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 - Respondent's Outline of oral argument
Filing party:	Respondent
Date filed:	05 Oct 2021

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IN THE HIGH COURT OF AUSTRALIA
HOBART REGISTRY

BETWEEN: **CHAUNCEY AARON BELL**
Appellant

and

STATE OF TASMANIA
Respondent

RESPONDENT'S OUTLINE OF ORAL SUBMISSIONS

Part I: Certification as to publication

1. It is certified that this submission is in a form suitable for publication on the internet.

Part II: Outline of oral argument

2. In order for this appeal to succeed, it is submitted the Court would need to overturn the decision of *Bergin v Stack* (1953) 88 CLR 248 and depart from the obiter dicta in *CTM v The Queen* (2008) 239 CLR 400.
3. Further, the Appellant must establish that s14 of the *Criminal Code* (Tas) provides a defence in circumstances where the mistaken belief of an accused person, if true, would render the accused not guilty of the offence charged even when such conduct would amount to another criminal offence within the same enactment.
4. In Tasmania the common law doctrine of *mens rea* is displaced by the *Criminal Code Act 1924* (Tas). The mental element attaching to all crimes is found exclusively in ss13 and 14, and in some cases, the particular offence provisions (*Vallance v the Queen* (1961) 108 CLR 56; *Snow v R* [1962] Tas SR 51; *R v Martin* [1963] Tas SR 103; *Arnol v R* [1981] Tas R 157; *Bennett v the Queen* [1991] Tas R 11). This is also the situation under the Criminal Codes of Queensland and Western Australia (*William Levi Clare* (1993) 72 A Crim R 357 at 379 per Pincus JA and at 382 per Davies JA and *R v Hutchinson* (2003) 144 A Crim R 28 at [30] – [32]). The Appellant does not contend that this fundamental principle ought be reconsidered by this Court.

5. Sections 13 and 14 of the *Criminal Code* and the *Code* principles of criminal responsibility apply to s14 of the *Misuse of Drugs Act 2001* by virtue of s4 of the *Criminal Code Act*. Therefore, *mens rea* is not implied into s14 of the *Misuse of Drugs Act 2001*.
6. Further, like the *Criminal Code,* the *Misuse of Drugs Act 2001* is very specific when it creates intention or knowledge as an element of particular offences. Parliament would be well aware of how criminal responsibility is interpreted under the *Code*.
7. Section 14 of the *Criminal Code* has been interpreted either as specifically reciting the common law (*Snow* per Burbury CJ and Cox J at 277) or, either by itself or in combination with s8 of the *Code,* as an enabling provision for the common law (*Attorney-General's Reference No. 1 of 1989; R v Brown* [1990] Tas R 46).
8. The term 'excuse' contained in s14 of the *Code* is synonymous with 'innocence' (*Martin*) and therefore reproduces the common law with respect to the doctrine of mistake of fact. In other words, the term 'excuse' has developed a technical meaning at common law.
9. At common law, the term 'innocent' means to be innocent of the *act* (not the offence charged). In *Thomas v the King* (1937) 59 CLR 279 both Latham CJ and Dixon J considered the meaning of 'innocent' and directly referred to the decision of Cave J in *R v Tolson* (1889) 23 QBD 168.
10. Thus, *Proudman v Dayman* (1941) 67 CLR 536, which states that the term 'excuse' means to make the act 'innocent', should be read in light of *Thomas, Tolson* and *Prince* (1875) LR 2 CCR 154.
11. The term 'excuse' has been deliberately included in the Tasmanian *Criminal Code,* which draws heavily on the Stephen's Draft Code of 1879. The Draft Code of 1879, unlike the *Criminal Code Bill No. 2 1880* (UK) and the Griffith Codes of Queensland and Western Australia, contained no mistake of fact provision at all. It can therefore be inferred that the drafters of Tasmanian *Criminal Code* declined to adopt any existing statutory provision in relation to this area of the law, and instead enact the common law as it stood at the time, as articulated in *Tolson*.
12. The mistake of fact provision in the Tasmanian *Criminal Code* differs from those contained within the criminal *Codes* of Queensland and Western Australia. Neither the Queensland nor the Western Australian *Code* uses the word 'excuse' in their respective provisions. The Queensland and Western Australian *Codes* are clear that a person is only criminally responsible for an act to the level of their mistake. This is

not the case in the Tasmanian legislation. The Tasmanian provision is an enactment of the common law *(Martin*).

13. Further, s14 of the Tasmanian *Criminal Code* states that the relevant mistaken belief would excuse such *act or omission* [emphasis added]. It does not refer to being excused from the offence charged.

14. The principles relating to mistake of fact at common law are well-settled, dating back to *Prince*'s case and *R v Tolson*. That is, 'innocent' means not just innocent of the offence charged, but innocent of any offence, or offence within the same enactment. *Tolson* was adopted by *Thomas v the King* (see Latham CJ at 287, Dixon J at 300-304), and in *Proudman v Dayman*. It was also applied in *R v Reynhoudt* (1962) CLR 107 CLR 381. The dissenting judgments in *Reynhoudt* did not dissent on that point, but rather whether *mens rea* was read into the offence or not. *He Kaw Teh v the Queen* (1985) 157 CLR 523 also referred to *Tolson's* case without criticism, and it was ultimately applied in *CTM*. The Court of Criminal Appeal applied these principles, reflected in the long-settled authority of this Court, when considering s14 and the doctrine of mistake of fact.

15. The principle in *Bergin v Stack* has been well-developed. There have been no dissenting judgments in relation to the principle, and it has been applied in a number of other cases throughout the country. Further, the Tasmanian Parliament has acted upon the principle by enacting s14A and s14B of the *Criminal Code*.

16. The Respondent contends that the application of the principle can be appropriately limited to criminal offences contained within the same enactment.

17. There is no authority that supports the proposition that an accused person's mistaken belief must render them innocent of the *offence charged*, as the Appellant contends, rather than rendering their *act* innocent.

18. If holding an honest and reasonable mistake of fact, if true, meant that an accused committed another offence but the primary offence was excused, (although not in this case) it could mean the accused is not guilty of either offence (see *CTM).*

19. The circumstances of the offending can be addressed in the sentencing process (see *CTM* at [27]).

20. The principles outlined in *Bergin v Stack* and the dicta in *CTM,* that is, in order for the provision to apply, the belief held by an accused must render the conduct innocent of any criminal offence, has been developed and accepted through a series of cases in this Court and should not be overturned.

Dated: 5 October 2021

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