

HIGH COURT OF AUSTRALIA

KIEFEL CJ,
GAGELER, KEANE, GORDON, EDELMAN, STEWARD AND GLEESON JJ

CHAUNCEY AARON BELL

APPELLANT

AND

STATE OF TASMANIA

RESPONDENT

Bell v Tasmania
[2021] HCA 42
Dates of Hearing: 5 & 6 October 2021
Date of Judgment: 8 December 2021
H2/2020

ORDER

Appeal dismissed.

On appeal from the Supreme Court of Tasmania

Representation

K L Baumeler with P J Willshire for the appellant (instructed by Philippa Willshire)

D G Coates SC with M C Figg for the respondent (instructed by Office of the Director of Public Prosecutions (Tas))

M E O'Farrell SC, Solicitor-General for the State of Tasmania, with D R Osz for the Attorney-General for the State of Tasmania, intervening (instructed by Office of the Solicitor-General (Tas))

G A Thompson QC, Solicitor-General of the State of Queensland, with P M Clohessy for the Attorney-General of the State of Queensland, intervening (instructed by Crown Law (Qld))

D T Kell SC with E S Jones for the Attorney-General for the State of New South Wales, intervening (instructed by Crown Solicitor's Office (NSW))

Notice: This copy of the Court's Reasons for Judgment is subject to formal revision prior to publication in the Commonwealth Law Reports.

CATCHWORDS

Bell v Tasmania

Criminal law – Defences – Honest and reasonable mistake of fact – Where appellant charged with supplying controlled drug to child contrary to s 14 of *Misuse of Drugs Act 2001* (Tas) – Where appellant claimed he honestly and reasonably believed child was adult – Where appellant's conduct, had his belief been true, would have constituted lesser offence of supplying controlled drug contrary to s 26 of *Misuse of Drugs Act* – Where common law principle of honest and reasonable mistake of fact operates to excuse conduct that, on believed state of facts, would be innocent – Meaning of "innocent" – Whether appellant entitled to rely on excuse of honest and reasonable mistake of fact.

Words and phrases – "common law principle", "criminal responsibility", "excuse", "ground of exculpation", "honest and reasonable but mistaken belief in the existence of any state of facts", "innocent", "justification", "mistake as to age", "voluntary and intentional".

Criminal Code (Tas), ss 13, 14.

Criminal Code Act 1924 (Tas), s 8.

1 KIEFEL CJ AND KEANE J. The appellant was charged with one count of supplying a controlled drug to a child contrary to s 14 of the *Misuse of Drugs Act 2001* (Tas). The appellant was also charged with one count of rape contrary to s 185(1) of the *Criminal Code* (Tas) ("the Tasmanian Code"). Both offences were alleged to have been committed against the same child, who was 15 years old at the time of the alleged offences. The Crown case was that the appellant injected the complainant with methylamphetamine and, sometime later, had sexual intercourse with her. In a record of interview with police, the appellant admitted to those acts, but claimed that the complainant told him, and he believed, that she was 20 years old.

2 The trial judge (Blow CJ) ruled that the defence of honest and reasonable mistake as to the complainant's age was not available as a defence to the charge of supplying the complainant with a controlled drug because, even if the appellant's mistaken belief that the complainant was an adult had been true, he would still have committed the offence of supplying a controlled drug to another person contrary to s 26 of the *Misuse of Drugs Act*. His Honour directed the jury accordingly. The jury returned a guilty verdict in respect of the supply charge but failed to reach a verdict in respect of the rape charge.

3 An appeal to the Court of Criminal Appeal of the Supreme Court of Tasmania (Pearce and Brett JJ and Martin A-J) concerned only the conviction relating to the charge of supplying a controlled drug to a child. The Court of Criminal Appeal upheld the trial judge's ruling that the defence of honest and reasonable mistake was not available and dismissed the appeal¹.

4 The Court of Criminal Appeal was correct. In this regard, we are in general agreement with the reasons of Edelman and Gleeson JJ. We write separately to observe that to accept the appellant's argument would require one to adopt an understanding of the operation of s 14 of the Tasmanian Code that cannot be supported as an exercise in statutory interpretation.

5 Section 14 of the *Misuse of Drugs Act* proscribes the intentional² supply of a controlled drug to a person who was, in fact, a child. It is uncontroversial that, to prove the commission of an offence against s 14, the prosecution need not prove that the accused knew or believed that the person to whom the controlled drug was supplied was a child.

1 *Bell v Tasmania* (2019) 279 A Crim R 553.

2 See s 13 of the Tasmanian Code; *Vallance v The Queen* (1961) 108 CLR 56.

6 Section 14 of the Tasmanian 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."

7 The term "excuse" is not defined in the Tasmanian Code. However, "criminal responsibility" is defined to mean "liability to punishment as for an offence"³. "Offence" is in turn defined to mean "any breach of the law for which a person may be punished summarily or otherwise"⁴.

8 Section 14 of the Tasmanian Code does not itself lay down a substantive rule of law. Rather, it acknowledges the existence of, and regulates the application of, a principle of the common law relating to the interpretation of statutes that create criminal offences⁵. The operative effect of s 14 is that the application of the common law principle of interpretation in any particular case depends on the true construction of the statute constituting the particular offence. The notion that s 14 acknowledges a ground of exculpation which has its basis in the common law is supported by s 8 of the *Criminal Code Act 1924* (Tas), which provides:

"Saving of common law defences

All rules and principles of the common law which render any circumstances a justification or excuse for any act or omission, or a defence to a charge upon indictment, shall remain in force and apply to any defence to a charge upon indictment, except in so far as they are altered by, or are inconsistent with, the Code."

9 The interpretative principle of the common law recognised by s 14 of the Tasmanian Code has variously been referred to as a circumstance of excuse or exculpation or as a defence to a charge⁶. This interpretative principle had its origins in the willingness of the judges of Victorian England to gloss the terms of a statute

3 s 1 of the Tasmanian Code.

4 s 1 of the Tasmanian Code.

5 Compare *Proudman v Dayman* (1941) 67 CLR 536 at 540.

6 *Thomas v The King* (1937) 59 CLR 279 at 304; *CTM v The Queen* (2008) 236 CLR 440 at 446 [6].

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to an extent that reflected the historical development of the criminal law in England over centuries as something of a collaboration between the judges and the Parliament. The rationale for the judicial gloss can be found in the view of the judges of Victorian England that there would be an unacceptable gap between moral culpability and criminal responsibility if a statute constituting an offence were construed as imposing criminal responsibility for an act or omission which the accused honestly and reasonably believed to be lawful. This rationale was clearly articulated in *R v Tolson*⁷.

10 In this regard, in *CTM v The Queen*⁸, Gleeson CJ, Gummow, Crennan and Kiefel JJ cited the following passages from the judgment of Cave J in *Tolson*⁹:

"At 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. ...

Now it is undoubtedly within the competence of the legislature to enact that a man shall be branded as a felon and punished for doing an act which he honestly and reasonably believes to be lawful and right; just as the legislature may enact that a child or a lunatic shall be punished criminally for an act which he has been led to commit by the immaturity or perversion of his reasoning faculty. But such a result seems so revolting to the moral sense that we ought to require the clearest and most indisputable evidence that such is the meaning of the Act."

11 In *CTM*, the plurality went on to say¹⁰:

"[T]he point made by Cave J at the end of the second passage quoted above continues to be of fundamental importance to the function of courts in seeking to find and give effect to the meaning of criminal legislation. While the strength of the consideration may vary according to the subject matter of the legislation¹¹, when an offence created by Parliament carries serious penal consequences, the courts look to Parliament to spell out in clear terms

7 (1889) 23 QBD 168.

8 (2008) 236 CLR 440 at 445-446 [3]-[4].

9 (1889) 23 QBD 168 at 181-182.

10 (2008) 236 CLR 440 at 447 [7]-[8].

11 As explained by Dixon J in *Proudman v Dayman* (1941) 67 CLR 536 at 540.

any intention to make a person criminally responsible for conduct which is based on an honest and reasonable mistake. ...

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'¹²."

12 It is apparent that the common law interpretative gloss recognised by s 14 of the Tasmanian Code was justified by the need to avoid "the public scandal of convicting on a serious charge persons who are in no way blameworthy"¹³. But the unacceptable affront to the moral sense that provided the rationale for the common law gloss did not arise in cases where the act of the accused was such that he or she would rightly "be branded as a felon and punished"¹⁴ even if the facts of the case were indeed as the accused believed them to be. That this is so is apparent from the statements in the authorities that, for the ground of exculpation to apply, the act in question must have been believed by the accused to be "innocent"¹⁵. That understanding of the rationale for the common law gloss, and the expression of the common law principle of interpretation to which it gave rise, was confirmed by a majority of this Court in *Bergin v Stack*¹⁶, and in the reasons of the plurality in *CTM*¹⁷.

13 So understood, the rationale for the judicial gloss does not support a further and more nuanced gloss on the meaning of a statute whereby the act of an accused would be excused even where, on the mistaken view of the facts asserted by the accused, the act would warrant conviction of an offence against that statute. In

12 *Proudman v Dayman* (1941) 67 CLR 536 at 541.

