HIGH COURT OF AUSTRALIA

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Details of Filing

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Important Information

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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; *Bennett v the Queen* [1991] Tas R 11). 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.*
6. The term 'excuse' contained in s14 of the *Code* is synonymous with 'innocence' 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.
7. 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* (1899) 23 QBD 168.
8. 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.
9. The term 'excuse' has been deliberately included in the Tasmanian *Criminal Code,* which draws heavily on the Stephen's Draft Code of 1879.
10. 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 (*R v Martin* [1963] Tas SR 103).
11. 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.
12. The principles relating to mistake of fact at common law are well-settled, dating back to *Prince*'s case (1875) LR 2 CCR 154. That is, 'innocent' means not just innocent of the offence charged, but innocent of any offence, or offence within the same enactment (see *Bergin v Stack* per Fullagar J at 262; *CTM v the Queen* per Gleeson CJ, Gummow, Crennan and Kiefel JJ at [26] and Hayne J at [199]). 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.

13. Any potential unfairness in interpreting the Tasmanian *Criminal Code* in accordance with the principle in *Bergin v Stack* is limited. It is unusual within the Tasmanian legislative scheme not to have an alternative verdict available to the fact-finder, or an alternative conviction available through s341 of the *Code.*
14. Section 341 of the *Code* provides an alternative pathway to conviction where the specific statutory alternatives do not apply. In order for s341 to apply, the alternative crime must be divisible to the count in the indictment.
15. Section 1 of the *Criminal Code* defines 'crime' as an offence punishable upon indictment. Supplying a controlled drug, contrary to s26 of the *Misuse of Drugs Act 2001,* although divisible to the crime of supplying a controlled drug to a child, is not available through s341 of the *Code* because it is not a crime. Supplying a controlled drug is a summary offence and therefore not triable on indictment, although it is a criminal offence (see s1 of the *Criminal Code,* where 'criminally responsible' means liable to punishment as for an offence). 'Offence' means any breach of the law for which a person may be punished summarily or otherwise.
16. Although both the *Criminal Code* and the *Misuse of Drugs Act 2001* provide for alternative convictions for some specific summary offences, there is no such alternative available with respect to s14 of the *Misuse of Drugs Act 2001.*
17. Interpreting s14 of the *Misuse of Drugs Act 2001* in the manner contended by the Respondent does not create a crime of absolute liability. The doctrine of mistake of fact would still operate in certain factual scenarios that differ from the present case, particularly in reference to section 4 of the *Misuse of Drugs Act 2001* in relationship with the *Poisons Act 1971.*
18. The Respondent contends that the application of the principle can be appropriately limited to criminal offences contained within the same enactment.
19. 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.
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, is good law and ought not be disturbed.

Dated: 2 February 2021

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