

# No mistaking innocent acts

Belinda Baker reports on *Bell v Tasmania* [2021] HCA 42

## Introduction

In *Bell v Tasmania*, the High Court held that the common law excuse of honest and reasonable mistake of fact will only be available in circumstances where the facts honestly believed, would be such as to render the person innocent of any offence.

## Background

The issue in the trial concerned the appellant's belief about the age of a child in relation to a charge of supplying a controlled drug to a child (a person under 18 years) contrary to s 14 of the *Misuse of Drugs Act 2001 (Tas)*.

A 15-year-old complainant went with a man (Mr Percy) to purchase drugs from a dealer who was living at the same house as the appellant. As the complainant had no experience injecting drugs, the appellant injected methylamphetamine into her arm. That conduct formed the basis for a charge of the supplying a controlled drug to a child. The appellant subsequently called a taxi for Mr Percy and the complainant, however, when it arrived, he instead invited the complainant to go for a walk with him. She agreed to do so and they walked to a grassy area, where sexual intercourse took place which was the basis of a charge for rape under s 185(1) *Criminal Code* with a statutory alternative of sexual intercourse with a young person under the age of 17 years (s 124 *Criminal Code*). In a record of interview the appellant admitted to the acts but claimed the complainant had told him, and he believed, that she was 20 years old.

At the first trial, the trial judge instructed the jury that they could not find the appellant guilty of the alternative offence of sexual intercourse with a young person under 17 years of age unless they were satisfied that the appellant did not hold an honest and reasonable mistaken belief that the complainant was aged 17 years or older. However, in relation to the supply of a controlled drug to a child, the trial judge directed the jury that it made no difference whether the appellant held a reasonable mistaken belief that the complainant was 18 years or older. The basis for trial ruling that the defence was not available in relation to the drug charge was that even if the appellant had been honestly mistaken about the



child's age, he would still have committed the offence of supplying the drug contrary to s 26 of the *Misuse of Drugs Act*.

The appellant was convicted of the supply controlled drug to a child offence and subsequently convicted of the alternative sexual offence upon a retrial of that count.

## The common law defence of honest and reasonable mistake

The sole issue in the appeal concerned 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 appellant contended that it was only necessary for the honest and reasonable belief to render the person innocent of the particular offence charged. In this regard, the appellant sought to depart from the previous decision of the High Court in *Bergin v Stack* (1953) 88 CLR 248, which he submitted represented a 'step backwards', which should be either confined to regulatory offences or overturned.

Edelman and Gleeson JJ surveyed a range of authorities from the early judicial development of the common law excuse and observed that some of the early approaches had contemplated a broader basis for disqualifying the availability of the excuse to circumstances where the mistaken belief, if true, would make the person's act immoral or a civil wrong. However, their Honours held that such approaches were never widely accepted and had been correctly rejected by Brennan J in *He Kaw Teh v The Queen* (1985) 157 CLR 523.

Their Honours found that, to the extent that *Bergin v Stack* adopted a requirement that the acts of the accused person, on the facts believed, would not amount to another offence, then it was correctly reasoned. Edelman and Gleeson JJ identified a number of examples showing the absurdity of treating as excused an act that, on the facts as the accused person believed them to be, would constitute another offence of a similar nature.

In relation to the appellant's argument that it would be contrary to well established principles of the accusatorial criminal justice system for the prosecution to be permitted to conduct a 'trial within a trial' as to whether some different, uncharged offence had been committed, their Honours said that there was clearly a limit requiring the prosecution to identify and establish the acts that would constitute that other offence based upon the facts believed. It was however unnecessary to explore the 'metes and bounds' of the limit which was not in issue in *Bergin v Stack*, or the present case, and in many cases would be straightforward.

Kiefel CJ and Keane J were in general agreement with the reasons of Edelman and Gleeson JJ. Their Honours observed that the appellant's argument could not be supported as an exercise in statutory interpretation of s 14 of the *Tasmanian Code*, which 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.*

The textual focus upon the 'act or omission' that entailed the 'criminal responsibility' and which would be excused by the relevant 'belief' confirmed that the common law interpretive principle it recognises is one which excuses an accused from *any and all* criminal responsibility entailed by the act or omission, but only where it is done under an operative mistake.

In the present matter, the act which entailed criminal responsibility was the supply of a controlled drug to another person, which was an offence under s 26 of the *Misuse of Drugs Act*. While the culpability

of a person performing that act was less than that of a person who knowingly supplied the drug to a child, it could not be said that the former would be 'innocent' or 'in no way blameworthy' and there was not the same gulf between moral culpability and criminal responsibility as that which arises when the act is undertaken with an honest and reasonable belief that it was lawful.

Gordon and Steward JJ agreed that the appeal should be dismissed, holding that the common law principle of honest and reasonable but mistaken belief applies and was not altered by or inconsistent with s 14 of the *Criminal Code*. The common law principle, set out in *Bergin v Stack* and *CTM v The Queen* (2008) 236 CLR 440, provides 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. Their Honours observed further (at [48]) that, like the mistake in *CTM*:

*a mistake of fact which would merely take a case 'out of one prohibition into another' is 'legally irrelevant to guilt, although it could possibly have some consequence for sentencing purposes'.*

Gagelar J, in brief additional reasons, agreed that the appeal should be dismissed, observing that there was no good reason to depart from *Bergin v Stack*. His Honour held that the application of the common law presumption in the present case led to the conclusion that an honest and reasonable mistaken belief that the person to whom the supply is made is not a child does not excuse the voluntary and intentional supply of a controlled drug to a person who is in fact a child, because the former is not innocent, but guilty of an offence against s 26 of the *Misuse of Drugs Act*.

### Conclusion

The High Court unanimously confirmed the correctness of *Bergin v Stack*. For the defence to be available, the accused person's acts, on the facts believed to exist, must be sufficient to render the person innocent of any offence. It would appear to be expected that the prosecution will be able to identify and establish that other act and offence with clarity. There may be scope for the High Court to consider further the limitations on the extent to which the prosecution will be permitted to identify another offence as a matter of fairness, however the present case represented a clear example of where the relevant act was squarely within another prohibition. **BN**

