HIGH COURT OF AUSTRALIA

NOTICE OF FILING

This document was filed electronically in the High Court of Australia on 27 Apr 2021 and has been accepted for filing under the *High Court Rules 2004*. Details of filing and important additional information are provided below.

Details of Filing

File Number:	H2/2020
File Title:	Bell v. State of Tasmania
Registry:	Hobart
Document filed:	Form 27C - Intervener's submissions (NSW)
Filing party:	Interveners
Date filed:	27 Apr 2021

Important Information

This Notice has been inserted as the cover page of the document which has been accepted for filing electronically. It is now taken to be part of that document for the purposes of the proceeding in the Court and contains important information for all parties to that proceeding. It must be included in the document served on each of those parties and whenever the document is reproduced for use by the Court.

IN THE HIGH COURT OF AUSTRALIA
HOBART REGISTRY

H2/2020

BETWEEN: **CHAUNCEY AARON BELL**
Appellant

and

STATE OF TASMANIA
Respondent

SUBMISSIONS OF THE ATTORNEY GENERAL FOR NEW SOUTH WALES (INTERVENING)

Part I: Certification

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

Part II: Basis of intervention

2. On 3 February 2021, the Court adjourned the hearing of this matter to allow an opportunity for the State and Territory Attorneys General to intervene in light of the issues raised. In exercise of that opportunity, the Attorney General for New South Wales (**AG (NSW)**) seeks to intervene in the proceedings. Courts in New South Wales have approached the common law ground of exculpation of honest and reasonable mistake of fact in accordance with *Bergin v Stack* (1953) 88 CLR 248 (***Bergin v Stack***) and, more recently, *CTM v The Queen* (2008) 236 CLR 440 (***CTM***). A decision by this Court to overrule or depart from *Bergin v Stack* would, therefore, work a significant change to the common law applicable to criminal trials in New South Wales.

Part III: Leave

3. To the extent required, the AG (NSW) seeks leave to intervene or to be heard as amicus curiae.

Part IV: Statement addressing issues

4. The submissions of the AG (NSW) proceed on the basis that:

   a. it was not necessary for the Crown to prove, as an element of the offence against s 14 of the *Misuse of Drugs Act 2001* (Tas), that the appellant knew the complainant was under 18 years of age;[1]

   b. for the purposes of s 14 of the *Criminal Code Act 1924* (Tas), s 14 of the *Misuse of Drugs Act* did not exclude the operation of honest and reasonable mistake of fact as a possible ground of exculpation;[2] and

   c. the common law relating to honest and reasonable mistake of fact as a ground of exculpation is, for present purposes, the same as what falls for consideration in the context of the Tasmanian *Criminal Code*.[3]

Common law position at present

5. The classic statement of the common law position is found in the judgment of Dixon J in *Proudman v Dayman* (1941) 67 CLR 536 (***Proudman v Dayman***), where his Honour said (at 540-541; emphasis added):

> "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. …
>
> The burden of establishing honest and reasonable mistake is in the first place upon the defendant and he must make it appear that he 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."

In the result, a mistaken belief on reasonable grounds was not shown to arise in *Proudman v Dayman*.[4]

6. The appellant seeks to call into question the meaning of the word "innocent" in the above passage from *Proudman v Dayman* and in similar statements in subsequent cases. The AG (NSW) submits that, as the common law presently stands, the meaning of "innocent" is not unclear. To an extent, the appellant seems to accept this: he acknowledges that the

---

[1] *Bell v Tasmania* [2019] TASCCA 19; 279 A Crim R 553 at [4] per Pearce J, [17]-[18] per Brett J.

[2] Appellant's Further Submissions filed 29 March 2021 (**AFWS**) at [23].

[3] AFWS at [23]; Respondent's Further Submissions filed 12 April 2021 (**RFWS**) at [5], [40]; *Bell* [2019] TASCCA 19; 279 A Crim R 553 at [19] per Brett J.

[4] (1941) 67 CLR 536 at 538-539 per Rich ACJ, 541 per Dixon J, 542-543 per McTiernan J.

