HIGH COURT OF AUSTRALIA

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Details of Filing

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IN THE HIGH COURT OF AUSTRALIA
HOBART REGISTRY

BETWEEN: CHAUNCEY AARON BELL
Appellant

and
STATE OF TASMANIA
Respondent

APPELLANT'S SUPPLEMENTARY REPLY

Part I: Certification

1. The submissions are in a form suitable for publication on the internet.

Part II: Submissions

The State Specific Issue: The Connection between ss 13 and 14 of the Criminal Code Act 1924 (Tas) and s 14 of the Misuse of Drugs Act 2001 (Tas).

2. The Respondent and the Attorney-General for Tasmania were, not surprisingly, the only parties to comment with any specificity on this issue. The Respondent's submission largely replicated what it had previously said. The Appellant has replied to that.[1] The Appellant submits that the Respondent has missed, with its analysis of the legislation, the connections between ss 13 and 14 of Schedule 1 of the *Criminal Code Act 1924* (Tas). It is submitted that the provisions need to be read compositely to establish appropriate parameters around fault based liability for criminal offences. Following *CTM v The Queen*[2] this is required. In summary the argument for the Appellant is that:
    a. As evidenced by *CTM,* the starting point in Tasmania is one of statutory construction. 'Properly identifying the nature of the issue as one about statutory construction and criminal responsibility is central to its resolution.'[3] The principles of criminal responsibility for an accused charged with breaching s 14 of the *Misuse of Drugs Act 2001* (Tas) stem

[1] Appellant's Reply filed September 11, 2020.
[2] (2008) 236 CLR 440 (*CTM).*
[3] Ibid, 480 [138] Hayne J.

from the relevant provisions in schedule 1 of the *Criminal Code Act 1924* (Tas). Rather unhelpfully, s 14 of the *Criminal Code* returns the attention of the reader to the legislation creating the offence. The circularity of this approach is self-evident. The holding in *CTM,* applied to the instant matter, asks whether the *Misuse of Drugs Act 2001* (Tas) explicitly or implicitly removes the operation of age-based mistake of fact defences. As with the legislation under consideration in *CTM v The Queen,* it does not.

b. Statutory construction supports this result, as does the general principle of criminal responsibility enunciated and examined in *CTM*. An honest and reasonable belief in a state of circumstances that renders an act innocent has always been a good defence.[4] Where the putative secondary offence (supply to a person) is a summary offence, as contrasted with the indictable offence of supply to a child, the offences cannot be accurately described as same 'kind' of offence in the sense mentioned in *CTM.*[5]

c. The legal error by the learned Trial Judge,[6] uncorrected by the Court of Appeal[7] was to conflate the availability of the ground of exculpation with its likelihood of success. That these are separate matters is clear from *CTM* where the Court, by a significant majority, held that honest and reasonable mistake of fact as to age was relevant to the offences under examination. 'If Parliament [intended] to abrogate that principle, it [would have made] its intention plain by express language or necessary implication.'[8] The Court in *CTM* reached the conclusion that mistake of age was available as a ground of exculpation through a focus on the legislative history, as well as the operation and importance of mistake of fact as an exculpatory basis within criminal jurisprudence. The approach of the Tasmanian courts was very different. It asked what 'innocence' meant, with this then informing the conclusion as to whether the ground of exculpation was available. It should have asked

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[4] Paraphrasing what was quoted from *R v Tolson (1889)* 23 QBD 168, 181 in *CTM* (n 2) 445, [3].
[5] *CTM* (n 2) 453, [27].
[6] *Tasmania v Bell* [2019] TASC 34 (*Bell – TJ).*
[7] *Bell v Tasmania* [2019] TASSCA 19 (*Bell – CA).*
[8] *CTM* (n 2) 456 [35].

whether Parliament had removed the operation of mistake of fact expressly or by 'necessary implication.' As noted in *CTM,* 'It is not a question about the availability of any 'common law defence' to the offence created by the [legislation].'[9]