13 *Sweet v Parsley* [1970] AC 132 at 150; *He Kaw Teh v The Queen* (1985) 157 CLR 523 at 565; *CTM v The Queen* (2008) 236 CLR 440 at 484 [148].

14 *R v Tolson* (1889) 23 QBD 168 at 182.

15 *Bergin v Stack* (1953) 88 CLR 248 at 262-263; *CTM v The Queen* (2008) 236 CLR 440 at 447 [8], 453 [27]. See also *Proudman v Dayman* (1941) 67 CLR 536 at 541; *R v Reynhoudt* (1962) 107 CLR 381 at 389.

16 (1953) 88 CLR 248 at 253, 262-263, 277.

17 (2008) 236 CLR 440 at 447 [8], 453 [27].

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such a case, the unacceptable prospect of convicting a person of a serious charge where that person is "in no way blameworthy" does not arise.

14 This understanding of the common law interpretative principle recognised in s 14 of the Tasmanian Code is confirmed by the textual focus of s 14 upon the "act or omission" that is said to entail "criminal responsibility". Section 14 refers to a "state of facts the existence of which would excuse such act or omission" from criminal responsibility "entailed" by that act or omission. The ordinary and natural reading of these words confirms that the common law interpretative principle there recognised excuses the accused from *any and all* criminal responsibility entailed by the act or omission, but only where the act or omission is done under an operative mistake.

15 The point may be illustrated by reference to the present case. The act of the appellant which entailed criminal responsibility was the supply of a controlled drug to another. By reason of s 26 of the *Misuse of Drugs Act*, that act is an offence. That the moral culpability of a person who commits that offence is less than that of a person who supplies a controlled drug to someone he or she knows to be a child may, no doubt, be reflected in the sentence to be imposed¹⁸; but it cannot be said that the former act would be "innocent" or "in no way blameworthy". There is not that gulf between moral culpability and criminal responsibility that arises when the act of an accused has been committed with an honest and reasonable belief that the act was lawful.

16 It must be acknowledged that the common law principle of interpretation recognised by s 14 of the Tasmanian Code operates in a rather "blunt" way in that it does not seek to align the extent of criminal responsibility precisely with the degree of moral culpability revealed by the accused's belief as to the state of affairs in which he or she acts. In this regard, it may be noted that s 14 of the Tasmanian Code stands in marked contrast to the *Criminal Code* (Qld) ("the Queensland Code"), which expressly provides that an accused is criminally responsible only to the level that his or her acts or omissions are not affected by mistake. Section 24(1) of the Queensland Code provides¹⁹:

"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."

18 *CTM v The Queen* (2008) 236 CLR 440 at 453 [27].

19 See also s 24 of the *Criminal Code* (WA).

17 Yet the argument for the appellant would have it that the effect of the interpretative principle recognised by s 14 of the Tasmanian Code is no different from the effect of s 24 of the Queensland Code, save that, in this case, the appellant could not even be held criminally responsible for the lesser offence under s 26 of the *Misuse of Drugs Act* because he was not charged with that offence as an alternative charge on the indictment. The obvious differences between the terms of the Tasmanian and Queensland provisions render this argument distinctly implausible.

18 The text of s 24 of the Queensland Code expressly aligns criminal responsibility for an act with the moral culpability associated with the accused's belief. It achieves that result by focussing on the "state of things" in which an act is committed, and fixing the extent of criminal responsibility for the act by reference to that state of things honestly and reasonably believed to exist. The ordinary and natural meaning of the text of the Queensland Code requires criminal responsibility to be determined by reference to that believed "state of things" and not to the criminality entailed by the "act" in question.

19 At this point, it is necessary to observe that, in *Thomas v The King*²⁰, Dixon J, having referred to statements in the authorities of the interpretative principle of the common law, said:

"The rule or rules have 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."

20 It was simply not correct to say that the relevant provisions of the Tasmanian and Queensland Codes are in the same terms. That is readily apparent from a textual comparison of the two provisions. That Dixon J did not observe the differences between these provisions has not passed without remark²¹. No doubt the muted tone of those remarks reflects the high and universal esteem in which the judicial work of Sir Owen Dixon is held. But the difference between the two statutory provisions – and indeed between the common law interpretative principle

20 (1937) 59 CLR 279 at 305-306.

21 See *Walden v Hensler* (1987) 163 CLR 561 at 570, 580, 591.

and the substantive rule enacted in s 24 of the Queensland Code – has consistently been recognised by the courts²² and by learned commentators²³.

21 It may be observed that Sir Samuel Griffith, in a marginal note to the provision in his Draft of a Code of Criminal Law that was enacted to become s 24 of the Queensland Code, wrote "Common Law"²⁴. That marginal note may be understood as a reference by Sir Samuel to the origins of what became s 24 of the Queensland Code, rather than as an assertion that the text of the Queensland Code effected no alteration to the common law. It might also be that Sir Samuel envisaged the terms of s 24 of the Queensland Code to be the natural development of the rationale underlying the common law principle of interpretation and the concomitant expression of a more nuanced rule aligning criminal responsibility with moral culpability²⁵. But there is little to be gained by further speculation as to Sir Samuel's thinking.

22 What matters for present purposes is the meaning and effect of the Tasmanian Code. The Tasmanian legislature chose to enact the Tasmanian Code with its mixture of common law principles and re-enactments of statute law. As Windeyer J observed in *Vallance v The Queen*²⁶ in relation to the Tasmanian Code:

"In some places the Code states common law principles in words that have long been familiar. Other parts of it are a mere assembly of old statute law, re-enacted in its terms."

23 The Tasmanian legislature had before it the Queensland Code when it enacted the Tasmanian Code. There is simply no escaping the conclusion that the Tasmanian legislature, in enacting s 14 of the Tasmanian Code, chose to eschew the adoption of s 24 of the Queensland Code and chose instead to adhere to the common law principle of interpretation. Whatever the wisdom of that choice, one can be in no doubt that the choice was made. For this Court now to accept the construction of s 14 of the Tasmanian Code propounded by the appellant would be to set aside a clear legislative choice and exercise that choice afresh. That is not a

22 *Anderson v Nystrom* [1941] St R Qd 56 at 69-70; *Loveday v Ayre; Ex parte Ayre* [1955] St R Qd 264 at 267; *R v Mrzljak* [2005] 1 Qd R 308 at 315 [21], 326 [75].

23 Fairall and Barrett, *Criminal Defences in Australia*, 5th ed (2017) at [2.10]; Australia, *Review of Commonwealth Criminal Law, Interim Report: Principles of Criminal Responsibility and Other Matters* (1990) at 69 [7.9].

24 Griffith, *Draft of a Code of Criminal Law* (1897) at 13.

25 Compare *Hardgrave v The King* (1906) 4 CLR 232 at 237.

26 (1961) 108 CLR 56 at 74-75.

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course that is available as a matter of statutory interpretation according to the contemporary understanding of the orthodox exercise of judicial power.

24 The appeal should be dismissed.

25 GAGELER J. I agree that the appeal must be dismissed. The facts and statutory provisions having been set out in other reasons for judgment, I can state my reasons briefly.

26 The offence created by s 14 of the *Misuse of Drugs Act 2001* (Tas) has two physical elements. The first is an act – supplying a controlled drug. By operation of s 13(1) of the *Criminal Code*, found in Sch 1 to the *Criminal Code Act 1924* (Tas), an accused can be criminally responsible for that act only if the act is voluntary and intentional.

27 The second physical element of the offence is the existence of a state of fact – that the person to whom the supply is made is a child. Section 14 of the *Criminal Code* speaks to whether an honest and reasonable but mistaken belief that the person to whom the supply is made is not a child excuses the act of voluntary and intentional supply of the controlled drug from criminal responsibility. What s 14 tells us – and all that s 14 tells us²⁷ – is that is a question of law to be determined on the proper construction of s 14 of the *Misuse of Drugs Act*.

28 Section 8 of the *Criminal Code Act* then tells us that the common law presumption of statutory interpretation, as expounded in *He Kaw Teh v The Queen*²⁸ and in *CTM v The Queen*²⁹ by reference to the statement of principle of Cave J in *R v Tolson*³⁰, applies to the construction of s 14 of the *Misuse of Drugs Act*. The common law presumption is that an honest and reasonable but mistaken belief in the existence of a state of fact on the part of an accused will excuse the accused from criminal responsibility for the act in respect of which the accused stands charged of an offence only if that state of fact, if true, would have made the act "innocent".

29 Whatever uncertainty may have been implicit in earlier and more tentative statements of the common law presumption in *Thomas v The King*³¹ and in

27 cf *R v Martin* [1963] Tas SR 103 at 110.

28 (1985) 157 CLR 523 at 532.

29 (2008) 236 CLR 440 at 446-447 [7]-[8].

30 (1889) 23 QBD 168 at 181.

31 (1937) 59 CLR 279 at 304-306.

