HIGH COURT OF AUSTRALIA

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Details of Filing

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IN THE HIGH COURT OF AUSTRALIA
HOBART REGISTRY

BETWEEN: CHAUNCEY AARON BELL
Appellant

and

STATE OF TASMANIA
Respondent

APPELLANT'S FURTHER SUBMISSIONS

Part I: Certification

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

Part II: Issues

2. By written correspondence dated March 17, 2021, the Court requested further written submissions in relation to the issues raised at the hearing of February 3, 2021. The first part considers the operation of honest and reasonable mistake of fact and its interaction with the fault based elements of an offence. This part has national implications. The second part flows from this, and connects this broader question to the position under the jurisdiction of Tasmania – how does criminal responsibility and the connection between mental element, mistake, and fault based responsibility exist within a Code emanating from the work of Sir James Stephen, and what connection is there to common law influence.[1]

[1] There is no doubt that in Tasmania, the common law's evolution greatly influenced the relevant mistake of fact provision (s 14 schedule 1, *Criminal Code Act 1924)*. By contrast, where other States, Territories, or the

Part III: Section 78B of the Judiciary Act 1902 (Cth)

3. Notice under s 78B of the Judiciary Act 1903 (Cth) is not required.

Part IV: Factual Background

4. The Appellant's written submissions filed July 24, 2020, [6]-[18] detail the narrative and decisional history of this appeal.

Part V: Submissions

10 5. The first issue directly raises the meaning of 'innocence' in the criminal justice system. Where an accused has an honest and reasonable mistake of fact to an element of an offence, will the person be relieved from liability for that offence even though there may be some other offence of which accused might conceivably be guilty. Alternatively, does the presence of some other offence that the presiding trial judge considers the accused would likely fall foul of, prevent the jury from considering the operation of honest and reasonable mistake. It also asks whether the judicial interpretation, in this context, of the meaning of innocent is somehow different from a 'not guilty' verdict delivered by a jury – the latter not being a finding of innocence in the sense of free from any potential wrongdoing. A jury
20 might not be satisfied that the Crown has established proof of guilt beyond a

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Commonwealth have statutorily intervened, the Parliaments of those respective jurisdictions have clarified the matter in a different way.
The jurisdictions that include a specific defence of honest and reasonable mistake of fact are as follows: s 32 *Criminal Code Act 1983* (NT); s 24 *Criminal Code 1899* (Qld); s 14 *Criminal Code Act 1924,* schedule 1, (Tas); s 24 *Criminal Code Act Compilation Act 1913,* Schedule, (WA); ss 35 and 36 of the *Criminal Code 2002* (ACT). In the Northern Territory, Queensland, and Western Australia a person who makes such a mistake is only responsible to an extent consistent with what would be the case if the real state of things had been such as was believed to exist. For certain offences, and when the offence meets the criteria of Part IIAA of the Northern Territory *Criminal Code Act 1893,* the provisions in the Northern Territory more closely align with what occurs in the Commonwealth and ACT *Criminal Codes.* The Commonwealth *Criminal Code Act 1995* ss 9-1 to 9-3 are similar to the ACT and draw a distinction between strict liability offences, fault based offences, and negligence-based offences.

reasonable doubt, yet not, if asked, be convinced of the person's innocence, as they may understand that phrase.[2]

6. The second part, with its specific Tasmanian focus, draws into question the operation and interaction of the mental elements of an offence. The question asked is how, where there is an offence without a mental element explicitly stated, the general provisions on intent and voluntariness, mistake of fact, and common law defences, interlace with each other. In answering this, one is ever mindful of the comments of Dixon CJ in *Vallance v The Queen,*[3] when considering the operation of s 13 of Schedule 1 of the *Criminal Code Act 1924* (Tas) that the:

