HIGH COURT OF AUSTRALIA

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Details of Filing

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IN THE HIGH COURT OF AUSTRALIA

HOBART REGISTRY No. H2 of 2020

BETWEEN: **CHAUNCEY AARON BELL**

Appellant

and

STATE OF TASMANIA

Respondent

RESPONDENT'S 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: Statement of Issues

2. 1) Does s 14 of Schedule 1 of the *Criminal Code Act 1924* ('the *Criminal Code'*) (Tas) provide a defence in circumstances where the mistaken belief of an accused, if true, would render the accused not guilty of the offence charged, even when such conduct would amount to another criminal offence in the same enactment?
3. 2) For this appeal to succeed, it is submitted the Court would need to overturn this Court's decision in *Bergin v Stack* (1953) 88 CLR 248 and the dicta in *CTM v The Queen* (2008) 239 CLR 400 ('*CTM v The Queen* (HC)').

Part III: Certification with respect to s78B *Judiciary Act 1903*

4. It is certified that no notice is required under section 78B of the *Judiciary Act 1903* (Cth).

Part IV: Appellant's Narrative of Facts and Chronology

5. The Respondent accepts the facts as stated in Part V of the Appellant's written submissions.

Part V: Respondent's Argument

6. In summary, it is the Respondent's submission that the common law concept of *mens rea* is displaced in the Tasmanian *Criminal Code* by ss 13 and 14 of the *Criminal Code*. The term 'excuse' in section 14 of the *Code* is synonymous with 'innocence' and therefore reproduces the common law in respect of mistake of fact, and that for the section to operate the mistake of fact, if true, must make the accused's act innocent of any criminal offence.

7. The Appellant was convicted of supplying a controlled drug to a child contrary to s14 of the *Misuse of Drugs Act 2001* (Tas). The Appellant was also charged with one count of rape, upon which the jury on this trial did not reach a verdict on[1].

8. Section 14 of the *Misuse of Drugs Act 2001* provides:

> A person must not supply a controlled drug to a child.

9. A child is defined as a person who has not attained the age of 18 years[2].

10. At trial the Appellant claimed he believed the complainant was the age of 18.

11. The learned Chief Justice directed the jury that if the Appellant held a mistaken belief that the complainant was over the age of 18 it made no difference and the Appellant was still guilty of the charge[3].

12. Section 14 of Schedule 1 of *Criminal Code* provides:

> 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.

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[1] At a retrial he was acquitted of rape and convicted of the alternative charge, namely unlawful sexual intercourse with a young person (as the charge then was), contrary to s124 of the *Criminal Code.*

[2] *Misuse of Drugs Act 2001* (Tas), s3.

[3] The learned trial judge directed the jury that the defence of honest and reasonable mistake applied to the alternative charge on count 2 on the indictment, namely unlawful sexual intercourse with a young person contrary to s124 of the *Criminal Code*.

13. His Honour held that supplying a drug to the complainant believing she was an adult would not excuse the act of supplying a controlled drug to her. Such conduct would not be an entirely innocent act, or an 'excuse', but an offence contrary to another provision of the same enactment, namely s26 of the *Misuse of Drugs Act 2001* (see [4] – [8] of the judgment[4]).

14. Section 26 of the *Misuse of Drugs Act 2001* provides:

> A person must not sell or supply a controlled drug to another person[5].

15. Thus his Honour held that if the Appellant's belief existed he would be guilty of another criminal offence and therefore his belief was not an 'excuse' nor innocent. The Court of Criminal Appeal upheld his Honour's ruling, although Brett J stated that the limits of the rule were uncertain but did not need to be resolved in this case[6].

***The application of the common law doctrine of* mens rea *to the Tasmanian* Criminal Code**

16. The law in Tasmania is well-settled that unless a mental element is set out in the provision creating the offence in the *Criminal Code*, criminal responsibility is governed by Chapter IV of the *Criminal Code.* It is also well-settled that individual offence provisions are interpreted on the basis that it is a code, rather than separate statutory instruments or a reflection of the common law: *Vallance v The Queen* (1961) 108 CLR 56 per Dixon CJ at 60, Windeyer at 78; *Snow v R* [1962] Tas SR 51 per Burbury CJ and Cox J at 278; *Arnol v R* [1981] Tas R 157 per Neasey J at 168-169; *Pickett v Western Australia* [2020] HCA 20 at 22 – 24.

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[4] *Tasmania v Bell* (2019) TASSC 34.

