HIGH COURT OF AUSTRALIA

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IN THE HIGH COURT OF AUSTRALIA

HOBART REGISTRY

BETWEEN: **CHAUNCEY AARON BELL**

Appellant

and

STATE OF TASMANIA

Respondent

APPELLANT'S REPLY

Part I:

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

Part II: **A Reply to the Respondent's Submissions**

A General Reflection

[2] For the most part, and subject to the specific points noted below, the Appellant takes no issue with the doctrinal account of the law provided by the Respondent. Nevertheless, the statement of the legal principles fails to place them in the wider context of an accusatorial system of justice or the presumption of innocence afforded to the accused.[1] Nor do those principles as stated and understood by the Respondent reflect the values embedded in a contemporary system of criminal responsibility. The importance of values in this context cannot be underestimated. In *CTM v The Queen,*[2] the High Court clearly state: 'The common law principle in question [honest and reasonable mistake of fact] reflects fundamental values as to criminal responsibility. The courts should expect that, if Parliament intends to abrogate that principle, it will make its intention plain by express language or necessary implication.'[3]

[3] As noted in *Lee v New South Wales Crime Commission,* the **cardinal principle** is that the burden of proof of establishing beyond a reasonable doubt all elements of the offence rests with the Crown.[4] In the instant matter, it is not challenged that on current authority the act to which

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[1] *Lee v New South Wales Crime Commission* (2013) 251 CLR 196, 202 [1] (*Lee)*, per French CJ, 'The presumption of innocence, the privilege against self-incrimination and the right to silence are important elements of the "accusatorial system of justice" which generally prevails in the common law world.' In *Momcilovic v The Queen* (2011) 245 CLR 1, 47 [44-45] French CJ discussed the relationship between the principles of legality and the common law presumption of innocence.

[2] (2008) 239 CLR 400 (*CTM).*

[3] Ibid [35].

[4] As noted in *Lee* (n 1) [37] per French CJ: 'That reflected his Honour's view of the privilege as supportive of the "cardinal principle" that the burden of proof of guilt of a person charged with a criminal offence rests upon

s 13(1) of Schedule 1 of the *Criminal Code Act 1924* (Tas) applies is that of the physical act of the accused and not the circumstances or consequences that surround that act. The supply of the drugs must be voluntary and intentional (Respondent's Submission (RS) [27]). Where the tension between the Respondent and the Appellant exists is that on the submission of the Appellant, this does not end the inquiry. The decision of Brennan J. in *He Kaw Teh v The Queen*[5] provides the taxonomy for analysis. His Honour articulated that criminal responsibility flows not only from the act, but also from the circumstances attendant to that act, and sometimes the results that flow.[6] This is not at odds with the principle authority relied on by the Respondent: *Vallance v The Queen*[7] (Respondent's Submissions [19]-[27]). Rather, what it means in the context of honest and reasonable mistake of fact is that once the defence raises the possibility of honest and reasonable mistake of fact as a ground of exculpation, the burden then moves to the prosecution to prove beyond a reasonable doubt, the absence of such an honest and reasonable mistake of fact. As noted by Brennan J. in *He Kaw Teh* and in so doing he references *Vallance:* 'These elements - conduct, circumstances and results - are what Dixon C.J. in *Vallance v. The Queen* called "the external elements necessary to form the crime".'[8] To focus, as done by the Respondent (RS [6]-[34]), exclusively on the mental element attached to the physical act of the accused is 'the beginning of wisdom.'[9] The Appellant suggests that it is not the end as regards the offence under examination. As further noted by Brennan J, knowledge or the absence of an honest and reasonable belief is the mental state according to the circumstances that surround the offence.[10] In this case, it was the belief of the defendant as to the age of the complainant and the reasonableness and honesty of this, which should have been left to the jury.