> "[C]onsideration of case-law as pure science tends to make one look on codes as a kind of brutal interference with the natural process of legal reason" (*Holmes-Pollock Letters* i: p. 7*,* 21 July 1877*).* Surprised as one may be at the use even at that date of the words "pure science" with reference to case-law, an examination of the [Tasmanian Code], in an attempt to answer what might have been supposed to one of the simplest problems of the criminal law, leaves no doubt that little help can be found in any natural process of legal reason. The difficulty may lie in the use in the introductory part of the Code of ***wide abstract statements of principle about criminal responsibility… [that were framed] to satisfy the analytical conscience of an Austinian jurist than to tell a judge at a criminal trial what [he/she] ought to do.***[4]

The National Issue: The Meaning of Innocence and its Relationship to the Mental Element

7. The starting premise for criminal responsibility is that the Crown must prove, beyond a reasonable doubt, all the elements of an offence. The corollary of this is that if the accused makes a mistake that is honest and reasonable and which undermines one of those elements that the Crown needs to prove, then the jury

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[2] *Bartho v The Queen* (1978) 52 ALJR 520 per Gibbs ACJ 522, per Stephens J 522 (*Bartho).*
[3] (1961) 108 CLR 56.
[4] Ibid 58 (emphasis added).

should return a not guilty verdict.[5] A mistake of this nature can operate to deny the proof needed to satisfy the mental element of the offence. Another possibility is that it may negative responsibility where negligence is the mental element required. Finally, it could undermine proof, in circumstances where the offence is subject to the specific defence of a chance or an unforeseen event.[6] In addition to these specific instances, the defence of honest and reasonable mistake of fact, (more appropriately described as a ground of exculpation), can operate independently of the mental elements.[7] In Tasmania, the operation of honest and reasonable mistake of fact can also counterbalance the restrictive operation of s 13 of Schedule 1 of the *Criminal Code Act 1924* (Tas) brought about by the bare majority in *Vallance v The Queen.* This decision held that the required mental element of an indictable offence under the Tasmanian *Criminal Code* only attaches to the physical acts of the accused. [8]

8. As addressed in the Appellant's written arguments and reply, the finding of what is, and when the mental element applies, is only the beginning of the enquiry.[9] The High Court in Australia has recently endorsed the importance of honest and reasonable mistake of fact as a basis of exculpation.[10] As noted in *CTM,* 'The common law principles reflect fundamental values as to criminal responsibility. The courts should expect that if Parliament intends to abrogate that principle, it will make its intention plain by express language or necessary implication.'[11]

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[5] As noted earlier, 'not guilty' does not equate to 'innocence': *Bartho* (n 2).
[6] Brett J in *Bell v State of Tasmania* [2019] TASCCA 19 [16] (*Bell)* outlines a similar taxonomy.
[7] Ibid.
[8] For a recent discussion of the mental element within a common law jurisdiction see *Re Director of Public Prosecutions Reference No 1 of 2019* [2020] VSCA 181. (*DPP Reference).*
[9] Appellant's written submissions [20]-[34]; Appellant's reply [4]-[11].
[10] *Proudman v Dayman* (1941) 67 CLR 536, 540 per Dixon J (*Proudman)*; *He Kaw Teh v The Queen* (1985) 157 CLR 523 (*He Kaw Teh)*, and most recently in *CTM v The Queen* (2008) 236 CLR 440, 447 [8] (*CTM)*. Gleeson CJ, Gummow, Crennan and Kiefel JJ further clarified: '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.'
[11] *CTM* (n 10) [35].

9. These fundamental values lie, theoretically, on the foundation of the rule of law as well as what Ashworth describes as censure-based arguments.[12] 'Conviction without proof of fault as to a material element is to impose public condemnation without properly laying the foundations for it.'