[5] Sections 14 and 26 of the *Misuse of Drugs Act* carry different penalty provisions. Supplying a controlled drug is a summary offence. The penalty for supplying a controlled drug is 4 years' imprisonment (see s26 of the *Misuse of Drugs Act*). The penalty for supplying a controlled drug to a child, which is an indictable offence, however, is up to 21 years' imprisonment (see s 389(3) of the *Criminal Code* (Tas)). The maximum penalty of 21 years' imprisonment applies to all indictable offences in Tasmania, except murder and treason, irrespective of their seriousness, thus leaving the sentencing range for individual offences to judicial precedent. For example, the most a person has ever received for supplying a controlled drug to a child contrary to s14 of the *Misuse of Drugs Act* is 9 months' imprisonment.

[6] See *Bell v Tasmania* [2019] TASCCA 19 at per Brett J [37].

17. The law is also well-settled that s13 of the *Criminal Code* replaces the general presumption of *mens rea* in relation to indictable offences in Tasmania[7]. As at October 2018[8], Section 13 relevantly provided the following:

> (1) 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.

18. As no mental element is specified in s14 of the *Misuse of Drugs Act 2001,* the general provisions of the *Criminal Code* apply (see s4 of the *Criminal Code Act 1924*). In this case section 13(1) and s14 apply[9]. Thus, contrary to the Appellant's submissions, the Respondent does not suggest that s14 of the *Misuse of Drugs Act 2001* creates an absolute offence; rather that in the circumstances of this case s14 of the *Criminal Code* did not provide a defence, although in other circumstances it may do so.

19. Section 13(1) of the *Code* was considered in *Vallance*'s case (*R v Vallance* [1960] TASStRp 12; [1960] Tas S R 51; *Vallance v The Queen* (1961) 108 CLR 56. In *Vallance* it was held that s13(1) displaces the common law presumption of *mens rea*. Further, the majority (Kitto, Taylor and Menzies JJ in separate judgments) held that in the first limb of s13(1), the relevant mental element attaches to the physical act or acts of an accused person only, and not the circumstances or the consequences of an act[10]. By virtue of the second limb of s13(1), no person is criminally responsible for an event that is unintended, unforeseen and unforeseeable.

20. In *Vallance,* the majority found that a mental element is not read into an offence within the *Criminal Code.* Clearly this is supported by a reading of the *Criminal Code* where some offences such as murder (s158), manslaughter (s159), committing an unlawful act intended to cause bodily harm (s170) and arson (s268)

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[7] *R v Vallance* [1960] TASStRp 12; [1960] Tas S R 51; *Vallance v The Queen* (1961) 108 CLR 56.

[8] Section 13 has since been amended to explain the concept of a 'chance event'. It now provides: "No person shall be criminally responsible for an act, unless it is voluntary and intentional; nor, except as hereinafter expressly provided, for an event (a) that the person does not intend or foresee as a possible consequence; and (b) that an ordinary person would not reasonably foresee as a possible consequence". This confirms the principles expressed in *Vallance*, and later in *Kaporonovski v The Queen* (1973) 133 CLR 209.

[9] See Brett J in *Bell v Tasmania* [2019] TASCCA 19 at [17]

[10] See *Vallance* (1961) 108 CLR 56 per Kitto J at 64, Taylor J at 69 and Menzies J at 71.

have mental elements as an ingredient of the offence, whilst others such as rape (s185), assault (s184) and indecent assault (s127) do not.

21. Dixon CJ and Windeyer J dissented on this point, instead concluding that the word 'act' in s13(1) referred to the whole punishable act, and not merely the physical act or acts of the accused[11].

22. *Vallance* was concerned with a charge of wounding contrary to s172 of the *Criminal Code*, whereby the accused had fired a rifle and wounded a child. Argument focused on whether the consequences of the act, namely the wounding, had to be intended by the accused. Ultimately it was held that the crime of wounding has a mental element incorporating recklessness and reasonable foreseeability, and by majority, that the relevant act was limited to the physical act of the firing of the rifle, and did not extend to the wounding.

23. The consequence of *Vallance* was considered by the Court of Criminal Appeal in the case of *R v Bennett*; *Bennett v The Queen* (1989) Tas R 72. Neasey J at 81 concluded that the principles to be distilled from *Vallance* are as follows:

    1. "There was a consensus among all five justices as to what the correct direction would have been – that is, it was necessary for the Crown to prove actual intent to wound or subjective recklessness.

    2. There was a majority of three to two as to the meaning of 'act' in s13(1) – namely, that it means the physical act or acts of the accused alleged to have brought about the occurrence of 'the event';

    3. A further combination of three justices (Dixon CJ, Kitto and Windeyer JJ) held that the words "by chance" refer to an event both unforeseen by the doer and unforeseeable by a reasonable person."

24. Neasey J went on to state that "the view has been taken in this State with virtual uniformity since *Vallance*'s case, I believe rightly, that… the 'act' in s13(1) means the relevant physical act or acts of the accused".

