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

SUBMISSIONS OF THE ATTORNEY-GENERAL FOR THE STATE OF TASMANIA (INTERVENING)

Part I: Certification

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

Part II and III: Intervention

2. The Attorney-General for the State of Tasmania intervenes pursuant to the direction made by the Honourable Chief Justice Kiefel on 3 February 2021. The Attorney-General intervenes in support of the respondent.

Part IV: Argument

A Summary

3. The core issue on this appeal is whether the appellant's belief that he was supplying drugs to an adult contrary to s 26 of *Misuse of Drugs Act 2001* (Tas) (the **MD Act**) excuses him from criminal liability for, in fact, supplying drugs to a child contrary to s 14 of that Act. The Attorney-General submits, for reasons different to the court below, that the answer to that question is no.

4. Chapter IV of sch 1 to the *Criminal Code Act 1924* (Tas) (the **Code**) sets down the principles of criminal responsibility that determine this appeal.[1] Section 13(3) of the Code requires that where a person intentionally does an act or makes an omission which constitutes an offence, the not unforeseeable consequences[2] of which bring the offence within a more serious class of offence, she or he is deemed criminally responsible for the greater offence.[3] Alternatively, if s 13(3) does not operate, s 14 of the Code does not excuse criminal responsibility for an act done or omission made under an honest and reasonable, but mistaken, belief in the existence of any state of facts where that belief is inculpatory of the commission of a different offence under the MD Act.[4]

10 5. It is submitted that upon either basis the appeal is misconceived and should be dismissed. If, however, the appeal is not dismissed on the above bases, it is submitted further or in the alternative that this Honourable Court's decisions in *Bergin v Stack*[5] and *CTM v The Queen*[6] should not be re-opened and that, for that reason, the appeal should be dismissed.

B Construction of s 14 of the *Misuse of Drugs Act 2001* (Tas)

6. Given that the offence under s 14 of the MD Act is prosecuted on indictment in accordance with s 5 of that Act, it is to be read and construed as if it were described or

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1 *CTM v The Queen* (2008) 236 CLR 440, 480 [138] (Hayne J); *Vallance v The Queen* (1961) 108 CLR 56, 63 (Kitto J).

2 *Vallance v The Queen* (1961) 108 CLR 56, 61 (Dixon CJ) 65 (Kitto J) 82 (Windeyer J); see also *Boughey v The Queen* (1985) Tas R 1, 15 (Green CJ) 21 (Cosgrove J, Cox J agreeing at 21); *Criminal Code Act 1924* (Tas) sch 1 s 13(1): cf *The Queen v Prince* (1875) LR 2 CCR 154, 169 (Brett J): '[T]here can be no conviction for crime in England in the absence of criminal mind or mens rea. Then comes the question, what is the true meaning of that phrase. I do not doubt that it exists where the prisoner knowingly does acts which would constitute a crime if the result were as he anticipated, but in which the result may ***not improbably*** end by bringing the offence within a more serious class of crime.' (Emphasis added).

3 *The Queen v Prince* (1875) LR 2 CCR 154, 169 (Brett J).

4 *The Queen v Prince* (1875) LR 2 CCR 154, 169 (Brett J) 179 (Denman J); *The Queen v Tolson* (1889) 23 QBD 168, 181 (Cave J) 190 (Stephen J); *CTM v The Queen* (2008) 236 CLR 440, 447 [8] (Gleeson CJ, Gummow, Crennan and Kiefel JJ) 497 [199] (Heydon J); *Bergin v Stack* (1953) 88 CLR 248, 262 (Fullagar J).

5 (1953) 88 CLR 248.

6 (2008) 236 CLR 440.

referred to as a crime under the Code; and all the provisions of the Code relating to crimes generally, therefore, apply to it.[7]

7. The text of s 14 of the MD Act provides that '[a] person must not supply a controlled drug to a child.' The words 'supply', 'controlled drug' and 'child' are defined in s 3(1):

   (1) 'supply, in relation to a substance includes – (a) administer[ing] the substance, whether orally, subcutaneously or by other means; and (b) offer[ing] or agree[ing] to supply the substance;'

   (2) 'child means a person who has not attained the age of 18 years;' and

   (3) 'controlled drug means a substance, other than a growing plant, specified or described in Part 2 of Schedule 1.'