10. These ideas underpinned the seminal holding in *He Kaw Teh* that a presumption of fault based criminal responsibility should apply to serious offences. The broader applicability of this presumption, or perhaps more correctly, the approach to criminal responsibility in cases where an evidentiary basis for mistake is made, were later re-examined by the High Court in *CTM v The Queen.*[13] Hayne J, in this latter case, considered that there was no initial presumption that a fault based mental element was required. It was a question of statutory construction. Some element such as knowledge would only be required where the offence suggests this, such as in *He Kaw Teh.*[14] There was, nevertheless, a presumption that 'a person who does an act under a reasonable misapprehension of fact is not criminally responsible for it even if the facts which [he/she] believed did not exist.'[15] Statutory silence was not conclusive as to the unavailability of mistake.[16] In coming to this conclusion, Hayne J relied on the view of Sir James Stephen, that 'the full definition of every crime contains expressly or by implication a proposition as to a state of mind.'[17] The plurality of Gleeson CJ, Gummow, Crennan and Kiefel JJ also began their analysis with consideration of the operation of honest and reasonable mistake of fact, rather than with any presumption as to mens rea. The starting point was the principle in *R v Tolson* that 'at common law an honest and reasonable belief in the existence of circumstances which, if true, would make the act for which the prisoner is indicted an innocent act has always been held to be a good defence.'[18] With this in mind, both Hayne J, the plurality in *CTM,* as well as Kirby

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[12] Andrew Ashworth, 'Should Strict Criminal Liability be Removed from all Imprisonable Offences' (2010) 45 *Irish Jurist* 1, 5-6. (Strict liability in the English context is what, in Australia, would be called absolute liability).
[13] (2008) 236 CLR 440.
[14] Ibid 484 [150] (Hayne J).
[15] Ibid 480 [139] (Hayne J); quoting from *Hardgrave v The King* (1906) 4 CLR 232, 237 (Griffith CJ).
[16] Ibid 481 [141] (Hayne J).
[17] Ibid 486 [159], quoting with approval Sir James Stephen in *R v Tolson* (1889) 23 QBD 165, 187 (*Tolson).*
[18] Ibid 445 [3], quoting *Tolson* (n 17) 181.

J in a separate judgment, held that the trial judge should have left the ground of exculpation to the jury.[19]

11. Critically for the instant matter, and despite the differences in approach, both *He Kaw Teh* and *CTM* support a view that fault based liability remains fundamental to the allocation of criminal responsibility. The decisions, emanating from common law jurisdictions, can still undeniably influence a code jurisdiction such as Tasmania – even though the common law concept of mens rea has no application to indictable offences in Tasmania,[20] though it remains relevant to summary offences.[21]

12. The original written submissions of the Appellant, and the reply to the Respondent's submissions,[22] more broadly consider the reasons for the availability of the ground of exculpation to the instant matter. However, if the ground of exculpation exists, how does it operate where the person charged is potentially liable for another offence, though that person has never been charged with that offence? Further, to date, there has been little curial consideration of the position of the jury finding the accused guilty of an indictable offence, in the absence of them considering honest and reasonable mistake of fact, with the ground of exculpation removed from consideration because of the accused's putative guilt on a summary offence. In most situations where courts have applied *Bergin*, the disparity between a summary and indictable offence has not been in consideration.

13. The Appellant accepts that the traditional orthodoxy, if one accepts that to be *Bergin v Stack,*[23] is that at common law, the defence of mistake of fact is all or nothing.[24] The mistake is an excuse or justification that amounts to innocence only if there is no other offence that would have likely led to the conviction of the

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[19] The decision though has been criticised for its failure to start from a presumption of mens rea, or the need for a fault-based mental element. Susannah Hodson, 'CTM v The Queen: A Challenge to the Fundamental Presumption of Mens Rea' (2010) 34 *Criminal Law Journal* 187.
[20] *Vallance v The Queen* (1961) 108 CLR 56.
[21] *Browning v Barrett* [1987] Tas R 122.
[22] Appellant's written submissions [20]-[34]; Appellant's reply [4]-[11].
[23] *Bergin v Stack* (1953) 88 CLR 248 at 262 (Fullager J).
[24] Ibid 262.

accused. If there is a lesser offence that would likely have led to conviction, even though the accused is not charged with that lesser offence, the accused is convicted of the more serious offence.[25] This is the essence of *Bergin v Stack.* It is this view that the Appellant submits is wrong and involves a misreading of the cases preceding *Bergin.*

14. With these questions an open wound in the common law, most other States and Territories have intervened to produce a different result. For example, in the Northern Territory, Queensland, and Western Australia, if the 'things' lead to a conclusion that the person would be liable for a lesser offence, then responsibility is to the extent that would be the situation if the real state of things had been such as was believed to exist. The wording in the ACT and the Commonwealth *Criminal Code* take the matter even further. They explore a distinction between strict liability offences and other forms of offences.[26] In the Commonwealth *Criminal Code* where the fault elements are something other than negligence, the existence of a mistake will negate the physical element required for the offence (Division 9-1). If the offence is one of strict liability, the position in *Bergin* appears to be adopted, and no responsibility will lie unless the accused has not committed any offence. The Parliament in the ACT adopted a similar framework for the *Criminal Code* in that jurisdiction.