*Proudman v Dayman*³², *Bergin v Stack*³³ is unambiguous authority for the proposition that an act is only "innocent" within the meaning of the common law presumption if it is not a criminal offence at all. There, a steward in a club was charged with the offence of having made an unlicensed sale of liquor. He claimed that he believed that the club had a licence. The holding was that his mistaken belief, assuming it to have been honest and reasonable, did not excuse him from criminal responsibility for the sale which constituted the offence charged. That was because, had his belief been true, he would still have committed the separate offence of having sold liquor outside lawful trading hours for a licensed club, since the sale had been proved to have been made at 6.40 pm.

30 The plurality in *CTM* reflected that holding in *Bergin* in stating that "innocent" in this context "means not guilty of a criminal offence"³⁴. The plurality in *CTM* cannot be taken by its subsequent references to *Proudman*³⁵ to have been departing from the holding in *Bergin*.

31 There is no reason now to depart from the holding in *Bergin* that an honest and reasonable but mistaken belief in the existence of a state of fact will excuse criminal responsibility for the act only if the state of fact, if true, would have made the act not a criminal offence at all. To the contrary, there is good reason to adhere to the holding. For nearly 70 years, it has provided a stable foundation of common law interpretative principle by reference to which legislatures throughout Australia have formulated and explicated myriad statutory offences. Sections 14A and 14B of the *Criminal Code* – which respectively deal with mistake as to consent in certain sexual offences and mistake as to the age of victims in relation to certain sexual offences – are examples of legislative explication of statutory offences proceeding on that common law foundation.

32 Applying that common law presumption to the construction of s 14 of the *Misuse of Drugs Act* leads to the conclusion that an honest and reasonable but mistaken belief that the person to whom the supply is made is not a child does not excuse the voluntary and intentional supply of the controlled drug to a person who is in fact a child. That is because the voluntary and intentional supply of the controlled drug to a person who is not a child is not "innocent": it is an offence against s 26 of the *Misuse of Drugs Act*.

32 (1941) 67 CLR 536 at 540-541.

33 (1953) 88 CLR 248 at 253, 262-263, 277.

34 (2008) 236 CLR 440 at 447 [8]. See also at 491 [174], 497 [199].

35 (2008) 236 CLR 440 at 447 [8], 453 [27].

33 Procedural fairness issues might well arise in a case, closer to *Bergin*, in which an element of the separate offence which the accused would have committed had the state of fact believed by the accused been true is not an element of the offence of which the accused stands charged. In *Bergin*, for example, the timing of the sale was not an element of the offence with which the steward was charged. No issue of that nature arises here given that the voluntary and intentional supply of the controlled drug sufficient to establish the first element of the offence against s 14 of the *Misuse of Drugs Act* is sufficient in itself to establish the offence against s 26 of the *Misuse of Drugs Act*. Here, as in *CTM*³⁶, on the facts which must be taken to have been found by the jury, the postulated mistake of the appellant "would merely take the case out of one prohibition into another" so as to render his mistake no more than "a mistake about the kind of offence that [was] being committed".

36 (2008) 236 CLR 440 at 453 [27].

34 GORDON AND STEWARD JJ. The appellant, Mr Bell, injected a 15-year-old female with methylamphetamine. He was relevantly charged on indictment, and convicted, of supplying a controlled drug to a child, a person who had not attained the age of 18 years, contrary to s 14 of the *Misuse of Drugs Act 2001* (Tas)³⁷. Mr Bell did not give evidence, but the prosecution adduced a record of interview between him and the police in which he claimed he believed that the female was 20 years of age. The trial judge ruled that the defence³⁸ of honest and reasonable mistake as to age was not available to Mr Bell as an excuse to the charge. In summing up, the trial judge directed the jury that if Mr Bell had a mistaken belief that the female was aged 18 years or more "that makes no difference". The question is whether the trial judge erred in ruling that honest and reasonable mistake of fact was not available to Mr Bell. The answer is "no".

35 The background to this appeal and the applicable provisions of the *Criminal Code* (Tas) and the *Misuse of Drugs Act* are set out in the reasons of Edelman and Gleeson JJ. We write separately because we consider the principles to be applied in the circumstances of this case to be sufficiently stated in *Bergin v Stack*³⁹ and *CTM v The Queen*⁴⁰.

36 Part 2 of the *Misuse of Drugs Act*, headed "Major offences", includes s 14, which provides that "[a] person must not supply a controlled drug to a child"⁴¹. Offences in Pt 2 are indictable offences⁴².

37 The *Criminal Code* is Sch 1 to the *Criminal Code Act 1924* (Tas). The *Criminal Code* applies to all "crime[s]", defined to mean "an offence

37 *Misuse of Drugs Act*, s 14 read with s 3(1) definition of "child".

38 This term is used without pre-empting questions of onus of proof: *CTM v The Queen* (2008) 236 CLR 440 at 446 [6].

39 (1953) 88 CLR 248 at 262-263.

40 (2008) 236 CLR 440 at 447 [8].

41 Pursuant to s 3(1) of the *Misuse of Drugs Act*, "child" means "a person who has not attained the age of 18 years", "controlled drug" means "a substance, other than a growing plant, specified or described in Part 2 of Schedule 1" to the *Misuse of Drugs Act* (which relevantly includes methylamphetamine), and "supply", in relation to a substance, relevantly includes "administer[ing] the substance".

42 *Misuse of Drugs Act*, s 5.

punishable upon indictment"⁴³. It therefore applies to the offence created by s 14 of the *Misuse of Drugs Act*.

38 Chapter IV of Pt I of the *Criminal Code*, headed "Criminal Responsibility", relevantly contains ss 13 and 14. Section 13, headed "Intention and motive", provides:

- "(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.
- (2) Except as otherwise expressly provided, no person shall be criminally responsible for an omission, unless it is intentional.
- (3) 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.
- (4) Except where it is otherwise expressly provided, the motive by which a person is induced to do any act or make any omission is immaterial."

39 Two matters should be stated at the outset.

40 First, the *Criminal Code* provides that no person shall be criminally responsible for an *act*, unless the *act* is *voluntary and intentional*⁴⁴. The "act" which must be "voluntary and intentional" under s 13(1) is the physical act of the accused and not the whole *actus reus*⁴⁵.

41 Second, in the context of s 14 of the *Misuse of Drugs Act* – supply of a controlled drug to a child – the supply of a controlled drug is the act that must be both voluntary and intentional. In the present appeal, there was no dispute that Mr Bell voluntarily and intentionally supplied a controlled drug. It was thus found below, and is not challenged on appeal, that the mental element required by s 13(1)

43 *Criminal Code*, s 1 definition of "crime"; *Criminal Code Act*, s 4(1).

44 *Criminal Code*, s 13(1).

45 *Vallance v The Queen* (1961) 108 CLR 56 at 64, 68-69, 71; *Kaporonovski v The Queen* (1973) 133 CLR 209 at 230-231; *R v Falconer* (1990) 171 CLR 30 at 38, 81. See also *Snow v The Queen* [1962] Tas SR 271 at 278. cf *He Kaw Teh v The Queen* (1985) 157 CLR 523 at 582.

of the *Criminal Code* for s 14 of the *Misuse of Drugs Act* "will not apply to the surrounding circumstances necessary to establish the crime" (emphasis added), namely that "the substance is a controlled drug and that the person to whom the drug is supplied is a child". Mr Bell's defence was that he thought that the female to whom he supplied the controlled drug was not a child but was 20 years of age. But the age of a person is not an act – it is a state of fact.

42 Section 14 of the *Criminal Code* provides that it is a question of law whether, for a given offence, an excuse of reasonable mistake of fact is available. Section 14, headed "Mistake of fact", 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." (emphasis added)

43 Section 8 of the *Criminal Code Act* provides that "[a]ll rules and principles of the common law which render any circumstances a justification or excuse for any act or omission, or a defence to a charge upon indictment, shall remain in force and apply to any defence to a charge upon indictment, *except in so far as they are altered by, or are inconsistent with, the Code*" (emphasis added).

44 On the proper construction of s 14 of the *Criminal Code*, the common law principle of honest and reasonable but mistaken belief applies⁴⁶: the common law principle is not *altered by, or inconsistent with*, s 14 of the *Criminal Code*⁴⁷.

45 The next question posed by s 14 of the *Criminal Code* is whether, as a matter of construction, s 14 of the *Misuse of Drugs Act* would *exclude* the operation of the reasonable mistake of fact excuse in s 14 of the *Criminal Code*. The answer is there is nothing in s 14 of the *Misuse of Drugs Act* that would have that effect⁴⁸.

46 *Criminal Code Act*, s 8.

47 *Thomas v The King* (1937) 59 CLR 279 at 305-306; *Snow* [1962] Tas SR 271 at 277, 296; *R v Martin* [1963] Tas SR 103 at 109, 135; *Attorney-General's Reference No 1 of 1989* [1990] Tas R 46 at 55, 63.

48 cf, eg, *Corporations Act 2001* (Cth), s 588G(3A) and *Criminal Code* (Cth), s 6.2(1).

46 Section 14 of the *Criminal Code* states and embodies the common law principle of mistake of fact as a ground of exculpation⁴⁹. The common law principle of honest and reasonable but mistaken belief was set out in *Bergin*⁵⁰ and *CTM*⁵¹: it is a ground of exculpation if an accused can establish an honest and reasonable belief in a state of facts which, if true, would make the act of the accused "innocent", where "innocent" means not guilty of any criminal offence. The evidentiary onus of raising the ground of exculpation is on the accused, but, once that occurs, the ultimate legal onus of displacing the ground lies on the prosecution⁵². There is no reason now to depart from *Bergin* or *CTM*.