"traditional orthodoxy" arising from this Court's decision in *Bergin v Stack* is that "innocent" means 'not guilty of another offence'.[5]

7. In *Bergin v Stack*, Fullagar J, with whom Williams ACJ and Taylor J agreed, considered whether it would be an answer to a charge of selling liquor without a licence under s 161 of the *Licensing Act 1928* (Vic) that Mr Stack believed that the club at which he worked had a licence. His Honour concluded that it would not because there was insufficient evidence of a relevant belief and because Mr Stack would have been guilty of an offence in any event. Of the latter reason, Fullagar J said (at 262):

> "At this point the fact that the sale took place at 6.40pm, i.e. outside lawful trading hours for a club (see ss 266(2) and 8 of the *Licensing Act 1928*) becomes for the first time relevant. (Since the defendant was not charged with selling outside trading hours, it is not, in my opinion, relevant in any other respect.). If his belief had been true, the only result would have been that he was guilty of an offence under s 266 of the Act. 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 difference offence was being committed."

Aspects of Fullagar J's reasoning will be discussed further below in the context of the appellant's criticism of *Bergin v Stack*. But it is sufficient presently to observe that his Honour's statement of the relevant point is clear.

8. In *R v Reynhoudt* (1962) 107 CLR 381, the issue was whether it was an element of the offence of assaulting a police officer in the execution of duty, under s 40 of the *Crimes Act 1958* (Vic), that the defendant knew or intended that the person assaulted was a police officer. Four members of this Court also referred to an honest and reasonable mistake about whether the person assaulted was a police officer as a ground of exculpation.[6] Consistently with *Bergin v Stack*, the effect of those references was that the defendant would need to show an honest and reasonable mistake that would justify or make lawful the assault *simpliciter*.[7] Justice Kitto said (at 389):

> "if the respondent had satisfied the jury on a balance of probabilities that he honestly and on reasonable grounds believed in the existence of facts which, if they had existed, would have made what he did to the police officer no assault at all, he must have been acquitted".

---

[5] AFWS at [13].

[6] Note that Dixon CJ and Kitto J dissented in the result, on the question of the mental elements of the offence.

[7] *Reynhoudt* (1962) 107 CLR 381 at 385-386 per Dixon CJ, 389 per Kitto J, 395-396 per Taylor J, 404, 407-408 per Owen J. See also *R v Mark* (1961) Crim Law Rev 173.

9. In *CTM*, this Court considered whether the common law principle of honest and reasonable but mistaken belief was a ground of exculpation in respect of s 66C(3) of the *Crimes Act 1900* (NSW), being an offence of sexual intercourse with a person aged between 14 and 16 years. What was meant by an honest and reasonable belief in a state of facts which, if they existed, would make the defendant's act "innocent" was raised in argument. Both parties accepted that *Bergin v Stack* supplied the answer and that it was necessary that the defendant be guilty of no other offence.[8] In their joint judgment, Gleeson CJ, Gummow, Crennan and Kiefel JJ said:[9]

> "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' [citing *Proudman v Dayman* (1941) 67 CLR 536 at 541 per Dixon J]".

10. In illustration of the same point, their Honours later said (at [27]):

> "It would therefore not assist an accused to believe that a child was aged between ten and fourteen, or between fourteen and sixteen; for if the child were of that age, it would merely take the case out of one prohibition into another. … An honest mistake about the extent to which a child is under-age would merely be a mistake about the kind of offence that is being committed. That would be legally irrelevant to guilt, although it could possibly have some consequence for sentencing purposes."

11. Justice Hayne referred to the general rule that a person is excused from liability if the person reasonably and honestly believed in a state of facts that would make his or her conduct "innocent".[10] That his Honour understood the question of innocence consistently with Fullagar J's explanation in *Bergin v Stack* is made clear where Hayne J says (at [174]):

> "The fact that the accused may have reasonably believed that the child was 14 years or above (but under 16 years) would not affect that person's criminal responsibility. It would not affect that person's criminal responsibility under s 66C(1) because the belief, if true, would not make the accused person's conduct innocent. If the accused's belief about the age of the child were true, the accused would nonetheless have committed the offence under s 66C(3), of having intercourse with a person of or above the age of 14 years and under the age of 16 years."