15. The common law provides the impetus for the Tasmanian provision of mistake of fact and reflects the drafting of Sir James Stephen, with influence from the Griffith Code. The Appellant submits that the ratio often cited from *Bergin v Stack* is not what the common law determined prior to this case, nor what it should be in the contemporary environment of subjective criminal responsibility. The submission the Appellant makes is that 'innocence' means that the person is innocent of the

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[25] Conversely, if the accused is charged with an offence and the argument is made that mistake should be removed because of potential guilt on a more serious offence of which the accused has not been charged, it is likely that the physical elements of that more serious offence have not been met. Alternatively, perhaps the matter should have been considered as an attempt of the more serious offence.

[26] As well as some types of offences in the Northern Territory - see Part IIAA of the Northern Territory *Criminal Code Act* 1983.

charge that they face, and there need be no further examination. In summary the reasons for this are as follows:

- The reliance on *Bergin v Stack* as the key authority is misplaced. This decision relies heavily on the 'now discredited' decision of *Reg v Prince,* [27] 'a relic from an age dead and gone'[28] – a point accepted in Tasmania.[29] A person should be judged 'on the facts as they believe them to be.'[30]*Bergin* did not cite the earlier Australian cases of *Proudman v Dayman,* or *Thomas v The King* in the appropriate context nor did these earlier cases suggest that innocence in this environment means innocent of all potential wrongdoing. The earlier authorities, such as *Proudman* and *Thomas*, *R v Tolson,* and *CTM* can be read as meaning that an honest and reasonable mistake will lead to a finding of innocence, (or more correctly a not guilty finding by a jury). It is not possible to extrapolate from these cases that the jury should not be entitled to consider a mistake based defence where the accused would be guilty of some other offence, of which the person has not been charged.[31] Nothing in the earlier cases supports the stance taken by Fullagher J in *Bergin. Bergin* is not the seminal authority. It is the outlier. In the passage where *Bergin* is oft-quoted for the view that innocent must mean innocent of any or all crime, Fullagher J, with whom Williams and Taylor JJ agreed, in addition to relying on the now shunned decision of *Reg v Prince,* also relied on *Bank of New South Wales v Piper.*[32] In that case, their Lordships said, 'On the other hand, the absence of mens rea really consists in an honest and reasonable belief entertained by the accused of the existence of facts which, if true, would make the **act charged against him** innocent.'[33] This, it is submitted is as supportive of what the Appellant is

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[27] [1875] LR 2 CCR 154. See *R v K,* [2002] 1 AC 462, 474 (*K).* Reliance by the Respondent (Respondent's submission) [68] on *Prince* is misplaced.
[28] *B (a Minor) v Director of Public Prosecutions (UK)* [2000] 2 AC 428, 476 (Lord Steyn) *(B – a Minor)*
[29] *Tasmania v QRS* (2013) 22 Tas R 180, 184 (Evans J) (*QRS*).
[30] B (a Minor) (n 28) 476 (Lord Steyn).
[31] For example in *Thomas v The King* (1937) 59 CLR 279, 304 states: 'In cases where the statute requires a motive to be proved as an essential element of the crime, the prosecution must fail if it is not proved. On the other hand, the absence of mens rea really consists in an honest and reasonable belief entertained by the accused of the existence of facts which, if true, **would make the act charged against him innocent**.' (emphasis supplied).
[32] [1897] AC 383 (*Piper).*
[33] Ibid 389-390.

arguing, and not, as some have suggested,[34] of the contrary position. The only charge of which the accused needs to be found not guilty is that which has been laid against her or him.