47 Applying that principle to the offence created by s 14 of the *Misuse of Drugs Act* in this case, even if Mr Bell held an honest and reasonable belief in the fact that the female he supplied with a controlled drug was 20 years of age, the act – the supply of a controlled drug – was not capable of being excused because the act of supplying a controlled drug was criminal. It was an offence contrary to s 26 of the *Misuse of Drugs Act*.

48 The fact that Mr Bell would not be excused of the charged offence on the indictment, even if he held an honest and reasonable but mistaken belief about the age of the female to whom he supplied the controlled drug, is not harsh, unfair or otherwise contrary to the principles of the criminal justice system⁵³. First, the act – the supply of a controlled drug – was the particular act alleged as the foundation of the relevant charge in the indictment⁵⁴. Second, as the plurality in *CTM* observed, a mistake of fact which would merely take a case "out of one prohibition

49 *Thomas* (1937) 59 CLR 279 at 305-306; *Snow* [1962] Tas SR 271 at 277, 296; *Martin* [1963] Tas SR 103 at 109, 135; *Attorney-General's Reference No 1 of 1989* [1990] Tas R 46 at 55, 63.

50 (1953) 88 CLR 248 at 262-263.

51 (2008) 236 CLR 440 at 447 [8].

52 *CTM* (2008) 236 CLR 440 at 447 [8], citing *He Kaw Teh* (1985) 157 CLR 523 at 534-535.

53 *Ratten v The Queen* (1974) 131 CLR 510 at 517; *Kirk v Industrial Court (NSW)* (2010) 239 CLR 531 at 557 [26], relevantly citing *Johnson v Miller* (1937) 59 CLR 467 at 486, 489 and *John L Pty Ltd v Attorney-General (NSW)* (1987) 163 CLR 508 at 519, 520.

54 *Kirk* (2010) 239 CLR 531 at 557 [26], citing *Johnson* (1937) 59 CLR 467 at 489.

into another" is "legally irrelevant to guilt, although it could possibly have some consequence for sentencing purposes"⁵⁵.

49 Parliaments have relied on the common law principle of honest and reasonable but mistaken belief in drafting and creating offences⁵⁶. Section 14 of the *Criminal Code* in its terms – "[w]hether 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* ... [is] to be determined on the construction of the statute" – reinforces that view. This appeal is not the appropriate vehicle to seek to qualify or clarify the outer limits of the common law principle of honest and reasonable mistake.

50 Finally, s 13(3) of the *Criminal Code* – which is concerned with criminal responsibility for an act or omission, with intent to commit an offence, which brings about an unforeseen result which, if intended, would have constituted some other offence – was not relevant in this appeal. Section 13(3) is concerned with unforeseen results⁵⁷.

51 The appeal is dismissed.

55 (2008) 236 CLR 440 at 453 [27].

56 See, eg, *Criminal Code*, ss 14A and 14B.

57 *R v Vallance* [1960] Tas SR 51 at 94, 115-117.

EDELMAN AND GLEESON JJ.

Introduction

52 This appeal concerns the common law excuse of honest and reasonable mistake of fact for an act that would otherwise constitute an offence. Where the excuse is available, and sufficient evidence has been led to permit the excuse to be left to the jury, an offence can be excused if the prosecution does not negate that the accused person acted or failed to act under an honest and reasonable, but mistaken, belief in the existence of any fact which, if true, would make the act an "innocent act". Other than in the differently expressed *Criminal Codes* in Queensland and Western Australia, the same common law excuse of honest and reasonable mistake is usually contained, by implication, in statutory offences in Australia. In Tasmania, statutory indictable offences are incorporated into the *Criminal Code* (Tas)⁵⁸ and common law excuses will apply to the incorporated offences⁵⁹, subject to interpretation of the provisions that create those offences⁶⁰.

53 This appeal is not concerned with difficult questions that have arisen about the scope of the common law excuse such as whether the excuse is limited to mistakes about existing facts or whether ignorance or a tacit belief can be treated as a mistake within the common law excuse⁶¹. The sole issue on this appeal concerns the qualification upon the common law excuse that the facts as honestly and reasonably believed must make the act of an accused person an "innocent act". The authorities have taken four different approaches. Must the person's act, on the facts as honestly and reasonably believed by them, make the person: (i) innocent of any offence, civil wrongdoing or immoral conduct? (ii) innocent of any offence or civil wrongdoing? (iii) innocent of any offence? (iv) innocent of the particular offence charged?

54 For the reasons below, the correct qualification is (iii). The accused person's act, on the facts as honestly and reasonably believed by them, must render the accused person innocent of any offence. It is in the nature of the common law excuse that the accused person is not punished for an offence despite all elements of the offence being satisfied by their action due to the "beliefs ... on the strength

58 *Criminal Code Act 1924* (Tas), s 4(1).

59 *Criminal Code Act*, s 8.

60 *Criminal Code* (Tas), s 14.

61 cf *Criminal Code* (Cth), ss 9.1-9.4.

of which [they] took that action"⁶². An honest and reasonable belief in facts that would nevertheless have involved a different offence cannot entirely excuse offending action at common law. Nevertheless, systemic considerations which preclude the conduct of a trial within a trial, based on new and disputed facts or allegations, may constrain the manner in which the prosecution can exclude the excuse of honest and reasonable mistake on the basis that the act of the accused person would constitute a different offence if the facts believed by the accused were true. Such considerations do not apply in this case.

55 The trial judge in this case, Blow CJ, was correct not to leave to the jury the excuse of honest and reasonable mistake of fact on the basis of Mr Bell's assertion that, for a charge of supplying a controlled drug to a child, he honestly and reasonably believed that the person was over the age of 18 years. That belief would nevertheless have amounted to another offence: the offence of supplying a controlled drug to another person. The Court of Criminal Appeal of the Supreme Court of Tasmania (Pearce and Brett JJ and Martin A-J) was correct to dismiss the appeal. The appeal to this Court should be dismissed.

Background

56 In 2019, the appellant, Mr Bell, was charged with one count of supplying a controlled drug to a child, being a person under the age of 18 years⁶³, contrary to s 14 of the *Misuse of Drugs Act 2001* (Tas). There is no statutory alternative conviction for s 14⁶⁴. He was also charged with one count of rape, contrary to s 185(1) of the *Criminal Code*. By s 335 of the *Criminal Code*, a statutory alternative offence upon an indictment for rape is the offence in s 124 of sexual intercourse with a young person under 17 years of age.

57 The facts of Mr Bell's offending were as follows. Between midnight and 1 am on 13 October 2018, the complainant, who was 15 years old at the time, went to the house where Mr Bell was living. She was accompanied by a man called Mr Percy. They both went to the house to purchase drugs. Mr Percy bought methylamphetamine from a dealer who was living at the house with Mr Bell and Mr Percy then injected the methylamphetamine into his own arm. The complainant

62 Gardner, *Offences and Defences: Selected Essays in the Philosophy of Criminal Law* (2007) at 86.

63 *Misuse of Drugs Act 2001* (Tas), s 3(1) (definition of "child").

64 See *Criminal Code*, s 332(1), together with the absence of any provision for an alternative conviction to s 14 in *Misuse of Drugs Act*, s 36A.

had no experience injecting drugs so Mr Bell injected methylamphetamine into her arm, which was the basis for the charge of supplying a controlled drug to a child.

58 Mr Bell subsequently called a taxi for the complainant and Mr Percy. When the taxi arrived, Mr Bell invited the complainant to go for a walk with him rather than departing with Mr Percy. The complainant agreed to do so. Mr Bell and the complainant walked to a grassy area where sexual intercourse took place, which was the basis for the charge of rape and the statutory alternative of sexual intercourse with a young person under 17 years of age.

59 At Mr Bell's first trial, the trial judge instructed the jury that they could not find Mr Bell guilty of the alternative offence of sexual intercourse with a young person under 17 years of age unless the jury were satisfied that Mr Bell did not hold an honest and reasonable mistaken belief that the complainant was aged 17 years or older. However, in relation to the offence of supplying a controlled drug to a child, the trial judge directed the jury that it made no difference if Mr Bell held an honest and reasonable mistaken belief that the complainant was aged 18 years or over. The jury convicted Mr Bell of the offence of supplying a controlled drug to a child but were unable to reach a verdict in relation to the sexual offences.

60 Mr Bell was retried for the sexual offences. At his second trial he was found not guilty of rape but guilty of the alternative offence of sexual intercourse with a young person under 17 years of age. Consequent upon the convictions at the two trials, the trial judge sentenced Mr Bell to partly cumulative terms of nine months' imprisonment for the offence of supplying a controlled drug to a child and 10 months' imprisonment for the offence of sexual intercourse with a young person under 17 years of age, with a total effective sentence of 14 months' imprisonment.