25. This view also accords with the judgment of Gibbs J (with whom Stephen J agreed) in *Kaporonovski v The Queen* (1973) 133 CLR 209, which considered the Queensland equivalent of s13(1), s23 of the *Criminal Code* (Qld). This view was

[11] Per Dixon CJ at 61 and Windeyer J at 79 - 80.

also supported by the joint judgment of Mason CJ, Brennan and McHugh JJ in *R v Falconer* (1990) 171 CLR 30, which considered the Western Australian equivalent (then s23). Similarly, in *R v Reynhoudt* (1962) 107 CLR 381 by majority it was held that under the *Crimes Act 1958* (Vic), in a charge of assaulting a police officer, it was only the physical act of the assault which attracted the operation of *mens rea*[12].

26. This principle has also been confirmed in later Tasmanian cases: *Snow v The Queen*; *Arnol v The Queen*. In *Snow*'s case, the Court of Criminal Appeal held that only the physical act of the accused in the crime of rape, that is, the act of penetration, had to be voluntary and intentional. The correctness of this decision was challenged, but ultimately confirmed in *Arnol v The Queen*[13]. In *Arnol,* is was argued that *Snow*'s case was wrongly decided as it represented a departure from the common law in respect to the mental element that must be proved. However, the Court of Criminal Appeal upheld the decision in *Snow* and confirmed that it is only the physical act of an accused that attracts a mental element under s13(1), and not external elements. The Court held that such external elements (in the case of *Snow* and *Arnol*, a lack of consent) are not part of the 'act' mentioned in s13(1) (see Crawford J at 173, citing *Kaporonovski v The Queen* at 231).

27. It is submitted that the law in Tasmania post-*Vallance* is clear that s13(1) only applies to the physical act or acts of the accused, and not all the external elements of the crime. It is further submitted that *mens rea* is not read into the ingredients of the crime, where the crime itself does not provide a mental element. Where there is no *mens rea* the sole mental element is found in ss13 and 14 of the *Criminal Code.*

28. This approach differs from the common law, as expressed in *He Kaw Teh v The Queen* (1985) 157 CLR 523, which considered offences under the *Customs Act 1901* (NSW). In *He Kaw Teh*, it was held that absent clear statutory indication to the contrary, criminal liability only flows if it is proved that an accused person had knowledge of all the circumstances that make his or her act the criminal act charged.

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[12] See Taylor J at 395, Menzies J at 402 and Owen J at 408. Dixon CJ and Kitto J, in the minority, held that the section required, at the least, advertence to the possibility that the person the subject of the assault may be a police officer.

[13] [1981] Tas R 157.

29. The proposition that the common law presumption of *mens rea* is excluded by the *Criminal Code*, as explained in *He Kaw Teh,* and that ss 12 – 17 of the *Criminal Code* exhaustively state the general principles of criminal responsibility relating to the mental element of crimes, has been confirmed in a number of Tasmanian cases including *Snow v The Queen, R v Martin* [1963] Tas SR 103, and *Williams v The Queen* [1978] Tas SR 98, before the issue was considered with finality in *Bennett v The Queen* [1991] Tas R 11.

30. *Bennett* post-dates the High Court's decision in *He Kaw Teh* and considers its application to the Tasmanian *Criminal Code.* In *Bennett's* case, *Snow* was again challenged. It was argued that the decision in *Snow* was incorrectly decided as the Court did not approach the consideration of the mental element of the crime of rape in accordance with the principles stated in *He Kaw Teh, Cameron v Holt* (1980) 142 CLR 342 and *Kural v The Queen* (1987) 162 CLR 502. This argument was rejected in a unanimous decision of the Court of Criminal Appeal.

31. It is submitted that *Bennett* is clear authority that s13(1) of the *Code* supplants the common law doctrine of *mens rea,* and that the mental element of a crime is completely provided for in the *Criminal Code.*

32. Further, in *Bennett* it was held that the decision in *He Kaw Teh* did not affect the decision in *Snow's* case. At 18, Green CJ (with whom Cox and Crawford JJ agreed) stated that to accept that *Snow*'s case was wrongly decided would:

> "Involve substantially changing the view which has hitherto been held of the significance of the fact that the instrument which we are construing is a code as opposed to an ordinary statute. Even if the authorities relied upon by counsel for the appellant have effected as radical an alteration of the principles governing the interpretation of penal statutes as he submits they have, which I doubt, there is nothing in those cases to suggest that the common law presumption as to *mens rea* referred to in them applies to the construction of a code such as the Tasmanian *Criminal Code* which contains its own provisions as to the mental elements of crime."