- Hayne J in *CTM* examined the decision of *Reg v Prince* closely. In his Honour's view, the reasoning in *Prince* was reliant on the construction of the statute in question.[35] He considered that little could be gained from seeking to reconcile *Prince* with *Tolson*[36] but what was critical was the core idea of criminal jurisprudence that the accused acts under the state of facts which he or she accepted in good faith and on reasonable grounds when they were engaging in that behaviour. '[The High Court's decision] in *Thomas* resolved any such doubts [between *Prince* and *Tolson]* for Australia by adopting the principles described by Sir James Stephen [in *Tolson].*[37]
- An accused is entitled to the presumption of innocence. This presumption is often asserted when the accused is charged, or when there is the making of allegations. It would be legally unjustifiable to suggest that a person is not entitled to the same presumption in relation to offences of which they are not changed. To accept a position where this is not the case usurps the role of the jury as the decider of fact.
- Criminal justice is an adversarial, accusatorial process where the State asserts specific allegations against specific individuals in relation to specific offences. The role of the jury, at least in Tasmania where judge only trials are not permitted, is that of the arbiters of fact. Mistake should be left to their consideration. To deny this from consideration of the jury conflates the availability of the ground of exculpation with the likelihood that it would succeed.
- If the overturning of *Bergin v Stack* is too large a bridge to cross, alternatives do exist. In most of the State-based scenarios where state based courts follow the supposed ratio of *Bergin v Stack,* the like offences have been of a cognate nature to the offence of which the person is charged. In

[34] Respondent's submissions [55].
[35] *CTM* (n 10) 487 [160].
[36] Ibid 486 [158],
[37] Ibid 487 [160].

this instant matter, a jury has found the accused guilty of an indictable offence where Code provisions relating to fault based liability apply. Honest and reasonable mistake of fact was not left to the jury because of the accused's putative guilt of a summary offence. A hybrid position would be to allow *Bergin* to operate in the area of minor or summary offences, where the courts and Parliament have been more willing to find strict or absolute liability offences existing, but draw a line against applicability in the context of indictable offences.[38]

- Another option is to restrict the operation of *Bergin* to scenarios where the 'other offence' is truly of a like nature, carrying similar penalties, and with a similar process (rather than guilt on an indictable Code based offence because of presumed guilt on a common law guided summary offence). All parties accept that a line must be drawn somewhere,[39] and this distinction between indictable and summary, at least in the jurisdiction of Tasmania serves as a parameter around which legal coherency can be built.
- The decision in *Bergin* needs re-examination in light of the emphasis placed on faulty based liability in *He Kaw Teh,* and more specifically, in light of the prominence given to honest and reasonable mistake of fact in *CTM.*
- In the discussion that surrounds the meaning of innocence, it is pertinent to note that a jury finding of 'not guilty' is not a finding of innocence – however, that may be interpreted. This, it is submitted, should be borne in mind when determining the meaning of innocence in the context of mistake. Where possible the meaning of innocence should have a similar understanding throughout the criminal law.
- While *Vallance* remains of precedential value, the restrictive approach to the fault based mental elements within the Tasmanian Criminal Code necessitates a balance to meet the need for subjective responsibility that responds to this restrictiveness. The fact that this may lead some unmeritorious individuals to escape punishment is not a reason to remove the consideration of fault from the jury.[40] Similarly, the arguable omissions

[38] An analogous point was made by Wills J in *R v Tolson* (1889) 23 QBD 165, 177.
[39] *Bell* (n 6) [34].
[40] *Thomas v The King (*1937) 59 CLR 279, 309 (Dixon J) (*Thomas)*; *He Kaw Teh* (n 10) 580-581 (Brennan J).

within the legislation that led to this matter appearing before the High Court of Australia should be no reason to deny the relief sought by the accused.