---

[8] *CTM v The Queen* [2008] HCATrans 117 at lines 325-340, 2245-2275, 3405-3430.

[9] (2008) 236 CLR 440 at [8]. See also *CTM v The Queen* [2007] NSWCCA 181; 171 A Crim R 371 at [40], [72]-[74], [126].

[10] *CTM* (2003) 236 CLR 440 at [146]-[147], [159], [173].

12. Justice Heydon referred (at [199]) to the ground of exculpation as being raised where the defendant satisfies the "evidential burden of establishing an honest belief on reasonable grounds in the existence of a state of factual affairs which, had it existed, would have made the acts alleged by the prosecution *non-criminal*" (emphasis added).

13. State courts, including those of New South Wales, have followed the authority of *Bergin v Stack*.[11] In *R v Iannazzone* [1983] 1 VR 649, the Full Court of the Supreme Court of Victoria considered the excuse of an honest and reasonable belief in a state of facts which, if they existed, would make the defendant's act innocent in the context of a conviction for murder where it was contended that the defendant honestly and reasonably believed that a suicide pact had been entered into and that the killing was pursuant to that pact. One of the answers to the defendant's submission was that such a belief would not have rendered his actions innocent. Justice Brooking, with whom Young CJ and Starke J agreed, reasoned (at 655):

> "the honest and reasonable belief doctrine requires belief in a state of facts which, if they existed would make the defendant's act innocent. The meaning of innocent for this purpose has been the subject of considerable debate, but it is at all events made clear by the judgment of Fullagar J in *Bergin v Stack* (1953) 88 CLR 248 at p 262, that a belief does not excuse if its truth would have meant, not that no offence was being committed, but that some other and different offence was being committed. Williams ACJ at p 253 and Taylor J at p 277 concurred in the judgment of Fullagar J, and Webb J at pp 253-4, appears to have been of the same opinion as Fullagar J on the point now under consideration. If the supposed belief in the present case had been true, the applicant would have been guilty of manslaughter; and this circumstance is itself enough to render the mistake doctrine inapplicable".

14. In *R v Dib* [2002] NSWSC 934; 134 A Crim R 329, the issue was whether an honest and reasonable mistake by the defendant as to conduct of the deceased was relevant to provocation in support of a verdict of manslaughter, rather than murder. Justice Hulme said (at [41]-[42]):

> "[A]s the decision of *R v Iannazzone* [1983] 1 VR 649 at 655; (1980) 3 A Crim R 246 at 252-253 and the cases referred to in it make clear, 'the honest and reasonable belief doctrine requires belief in a state of facts which, if they existed, would make the defendant's act innocent' and a 'belief does not excuse if its truth would have meant, not that no offence was being committed, but that some other and different

[11] In addition to the cases discussed below, see also the statements of principle in *Budrodeen v R* [2014] NSWCCA 332 at [6] per Rothman J; *R v Lavender* [2004] NSWCCA 120 at [265] per Hulme J; *Semaan v Poidevin* [2013] NSWSC 226; 228 A Crim R 363 at [68] (and, on appeal, *Poidevin v Semann* (2013) 85 NSWLR 758 at [14] per Leeming JA (Ward and Emmett JJA agreeing)); *SafeWork NSW v Assign Blue Pty Ltd* [2020] NSWDC 756 at [79]; *Hawkesbury City Council v Johnson* [2008] NSWLEC 138 at [166]. See further Gillies, *Criminal Law* (4th ed) at 305.

> offence was being committed'. Here any mistake as to the deceased's conduct could only assist an accused in obtaining a conviction for manslaughter rather than murder. On this ground alone, I would regard the issue of any mistake by the accused as one which does not arise."