Specific Reflections on the Respondent's Submissions

[4] It is agreed (RS [3]) that for the Appellant to succeed *Bergin v Stack*[11] must be overturned (AS [27]). While the Appellant recognises that there is a need for some clarification of *CTM,*

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the Crown[4]. That cardinal principle, and the privilege which supports it, are central to, although not exhaustive of, the accusatorial character of criminal proceedings…'

[5] (1985) 157 CLR 523 (*He Kaw Teh).*

[6] Ibid 564-565 per Brennan J.

[7] *Vallance v The Queen* (1961) 108 CLR 56 (*Vallance).*

[8] *He Kaw Teh* (n 5) 565 per Brennan J.

[9] Ibid 568, per Brennan J quoting from *Reg v Morgan* [1976] A.C. 182, at p. 213: It is one thing to say that mens rea is an element of an offence; it is another thing to say precisely what is the state of mind that is required. It is the "beginning of wisdom", as Lord Hailsham of St. Marylebone said in *Reg. v. Morgan* (39), to see "that 'mens rea' means a number of quite different things in relation to different crimes".

[10] Ibid 568.

[11] (1953) 88 CLR 248 (*Bergin).*

it is significant to note that the High Court did hold that honest and reasonable mistake of fact as to age was available in that matter.

[5] It is incorrect to suggest that the Appellant was arguing that the offence in question was one of absolute liability (RS [18]). Rather, the Appellant has suggested that the interpretation provided by the Court of Appeal creates an element of absolute liability as regards age (AS [24], [39]). The Appellant suggests that it is unprincipled to allow one element (e.g. whether the drug supplied is a controlled substance or not) to be a matter of proof for the prosecution and for which honest and reasonable mistake of fact would be left to the jury, while allowing another element (i.e. the age of the complainant), to be something which the defendant is unable to rely upon as a ground of exculpation (AS [39]). Arguably what the Trial Judge's ruling did, which remains uncorrected in the Court of Appeal is to conflate the availability of the ground of exculpation and the possibility that it would succeed. The basis of exculpation was not left to the jury because, according to the Trial Judge, the defendant had committed a criminal offence in the same enactment. This decision is made before the jury has resolved guilt on the elements that are common to both offences (e.g. supply of a controlled drug).

[6] Further concerns with the doctrinal summary is that nothing is said as to how these authorities would apply in circumstances where there is a significant disparity in penalty,[12] or how they align with the previously mentioned fundamental tenets of criminal responsibility. Brett J. alluded to these difficulties in the Court of Criminal Appeal,[13] with that same Court also highlighting that the Respondent had made submissions that some limit needed to be drawn as to when a person's honest and reasonable mistake results in innocence.[14] Further, many of the later state courts that have referred to these issues have not needed to address them in any significant way. These later decisions involving matters which were regulatory or minor in nature, or involving offences where there was no significant disparity in penalty between the alleged offence and the putative alternative (AS [43]).

[7] The suggestion by the Respondent that the issue of whether the accused thought the person was an adult may be relevant to sentencing (RS [69]) masks the difficulty that this causes. In the instant matter, the Trial Judge had no basis on which he could decide whether the jury

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[12] The Respondent [RS fn 5] mentions that the most that a person has received for supplying a drug to a child is 9 months imprisonment. From what the Appellant can tell the only matter where s 14 of the *Misuse of Drugs Act 2001* (Tas) has been alleged is the current matter where the accused received that term of imprisonment.
[13] *Bell v Tasmania* [2019] TASCCA 19 [30]-[36] per Brett J (*Bell).*
[14] Ibid [34].

thought the accused honestly and reasonably believed the complainant was a child or not. His Honour, despite not leaving honest and reasonable mistake of fact to the jury was prepared to find that the accused was either reckless or at least indifferent to the complainant's age (Core Appeal Book 32). In this context *CTM* alluded to the difficulties of age.[15]