- The mistake must be honest and reasonable for it to succeed. Juries are uniquely placed to resolve this, and distrust of juries and their capacity to make sound decisions is no reason to remove mistake as a legal avenue.[41]

The Tasmanian Dimension: a circular statutory construct

16. The conceptual difficulty with the Tasmanian provisions lies in their method of interaction between the provisions creating the offence, and those sections of the *Criminal Code Act 1924* (Tas) that purport to establish the fault based elements of the offence.

17. Section 14 of the *Misuse of Drugs Act 2001* (Tas) fails to reference any mental element and is an offence punishable on indictment. By s 4 of the *Criminal Code Act 1924* (Tas), the Code applies to proceedings on indictment. Section 13 of Schedule 1 of the *Criminal Code Act 1924* (Tas), indicates that the fault based mental element required is that the act of the accused be voluntary and intentional. Section 14, Schedule 1 *Criminal Code Act 1924* (Tas) then 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 supplied)

18. Further compounding the circular nature of this analysis is the recognition, as alluded to in the hearing of February 3, 2021[42] that it is difficult to read s 14 as an operative provision, though this does not seemed to have caused the Tasmanian Court of Appeal any difficulty.[43]

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[41] *Thomas* (n 40) 309.
[42] High Court transcript of hearing of *Bell v State of Tasmania* [2021] HCATrans 5 (3 February 2021)February 3, 2021: http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/HCATrans/2021/5.html.
[43] The same problem is not necessarily evident in the other Code jurisdictions, or in the Commonwealth *Criminal Code 1995*. The wording of their equivalent provisions provides a positive statement that honest and reasonable mistake of fact will operate as a defence or ground of exculpation. The Tasmanian provision relies on an interpretation of the statute, but the Court of Appeal in Tasmania has interpreted this so that s 14

19. The leading decision on the operation of s 14 of the *Criminal Code Act 1924* (Tas) is *R v Martin.*[44] The Respondent summarises this decision in its written submissions.[45] Of specific importance is the view of Burbury CJ that:

> Section 14 refers to mistake of fact in terms which assume its existence as a ground of exculpation and clearly identify it as the defence of mistake of fact as existing at common law. The principles relating to the content and application of this general concept of mistake of fact as a defence recognised by the *Code* must therefore be ascertained from the common law as judicially determined from time to time.[46]

20. The Appellant's reply details the differences in approach to that of the Respondent in the analysis and interaction between ss 13 and s 14 of the *Criminal Code Act 1924* (Tas).[47] In addition to what was said there, Burbury CJ in *Martin,*[48] noted that:

> The truth is that a general principle of criminal responsibility although expressed in statutory form in a code is nevertheless a flexible and dynamic concept. And once it appears that a provision of the code only attempts to express a pre-existing established principle in its interpretation and its interpretation and its application to a particular set of fact cannot be undertaken without recourse to its common law.

21. The High Court's obiter comments in *CTM* on honest and reasonable mistake of fact heavily influence the common law. This case must necessarily assist in the understanding of s 14 of the *Criminal Code Act 1924* (Tas). As noted earlier,[49] Hayne J was of the view that where the provision in question does not require a

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is utilised as a substantive defence and that it has operative effect: *R v Martin* [1963] Tas SR 103; *Snow v The Queen* [1962] Tas SR 277.

[44] *R v Martin* [1963] Tas SR 103 (*Martin).*

[45] Respondent's submissions, [48]-[53], https://www.hcourt.gov.au/cases/case_h2-2020.

[46] *Martin* (n 44) 110.

[47] Appellant's Reply, [2]-[3], <https://cdn.hcourt.gov.au/assets/cases/05-Hobart/H2-2020/Bell-Tas_reply.pdf>

[48] *Martin* (n 44) 110, in quoting from his own judgment in *Murray v The Queen* [1962] Tas SR 170, 172-173.

[49] Paragraphs [7]-[8].

specific state of mind[50] that the presumptive fault base is an absence of an honest and reasonable mistake of fact. The plurality did not articulate their position on the place of mens rea as a presumptive threshold, but endorsed a view, that in the instance before them, honest and reasonable mistake should be available as a ground of exculpation. Their Honours saw this as part of the law of Australia.[51]

22. The common law's position on honest and reasonable mistake of fact is that where the consequences for the accused are severe, and there is an absence of any explicit removal of its operation, then, as a ground of exculpation, it should be available. The second question is what it means. While there is a difference between the Appellant and the Respondent as to the weight to be afforded *Bergin v Stack,* it is unarguable that since that decision was made in 1953, there have been significant developments within criminal jurisprudence that reinforce the importance of fault based criminal responsibility.

