out in *CTM,* the concept itself is protean.[68] The submission is that judicial fiat should not replace the opportunity for the jury to consider the reasonableness of the mistake allegedly made by the accused. The concept of reasonableness and honesty is appropriately left to the jury to consider, based on the evidence they have seen and heard. To reference Kirby J in *CTM,* 'If an offence is not, by clear

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[62] Ibid 445 [3] per Gleeson CJ, Gummow, Crennan and Kiefel JJ., quoting from *R v Tolson* (1889) 23 QBD 168, 181 per Cave J.

[63] With respect, it is not submitted that 'the outside of the enactment' test should be adopted in any form. It is difficult to know what was meant by that phrase, as judges have indicated (*Bell* (n 10) 64). It is very difficult to determine what parameters could be placed on this, and how it could be practically applied. It should also be noted that: 'Every section of an Act shall have effect as a substantive enactment without introductory words.'

30 *Acts Interpretation Act 1931* (Tas), s 6(1)'

[64] International Covenant on Civil and Political Right, opened for signature General Assembly Resolution 2200A (XXI) 16th December 1966, entered into force 23 March 1976, ratified by Australia 13 August 1980, Article 14(2).

[65] Ibid 14(3).

[66] *Petty v The Queen* (1991) 173 CLR 95.

[67] The High Court discussed the right to a trial by jury in *Alqudsi v The Queen* (2016) 258 CLR 203.

[68] *CTM* (n 17) 447 [7].

statutory provision, rendered one of absolute liability, it is open to an accused to raise a doubt about guilt on the basis of an honest and reasonable mistake about an essential component of the offence.'[69]

Cases following or applying Proudman, Bergin and/or CTM.

32. State Courts that have either followed or applied the High Court authorities have generally not questioned the underlying rationale, nor sought to put honest and reasonable mistake of fact in a context that aligns with the principles of *He Kaw Teh,* nor have they recognised the difficulties inherent in *CTM.* For example, in *R v Innazzone*[70] the Victorian Court of Appeal refused to allow an appeal against the failure of a trial judge to leave a direction as to involuntary manslaughter based on an alleged honest and reasonable mistake of fact that may have led to an acquittal. Brooking J followed the approach of Fullagar J in *Bergin v Stack,* though its value as an authoritative source is weakened by the erroneous assumption of counsel that if the mistake doctrine had been left to the jury, and accepted, the result would have been manslaughter.[71] Howie J in the New South Wales Court of Appeal decision in *CTM v The Queen* referred to this case, but for present purposes, it is simply relevant to note that his Honour raises the very question being asked by this appeal.

> The defence only applies where the accused had a reasonable belief of the existence of fact that, if they exist, "would make the conduct innocent". A question arises as to what innocence means in the statement of the defence. Does it mean that, if the fact existed, the accused would not have been guilty of the offence charged? Or does it mean that, if the fact existed, the accused would be innocent of any wrongdoing at all.... The meaning of innocent for this purpose has been the subject of considerable debate... It is unnecessary for present purposes to consider this issue further or determine whether... some limit should be put on the concept of "innocence" for the purpose of the defence.[72]

[69] Ibid 473 [105].
[70] (1983) 1 VR 649.
[71] Ibid 655 per Brooking J. *Innazzone* was followed without any further analysis in *R v Dib* (2002) 134 A Crim R 329, [42].
[72] (2007) 171 A. Crim R. 371, 386 [72], [74]; [2007] NSWCCA 131.

33. *Innazzone* and *Bergin* were both distinguished in *Director of Public Prosecutions v Bone.*[73] Bone tested positive for mid-range drink driving. He alleged that some of his drinks had, unbeknownst to him, been spiked with vodka. The magistrate accepted that a *Proudman* defence was available, and dismissed the charges. An appeal by the prosecution failed, as there was no evidence that absent the vodka he would have been guilty of low-range drink driving. Justice Adams undertook a detailed examination[74] of honest and reasonable mistake of fact, including reference to New Zealand authorities, and concluded very strongly that not only did the ground of exculpation apply, with this strongly indicated because of the serious consequences[75] and 'public obloquy'[76] that would flow from conviction, but that the mere availability of a lesser offence did not necessarily mean guilt on the alleged offence:

> The mere fact that, if Mr Bone did have that lower range, his honest belief that he did not was not reasonable and hence would have afforded him no defence to that charge, does not logically lead to the conclusion that his honest and reasonable belief that he drank only the quantity of which he was aware meant that he was guilty of the lower range offence. It only means that, if he did have that lower range, he did not have a defence to a charge to that effect.[77]