3. The Attorney-General for Tasmania also relied on the operation of s 13(3) of Schedule 1 of the *Criminal Code Act 1924* (Tas) as a basis to establish liability. Such reliance is, with respect, misplaced. The Respondent, nor the courts below saw any reason to invoke this provision. Further, it is the Appellant's view that such an omission was entirely appropriate. The section has been rarely used,[10] criticised,[11] possibly confined to offences of specific intent,[12] and even if applicable, unclear as to the conviction.[13] It would be a tortuous reading of s 13(3) to consider that the supply to a child was an 'unforeseen result', rather than a circumstance associated with supply.

The National Issue: The Meaning of Innocence

4. The submission of the Queensland Attorney-General related specifically to the legislation in that jurisdiction. That legislation leads, undeniably, to a different outcome than in Tasmania. Having said this, the detailed examination by the Queensland Attorney-General of the history leading to the introduction to the Queensland Criminal Code does provide some insight into the reasons for that jurisdiction adopting a different wording that has led to a consequence that is distinct from the common law. In Queensland, where an operative mistake relieves liability in relation to a primary offence, the potential for guilt to be established on a secondary offence remains.[14] '[Section 24 of the Queensland Code] accommodates the effects of the mistake by allowing for degrees of excusal from criminal responsibility rather than only providing for complete excusal as provided by the common law.'[15] As noted by the Queensland Attorney-General, the seminal authorities in relation to the establishment and

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[9] *CTM* (n 2) 480 [138].
[10] The Attorney-General of Tasmania cites two decisions: *Standish v R* (1991) 60 A Crim R 364 (*Standish)*; *Vallance v the Queen* (1961) 108 CLR 56, 81 (Windeyer J) (*Vallance*)
[11] In *Vallance,* (n 10) 61 Dixon J considered that 13(3) shed 'no light' on the the matter before him. In *Regina v Vallance* (1960) Tas SR 51, 69 (Burbury CJ), his Honour described 'great difficulties with the application of this 'imprecisely drafted subsection.'
[12] Standish (n 10) 372 (Zeeman J).
[13] *Regina v Vallance* (1960) Tas SR 51, 69-70 Burbury CJ considered that if it did apply, the accused would likely be guilty of the offence of which they intended, but that this would need to be pleaded.
[14] Submissions of the Queensland Attorney-General [53].
[15] Submissions of the Queensland Attorney-General [54].

meaning of 'innocence' in a common law context (such as *Tolson*[16] and *Thomas*[17]) were situations for which no putative secondary offence existed.[18] The Appellant acknowledges this and submits that to read these cases as authority for a view that 'innocence' requires innocence on any putative criminal offence, even those of which the accused has not been charged, extends the operation of those cases beyond their remit. The Appellant endorses the view expressed by the Queensland Attorney-General that the meaning of 'innocence' is 'ambiguous and unresolved.'[19]

5. The brief submission of the Tasmanian Attorney-General on the meaning of 'innocence' aligns with the previously stated view of the Respondent. The Appellant has replied to this.[20]

6. The submission of the New South Wales Attorney-General relies heavily on the continued authority of *R v Prince*[21] and *its* subsequent use by Fullagar J in *Bergin v Stack,*[22] as well as the state decisions that relied on this. The Appellant submits, with respect, than any such reliance is wrong. Courts have severely criticised *R v Prince* in its home jurisdiction[23] internationally,[24] questioned it in the High Court,[25] and it is no longer seen as good law in Tasmania.[26] Perhaps most significantly, the judgment of Hayne J in *CTM*, read as a whole should remove, in the Appellant's view (though it is conceded that his Honour didn't deem it necessary to overrule the decision), any last vestige of precedential