15. In *Director of Public Prosecutions (NSW) v Kailahi* [2008] NSWSC 752; 191 A Crim R 145, the defendant had been disqualified from driving by order unknown to her and made in her absence, but she was aware that she did not hold a driver's licence. In relation to an offence of driving while disqualified, Rothman J reasoned (at [10]-[12]):

> "the defence of honest and reasonable mistake applies only in circumstances where, were the facts believed by the accused to be true, the accused would have been guilty of no offence: *Bergin v Stack* (1953) 88 CLR 248 (per Fullagar J).
>
> In the instant proceedings, even if the Crown were required to negative honest and reasonable mistake as to the existence of a disqualification, such a requirement would only apply in circumstances where, but for the mistake of fact, Ms Kailahi would be entitled to drive. As a consequence, the 'mistake of fact', if it be one, is a mistake as to which offence was being committed.
>
> In those circumstances, it is unnecessary for the prosecuting authority to negative or preclude the existence of such a mistake, however reasonable or honest it be."

16. The appellant places some reliance on *Director of Public Prosecutions v Bone* (2005) 64 NSWLR 735.[12] That reliance is misplaced. In that case, the defendant had been charged with driving with alcohol in excess of the middle range prescribed concentration in his blood. He maintained that his drink had been spiked. The Director argued that the defendant could not rely on honest and reasonable mistake of fact because his belief as to the amount of alcohol he had consumed would still have rendered him guilty of the lesser offence of driving with a low range prescribed concentration of alcohol in his blood. Justice Adams concluded (at [39], [42]-[43]) that the analysis of Fullagar J in *Bergin v Stack* was inapplicable because there was no evidence (in particular, no expert evidence) to establish that, on the defendant's belief as to the amount of alcohol he had consumed, he would have been guilty of the low range prescribed concentration offence. Thus, as far as Adams J could be satisfied, the defendant's belief would have rendered his actions innocent in the sense described by Fullagar J.

Change to common law position?

17. The appellant seeks to persuade the Court that, in the classic statement of the common law ground of exculpation for honest and reasonable mistake of fact (see [5] above),

[12] Appellant's submissions filed 24 July 2020 (**AWS**) at [33].

"innocent" means that the person must be "innocent of the charge that they face, and there need be no further examination".[13] The burden of that submission is to persuade the Court that the reasoning in *Bergin v Stack* was wrong. It is trite to observe that this Court is, with respect, appropriately slow to re-open its own decisions.[14] In the submission of the AG (NSW), there is no warrant for doing so in this case. In his challenge to *Bergin v Stack*, the appellant advances, in effect, two arguments, namely that:[15]

a. *Bergin v Stack* is an "outlier" in the case law, involving a misreading rather than a reflection of principles carefully worked out in prior cases;[16] and

b. the reasoning of *Bergin v Stack* is contrary to fundamental principle.[17]

Each of these arguments, which will be addressed in turn, is unpersuasive.

Whether *Bergin v Stack* involved misreading of common law

18. The appellant contends that the decision of *Bergin v Stack* relied heavily on the "now discredited" decision of *R v Prince* [1875] LR 2 CCR 154, whereas nothing in earlier cases – including *Proudman v Dayman*, *Thomas v The King* (1937) 59 CLR 279 (***Thomas***) and *R v Tolson* [1889] 23 QBD 168 (***Tolson***) – supported what was said by Fullagar J (Williams ACJ and Taylor J agreeing) in *Bergin v Stack*.[18]

19. *R v Prince* [1875] LR 2 CCR 154 (***Prince***) concerned the unlawful taking of an unmarried girl under the age of 16, in circumstances where it was accepted that the defendant had a *bona fide* and reasonable belief that she was over the age of 16. The Court for Crown Cases Reserved considered whether such a belief excused the defendant's otherwise criminal acts. In a dissenting judgment as to the result, Brett J (later Lord Esher) was concerned to examine the legal position of the defendant assuming his belief was correct. His Honour reasoned (at 169-170) that a guilty mind would exist if the acts done would constitute a crime according to the belief. Thus, the ground of exculpation was available

[13] AFWS at [15].