33. It is submitted that the operation of s13(1), as it has been consistently interpreted in Tasmania post-*Vallance,* displaces the general common law principle explained in *He Kaw Teh.*

34. Further, it is submitted that the construction of the *Criminal Code* itself reveals the intent of the legislature to displace the common law concept of *mens rea* through s13(1). Some crimes within the *Criminal Code* contain specific mental elements; others do not. It is submitted that it could not be the case that the legislature intended that the common law be preserved and have application with respect to some crimes contained within the *Criminal Code*, and not to others. By both design and expression, the *Criminal Code* is "comprehensive and authoritative so as to exclude competing or supplementary common law doctrine in relation both to the *actus reus* and the *mens rea* of every crime therein provided for" (*Vallance v The Queen* [1960] Tas S R 51 at 86 per Crisp J, cited with approval by Burbury CJ and Cox J in *Snow*).

35. The effect of this is that, in this case, the Crown did not have to prove that the Appellant knew the complainant was under the age of 18[14]. However, s14 of the *Criminal Code* is applicable if it made the Appellant's act 'innocent'.

36. These principles were not contested by the Appellant in the Court of Criminal Appeal.

Section 14 of the* Criminal Code *(Tas)

37. It is submitted that in order for this appeal to be successful, the Appellant must establish that s14 of the *Criminal Code* provides a defence in circumstances where the mistaken belief of an accused, if true, would render the accused not guilty of the offence charged even when such conduct would amount to another criminal offence in the same enactment.

38. The judgment of the Court of Criminal Appeal applied well-established principles based on long settled authority from this Court in relation to the defence of honest and reasonable mistake of fact pursuant to s14 of the *Criminal Code.* That is, for the provision to apply, the belief held, if correct, must make such conduct innocent of any criminal offence.

39. Section 14 of the *Criminal Code* accurately reflects the common law: *Thomas v The King* (1937) 59 CLR 279 per Dixon J at 305-306; *R v Martin* per Burbury CJ at

[14] See *Bell v Tasmania* [2019] TASCCA 19, per Pearce J at [4] and Brett J at [14].

109, Neasey J at 150; *A-G Reference No 1 of 1989* [1990] Tas R 46; *CTM v The Queen* (HC) per Gleeson CJ, Gummow, Crennan and Kiefel JJ at [3].

40. The common law in relation to mistake of fact states that where an accused person has a positive mistaken belief in facts which, had they existed, would have made the accused's conduct innocent, a defence is available[15]. Innocent means innocent of any offence[16]. This is distinct from the criminal codes in Queensland and Western Australia. In Queensland, s24 of the *Criminal Code* provides for 'mistake of fact' as a ground of exculpation. Section 24 states:

> (1) A person who does or omits to do an act under an honest and reasonable, but mistaken, belief in the existence of any state of things is not criminally responsible for the act or omission to any greater extent than if the real state of things had been such as the person believed to exist.
>
> (2) The operation of this rule may be excluded by the express or implied provisions of the law relating to the subject.

41. In *Thomas v The King*, Dixon J (with whom Rich J agreed), stated at 305-306 that the common law relating to mistake of fact had been: "embodied in the three criminal codes of Australia – Queensland, secs. 22 and 24, Tasmania, secs. 12 and 14, and Western Australia, secs. 22 and 24. These provisions, which are in the same terms, state, in my opinion, the common law with complete accuracy".

42. However, despite this statement, in *Anderson v Nystrom* [1941] St R Qd 56, at 69-70, the Queensland Full Court held that the rule enacted in s24 is different from the common law doctrine.

43. Philp J (with whom Douglas J agreed) stated at 70:

> "Section 24 provides as follows: "a person who does or omits to do an act under an honest and reasonable, but mistaken, belief in the existence of any state of things is not criminally responsible for the act or omission to any greater extent than if the real state of things had been such as he believed to exist". "The operation of this rule may be excluded by the express or implied provisions of the law relating to the subject." The rule as enacted is different from the Common Law doctrine. For example, at Common Law a defendant cannot rely on *ignorantia facti* with regard

[15] *Proudman v Dayman* (1941) 67 CLR 536.

[16] *Bergin v Stack* (1953) 88 CLR 248.

> to an element of the offence if the act he does is otherwise unlawful. Thus, in England, a man charged with assaulting a police constable cannot plead ignorance that the man assaulted was a constable since the assault itself is unlawful (R v Prince ([1875] LR 2 CCR 154 per Bramwell B at p176). But under s24 the man could be convicted only of assault *simpliciter*."