34. *Azadzoi v County of Court of Victoria*[78] also undertook a detailed examination of the area. The accused was convicted in the magistrates' court of an indecent act in front of three children of less than 16 years. He appealed, with one ground being that he had an honest and reasonable belief that the children were over that age, with his argument strengthened by the regulations of the aquatic centre which provided that children of less than 16 years were not permitted in that part of the arena. The court decided that honest and reasonable mistake was

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[73] [2005] NSWLR 735, 750-751 [38]-[39], [41] per Adams J (*Bone)*
[74] Ibid 741-751 [17]-[42] per Adams J. Another outline of the development of honest and reasonable mistake of fact can be found in *F v Ling* [1985] Tas R 112, 112-117 per Underwood J (*Ling).*
[75] This can be contrasted with *Director of Public Prosecutions v Stanojlovic and Another* (2017) 53 VR 90 where the prosecution was for a failure to display 'P' plates. The character of the offence in not being truly criminal in nature, the modest penalties, no risk of imprisonment, nor any social stigma led to a conclusion that the offence was one of absolute liability. This decision was affirmed by the Court of Appeal in *Stanojlovic v Director of Public Prosecutions* (2018) 273 A Crim R, [2018] VSCA 152.
[76] *Bone* (n 73) 749 [35] per Adams J.
[77] Ibid [39].
[78] (2013) 40 VR 390 (*Azadzoi).*

not available as the subject matter of the legislation, its terms, and the purpose all tended towards the view that the offence was one of absolute liability.[79]

Summary of the Argument

35. The rule of law and the subjective view of criminal responsibility all indicate that fault-based liability is the norm within criminal justice. This is supported by *He Kaw Teh.*

36. In Tasmania, mens rea, as a common law concept has no application. Fault, however, is still very much relevant, with this provided through ss 13 and 14 of Schedule 1 of the
10 *Criminal Code Ac 1924* (Tas).

37. *Vallance* has provided a restrictive interpretation to the fault requirement; applying only to the voluntary and intentional actions of the accused. The narrowness of this interpretation supports a view that s 14 be used to develop the content of fault-based liability for indictable offences in Tasmania.

38. To ensure that only the truly blameworthy have guilt attached to their acts or omissions, honest and reasonable mistake should be left to the jury unless explicitly excluded by statutory command.

39. There is no indication within the legislation or the second reading material,[80] that the offence created by s 14 of the *Misuse of Drugs Act 2001* was intended to be one of absolute
20 liability as to age (contrast *Azadzoi)*. Furthermore, as it is conceded that mistake of fact would be available where the accused had an honest and reasonable error as to what is being supplied (e.g. a person having a reasonable belief they are supplying a non-controlled drug, when in reality, what is being supplied is a controlled drug), it seems unprincipled to allow it to operate to one element of the crime, but not another.

40. Decisions that have interpreted honest and reasonable mistake of fact support its application to the legislation (*Proudman, CTM).*

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[79] Additional cases include *Director of Public Prosecutions v Kailahi* (2008) 191 A Crim R 145, [2008] NSWSC 752 – the Court applied *Bergin* and as another traffic offence would have likely been proved, honest and
30 reasonable mistake of fact was not available. For a decision from the Code jurisdiction of Queensland, see *R v Duong* (2015) A Crim R 57, 67 [47], [2015] QCA 170, where the conviction stood even if the accused had been in possession of a different dangerous drug than that specified by the indictment. It still implicated him in equivalent criminal behaviour.

[80] Tasmanian Parliament, Hansard, House of Assembly, 23 October 2001, 47. At 48, Dr Patmore, Minister for Justice and Industrial Relations, states: 'The bill, for the first time, creates new indictable offences for adult offenders who exploit persons under the age of 18 years for profit by selling or supplying them with illicit drugs, or engaging them in drug trafficking activities. The exploitation of young people through drugs is a particularly heinous crime and the bill treats such activity accordingly.'

41. Section 14 of Schedule 1 of the *Criminal Code Act 1924* (Tas) references the honest and reasonable mistake of the accused as applying to the act or omission of the accused. The 'Code clearly endorses a criminal process which relies on accusation and clear identification of the crime which is the subject of the accusation… The word 'excuse in s 14… can accordingly be properly construed by limiting its application to the question of criminal responsibility for the act or omission which is a constituent of the crime which is the subject of the identified accusation.'[81] Accordingly, a textual analysis supports a view that honest and reasonable mistake should have been left to the jury.