[14] See *Queensland v The Commonwealth* (1977) 139 CLR 585 at 599 per Gibbs J, 602 per Stephen J, 620 per Aickin J; *Miller v The Queen* (2016) 259 CLR 380 at [39] per French CJ, Kiefel, Bell, Nettle and Gordon JJ.

[15] AFWS at [15].

[16] Cf *John v Federal Commissioner of Taxation* (1989) 166 CLR 417 at 438-439 per Mason CJ, Wilson, Dawson, Toohey and Gaudron JJ.

[17] See *Imbree v McNeilly* (2008) 236 CLR 510 at [45] per Gummow, Hayne and Kiefel JJ (Gleeson CJ and Crennan J agreeing).

[18] AFWS at [15].

"whenever the facts which are present to the prisoner's mind and which he has reasonable grounds to believe, and does believe to be facts would, if true, make his acts no criminal offence at all".

20. The position of Bramwell B in *Prince* (at 174-175) was that the ground of exculpation would be available where the facts honestly and reasonably believed by the defendant were such that his actions were not wrong, whether legally or morally. That was said to emerge as a matter of construction and legislative intention.[19] It is clear, however, that Bramwell B agreed with the analysis of Brett J, albeit considered it did not go far enough. For example, whereas it was a felony to unlawfully and carnally know a girl under the age of 10, it was a misdemeanour to unlawfully and carnally know a girl above 10 and under 12, and it was observed by Bramwell B (at 175-176) that a defendant could not avoid the felony by establishing that he believed the girl to be over the age of 10 but under 12. He gave the further example that a mistake as to a person's status as a police officer would not excuse an assault on the police officer in the execution of his duty given "the act was wrong in itself". That accords with what was said by this Court in *Reynhoudt* (1962) 107 CLR 381 (see [8] above). Justice Denman, who agreed with Blackburn J and Bramwell B, added (at 179) that a defendant "cannot set up a legal defence by merely proving that he thought he was committing a different kind of wrong from that which in fact he was committing".

21. Following the decision in *Prince*, a potential defence based upon the belief as to a girl's age was introduced by statute.[20] In light of subsequent decisions like *Sweet v Parsley* [1970] AC 132 (and, by analogy, *He Kaw Teh v The Queen* (1985) 157 CLR 523 in this Court), it may be said that the majority in *Prince* too lightly accepted that the legislative intention in respect of the offence was to exclude any mental element in connection with the complainant's age. It is in that sense that the authority of *Prince* has been said to be discredited.[21]

---

[19] *Prince* [1875] LR 2 CCR 154 at 175, 177; see also at 171-172 per Blackburn J. This understanding of the reasoning is consistent with how *Prince* was discussed in *Tolson* [1889] 23 QBD 168: see at 180 per Wills J, 190 per Stephen J, 194 per Hawkins J. See also Stephen, *History of the Criminal Law of England*, vol 2 at 117; Kenny, *Outlines of Criminal Law* (5th ed) at 41-42.

[20] See *R v K* [2002] 1 AC 462 at [9]-[10] per Lord Bingham (Lords Nicholls, Hobhouse and Millett agreeing).

[21] *R v K* [2002] 1 AC 462 at [21] per Lord Bingham, [30] per Lord Steyn, [39] per Lord Hobhouse.

22. In the present case, the appellant is critical of Fullagar J's invocation of *Prince* in *Bergin v Stack*.[22] That criticism is unjustified. Justice Fullagar recognised (at 262) the majority's reasoning in *Prince* that "a mistake could not excuse unless the fact believed was such that, if it had been true, there would not merely have been no crime at all but no wrongful act at all". The position of Brett J – that the facts believed, if true, would mean there was "no criminal offence at all" – was described as the "*minimum* requirement" (emphasis in original). This was, in the submission of the AG (NSW), a correct understanding of *Prince*[23] and the conclusion of Fullagar J in *Bergin v Stack* did not go beyond that minimum requirement.