44. This decision was referred to in *Loveday v Ayre; ex parte Ayre* [1955] St R Qd 264. Whilst the issue of the influence of the common law on the section was not directly considered, Philp J, at 267, stated "whatever may be the position at common law, a mistake is not a *defence* in Queensland – it is not a matter which the defendant must prove on the balance of probabilities", suggesting that the Queensland *Code* may be a departure from the common law principle. Further, in the decision of *Walden v Hensler* (1987) 163 CLR 561 (which considered s22 of the *Criminal Code* (Qld)) Deane J noted, at 580, that the comprehensiveness of Dixon J's statement in *Thomas v The King* is "open to question", and gave the example of the judgment of Philp J in *Anderson v Nystrom.* Similarly, Brennan J stated at 570 that "it does not follow that s22 has the same application as the common law defence, for they do not operate in precisely the same way (but cf. *Thomas v The King* (26), where Dixon J expressed the opinion that s22 stated the common law with complete accuracy)".

45. Paul Fairell and Malcolm Barrett, in the text Criminal Defences in Australia,[17] also differentiate the Queensland (or Griffith) *Code* from the common law and the Tasmanian *Criminal Code* insofar as mistake of fact is concerned at [2.9] to [2.11]. At [2.10] Fairell and Barrett state:

> "There are two important points of divergence. First, at common law, under the model Criminal Codes and the Criminal Code (Tas), the excuse only applies where the accused's conduct would have been innocent if what he or she mistakenly believed was, in fact, the real state of things. In these jurisdictions, if the defence is successfully raised, an acquittal is the only possible outcome. By contrast, under the Griffith Code and s32 of the Criminal Code (NT), an accused is not criminally responsible to any greater extent than if his or her belief represented the real state of things. Therefore, in these jurisdictions, a successful reliance on the excuse could result in an acquittal, a lesser penalty or a conviction for a lesser offence".

[17] LexisNexis Butterworths, 5th ed. 2017.

46. At [2.41] and [2.43] the authors again state that the law in Tasmania and Queensland diverges on this issue. The authors state that the Tasmanian *Criminal Code* follows the common law as explained in *Bergin v Stack*, whereby an accused person's belief must render them 'innocent', whereas the Queensland *Code* states that an accused is not criminally responsible to any greater extent than if his or her belief represented the actual state of things.

47. Whatever the influence of the common law on s24 of the Queensland *Code*, it is clear that the plain words of s14 of the Tasmanian *Criminal Code* closely correlate with the common law principle as expressed in *R v Prince* [1875] LR 2 CCR 154 and later *Bank of New South Wales v Piper* (1897) AC 383 at 389-90. The Tasmanian *Criminal Code* was drafted to reflect the common law of England at the time, wherever possible[18]. In drafting the *Criminal Code*, the Tasmanian drafters drew heavily on Stephen's *Draft Code of 1879*, and departed from the Griffith Code in a number of ways. In light of the foregoing, it is submitted that s14 of the Tasmanian *Criminal Code* more closely reflects the common law than the rule expressed by s24 of the Queensland *Code*, in which an accused person is only criminally responsible to the level of their mistake. In Tasmania, it is submitted that the common law principle of 'innocence' is reflected in the wording of s14, which refers to 'excuse'.

48. The parallels between s14 of the Tasmanian *Criminal Code* and the common law were discussed in *Martin v R*, the leading Tasmanian authority on the interpretation of s14 of the *Criminal Code.* Although the question of where the onus of proof lies has since been revisited and overruled in *Attorney-General's Reference No. 1 of 1989* (following the decision in *He Kaw Teh*), it is submitted that *Martin* remains authoritative as to the general meaning and application of s14. *Martin's* case involved a charge of bigamy. The accused claimed that at the time of undergoing his second marriage, he honestly and reasonably believed that his first marriage was lawfully dissolved.

49. It was held in *Martin* that *mens rea* has no place in the *Criminal Code*, and therefore the only means by which 'mistake' can be relied upon is through s14 and

[18] 'Second reading speech '*Criminal Code Bill'*, The Mercury, Hobart, Friday 29 February 1924, p 3

the provision creating the offence[19]. In *Martin*, Burbury CJ set out the development of the 'defence' of mistake of fact at common law, noting that at common law it is treated as part of the concept of *mens rea*[20]. Burbury CJ held that the use of the word 'excuse' in s14 of the *Criminal Code* was a reflection of the common law as explained by Sir Richard Couch in *Bank of New South Wales v Piper* (at 52).

50. His Honour went on to say at 112 that s14 "ineptly refers to "the existence of facts which would excuse such act or omission." If the facts exist (in the present case dissolution of the lawful marriage) then no crime is committed. But the word "excuse" is no doubt loosely used as the equivalent of "make innocent"".