[8] The Respondent's submission (RS [55]) that the cases of *Bergin, Proudman* and *Thomas* can be reconciled is misconstrued. The distinction the Respondent draws between the mistaken belief making the act innocent as distinct from the mistaken belief making the accused innocent of the charge fails to recognise the accusatorial system of justice and the need, as Brennan J suggests in *He Kaw Teh,* to ensure that 'the particular mental states that apply to **the several external elements** of an offence must be distinguished, not only as a matter of legal analysis, but in order to maintain tolerable harmony between the criminal law and human experience.'[16]

[9] The Respondent refers to the 'outside of the enactment test' (RS [65]). As noted by Martin AJ in the Court of Criminal Appeal in *Bell,* 'The historical context for Dixon J's reference to conduct "outside the operation of the enactment" has not been explored.'[17]

The suggestion is that this is not an avenue to explore. There are significant difficulties in determining what enactment could mean in this context. For example, the Macquarie Dictionary definition of enactment includes an individual section within an Act as well as the Act itself.[18] To illustrate, it would seem an unusual outcome to suggest that had the indictable offences from the *Misuse of Drugs Act 2001* (Tas) been placed in separate legislation, with the summary offences remaining in the *Misuse of Drugs Act 2001* (Tas) that the result should be different. Such a conclusion would seem to have little basis in logic.

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[15] *CTM* (n 2) 455 [33] per Gleeson CJ, Gummow, Crennan and Kiefel JJ, quoting from the Court of Appeal decision of Howie J.
[16] *He Kaw Teh* (n 5) 568 (emphasis supplied).
[17] Bell (n 13) [64] per Martin AJ.
[18] Enactment:

> *noun* **1.** the act of enacting.
>
> **2.** the state or fact of being enacted.
>
> **3.** that which is enacted; a law; a statute.
>
> **4.** a section or part of a section in an act.

Ed: Alison Moore, Macquarie Dictionary Publishers, 8th edition, 2020
See also [AS fn 63] for a discussion of the *Acts Interpretation Act 1931* (Tas) s 6.

[10] The Appellant disputes the suggestion by the Respondent that reliance on *Bone* is misplaced (RS [64]). Cases such as *Iannazzone v the Queen*[19] and *R v Dib*[20] are unusual cases relying on the 'effect of possible provocation on the offence of murder and the inter-relationship of the elements of both crimes.'[21] The cases did not deal with the 'present problem.'[22] Further, the specific analysis by Adams J in *Bone* of *Bergin* is of little utility here, as the question before Adams J involved the actions of another party of whom the accused could not reasonably have been aware.[23]

[11] The Respondent spends considerable time (RS [40]-[47]) analysing the differences between the mistake of fact provisions of Western Australia, Queensland, and Tasmania. We take no issue with that analysis, other than to suggest it is largely irrelevant. The Tasmanian provision does reflect the common law position which, it is suggested, supports a view that honest and reasonable mistake of fact provides a 'defence', or a 'ground of exculpation' or as noted by Brennan J. in *He Kaw Teh,* qualifies the external elements of the offence - in this case, the supply of a controlled drug to a child. In his Honour's words: ' A mental state less than knowledge can apply more readily to circumstances attendant on the occurrence of an act involved in the commission of an offence being circumstances which make the act criminal.'[24] One element that makes an act criminal contrary to s 14 of the *Misuse of Drugs Act 2001* (Tas) is that the **supply is to a child**. These words distinguish this indictable offence from the summary offence of supply to a person. A person should not be convicted of the offence of supply to a child where the prosecution has failed to prove beyond a reasonable doubt to a jury that there was an absence of an honest and/or reasonable belief that the person was an adult.

Dated: 9 September 2020

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[19] [1983] 1 VR 649 (*Iannazzone).* NB/ Incorrectly referred to as 'Innazzone' in the Appellant's Submissions.
[20] (2002) 134 A Crim R 329 (*Dib).*
[21] *DPP v Bone* [2005] NSWLR 735, 751 [41] (*Bone).*
[22] Ibid.
[23] *Bone* (n 21) 751 [43].
[24] *He Kaw Teh* (n 5) 575.