10 23. Further, it is unjustified to characterise Fullagar J as relying "heavily" on *Prince* if that is intended to suggest that there was otherwise little support for his Honour's reasoning.[24] Citing *Bank of New South Wales v Piper* [1897] AC 383, Fullagar J said "[t]he rule is generally stated in terms which mean that the existence of the fact mistakenly believed must be such as to render the act an innocent act". It is clear that – in the same way as the issue arises here – his Honour was seeking to give content to references in prior cases to 'innocence'. The appellant is, with respect, incorrect to say that it is "not possible to extrapolate" from those earlier cases that "innocent" means 'not guilty of any criminal offence'.[25] In that connection, the appellant refers in particular to *Tolson* and *Thomas*.

24. In *Tolson*, Cave J described the general position as being that:[26]

20 > "[a]t 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 been held to be a good defence".

25. The question raised in *Prince* of whether innocence means not only not criminal, but also not immoral, did not need to be resolved in *Tolson* because the latter case related to the offence of bigamy and the act of marriage, if done with a belief that a first husband had died, would be neither criminal nor immoral.[27] It is nonetheless relevant to note that Stephen J accepted (at 190) the correctness of the principle stated by Brett J in *Prince* that "a mistake of facts on reasonable grounds, to the extent that, if the facts were as

[22] AFWS at [15].
[23] See *Tolson* [1889] 23 QBD 168 at 190 per Stephen J.
[24] AFWS at [15].
[25] AFWS at [15].
[26] [1889] 23 QBD 168 at 181; see also at 171-172 per Wills J.
[27] *Tolson* [1889] 23 QBD 168 at 181-182 per Cave J, 193 per Hawkins J.

believed, the acts of the prisoner would make him *guilty of no offence at all*, is an excuse" (emphasis added). Additionally, Wills J said (at 171-172):

> "It is … undoubtedly a principle of English criminal law, that ordinarily speaking a crime is not committed if the mind of the person doing the act in question be innocent. 'It is a principle of natural justice and of our law', says Lord Kenyon CJ, 'that actus non facit reum, nisi mens sit rea. The intent and act must both concur to constitute the crime:' *Fowler v Padget* [7 TR 509, 514]. The guilty intent is not necessarily that of intending the very act or thing done and prohibited by common or statute law, but it must at least be the intention to do something wrong."

10 26. The general principle stated in *Tolson* – that an honest and reasonable belief in the existence of facts which, if true, would make the relevant act innocent – was accepted by this Court in *Thomas*.[28] The appellant draws to attention the following passage from the judgment of Dixon J in *Thomas* (at 304-305):[29]

> "The rule accepted [in *Tolson*] was that in the case alike of an offence at common law and unless expressly or impliedly excluded by the enactment, of a statutory offence, it is a good defence that the accused held an honest and reasonable belief in the existence of circumstances which if true, would make innocent the act for which he is charged."

The reference here to "the act for which he is charged" does not decisively support the
20 appellant's argument. It is not a reference to the offence charged. The AG (NSW) submits that this passage refers, by example to this case, to whether the act of supplying the drug would be innocent. It would not be.

27. In *Bergin v Stack*, Fullagar J also drew support from Kenny's *Outlines of Criminal Law* which, as described by his Honour (at 262-263), offered the following example (11th ed at 65):

> "the case of a man who is charged with burglary, and proves that he honestly and on reasonable grounds believed that his breaking and entering occurred before 9 pm. He would not be entitled to an acquittal on that ground, although if his belief had been well founded, he would not have been guilty of burglary."

30 This kind of example is, in fact, of long-standing, being referred to in Stephen's *Digest of the Criminal Law* (6th ed) at 28-29.[30]

---

[28] (1937) 59 CLR 279 at 287, 292 Latham CJ, 300 per Dixon J (Rich J agreeing). See also *Maher v Musson* (1934) 52 CLR 100 at 104 per Dixon J (Rich J agreeing).

[29] AFWS at [15] fn 31. See also *Bank of New South Wales v Piper* [1897] AC 383 at 389-390.

[30] At the time this example was proffered, the felony of burglary was understood to mean breaking and entering any dwelling-house by night with intent, night being understood to be the interval between 9 pm and 6 am: see Stephen's *Digest of the Criminal Law* (6th ed) at 282-283.