61 Mr Bell appealed to the Court of Criminal Appeal of the Supreme Court of Tasmania against his conviction at the first trial for the offence of supplying a controlled drug to a child. He submitted that the trial judge should have directed the jury that they could not convict of that offence unless they were satisfied that Mr Bell did not hold an honest and reasonable mistaken belief that the complainant was aged 18 years or over. Mr Bell's appeal was unanimously dismissed.

The Criminal Code and the Misuse of Drugs Act

The Criminal Code Act and the Criminal Code

62 The *Criminal Code* was established by the *Criminal Code Act 1924* (Tas). Section 4(1) of the *Criminal Code Act* provides relevantly that, for the purposes of the *Criminal Code Act*, every statute shall be "read and construed as if any offence therein mentioned ... were described or referred to as a crime as defined by the Code; and all provisions of this Act relating to crimes generally shall apply to every

such offence". The effect of s 4(1) of the *Criminal Code Act* is to: (i) incorporate into the *Criminal Code* all Tasmanian offences that may be prosecuted on information or indictment; and (ii) make all of those offences subject to the provisions of the *Criminal Code Act*.

63 Section 8 of the *Criminal Code Act* is a provision that prima facie applies all the justifications and excuses recognised by the common law to the offences in the *Criminal Code*, including those offences incorporated into the *Criminal Code* by s 4(1). Section 8 provides:

"All rules and principles of the common law which render any circumstances a justification or excuse for any act or omission, or a defence to a charge upon indictment, shall remain in force and apply to any defence to a charge upon indictment, except in so far as they are altered by, or are inconsistent with, the Code."

64 Chapter IV of the *Criminal Code*, entitled "Criminal Responsibility", affects the operation of the *Criminal Code* upon all indictable Tasmanian offences, together with the common law justifications and excuses incorporated by the *Criminal Code Act*. In *Vallance v The Queen*⁶⁵, Dixon CJ said that the *Criminal Code* was conceived, and to some extent drafted, upon a plan "to provide for specific crimes but to treat the complete definition of them as finally governed or controlled by Ch IV (criminal responsibility)". His Honour said that this plan had not been, and could not be, uniformly carried out: there will be some offences where the mental element of the offence is contained within the offence provision itself independently of Ch IV of the *Criminal Code*⁶⁶. In *Vallance*, Dixon CJ proceeded by "accepting the view" that no mental element was contained in the offence provision in that case⁶⁷. In such circumstances it is necessary to turn to the provisions of Ch IV to ascertain the content of any required mental element of the offence.

65 Two of the provisions contained in Ch IV of the *Criminal Code* are ss 13 and 14. Section 13(1) of the *Criminal Code* provides that "[n]o 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". In the

65 (1961) 108 CLR 56 at 60.

66 See also *Snow v The Queen* [1962] Tas SR 271 at 295; *R v Martin* [1963] Tas SR 103 at 114; *Arnol v The Queen* [1981] Tas R 157 at 168; *R v Bennett* [1990] Tas R 72 at 84.

67 (1961) 108 CLR 56 at 60.

absence of any specific mental element required by an offence provision that is either in the *Criminal Code* or incorporated into the *Criminal Code* by s 4(1) of the *Criminal Code Act*, s 13(1) provides the requisite mental element for criminal responsibility for an act.

66 In *Vallance*⁶⁸, this Court divided on the meaning of an "act" for the purpose of s 13(1) in relation to a charge of unlawful wounding under s 172 of the *Criminal Code*. A broad approach was taken by Dixon CJ and Windeyer J, who each reasoned that the "act" was everything comprised in the wounding, so that everything comprised in the wounding needed to be voluntary and intentional⁶⁹. By contrast, a narrow approach, which Taylor J "tended"⁷⁰ to support, was taken by Kitto J and Menzies J. Their Honours reasoned that the "act" was only the physical, willed action which led to the wounding⁷¹. In *Kaporonovski v The Queen*⁷², Gibbs J (with whom Stephen J agreed) observed that, although this Court had been, in effect, "evenly divided" between the two approaches in *Timbu Kolian v The Queen*⁷³, the narrow approach of Kitto J and Menzies J in *Vallance* should be adopted. In *R v Falconer*⁷⁴, the narrow approach was also taken by Mason CJ, Brennan and McHugh JJ (with whom Gaudron J agreed on this point⁷⁵). All parties to this appeal proceeded on the narrow view of "act" within s 13(1) as the physical, willed action independent of the circumstances in which that action occurred and independent of the consequences of the act. On this narrow approach, the intention required by s 13(1) is an intention only to do the physical, willed action. The intention does not concern the consequences or results of that action.

68 (1961) 108 CLR 56.

69 (1961) 108 CLR 56 at 61 (Dixon CJ), 79-80 (Windeyer J).

70 See *Director of Public Prosecutions (NT) v WJI* (2004) 219 CLR 43 at 51 [21], citing *Vallance v The Queen* (1961) 108 CLR 56 at 68-69.

71 (1961) 108 CLR 56 at 64 (Kitto J), 71 (Menzies J).

72 (1973) 133 CLR 209 at 230-231.

73 (1968) 119 CLR 47.

74 (1990) 171 CLR 30 at 38. See also *Ugle v The Queen* (2002) 211 CLR 171 at 178 [26].

75 (1990) 171 CLR 30 at 81.

67 Section 14 of the *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."

68 The excuse of honest and reasonable mistake to which s 14 refers is the excuse in the form as developed by the common law and generally implied in statutory offence provisions⁷⁶. Section 14 recognises that, as a matter of construction, the statute creating the offence, in this case the *Misuse of Drugs Act*, can exclude the common law excuse of honest and reasonable mistake. Otherwise, that common law excuse is, by s 8 of the *Criminal Code Act* and the common statutory implication, prima facie applied to all offences in the *Criminal Code*, including those offences incorporated by s 4(1) of the *Criminal Code Act*.

The Misuse of Drugs Act

69 Part 2 of the *Misuse of Drugs Act* is entitled "Major offences". Division 3 of Pt 2 is entitled "Trafficking and supply". Division 3 contains s 14, which provides that "[a] person must not supply a controlled drug to a child". A child is defined in s 3(1) as "a person who has not attained the age of 18 years". The maximum penalty for this offence, selected for reasons of consistency with the same maximum penalty for all indictable offences in Tasmania except murder or treason⁷⁷, is imprisonment for a term not exceeding 21 years.

70 Part 3 of the *Misuse of Drugs Act* is entitled "Minor offences". Division 4 of Pt 3 is entitled "Sale and supply". Division 4 contains s 26, which provides that "[a] person must not sell or supply a controlled drug to another person". The penalty for this offence is a fine not exceeding 100 penalty units or imprisonment for a term not exceeding four years.

71 Although Mr Bell was not charged with an offence under s 26, in the Court of Criminal Appeal and in this Court there was no dispute that Mr Bell's conduct amounted to offences under both ss 14 and 26 of the *Misuse of Drugs Act*. This concession by Mr Bell was based upon the assumption that there is no mental element contained in either s 14 or s 26. In particular, in this Court, counsel for

76 *R v Martin* [1963] Tas SR 103 at 144, 150; *Attorney-General's Reference No 1 of 1989* [1990] Tas R 46 at 55-56.

77 See Tasmania, House of Assembly, *Parliamentary Debates* (Hansard), 23 October 2001 at 52; *Criminal Code*, ss 56, 158, 389(3).

Mr Bell repeatedly disclaimed any submission that s 14 of the *Misuse of Drugs Act* contained any mental element. That concession was embraced by the State of Tasmania and not contradicted by any intervener. In the absence of any submissions to the contrary, the concession should be accepted. The consequence is that, subject to defences, the only mental element for the offence in s 14 of the *Misuse of Drugs Act* is supplied by s 13(1) of the *Criminal Code*. There was, and could be, no dispute that, on the narrow approach to an "act" in s 13(1), Mr Bell acted voluntarily and intended to perform the physical, willed act of supplying methylamphetamine to the complainant.

72 The sole ground of Mr Bell's appeal to the Court of Criminal Appeal, like the sole ground of appeal in this Court, was therefore whether, on Mr Bell's first trial, the trial judge erred in not directing the jury that they could only convict Mr Bell if they were satisfied beyond reasonable doubt that his conduct was not excused because he did not have an honest and reasonable, but mistaken, belief that the complainant was 18 years or over.

The development of the honest and reasonable mistake excuse

Distinguishing the "common law" excuse from the elements of an offence

73 Although the excuse of honest and reasonable mistake is one which the prosecution bears the substantive onus of disproving⁷⁸, there is an important distinction between, on the one hand, the elements of a statutory offence, including whether knowledge or intention "is made an element of the statutory crime"⁷⁹, and, on the other hand, a defence of honest and reasonable mistake that excuses, or is a "ground of exculpation"⁸⁰ for, the action that amounted to the otherwise completed offence. Although both arise as a matter of statutory interpretation, this distinction is well established⁸¹.

78 *He Kaw Teh v The Queen* (1985) 157 CLR 523 at 534-535; *CTM v The Queen* (2008) 236 CLR 440 at 447 [8].

79 *Bank of New South Wales v Piper* [1897] AC 383 at 389-390, quoted in *Thomas v The King* (1937) 59 CLR 279 at 304. See also *He Kaw Teh v The Queen* (1985) 157 CLR 523 at 535.