51. At 114, Burbury CJ stated that:

> "The starting point in the consideration of mistake of fact as a "defence"… is to ascertain the external and mental elements of [the] crime as defined by the *Code.* Since the decision of the High Court in *Vallance*'s case (65) it is clear that to ascertain the constituent elements of a crime under the Tasmanian *Criminal Code* it is necessary first to turn to the section constituting the crime to determine whether any particular mental element (e.g. specific intent or knowledge) forms part of the definition of that crime and then to go to s13 of the *Code*. So far as the mental elements made ingredients of the crime of bigamy are concerned they must therefore be taken to be exhaustively stated in s193 and s13. There is no room for the introduction through the common law of any further mental element in the nature of *mens rea* or guilty mind as an ingredient of the crime. Any mental element as a positive ingredient of a crime must be found within the *Code* itself. Section 14 does not affect that fundamental proposition. Although mistake of fact at common law is widely treated as part of the concept of *mens rea* its recognition in s14 as a ground of exculpation cannot carry with it the introduction into the *Criminal Code* of the common law requirement of *mens rea* as an ingredient of the crime.

52. Burbury CJ went on to state that the possible external elements of a crime under the *Criminal Code* are 1) the physical action or conduct of the accused (which under s13(1) must be voluntary and intentional) 2) other elements or concomitant

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[19] Per Burbury CJ at 114.

[20] Per Burbury CJ at 108.

circumstances which the law requires to be combined with the accused's conduct to constitute a crime and 3) the result of the accused's act in those specified circumstances. Mistake of fact was a defence to all external elements of a crime, provided the accused's honest and reasonable mistake of fact would 'excuse' the act, that is make the conduct 'innocent'.

53. Therefore, Burbury CJ held that the term 'excuse' is synonymous with 'innocence[21]'. For the mistaken belief to operate it must make the act innocent if those facts had existed: *Bank of NSW v Piper*. It has been suggested that innocent means morally innocent: *R v Prince*. However, in Australia it means innocent of another offence: *Bergin v Stack* per Fullagar J at 262; *CTM v The Queen* (HC) per Gleeson CJ, Gummow, Crennan and Kiefel JJ at [26] and Hayne J at [199]. In *Thomas v The King* Starke J stated that "mistake of fact, which if true would make the act of the alleged offender an innocent act that exonerates him from criminal liability,[22]" whilst Dixon J (with whom Rich J agreed) stated the defence operates "in existence of circumstances which if true would make innocent the ***act*** for which he is charged[23]" [emphasis added]. In *Proudman v Dayman* (1941) 67 CLR 536, Dixon J stated "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[24]… the existence of a state of facts which if true would take his act outside the operation of the enactment[25]."

54. In *Bergin v Stack* Fullagar J says at 262, with which Williams ACJ and Taylor J concurred:

> "In the second place, even if it could be said that he entertained an honest and reasonable belief that the club was a registered club entitled under the Act to sell liquor to its members, it could not in this case, in my opinion, be an answer to the charge. At this point the fact that the sale took place at 6.40 p.m., 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

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[21] See *R v Martin* per Burbury CJ at 112.

[22] At p 295.

[23] At p 304.

[24] At p 540.

[25] At p 541.

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 different offence was being committed. In the great case of *Reg. v. Prince* (1875) LR 2 CCR 154, Brett J. said that a mistake excused "whenever the facts which are present to the prisoner's mind, and which he has reasonable ground to believe . . . to be the facts, would, if true, make his acts no criminal offence at all" (1875) LR 2 CCR, at pp 169-170. The judgment of Brett J. was the single dissenting judgment in a court of sixteen judges, but the whole point of the case is that the majority held 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 statement of Brett J. is, therefore, to be regarded as stating a minimum requirement. Denman J. said: - "he 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" (1875) LR 2 CCR at p 179. The 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; see, e.g. *Bank of New South Wales v. Piper* (1897) AC, at pp 389-390. Kenny (Outlines of Criminal Law, 11th ed. (1922), p. 65), takes as an instance 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 p.m. 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. In the present case the defendant said that he "did not know that trading hours for clubs were universally restricted to 6 p.m." But this, of course, is merely a statement that he did not know the law. If the facts established an offence against s. 161, the existence of a belief which, if well founded, would mean that his offence was not against s. 161 but against s. 266, affords him, in my opinion, no defence."

55. The Appellant's submission that *Bergin* was inconsistent with *Proudman* and *Thomas*[26] is not correct. All three cases limited the defence to circumstances where the mistaken belief made the ***act*** innocent, as distinct from the mistaken belief making the accused innocent of the charge. This is consistent with s14 of the

[26] See paragraphs 28-29 of the Appellant's written submissions.

Criminal Code which states "would excuse such act or omission," rather than stating "excuse from the offence charged".

56. The proposition that a mistaken belief held, if it had been the case, does not amount to an excuse if all it means is that a different offence to the one charged has been committed was applied by the Victorian Full Court in *R v Iannazzone* (1983) 1 VR 649 per Brooking J at 655 and in New South Wales in *R v Dib* (2002) 134 A Crim R 329 [42] and *Director of Public Prosecutions (NSW) v Kailahi* [2008] NSWSC 752. See also the discussion in *CTM v The Queen* (2007) 171 A Crim R 371 ('*CTM v The Queen* (CCA)') per Howie J at [73].