42. In the accusatorial form of criminal justice adopted in Australia, the accused is presumptively innocent, can maintain a right to silence, and is entitled to assert any exculpatory grounds to the specific charges made against them.

43. Decisions such as *Bergin, Innazzone, and Dib* that support the removal of honest and reasonable mistake of fact where an alternative offence is putatively available either can be distinguished or should be overruled. In these cases, the alternative offence was one of a like character or a similar nature to the offence that was levelled against the accused. To promote a rationale which would 'attempt to draw a line according to the seriousness of the offence, for example by excluding minor regulatory offences from the consideration of innocence is fraught with difficulty.'[82] In the significant cases where the exculpatory ground of honest and reasonable mistake has been excluded because of the putative responsibility for another offence of which the accused has not been charged, the equivalent offence has been of a similar nature: e.g. *CTM* (sexual offences); the traffic cases (*Stanojlovic, Ling, Bone, Proudman);* regulatory offences (*Bergin);* assaults leading to death (*Innazzone, Dib).* These cases do not involve responsibility for an indictable offence based on putative liability for a summary offence. In the instant matter, the offences are not equivalent, neither in process nor in penalty.

44. The jury's responsibility is to determine whether the State of Tasmania has proved beyond reasonable doubt that the mistake of fact is not honest or not reasonable. It is not a situation that the availability of this ground of exculpation will allow the accused to create doubt in the criminal justice process. In the Tasmanian context, Underwood J in *Ling*[83] noted when referencing *Bergin,* the requirement is that the honest mistake also be reasonable and it

[81] *Bell* (n 10) [32] per Brett J; [CAB] 49.
[82] *Bell* (n 10) [36]; [CAB] 50.
[83] *Ling* (n 74) 62-63 – his Honour's comments as to the difficulty in meeting the standard of reasonableness were related to the drink driving offences. It is submitted that the comment is applicable to all offences. Juries are appropriately placed to determine the honesty and reasonableness of the mistake made by the accused.

would be rare that this 'defence' will succeed. To paraphrase Dixon J in *Thomas*[84] a lack of confidence in the jury to determine reasonableness should not be a basis on which to remove that option from the jury.

45. In the *Misuse of Drugs Act 2001,* several offences had alternatives. The legislation failed to provide one in this scenario. It is not the role of the court to correct an arguable failing within the legislation. As colourfully expressed in *Azadzoi,* courts should not "assume the role of legislators, and… fill imagined lacunae in penal statutes by the conjectural emendations of judges" or by reference to the "general atmosphere of a statute".[85]

10 ***Conclusion***

46. At the outset, two issues were raised. First, does s 14 of the Misuse *of Drugs Act 2001* (Tas) exclude the exculpatory basis of honest and reasonable mistake of fact as to the age of the complainant? The submission is that the answer is no. Legislative interpretation, precedent, and the history of the provision support the application of honest and reasonable mistake of fact to this element of the offence. Second, and perhaps more difficult, what does excuse, or innocence in relation to criminal conduct mean? The vast majority of cases have only peripherally touched on this matter. The Australian authority that strongly suggests innocence means innocent of any criminal conduct is that of *Bergin* and the progeny that have directly relied on this. Other cases have not had to deal with this. The subjective theory **20** of criminal responsibility, an accusatorial system of justice, protections provided by the international instruments and the common law, as well as an interpretation of s 14 of Schedule 1 of the *Criminal Code Act 1924* (Tas) all lend weight to a view that where honest and reasonable mistake of fact is available, the excuse operates to remove culpability from the charge that has been laid. No other interpretation is consistent with our framework and understanding of criminal responsibility.

Part VII: Orders sought:

47. Appeal Allowed.

48. The orders of the Court of Criminal Appeal dated 15 November 2019 be set aside and **30** the appellant's conviction of 13 August 2019 be quashed and sentence set aside; and

49. The matter be remitted to the Supreme Court of Tasmania for a new trial.

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[84] *Thomas* (n 24) 309.

[85] Azadzoi (n 78) [31], quoting from *R v Turnball* (1943) 44 SR(NSW) 108, 110 - though it should be noted that the Bell J in Azadzoi considered that the Victorian legislation had to be interpreted according to its own terms.

Part VIII: Time Estimate:

50. One hour is required to deliver the Appellant's submissions.

List of Annexures: Statutes and Statutory Instruments.

1. Sections 13 and 14 (as at the date of the offence), *Criminal Code Act 1924* (Tas)
2. Sections 14 and 26, *Misuse of Drugs Act 2001* (Tas)

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Dated: 24 July 2020

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