80 *CTM v The Queen* (2008) 236 CLR 440 at 447 [8].

81 See *Proudman v Dayman* (1941) 67 CLR 536 at 540; *Bergin v Stack* (1953) 88 CLR 248 at 261; *R v Reynhoudt* (1962) 107 CLR 381 at 399. See also *He Kaw Teh v The Queen* (1985) 157 CLR 523 at 535.

74 Although the distinction is now well established, early decisions concerning the excuse of honest and reasonable mistake to a statutory offence did not always distinguish between the mental elements of the offence and matters that would excuse the offence. Many of those decisions applied Latin maxims⁸² which cut across the distinction and which were deprecated by Sir James Fitzjames Stephen as "most unfortunate, and not only likely to mislead, but actually misleading"⁸³. In circumstances in which counsel for Mr Bell conceded that, apart from s 13(1) of the *Criminal Code*, there was no implied mental element contained in any element of the offence in s 14 of the *Misuse of Drugs Act*⁸⁴, the issue in this case is whether the entirety of the action constituting the offence should be excused, not merely some aspect of it.

75 Where the offence is a common law offence then, separately from the elements of the offence, the common law recognises an excuse of honest and reasonable mistake⁸⁵. Where the offence is statutory, by the technique that recognised a statutory implication as based upon the "rule and reason" of the common law⁸⁶, the excuse came to be recognised as implied in the statute. The implication is sometimes described as a "common law presumption"⁸⁷. In this sense, it can be described as a "common law" excuse. But, as s 14 of the *Criminal*

82 See, eg, *actus non facit reum, nisi mens sit rea*; *non est reus, nisi mens sit rea*: see Black, *A Dictionary of Law* (1891) at 31, "An act does not make [the doer of it] guilty, unless the mind be guilty".

83 *R v Tolson* (1889) 23 QBD 168 at 185. See also *CTM v The Queen* (2008) 236 CLR 440 at 486 [158].

84 cf *Cameron v Holt* (1980) 142 CLR 342 at 346, 347, 348; *He Kaw Teh v The Queen* (1985) 157 CLR 523 at 537, 552, 565, 582. See also *Gow v Davies* (1992) 1 Tas R 1 at 18, 38-39, 46.

85 Stephen, *A Digest of the Criminal Law*, 3rd ed (1883) at 26.

86 Coke, *Institutes of the Laws of England* (1628), pt 1, bk 3, ch 8, s 464 at 272. See also *Cooper v The Wandsworth Board of Works* (1863) 14 CB(NS) 180 at 194 [143 ER 414 at 420].

87 See *Thomas v The King* (1937) 59 CLR 279 at 304; *Proudman v Dayman* (1941) 67 CLR 536 at 540; *CTM v The Queen* (2008) 236 CLR 440 at 486 [159], 497 [200], see also at 481 [141] explaining *Hardgrave v The King* (1906) 4 CLR 232 at 237.

Code recognises, and as the history of the development of the common law excuse shows, the terms of a particular offence can deny the implication⁸⁸.

The early judicial development of the common law excuse

76 In written and oral submissions, counsel for Mr Bell focused in detail upon two early decisions which were very significant in the judicial development of the common law excuse. The first of those was *R v Prince*⁸⁹. In that case, Mr Prince was convicted of a Victorian-era offence⁹⁰ involving unlawfully taking an unmarried girl, under the age of 16 years, out of the possession and against the will of her father. A case was stated in the Court for Crown Cases Reserved as to whether it was an excuse that the girl went willingly with Mr Prince and that he honestly and reasonably believed that she was 18 years old. The sole dissident of the 16 members of the Court was Brett J, later Master of the Rolls.

77 In reasons with which nine other members of the Court concurred, Blackburn J held that the only basis upon which Mr Prince could succeed was if "the intention of the legislature should be presumed to be to include 'knowingly' in the definition of the crime, and the statute should be read as if that word were inserted"⁹¹. This implication was rejected as inconsistent with the purpose of the legislation⁹². In what Professor Cross described as a "'knock-out' argument"⁹³, Blackburn J referred to other provisions of the same statute⁹⁴ and added⁹⁵:

88 *Sherras v De Rutzen* [1895] 1 QB 918 at 921; *Maher v Musson* (1934) 52 CLR 100 at 104-105.

89 (1875) LR 2 CCR 154.

90 *Offences against the Person Act 1861* (24 & 25 Vict c 100), s 55.

91 (1875) LR 2 CCR 154 at 171.

92 (1875) LR 2 CCR 154 at 171. See also at 175-176 (Bramwell B).

93 Cross, "Centenary Reflections on Prince's Case" (1975) 91 *Law Quarterly Review* 540 at 542.

94 *Offences against the Person Act 1861*, ss 50 (a felony to unlawfully and carnally know a girl under the age of 10), 51 (a misdemeanour to unlawfully and carnally know a girl between the ages of 10 and 12 years).

95 (1875) LR 2 CCR 154 at 171. See also at 175-176 (Bramwell B).

"It would produce the monstrous result that a man who had carnal connection with a girl, in reality not quite ten years old, but whom he on reasonable grounds believed to be a little more than ten, was to escape altogether. He could not, in that view of the statute, be convicted of the felony, for he did not know her to be under ten. He could not be convicted of the misdemeanor, because she was in fact not above the age of ten."

78 In dissent, Brett J addressed the content of the common law excuse in detail, holding that Mr Prince's act was excused based on a foundation of criminal procedure that "a mistake of facts, on reasonable grounds, to the extent that if the facts were as believed the acts of the prisoner would make him guilty of no criminal offence at all, is an excuse"⁹⁶. Earlier in his reasons, however, Brett J described the disqualification from the excuse in broader terms, saying that the belief, if true, meant that the acts of Mr Prince involved no criminal offence and "no act in respect of which any civil action could have ever been maintained against him"⁹⁷. Denman J, in the majority, thought that the actions of Mr Prince were wrongful, and the excuse inapplicable, because the actions were a civil wrong⁹⁸. Still more broadly, in the majority, Bramwell B (with whom seven other members of the Court agreed) saw Mr Prince's act as one that was morally wrong or "wrong in itself"⁹⁹.

79 The second early decision upon which counsel for Mr Bell focused in her submissions was the decision of the Court for Crown Cases Reserved in *R v Tolson*¹⁰⁰, in which *R v Prince* was distinguished. In the case reserved in *R v Tolson*, Ms Tolson had been convicted of the offence of bigamy. The Court described how she had remarried only after desertion by her husband and also after having been informed, and honestly and reasonably believing, that her husband was dead. The conviction was quashed by majority, with *R v Prince* distinguished by four members of the majority on the basis that the "intention of the legislature" for the offence in that case was inconsistent with the existence of the excuse¹⁰¹.

96 (1875) LR 2 CCR 154 at 170.

97 (1875) LR 2 CCR 154 at 159.

98 (1875) LR 2 CCR 154 at 179.

99 (1875) LR 2 CCR 154 at 174, 175.

100 (1889) 23 QBD 168.

101 (1889) 23 QBD 168 at 180, 190-191.

80 By distinguishing *R v Prince* on the basis of the intention of the legislature, the availability of the excuse was made to depend upon a question of statutory interpretation, namely whether the particular provision had excluded the excuse. As Cave J said in *R v Tolson*, whether a defendant may be excused on the basis of an honest and reasonable belief is an "inference [that] necessarily arises from the language of the section"¹⁰². In other cases, where, unlike *R v Tolson*, it was inferred that the implication was not intended by Parliament, *R v Prince* was followed¹⁰³.

81 Although *R v Prince* was distinguished in *R v Tolson* on the basis that the legislation considered in *R v Tolson* did not disclose any parliamentary intention to exclude the common law excuse, Stephen J (with whom Grantham J agreed) nevertheless qualified the excuse by a requirement that the honest and reasonable belief must be such that "if the facts were as believed, the acts of the prisoner would make [them] guilty of no offence at all"¹⁰⁴. Wills J (with whom Charles J agreed) described the qualification even more broadly as one "to do a thing wrong in itself and apart from positive law, or it may be to do a thing merely prohibited by statute or by common law"¹⁰⁵.

82 The broadest approach to a qualification upon the excuse was taken in another of the majority judgments in *R v Tolson*¹⁰⁶, that of Cave J (with whom Day and A L Smith JJ concurred), who described the common law excuse as one in which the honest and reasonable belief, if true, "would make the act ... an innocent act", distinguishing the decision in *R v Prince* on the basis that the honest and reasonable belief of Mr Prince, if true, would not have been innocent because it would have involved an immoral, although lawful, act.

The different approach in the Criminal Codes

83 Section 24(1) of the *Criminal Code* in Queensland, which is materially the same as the first paragraph of s 24 of the *Criminal Code* in Western Australia, provides that 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

102 (1889) 23 QBD 168 at 182.

103 *R v Forde* [1923] 2 KB 400; *Maughan* (1934) 24 Cr App R 130.

104 (1889) 23 QBD 168 at 190.

105 (1889) 23 QBD 168 at 172.

106 (1889) 23 QBD 168 at 181.

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".