57. In *R v Iannazzone* the accused was charged with murder contrary to the *Crimes Act 1958* (Vic). The accused argued that he held a reasonable though mistaken belief that the deceased had entered into a 'suicide pact' with him, and that manslaughter should be left to the jury on that basis. The trial judge refused to do so. That decision was upheld by the Court of Criminal Appeal. Brooking J held at 253 that the 'honest and reasonable mistake of fact' doctrine requires belief in a state of facts which, if they existed, would make the accused's act innocent. Brooking J noted that the meaning of 'innocent' for this purpose has been the subject of much debate, however stated "it is at all events made clear by the judgment of Fullagar J in *Bergin v Stack* at 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… 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".

58. *R v Iannazzone* has been followed in New South Wales in *R v Dib*, and *Director of Public Prosecutions (NSW) v Kailahi*. *R v Dib* also concerned a charge of murder. In that case it was similarly held by Hulme J at 338 that an honest and reasonable, but mistaken, belief in the conduct of the deceased would not assist the accused, because even if it were true, the accused would have still committed the crime of manslaughter.

59. *Director of Public Prosecutions (NSW) v Kailahi* involved a summary charge of driving whilst disqualified contrary to the *Road Transport (Driver Licencing) Act 1998* (NSW). The defendant argued that she did not know that she was disqualified

from driving as the order disqualifying her was made in her absence whilst she was overseas. Despite this, when her vehicle had been intercepted she told attending police that she did not hold a driver's licence. Rothman J relied on the principles explained in *Bergin v Stack* and stated at [10], "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." His Honour went on to say at [11], "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 Ms Kailahi concedes, and as is clear from the conversation with the police officer, Ms Kailahi was aware that she was unlicensed and not permitted to drive. As a consequence, the "mistake of fact", if it be one, is a mistake as to which offence was being committed."

60. The proposition has also been applied in Queensland but is limited by the operation of their *Code*: *R v Duong* [2015] QCA 170. *R v Duong* concerned charges of possession and supply of a dangerous drug. It was argued that if the accused honestly and reasonably believed that the drug in his possession was a different controlled drug (carrying a different, lesser penalty provision), s24 would be available and he should be acquitted. However, the Court of Appeal held in *Duong* the accused had made no 'operative mistake', as his belief about 'the real state of things' still implicated him in equivalent criminal behaviour (despite the lesser penalty), to the extent that he had still committed the same crime.

61. Douglas J, (with whom Fraser JA and Flanagan J agreed) stated at [56] –[57]:

> "Section 24…applies in its own terms to make the appellant not criminally responsible for the act or omission to any greater extent than if the real state of things had been such as he believed to exist. If the "real state of things" still implicates him in such criminal behaviour he is not excused because of the operation of s24. Nor is this a case of proving some other offence than the one particularised simply in reliance on the appellant's belief. There was no doubt that he possessed and intended to supply the particular dangerous drug, methylamphetamine, even if he thought it might have been another drug such as DMA, found in Schedule 2 rather than Schedule 1 of the *Drugs Misuse Act*. It was

only if he established a belief that he was not in possession of any dangerous drug that he was entitled to an acquittal based on s24."

62. The proposition has most recently been affirmed by the High Court in *CTM v The Queen* (HC). In *CTM v The Queen* (HC) Hayne J at [174] refers to *Bergin v Stack* and states, "even if the belief had been well founded the conduct was not innocent and an offence had been committed". Heydon J at [199] states "the existence of a state of affairs, which had it existed, would have made the act alleged by the prosecution non-criminal". The joint judgment of Gleeson CJ, Gummow, Crennan and Kiefel JJ on this issue states at [26]:

> The question arises: what does the law now provide if a person charged with an offence against s 66C(3) honestly believed, on reasonable grounds, that the complainant was aged 16 years or over? It has already been noted with reference to what was said by Dixon J in *Proudman v Dayman* that the potential ground of exculpation requires an honest and reasonable belief in a state of affairs which, had it existed, would be such that the accused's conduct was innocent, in the sense earlier explained. It would therefore not assist an accused to believe that a child was aged between 10 and 14, or between 14 and 16; for if the child were of that age, it would merely take the case out of one prohibition into another. The act of consensual sexual intercourse is not of itself an offence. The offence consists in a particular accompanying state of affairs or circumstance (relevantly, age). 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.