28. In the course of discussing honest and reasonable mistake of fact as a ground of exculpation, Kenny's *Outlines of Criminal Law* stated that (emphasis added):[31]

> "The first condition [of the ground] is that the mistake must be of such a character that, had the supposed circumstances been real, they *would have prevented any guilt from attaching to the person in doing what he did*. Therefore, it is no defence for a burglar, who breaks into No 5 to shew that he mistook that house for No 6; or that he did not know that nine o'clock had already struck. Similarly, on an indictment for assaulting a constable 'in the discharge of his duty', the fact that the assailants did not know of his official character will be no defence for them. On the other hand, it will be no offence to lay violent hands upon a person whom you reasonably, though mistakenly suppose to be committing a burglary."

29. As to whether "any guilt" in this passage referred to legal guilt or moral guilt, the text cross-referenced the following earlier passage:[32]

> "We have seen that criminal liability may exist although the offender had no intention to commit the particular crime which he did in fact commit, and that it suffices if he had an intention to commit a crime at all, whatever it were, or even an act that was simply illegal without being criminal. But there remains a further question – whether English law does not even go so far as to permit a still slighter degree of mens rea to suffice, viz. an intention to commit some act that is wrong as a breach of the accepted rules of Morality, even though it be not a breach of Law at all. This question was discussed in the elaborately considered case of *R v Prince* …"

These passages from Kenny's *Outlines of Criminal Law* lend support to Fullagar J's analysis in *Bergin v Stack* that the "minimum requirement" which emerges from *Prince* – that the believed facts, if true, would result in there being no criminal offence – represents the position at common law.

30. The AG (NSW) submits that *Bergin v Stack* constitutes neither a divergence from nor a misreading of the common law which obtained prior to that decision. The appellant's argument to that effect should be rejected.

Whether *Bergin v Stack* contrary to principle

31. The appellant calls in aid the proposition that no conviction should arise in criminal law without proof of fault in connection with the relevant offence.[33] It is said that overruling *Bergin v Stack* would better accord with such principles and the presumption of

[31] 5th ed at 65-66. Cf the approach stated by Phillips in the revised 15th ed of *Kenny's Outlines of Criminal Law* at 51-53.

[32] *Kenny's Outlines of Criminal Law*, 5th ed at 41.

[33] AFWS at [9], [11]. See also Fisse, *Howard's Criminal Law* (5th ed) at 518-521.

innocence. The AG (NSW) submits that *Bergin v Stack* should not be understood to be contrary to principle for two reasons.

32. *First*, to disallow exculpation where the honestly and reasonably believed facts would still see the defendant guilty of some offence in no way undermines the need for the Crown to establish the elements of the offence. The "clear distinction between the failure of a criminal charge for want of evidence of an essential element in the crime and failure of a charge … because in answer to the Crown case the accused has made out a defence of 'honest mistake'" should not be depreciated.[34] Further, a legislature which defines an offence in a statute so as to allow honest and reasonable mistake of fact to operate as a ground of exculpation must be taken to have understood, at least since *Bergin v Stack* was decided in 1953, that the ground would exculpate the defendant only if, on the facts as believed, he or she was not guilty of another offence. That must be the case for the *Misuse of Drugs Act* in Tasmania, which was enacted in 2001.

33. *Secondly*, it overstates the purpose of the common law in Australia in respect of honest and reasonable mistake of fact to suggest that it should be understood as preserving the need for a 'guilty mind'. The extent to which the common law incorporates a "subjective theory of criminal responsibility" is clearly limited at least to the extent of requiring that the defendant's mistake was reasonable.[35] The reasonableness of the defendant's mistaken belief as to the facts is objectively measured and an essential feature of the ground of exculpation.[36]

'Outside the operation of the enactment'

34. As noted at [5] above, in *Proudman v Dayman* Dixon J referred to an honest and reasonable mistake of fact which "if true, would take [the defendant's] act outside the operation of the enactment".[37] That formulation has been repeated in some subsequent cases, although its meaning has not been substantively considered.[38] As noted at [9] above, conduct falling "outside the operation of the enactment" was equated in *CTM* with

---

[34] *Reynhoudt* (1962) 107 CLR 381 at 410 per Owen J. See also *Bank of New South Wales v Piper* [1897] AC 383 at 389.