23. In applying these principles to the Tasmanian context, the following points are made:

- The question in Tasmania is one of statutory interpretation;
- Section 14 of the *Misuse of Drugs Act 2001* establishes no mental element;
- Section 13 of Schedule 1 of the *Criminal Code Act 1924* provides the mental element – the act of the accused must be voluntary and intentional. This restrictive interpretation is provided by *Vallance*;
- Section 14 of Schedule 1 of the *Criminal Code Act 1924* (Tas) provides a ground of exculpation based on an accused's honest and reasonable mistake of fact. This section requires the rather circular route of then re-examining the original statute;
- There is nothing in s 14 of the *Misuse of Drugs Act 2001* that would exclude the ground of exculpation of honest and reasonable mistake of fact;

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[50] Transcript of Proceedings *CTM v The Queen,* High Court of Australia, CTM v The Queen [2008] HCATrans 117 (29 February 2008) < http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/HCATrans/2008/117.html?context=1;query=CTM;mask_path=au/cases/cth/HCATrans>.

[51] *CTM* (n 10), 447 [8].

- Schedule 14 of Schedule 1 of the *Criminal Code Act 1924* (Tas) is reflective of the common law position and is currently informed by the common law.[52]
- Hayne J in *CTM* raises the prospect that honest and reasonable mistake of fact is the presumptive mental element that needs to be considered when an offence, on its reading, discerns no mental element. Apart from Heydon J in *CTM,* the remaining judges endorse a greater focus and importance on honest and reasonable mistake of fact in the determination of criminal responsibility;
- If, consistent with *Vallance,* the voluntariness and intent of the accused in supplying a drug **to a child** is irrelevant to the mental element of the offence, then the results and the circumstances taxonomy as noted by Brennan J in He *Kaw Teh,* can only be met by the application of honest and reasonable mistake of fact. The circumstances of the offence dictate that the supply is to a child, and the accused's awareness of the age of the recipient must be relevant in establishing the fault of the accused. With *Vallance* interpreted restrictively, the need for this fault element is met by the availability and consideration by the jury of honest and reasonable mistake of fact. *CTM* endorses the importance of honest and reasonable mistake of fact.
- The excuse or justification, or its synonym in this context, 'innocence', means innocent of the offence asserted against the accused, and does not require, for the previously stated reasons, the person being innocent of all criminal charges. A not guilty verdict delivered by a jury is not an assertion of innocence, and a higher standard should not be required of an accused, particularly where a separate offence has not been levelled against the accused.
- The view posited by the Appellant is consistent with the legislation, consistent with the authorities, (apart from *Bergin),* and is consistent with the foundation stones within criminal responsibility, such as the principle of

[52] In any event, s 8 of the *Criminal Code Act 1924* (Tas) preserves common law defences, so far as they are not altered by the Code. It appears from *R v Martin* that the common law is central in interpreting what is meant by s 14 of Schedule 1 of the *Criminal Code Act* 1924.

legality, the rule of law and most fundamentally, the presumption of innocence. A presumption that must apply to any offence of which is charged, must, even more strongly, apply to any offence of which a person has not been charged.

24. The hearing on February began with a reference to the Mikado, taken from the words of Dixon J in *Thomas v The King:*

> 'There's not a word about mistake, or not knowing, or having no notion, or not being there. There should be of course; but there isn't. That's the slovenly way in which these Acts are drawn.'

Perhaps if the State had charged the accused with the summary offence of supply of a controlled drug to a person, or the Parliament had listed this as an alternative to the indictable offence of supply to a child, the matter would not have proceeded to the High Court. However, neither the State nor the Parliament did this. The costs of that should not be borne by the accused.

Dated: 29 March 2021

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