8. The language of s 14 is one of unqualified prohibition. On a plain reading, as no mental element is provided, a person comes within the terms of the prohibition by undertaking the 'supply' it proscribes. Whilst this is so, in accordance with s 13(1) of the Code (as drafted at the date of the appellant's offending):

   > No person shall be criminally responsible for an act, unless it is voluntary and intentional; nor, except as hereinafter expressly provided, for an event which occurs by chance.

   It follows, the external element of 'supply' under s 14 of the MD Act, which in this case was comprised of administering methylamphetamine, must be voluntary and intentional in the sense that the appellant's 'physical act' of administering the drug was not independent of his will.[8]

9. The way in which s 13(1) is framed recognises a distinction between a physical action, its consequence, and criminal responsibility, which the action otherwise would not have produced.[9] Accordingly, where s 13(1) speaks of an action being voluntary and intentional, it addresses itself only to the question of whether a person acted of her or his own free will and by decision.[10] Its second limb, which speaks of an 'event' occurring 'by chance', concerns the consequences of a person's physical action where: (1) a person

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[7] See *Criminal Code Act 1924* (Tas) sch 1 s 4(1).

[8] *Vallance v The Queen* (1961) 108 CLR 56, 64 (Kitto J) 71 (Menzies J); *Kaporonovski* (1993) 133 CLR 209, 215 (McTiernan ACJ and Menzies J) 231 (Gibbs J, Stephen J agreeing at 241); see also *Timbu Kolian v The Queen* (1968) 119 CLR 47, 53 (Barwick CJ) 55 (McTiernan J).

[9] *Vallance v The Queen* (1961) 108 CLR 56, 64 (Kitto J); see also Sir James Stephen, *A History of the Criminal Laws of England* (Macmillan and Co, 1883), vol 2, 110–111.

[10] *Vallance v The Queen* (1961) 108 CLR 56, 64 (Kitto J); see also *Criminal Code Act 1924* (Tas) s 13(4).

doing any act did not, in fact, intend or foresee the consequence of that act; and (2) the consequence would not reasonably have been foreseen by an ordinary person.[11] (This compound formulation was recently enacted into s 13(1) by s 4 of the *Justice Legislation Amendments (Criminal Responsibility) Act 2020* (Tas) with a clarification in the form of s 13(1A)).

10. Importantly, however, s 13(3) provides that:

> Any person who with intent to commit an offence does any act or makes any omission which brings about an unforeseen result which, if he had intended it, would have constituted his act or omission some other offence, shall, except as otherwise provided, incur the same criminal responsibility as if he had effected his original purpose.

11. Section 13(3) is a general provision that operates 'in a sense' as a qualification to s 13(1).[12] The word 'act' in s 13(3) is used for a different purpose to that in s 13(1). Section 13(1) exculpates an act that has both subjectively and objectively unforeseen consequences. Conversely, s 13(3) makes 'doing an act that is not itself an offence, an offence if it be done with intent to commit an offence and if it brings about an unforeseen result.'[13] The reference in that provision to an 'unforeseen result' (as distinct from 'chance event') is a 'reference to a consequence not foreseen by the person who has done the act.'[14]

12. Thus where, as in this case, a person has an intention to commit an offence, and she or he does any act or makes any omission that brings about a consequence that the person does not foresee and which comprises the commission of another offence, that person is deemed criminally responsible for that other offence on the basis of the offence they intended to commit.[15] On this appeal it is uncontroversial that the appellant intended to commit the offence under s 26 of the MD Act in that he intended to do, and did, the act of administering methylamphetamine intravenously to another person.[16] Were the

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[11] *Vallance v The Queen* (1961) 108 CLR 56, 65 (Kitto J) 82 (Windeyer J).

[12] *Vallance v The Queen* (1961) 108 CLR 56, 81–82 (Windeyer J).

[13] *Vallance v The Queen* (1961) 108 CLR 56, 80 (Windeyer J).