84 It has occasionally been suggested that the common law doctrine should also operate so that an accused person is "deemed to have acted under that state of facts which [they] in good faith and on reasonable grounds believed to exist when [they] did the act alleged to be an offence"¹⁰⁷, or that the *Criminal Code* (Qld) reflected that common law "with complete accuracy"¹⁰⁸. In a marginal note to the draft provision which became s 24 of the *Criminal Code* (Qld), Sir Samuel Griffith wrote "Common Law"¹⁰⁹, perhaps reflecting the view that the provision adopted the deeming approach taken in the Digest of Sir James Fitzjames Stephen and that author's view of the common law in the late-nineteenth century¹¹⁰.

85 Despite the helpful and detailed submissions of the Solicitor-General of the State of Queensland on this appeal, it is unnecessary to consider the scope of the honest and reasonable mistake excuse in the *Criminal Codes* of Queensland and Western Australia. The reason it is unnecessary to do so is that it was common ground on this appeal that the excuse under the *Criminal Codes* is not the same as it is under the common law¹¹¹, and no party or intervener submitted that the common law should develop so as to align with the literal meaning of s 24 of the *Criminal Code* in Queensland and Western Australia¹¹². Indeed, it might even be doubted whether the common law could develop an excuse in the terms of s 24, which would involve an offender being deemed to have committed a different offence whose elements were not, in fact, satisfied. For instance, there must be doubt as to whether, in circumstances such as those contemplated in *R v Prince*,

107 *R v Tolson* (1889) 23 QBD 168 at 188. See also Stephen, *A Digest of the Criminal Law*, 3rd ed (1883) at 26.

108 *Thomas v The King* (1937) 59 CLR 279 at 305-306.

109 Griffith, *Draft of a Code of Criminal Law* (1897) at 13. See also at xiv.

110 Stephen, *A Digest of the Criminal Law*, 3rd ed (1883) at 26. See *CTM v The Queen* (2008) 236 CLR 440 at 445 [3]. See also the possible influence of the *Italian Penal Code* 1889, Art 52.

111 See *Anderson v Nystrom* [1941] St R Qd 56 at 70. See also Australia, *Review of Commonwealth Criminal Law, Interim Report: Principles of Criminal Responsibility and Other Matters* (1990) at 69 [7.9].

112 cf Stephen, *A Digest of the Criminal Law*, 3rd ed (1883) at 28, illustration 8 and *Bergin v Stack* (1953) 88 CLR 248 at 263.

an accused person could be deemed by the common law to have committed a statutory offence of sexually assaulting a child required by statute to be between the ages of 10 and 12 years, when the child's age was not, in fact, within that range.

"Innocence" in the honest and reasonable mistake excuse

86 The component of "innocence" in the definition of the honest and reasonable mistake excuse by Cave J in *R v Tolson*¹¹³ – a belief which, if true, "would make the act ... an innocent act" – has been reiterated in many cases subsequently, including repeatedly in this Court¹¹⁴. It is thoroughly entrenched as an element of the common law excuse of honest and reasonable mistake. But the precise meaning of the requirement of "innocence" has been the subject of different approaches.

87 There are four approaches that can be discerned from the authorities, particularly those discussed above. From the narrowest to the broadest approaches they are as follows. An act will only be innocent if:

- (1) the facts as honestly and reasonably believed would involve no moral or legal culpability;
- (2) the facts as honestly and reasonably believed would not constitute any offence or legal wrong (including torts);
- (3) the facts as honestly and reasonably believed would not constitute any offence; or
- (4) the facts as honestly and reasonably believed would not constitute the offence charged.

113 (1889) 23 QBD 168 at 181.

114 See *Bank of New South Wales v Piper* [1897] AC 383 at 389-390; *Maher v Musson* (1934) 52 CLR 100 at 104; *Thomas v The King* (1937) 59 CLR 279 at 304-305; *Proudman v Dayman* (1941) 67 CLR 536 at 540; *Bergin v Stack* (1953) 88 CLR 248 at 262; *R v Reynhoudt* (1962) 107 CLR 381 at 385-386, 391, 399-400, 404; *Iannella v French* (1968) 119 CLR 84 at 110; *He Kaw Teh v The Queen* (1985) 157 CLR 523 at 550-551, 558-559, 572-573, 590; *CTM v The Queen* (2008) 236 CLR 440 at 445 [3], 447 [8], 453 [27], 472 [103], 483 [146].

The first and second approaches: Innocent of moral culpability or civil wrongdoing

88 One or other of the first two approaches – disqualifying from the excuse an accused person whose mistaken belief, if true, would make their act immoral or a civil wrong – was adopted by a number of the judges in *R v Prince* and *R v Tolson*. But neither of these approaches was ever widely accepted in subsequent cases. In some early decisions, the excuse was described without any reference to morality or by rejecting the relevance of immoral conduct that is not unlawful¹¹⁵. In others, judges expressly avoided deciding whether the excuse should be denied if the act is immoral but not criminal¹¹⁶.

89 Either the first or second approach was countenanced in *Bergin v Stack*¹¹⁷. In that case, Mr Stack was convicted of an offence of selling liquor without a licence contrary to s 161 of the *Licensing Act 1928* (Vic). On appeal to this Court by the Inspector of Police from the quashing of that conviction, one issue was whether Mr Stack had an excuse of honest and reasonable mistake of fact. This Court held that the elements of the offence contained in s 161 did not expressly or impliedly require Mr Stack to know that the club in which he had sold liquor lacked a licence¹¹⁸. But it was assumed, albeit doubted by Fullagar J¹¹⁹ and rejected by Kitto J¹²⁰, that s 161 included, by implication, the excuse of honest and reasonable mistake of fact. On the question of whether the excuse applied, in reasons with which Williams A-CJ and Taylor J agreed, Fullagar J referred to *R v Prince* as requiring that "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"¹²¹.

90 Whether, by Fullagar J's reference to a "wrongful act", his Honour was contemplating the first approach (extending to any immorality or legal wrong) or

¹¹⁵ *R v Green and Bates* (1862) 3 F & F 274 at 274-275 [176 ER 123 at 123]; *R v Hibbert* (1869) LR 1 CCR 184 at 185.

¹¹⁶ *R v Tolson* (1889) 23 QBD 168 at 181-182.

¹¹⁷ (1953) 88 CLR 248.

¹¹⁸ (1953) 88 CLR 248 at 254, 260.

¹¹⁹ (1953) 88 CLR 248 at 261.

¹²⁰ (1953) 88 CLR 248 at 273.

¹²¹ (1953) 88 CLR 248 at 262.

the second approach (extending only to legal wrongs), there had been no argument about the different possibilities. And the reasons for the rejection of the excuse by Fullagar J could have satisfied any of the first three approaches. One of Mr Stack's asserted beliefs was that he did not know that the club was unlicensed. Putting to one side whether the excuse requires a positive belief or whether tacit beliefs or ignorance can suffice, it was held by Fullagar J that even if the club had been licensed Mr Stack would have been guilty of another offence, namely an offence of the same nature under s 266(2) of selling liquor in any club during prohibited hours¹²².

- 91 Neither of the first two approaches should be accepted. In *He Kaw Teh v The Queen*¹²³, Brennan J correctly rejected any role for civil wrongdoing or immorality, noting that criminal punishment is "not imposed to enforce the civil law, to deter the commission of torts or to suppress immorality". Moreover, as Professor Kenny observed, these approaches substitute "the vagueness of an ethical standard for the precision of a legal one"¹²⁴. An example of the wide scope of application of that vague standard, even by the social mores of the time¹²⁵, is the reasoning of Bramwell B in *R v Prince* that to take a female "of such tender years", whether or not she was over 16 years, from the care of her parents was "wrong in itself". Professor Cross described this language as "gross judicial hyperbole", citing the example of a male friend who took a consenting 18-year-old female "against her parents' wishes on a short visit to his mother"¹²⁶.

The third and fourth approaches: Innocent of any offence or innocent of the offence charged

- 92 Counsel for Mr Bell submitted that the fourth approach should be adopted, with the relevant qualification upon the excuse being that the honest and reasonable belief cannot amount to one which would involve guilt of the offence charged. That submission is inconsistent with the rejection of the excuse in *Bergin v Stack*. Counsel for Mr Bell thus submitted that the decision of this Court in

122 (1953) 88 CLR 248 at 263.

123 (1985) 157 CLR 523 at 588.

124 Kenny, *Outlines of Criminal Law*, 7th ed (1915) at 42.

125 See, eg, Holmes, *The Common Law* (1881) at 58-59, recognising that the conduct might be excused in some circumstances.

126 Cross, "Centenary Reflections on Prince's Case" (1975) 91 *Law Quarterly Review* 540 at 543-544.

Bergin v Stack took a "step backwards" by following *R v Prince* and that *Bergin v Stack* should be either confined to regulatory offences or overturned.

93 To the extent that *Bergin v Stack* adopted at least a requirement for the excuse that the acts of an accused person, on the facts as believed, could not amount to another offence, *Bergin v Stack* did not take a step backwards by following *R v Prince*. *Bergin v Stack* was correctly reasoned insofar as Mr Stack could not rely upon the excuse of honest and reasonable mistake because any belief that the club was licensed would simply have meant that he had committed a different offence. Indeed, Mr Bell's submission to the contrary would require rejection of the "knock-out argument" in *R v Prince*, by which a sexual assault upon a child under the age of 10 years would be excused if the accused person honestly and reasonably believed the child to be a little over the age of 10 years.