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[16] *R v Tolson (1889)* 23 QBD 168 (*Tolson).*
[17] *Thomas v The King* (1937) 59 CLR 279 (*Thomas).*
[18] Submissions of the Queensland Attorney-General [55].
[19] Submissions of the Queensland Attorney-General, [49]. By contrast, the view of the New South Wales Attorney-General is that the meaning of innocence is 'not unclear.' Submissions of the New South Wales Attorney-General [6].
[20] Submissions of the Appellant filed September 11, 2020. One additional matter that should be mentioned is the submission by the Respondent that the decision of Evans J in *Tasmania v QRS* (2013) 22 Tas R 180, while asserting that *Prince* 'was no longer good law' (184) still held that mistake as to age was not available as a defence. Part of that reasoning was the legislative history associated with the section, but his Honour suggested 'That Parliament chose not to make any amendment [to the section]… is good reason to conclude that Parliament is satisfied with that construction.' That comment must be treated with caution. As noted in *CTM* when considering the machinations of political process *(*n 2) 454 [30], '[A court] is not well placed to draw inferences from silence.'
[21] *R v Prince* [1875] LR 2 CCR 154.
[22] (1953) 88 CLR 248.
[23] Appellant's Further Submissions, [15].
[24] In the Victorian decision of *Azadzoi v County Court and Another* (2013) 40 VR 390, 404 [47] (Bell J) noted the criticism that *Prince* has received in Ireland, where it has been described as 'incorrect' and 'bad in law.' The Appellant's submission is that the Respondent's suggestion that these international authorities were of 'little utility' is to downplay the quickly diminishing role that *Prince* plays, and should play, in the understanding of mistake of fact (Respondent's Further Submissions, [57]).
[25] *CTM v The Queen* (n 2) 485 [155], 487 [160] per Hayne J.
[26] Evans J in *Tasmania v QRS* (2013) 22 Tas R 180, 184.

authority in Australia for the decision of *Prince*. Continued reliance on *Prince* is unsound and inconsistent with fault-based responsibility within criminal law.

7. The second basis on which the Attorney-General of New South Wales seeks to challenge the submission of the Appellant is its view that *Bergin v Stack* does not run contrary to a fault based criterion for the establishment of liability. The Appellant has always submitted, as recognised by the Attorney-General of New South Wales, that mistake of fact is limited and delimited by the requirements that the jury must assess the honesty and reasonableness of the defendant's belief, as evidenced by what is placed before the jury. In that instant matter, the opportunity for the jury to consider these factors, at least on the supply charge was removed from them. The New South Wales Attorney-General also notes that the disallowing of mistake of fact in no way removes the requirement of the Crown to prove the remaining elements of the offence. In the instant matter where the accused is charged with an indictable offence, and the 'kind of offence that is being committed'[27] is arguably one of summary nature only, the application of *Bergin* seems tenuous. It is submitted that this was not the intent of *Tolson* and *Thomas* where there was no secondary offence in play, nor *Proudman v Dayman,*[28] which involved a regulatory style motor vehicle offence. With the deterioration in the weight that should be bestowed upon *Prince,* the foundation for *Bergin* and its continued application, at least without qualification, becomes fragile. Undoubtedly the last fifty years of criminal jurisprudence has seen an extensive re-examination of the need for fault based responsibility and an increasing importance placed on the principle of legality and its preservation of fundamental rights. Decisions such as *He Kaw Teh,*[29] and *CTM* are emblematic of that direction. This movement requires a reconsideration of the holding in *Bergin.*

Part III: Estimate of Time Required for Oral Submissions

8. The Appellant estimates two hours.

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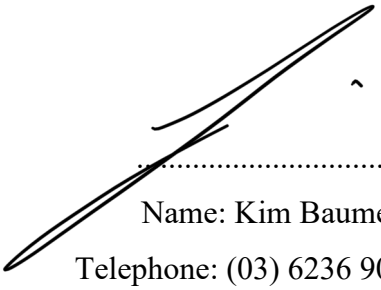
[27] *CTM* (n 2) 453 [27].
[28] (1941) 67 CLR 536 (*Proudman).*
[29] *He Kaw Teh v The Queen* (1985) 157 CLR 523 (*He Kaw Teh).*

Dated: 4 May 2021



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