[14] Cf *Vallance v The Queen* (1961) 108 CLR 56, 73 (Menzies J); *The Queen v Prince* (1875) LR 2 CCR 154, 169 (Brett J).

[15] *Standish v R* (1991) 60 A Crim R 364, 366 (Wright J) 381–382 (Slicer J); see also *Vallance v The Queen* (1961) 108 CLR 56, 81 (Windeyer J); cf *The Queen v Latimer* (1886) 17 QBD 359, 362 (Lord Esher MR) 363 (Manisty J).

[16] Cf *Tasmania v Bell* [2019] TASSC 34, [3] (Blow CJ).

appellant's plea of honest and reasonable mistaken belief as to the age of the victim accepted, it would also be accepted that he did not know, and could not therefore foresee, that his administration of methylamphetamine would have the result of that drug being administered to a child.[17]

13. That being the case, it is submitted that s 13(3) of the Code operates such that s 14 of the Code does not avail the appellant to 'excuse' his conduct. This is made plain on the terms of s 14 of the Code which provides that (emphases added):

> Whether *criminal responsibility* is entailed by an act or omission done or made under an honest and reasonable, but mistaken, belief in the existence of any state of facts *the existence of which would excuse* such act or omission, is a question of law, to be determined on the construction of the statute constituting the offence

'Criminal responsibility' is defined under s 1 of the Code to mean 'liability to punishment as for an offence.' The transitive verb 'excuse' is not defined, but its object is the criminal responsibility 'entailed' by a particular act or omission. Thus, an excuse for an act done or omission made under an honest and reasonable, but mistaken belief in the existence of any state of fact must, as a matter of law, make 'such an act or omission' *not* liable to punishment as for an offence.[18] '[O]ffence' is defined under s 1 of the Code to mean 'any breach of the law for which a person may be punished summarily or otherwise.'

14. It is submitted that 'liability for punishment' as for the offence under the MD Act is deemed by the operation of s 13(3) of the Code and the intentional commission of the offence under s 26 of the MD Act. The present is not a case where the offence the appellant intended to commit resulted in the commission of a completely different offence[19] (in other words, the appellant's intended criminal conduct did not produce a consequence or result that was not reasonably foreseeable by an ordinary person).[20] That being so, for the purposes of s 14 of the MD Act, an honest and reasonable, but mistaken,

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[17] Cf *He Kaw Teh* (1985) 157 CLR 523, 532–533 (Gibbs CJ); *David Securities Pty Ltd and Ors v Commonwealth Bank of Australia* (1992) 175 CLR 353, 369 (Mason CJ, Dean, Toohey, Gaudron and McHugh JJ): '… mistake not only signifies a positive belief in the existence of something which does not exist but also may include "sheer ignorance of something relevant to the transaction in hand."'

[18] Cf *R v Martin* [1963] Tas SR 90, 112 (Burbury CJ).

[19] Cf *The Queen v Latimer* (1886) 17 QBD 359, 362 (Lord Esher MR) 362–363 (Bowen LJ).

[20] *Criminal Code Act 1924* (Tas) sch 1 s 13(1); cf *Vallance v The Queen* (1961) 108 CLR 56, 61 (Dixon CJ) 65 (Kitto J) 82 (Windeyer J).

belief as to the victim's age cannot under s 14 of the Code operate to excuse the appellant from criminal responsibility.

C Section 14 of the Code and the Common Law

15. Leaving aside s 13(3) of the Code, the operation of s 14 would not, of its own, serve to exculpate the appellant's supply of drugs to a child. As has been seen, properly construed, s 14 is only concerned with an honest and reasonable, but mistaken, belief that is capable of excusing a person's liability to *punishment* as for an offence. The reference to 'punishment' contemplates not only that a person's reasonable belief in the existence of any state of facts will excuse a person's liability ' … as for an offence', but that that belief will, as a matter of law, also excuse a person from being otherwise liable 'to punishment'.