94 Whilst it might be argued that the extreme consequence in *R v Prince* could be avoided by a drafting technique that created a general offence of sexual assault against all children under the age of 16 years, Parliaments have relied at least upon the excuse involving a belief that does not amount to another offence in the drafting of subsequent legislation. For instance, in relation to the very example given in *R v Prince*, s 66C of the *Crimes Act 1900* (NSW), considered in *CTM v The Queen*¹²⁷, provided in broad terms for offences of: sexual intercourse with a person aged between 10 and 14 years; sexual intercourse with a person aged between 10 and 14 years in circumstances of aggravation; and sexual intercourse with a person aged between 14 and 16 years. As Gleeson CJ, Gummow, Crennan and Kiefel JJ explained in *CTM v The Queen*¹²⁸, it would "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".

95 Moreover, it is not merely peculiarities of legislative drafting that lead to the absurdity of treating as excused an act that, on the facts as the accused person believed them to be, would so obviously be an offence of a similar nature. In *Bergin v Stack*¹²⁹, another example was given by Fullagar J. For an offence of burglary after 9 pm, could a burglar be excused from the offence on the ground that they honestly and reasonably believed the time to be before 9 pm? Or, as

127 (2008) 236 CLR 440.

128 (2008) 236 CLR 440 at 453 [27].

129 (1953) 88 CLR 248 at 263.

Dr Kenny had also said in the course of originally giving this example¹³⁰, could the burglar be excused on the ground that they honestly and reasonably believed that the house was No 6 rather than No 5 as charged in the indictment?

96 Closer still to the facts of the present appeal are cases where it has been held that on a charge of assaulting a police officer it is not open for the accused person to be excused on the basis that they did not know that the victim was a police officer¹³¹. Even with an honest and reasonable belief that the victim is not a police officer, the act would still constitute the offence of assault. As Dixon CJ said of an offence involving an assault upon "any member of the police force in the due execution of [their] duty"¹³²:

"a defendant might set up honest and reasonable mistake but the facts in which [they] honestly and reasonably believed must be such as would make [their] act innocent, eg a justification of the assault".

97 A complete excuse thus denies responsibility for the consequences of the criminal acts based on reasons for thinking that the acts were justified although, in fact, they were not¹³³. It would be self-contradictory for a legal system to conclude, at the same time, that the acts of an accused person, on the facts believed by that person, would be an offence, and also that the actions of the accused person should be entirely excused based on that belief¹³⁴.

130 Kenny, *Outlines of Criminal Law* (1902) at 65. Kenny was himself adapting the example from Bramwell B in *R v Prince* (1875) LR 2 CCR 154 at 176.

131 *R v Forbes and Webb* (1865) 10 Cox Cr Cases 362. See also *R v Prince* (1875) LR 2 CCR 154 at 176.

132 *R v Reynhoudt* (1962) 107 CLR 381 at 385-386. See also at 389, "facts which, if they had existed, would have made what [they] did to the police officer no assault at all" (Kitto J).

133 Gardner, *Offences and Defences: Selected Essays in the Philosophy of Criminal Law* (2007) at 86, 131. See also Austin, "A Plea for Excuses: The Presidential Address" (1956) 57 *Proceedings of the Aristotelian Society* 1 at 2.

134 cf s 24 of the *Criminal Codes* of Queensland and Western Australia, above at [83]-[85].

Limits to the third approach

98 The most recent enunciation of the excuse of honest and reasonable mistake by this Court was in terms of the third approach, requiring the belief to be one that, if true, would have meant that the accused person was guilty of no offence. In *CTM v The Queen*¹³⁵, Gleeson CJ, Gummow, Crennan and Kiefel JJ said:

"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'."

99 The reference by their Honours to the offence falling "outside the operation of the enactment" is a quotation from Dixon J in *Proudman v Dayman*¹³⁶. The need for the accused person's belief not to be outside the "operation of the enactment" introduces a limit upon the circumstances in which the excuse can be excluded from consideration because the person's belief might amount to an offence. For the reasons below, that limit is based upon the accusatorial system of criminal justice.

100 The common law requires that an accused person is entitled to be told "not only of the legal nature of the offence with which he or she is charged, but also of the particular act, matter or thing alleged as the foundation of the charge"¹³⁷ and the manner in which the offence was alleged to have been committed¹³⁸. As Barwick CJ said in *Ratten v The Queen*¹³⁹, approving reasons given by the Full Court of the Supreme Court of Victoria:

"Under our law a criminal trial is not, and does not purport to be, an examination and assessment of all the information and evidence that exists,

135 (2008) 236 CLR 440 at 447 [8] (footnote omitted).

136 (1941) 67 CLR 536 at 541.

137 *Kirk v Industrial Court (NSW)* (2010) 239 CLR 531 at 557 [26]. See also *Johnson v Miller* (1937) 59 CLR 467 at 489.

138 *Kirk v Industrial Court (NSW)* (2010) 239 CLR 531 at 557 [26]. See also *John L Pty Ltd v Attorney-General (NSW)* (1987) 163 CLR 508 at 519.

139 (1974) 131 CLR 510 at 517, quoting *Re Ratten* [1974] VR 201 at 214.

bearing on the question of guilt or innocence'. It is a trial, not an inquisition".

101 It would be contrary to these longstanding common law assumptions underlying the accusatorial criminal justice system for the prosecution, during the course of a trial, to be permitted to conduct a trial within a trial as to whether the acts of the accused person constitute a different and uncharged offence, beyond the scope of the enactment as charged, and perhaps based upon new facts that might be disputed. In other words, the limit requires that whenever sufficient evidence is led to enliven a consideration of the excuse of honest and reasonable mistake, the prosecution must negate that excuse unless the prosecution can establish, consistently with the right of the accused person to be informed of the foundation of the charges against them, that the acts of that person would constitute another offence based upon the facts they believed.

102 This point can be illustrated by adapting an example given in a report of the Criminal Law Officers Committee of the Standing Committee of Attorneys-General¹⁴⁰, which followed the Committee's consideration of *Proudman v Dayman*. Suppose that a person accused of importing heroin were to lead evidence in support of an excuse that they honestly and reasonably believed that they were importing watches. Separately from any questions concerning the mental element required for the offence, the prosecution could not avoid its onus to negate the excuse of honest and reasonable mistake by seeking to establish that the belief of the accused person amounted to a different offence, involving new evidence and allegations outside the scope of the enactment, to show that the watches that were the subject of the belief were dutiable and that the accused did not have a licence to import them.

103 It is unnecessary in this case to explore the metes and bounds of this limit. It was not an issue in *Bergin v Stack*. And many cases will be simple. For instance, on a charge of sexual assault, it is consistent with an accusatorial system of criminal justice for the excuse to be unavailable in the circumstances discussed in *R v Prince* and *CTM v The Queen*. No excuse is available based on an erroneous belief as to the age of a child whom the accused is charged with having sexually assaulted, where the belief, if true, would involve an offence of the same nature. And, as set out above, the excuse has correctly been held to be unavailable where the alleged erroneous belief included a lack of knowledge that the person was a police officer, although the acts nevertheless constituted an assault.

¹⁴⁰ Criminal Law Officers Committee of the Standing Committee of Attorneys-General, *Model Criminal Code, Chapters 1 and 2: General Principles of Criminal Responsibility – Report* (1992) at 53-55 [307].

104 There was equally no denial to Mr Bell of the basic protections of the accusatorial criminal justice system by the refusal of the trial judge at Mr Bell's first trial to leave to the jury the question of whether any offence committed by Mr Bell under s 14 of the *Misuse of Drugs Act* would be excused by an honest and reasonable mistake. If the facts as to the complainant's age alleged to have been believed by Mr Bell had been true, then the same evidence in respect of the offence for which he was charged would have unequivocally established that Mr Bell would have been guilty of the offence under s 26 of supplying a controlled drug to another person. No uncharged fact or matter is involved in that conclusion.

Conclusion

105 Unlike any expressed or implied requirements for a particular element of an offence, the common law excuse of honest and reasonable mistake of fact operates to excuse the whole of the acts of an accused person from the charged offence. Mr Bell's alleged honest and reasonable belief that the complainant was 18 years or older could not have excused the entirety of his acts, which, even if the facts he believed were true, would have involved the offence of supplying a controlled drug to another person.

106 The trial judge properly did not instruct the jury that this excuse needed to be negated by the prosecution and the Court of Criminal Appeal of the Supreme Court of Tasmania correctly dismissed the appeal. This does not mean that any honest and reasonable belief concerning a strict liability element of the offence is irrelevant if the belief is of facts that would constitute an offence. The belief could still be a matter relevant to sentencing¹⁴¹. As it turned out, however, in the context of the sexual assault charge the second jury rejected Mr Bell's claim that such a belief was honestly and reasonably held.

141 See *CTM v The Queen* (2008) 236 CLR 440 at 453 [27].