63. *CTM v The Queen* (HC) considered s66C of the New South Wales *Crimes Act 1900,* which set out offences and penalties in relation to the crime of sexual intercourse with children between 10 and 16 years. The section distinguishes offences committed upon children under the age of 10 years, children between the ages of 10 and 14 and children between the ages of 14 and 16, with different penalties attaching to each offence in descending order from the highest penalty to the lowest. Notwithstanding the disparity in penalties between the offences, the Court held that it would be no answer to a charge under the section where a child was aged under 10 for an accused to claim they were honestly and reasonably mistaken that the child in question was aged between 10 or 14, or 14 and 16.

64. Blow CJ stated in *Tasmania v Bell*[27], "I have been unable to find a case in any *Code* state or common law jurisdiction that supports the argument put to me by Ms Baumeler on behalf of the accused". The Appellant's submissions to this court provide no authority for the propositions advanced. The Appellant's reliance on *DPP v Bone* [2005] NSWLR 735 is misplaced[28]. Adams J only distinguished *Iannazzone* and *Bergin v Stack* on the basis that the evidence in that case could not show that if the accused's mistaken belief had existed the accused was guilty of another offence.

65. As raised by the judgment of Brett J at [33] – [36][29] the proposition that for the excuse to exist a person has to be innocent of any offence has been criticized as being too broad: Paul Fairell and Malcolm Barrett, Criminal Defences in Australia (LexisNexis Butterworths, 5th ed. 2017) [2.42]. The authors of that text refer to the plurality judgment in *CTM v The Queen* (HC) at [8] in which they state, "… the word "innocent" means not guilty of a criminal offence. In the case of an offence, or 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"". They suggest this supports a narrower view that the other offence must be an offence in the same statute for the excuse not to apply. See also *CTM v The Queen* (CCA) at [73] where Howie J gives some support for this approach. As the Appellant correctly states,[30] Howie J raises the question of the limitations to be put on the meaning of 'innocence' at [73]. However, at [74] he goes on to give support to the proposition that for innocence to apply, it must mean innocent of any offence in the enactment[31] and not just the offence charged. Brett J at [29] states the plural judgment of the High Court in *CTM v The Queen* has two different tests for the meaning of innocent, "[o]ne is that "innocent" means not guilty of a criminal offence. The other is that conduct must be "outside the operation of the enactment"." Brett J at [32] took the view "innocent' meant innocent of any criminal offence whatsoever. Martin AJ was of the view that Fullagar J's view in

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[27] *Tasmania v Bell* [2019] TASSC 34 at 9.

[28] See paragraph 33 of Appellant's written submissions.

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

[30] At paragraph 32 of the Appellant's written submissions.

[31] Appellant's submissions paragraph 32.

Bergin v Stack was confirmed in *CTM v The Queen* (HC) to mean "in order to excuse the believed facts, if true must render the act charged innocent in the sense that the act would not amount to a criminal offence", at [56]. Pearce J agreed with Martin AJ, at [10].

66. Pearce J at [5] also found that there was no need in this case to resolve any uncertainties that exist within the terms "excuse" or "innocent" because, at [10], "he was not only guilty of a criminal offence, but guilty of a criminal offence within the same enactment". Similarly Brett J at [37] and Martin AJ at [68] agreed that it was not necessary in this case to determine any such limitations.

10 67. Thus in Tasmania, the law is clear that the common law principle of *mens rea* is displaced by s13 of the *Code*[32]*:* Similarly, the concept of *mens rea* has no application to s14[33]. However, it is clear that on a reading of the plain words of the section that 'excuse' reflects the common law concept of 'innocence', which is well-established. Notably, the word 'excuse' is not used in the Queensland or Western Australian equivalent provisions, which instead focus on the state of affairs as the accused believes them to be, and only attach criminal liability to that point. Whilst it may be argued that this approach is reflective of the doctrine of *mens rea* in Queensland and Western Australia, it is submitted that there is no such tension in the Tasmanian criminal law.

20 68. It is submitted that the Appellant's contention that s14 of the *Criminal Code* applies where the belief, if true, would make a person innocent of the charge and that it is irrelevant that the person's belief, if true, would make that person guilty of another criminal offence, is contrary to well-established authority dating back to *Prince*'s case, as interpreted by numerous decisions since.

69. The Appellant's conduct would have made him guilty of another criminal offence in the same enactment as the count charged and not merely a regulatory offence or minor infringement of the law. In other words, if genuinely held, the Appellant's belief was only a mistake about the type of criminal offence he committed under

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

[33] See *Martin* per Burbury J at 114.

the *Misuse of Drugs Act 2001*. Therefore, it was irrelevant to guilt, but may be of some relevance to sentencing[34].

Part VI:

70. Not applicable.

Part VII:

10 71. It is estimated that one and a half hours is required to deliver the Respondent's submissions.

Dated the 19th day of August 2020

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[34] See *CTM v The Queen* per Gleeson CJ, Gummow, Crennan and Kiefel JJ at [27].