16. The respondent correctly identifies, in this regard, that a basis of punishment is that the appellant's mistaken belief about his supply of drugs to a person was not 'innocent'.[21] The belief of facts which would, if true, make an offender's acts no criminal offence at all accords with the 'modern principle'[22] that criminal punishment is imposed to deter the commission of offences and not to: enforce the civil law; deter the commission of torts; or suppress immorality.[23] So understood, the appellant's invitation to this court to reconsider, under the auspices of s 14 of the Code, *Bergin v Stack* and re-explain *CTM v The Queen* is misconceived. There is not any doubt that, both on the proper construction of ss 13 and 14 of the Code and as a principle of the common law, honest and reasonable mistake of fact is, a 'defect of will' in circumstance where a person 'intending to do a lawful *act*, does that which is unlawful.'[24]

17. The underlying common law justification for punishing a person under a mistaken belief that she or he was committing a lesser crime is that by their, albeit diminished,

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[21] Respondent's Submissions, 2 [6], 13 [53].

[22] *He Kaw Teh v The Queen* (1985) 157 CLR 523, 589 (Brennan J) citing *The Queen v Prince* (1875) LR 2 CCR 154, 169–170 (Brett J); *Bank of New South Wales v Piper* [1897] AC 383; *The Queen v Green and Bates* (1862) 3 F & F 274; *The Queen v Hibbert* (1869) LR 1 CCR 184.

[23] *He Kaw Teh v The Queen* (1985) 157 CLR 523, 588 (Brennan J); cf *The Queen v Prince* (1875) LR 2 CCR 154, 178 – 179 (Denman J) 174 – 176 (Bramwell B).

[24] *The Queen v Prince* (1875) LR 2 CCR 154, 164–165 (Brett J) (emphasis added); *The Queen v Tolson* (1889) 23 QBD 168, 181 (Cave J) 190 (Stephen J); *Thomas v The King* (1937) 59 CLR 279, 295 (Starke J) 304–305 (Dixon J, Rich J agreeing at 294); *Proudman v Dayman* (1941) 67 CLR 536, 540–541 (Dixon J); cf *Criminal Code Act 1924* (Tas) sch 1 s 13(1), (3) (see also s 13(1A) in the current form of that provision).

knowledge of acting unlawfully they run the risk of their criminal act '*resulting* in the greater crime.'[25] (The appellant here ran the risk of administering methylamphetamine on a child instead of an adult). A person's ignorance of the legal consequences of their criminal act cannot avail them of an excuse at common law.[26] Such a mistake is expressly not excused under s 14 of the Code. Thus, the only exculpatory mistaken belief is one of fact that would make the person's act no criminal offence at all.[27] Otherwise, a person is liable to punishment for the unforeseen result or consequences of their acts.[28]

18. So understood, Brett J in the court below was wrong that this court has endorsed 'two separate tests' concerning the requirement that an honest and reasonable belief be 'innocent'.[29] Gleeson CJ, Gummow, Crennan and Keifel JJ explained what is meant by the expressions 'innocent' and 'outside the operation of the enactment' in *CTM v The Queen*:

> 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".[30]

Consistent with this principle, Martin AJ correctly observed that '[t]he appellant's mistake about the age of the person to whom he supplied the drug was merely "a mistake about the kind of offence" that was being committed. The mistake was, therefore, "legally irrelevant to guilt".'[31]

19. Brett J's other concern about 'the potential disparity in seriousness between the charged offence and the offence which the accused thought he was committing' is a matter that

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[25] *The Queen v Prince* (1875) LR 2 CCR 154, 169 (Brett J) (emphasis added); cf *Criminal Code Act 1924* (Tas) sch 1 s 13(3).

[26] *The Queen v Prince* (1875) LR 2 CCR 154, 169–170 (Brett J).

[27] *The Queen v Prince* (1875) LR 2 CCR 154, 170 (Brett J).

[28] Cf *Criminal Code Act 1924* (Tas) sch 1 s 13(1), (3).

[29] *Bell v Tasmania* [2019] TASCCA 19, [29].

[30] *CTM v The Queen* (2008) 236 CLR 440, 447 [8] (Gleeson CJ, Gummow, Crennan and Kiefel JJ).