[35] AWS at [20], [35], [46]; AFWS at [15].

[36] *CTM* (2008) 236 CLR 440 at [8], [39] per Gleeson CJ, Gummow, Crennan and Kiefel JJ, [176]-[177] per Hayne J. Cf Richardson (ed), *Archbold Criminal Pleading, Evidence and Practice 2016* at [17-17].

[37] (1941) 67 CLR 536 at 540-541.

[38] See *Jiminez v The Queen* (1992) 173 CLR 572 at 581-583 per Mason CJ, Brennan, Deane, Dawson, Toohey and Gaudron JJ. See also *State Rail Authority of NSW v Hunter Water Board* (1992) 28 NSWLR 721 at 722 per Gleeson CJ (Cripps JA and Slattery AJ agreeing).

innocence in the context of "an offence, or a series of offences, defined by statute".[39] In the Court of Criminal Appeal in *CTM v The Queen* [2007] NSWCCA 131; 171 A Crim R 371, Howie J said (at [74]):

> "It seems to me that in the present case at least the belief in the existence of facts should be that which, if true, would remove the accused from the ambit of the sexual assault offences contained in the *Crimes Act*."

35. The appellant submits that, as an alternative to overruling *Bergin v Stack*, this Court could adopt a "hybrid" position, whereby the ground of exculpation may operate so long as, on the facts believed, the defendant is innocent of cognate offences; offences carrying similar penalties; or offences subject to the same criminal process.[40] In making that submission, the appellant does not seek to rely on the words "outside the operation of the enactment" in Dixon J's judgment in *Proudman v Dayman*.[41]

36. Arguably, the words "outside the operation of the enactment" provide a foothold in the authorities for limiting the requirement of innocence to only some other offences, rather than any other offence or criminality. Additionally, to resolve the present appeal this Court may not need to go further than to conclude that the appellant was unable to avail himself of the ground of exculpation because, even on the facts he believed, he was guilty of another offence under the same enactment, namely the offence of supplying a controlled drug under s 26 of the *Misuse of Drugs Act*.

37. But the AG (NSW) submits that where, in *Proudman v Dayman*, Dixon J referred to "the enactment" he should not be understood as intending to convey that only offences in a particular statute or of a particular kind were relevant to the enquiry at hand. That is particularly so because his Honour's comments, and the subsequent adoption of them in *CTM*,[42] should not be understood as endorsing "two separate tests", namely, one of innocence of criminal offences generally and one of innocence of particular offences in a series or under one Act.[43] It is unlikely that the Court intended to express inconsistent tests for the application of the ground of exculpation.

---

[39] (2008) 236 CLR 440 at [8] per Gleeson CJ, Gummow, Crennan and Kiefel JJ.
[40] AFWS at [15].
[41] AWS [30] fn 63.
[42] (2008) 236 CLR 440 at [8] per Gleeson CJ, Gummow, Crennan and Kiefel JJ.
[43] Cf *Bell* [2019] TASCCA 19; 279 A Crim R 553 at [29] per Brett J.

38. To the extent it is necessary for the Court to decide, the AG (NSW) submits that references to the (or an) enactment should be understood as referring to the (or any) statute in which a relevant criminal offence of which the defendant would have been guilty, on the facts he or she believed, is found. That would be consistent with the position stated in *Bergin v Stack* and *CTM* that the common law ground of exculpation requires that, if the mistaken belief were true, the defendant would not have committed any criminal offence.

Part V: Estimate of time

39. The AG (NSW) estimates that 30 minutes would be required for his oral submissions.

10

Dated 27 April 2021

David Kell SC
Crown Advocate of New South Wales
T: 02 8093 5503
E: David.Kell@justice.nsw.gov.au

Eleanor Jones
Sixth Floor Selborne Wentworth Chambers
T: 02 8915 2686
E: ejones@sixthfloor.com.au