[31] *Bell v Tasmania* [2019] TASCCA 19, [55]; cf Sir James Stephen, *A History of the Criminal Laws of England* (Macmillan and Co, 1883), vol 2, 114.

is also clearly irrelevant to criminal responsibility, although it may be relevant for sentencing purposes (having regard to the reasonableness of the mistaken belief).[32]

D *Bergin v Stack* should not be reopened

20. Contrary to the appellant's submissions, this court's decisions in *Bergin v Stack* and *CTM v The Queen* should not be reopened.[33] As has been seen, those cases rested on principles 'carefully worked out in a significant succession of cases.'[34] Neither the authority in *R v K*[35] nor that in *B(a Minor) v Director of Public Prosecutions*,[36] upon which the appellant appears to rely, derogate in any way from what this Court held in those cases, much less from what Brett J in *R v Prince* and the court in *The Queen v Tolson* held over a century ago.[37]

21. There were no material 'difference[s] between the reasons of the justices constituting the majority' in *Bergin v Stack* and *CTM v The Queen*. The decisions have since been 'independently acted on in a manner which militate[s] against reconsideration.'[38] The Tasmanian legislature has enacted, consistently with those authorities, s 14A of the Code.[39] It has also amended s 13(1) of the Code (into which, among other provisions of Chapter IV of the Code, ss 14 and 14A integrate) to express the formulation of what comprises a 'chance event' set down by the majority in *Vallance v The Queen*. Further,

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[32] *CTM v The Queen* (2008) 236 CLR 440, 453 [27] (Gleeson CJ, Gummow, Crennan and Kiefel JJ).

[33] See generally *Queensland v The Commonwealth* (1977) 139 CLR 585, 599 (Gibbs J) 602 (Stephen J) 620 (Aickin J); *John v Federal Commissioner of Taxation* (1989) 166 CLR 417, 438–439 (Mason CJ, Wilson, Dawson, Toohey and Gaudron JJ); *Wurridjal v The Commonwealth* (2009) 237 CLR 309, 352–353 (French CJ); *Attwells v Jackson Lalic Lawyers Pty* Ltd (2016) 259 CLR 1, 19 (French CJ, Kiefel, Bell, Gageler and Keane JJ); *Minogue v Victoria* (2019) 93 ALJR 1031, 1038 [24] ((Kiefel CJ, Bell, Keane, Nettle and Gordon JJ).

[34] *John v Federal Commissioner of Taxation* (1989) 166 CLR 417, 438 (Mason CJ, Wilson, Dawson, Toohey and Gaudron JJ).

[35] [2001] 1 AC 462.

[36] [2000] 2 AC 428,

[37] See *B(a Minor) v Director of Public Prosecutions* [2000] 2 AC 428, 461 (Lord Nicholls of Birkinhead) citing *R v Tolson* (1889) 23 QBD 168, 181 (Cave J); *R v K* [2002] 1 AC 462, 472 [17] (Lord Bingham of Cornhill, Lord Nicholls of Birkenhead agreeing at 475 [27], Lord Steyn agreeing at 476 [28], Lord Hobhouse of Woodborough agreeing at 478 [36], Lord Millett agreeing at 479 [40]) citing *The Queen v Prince* (1875) LR 2 CCR 154, 159–169 (Brett J) and *R v Tolson* (1889) 23 QBD 168, 187 (Stephen J);

[38] *John v Federal Commissioner of Taxation* (1989) 166 CLR 417, 438–439 (Mason CJ, Wilson, Dawson, Toohey and Gaudron JJ).

[39] Cf *Queensland v The Commonwealth* (1977) 139 CLR 585, 599 (Gibbs J) 602 (Stephen J) 620 (Aickin J).

this Court's authority in *Bergin v Stack* has been applied over a long period by courts in Tasmania and around Australia.

22. Having regard to these matters, what the appellant seeks is, with respect, aptly described as 'a large step'.[40]

Part V: Estimate of Time Required for Presentation of Oral Argument

23. The Attorney-General estimates she will require approximately 20 minutes for the presentation of her oral submissions.

Dated 27 April 2021

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[40] *Bell v State of Tasmania* [2021] HCA Trans 005, 21 [881] (Kiefel CJ).