

Before the High Court

A “Rational and Humane Criminal Code”? *Bell v Tasmania* and the Reach of Honest and Reasonable Mistake of Fact

Andrew Dyer*

Abstract

In *Bell v Tasmania*, the appellant (‘Bell’) was convicted of the Tasmanian offence of supplying a controlled drug to a person aged under 18 years. Bell claimed that he believed on reasonable grounds that the person to whom he supplied the drug was 20 years old. However, the trial judge refused to leave honest and reasonable mistake with the jury because, even if Bell’s asserted belief had been accurate, he would still have been committing a (much less serious) offence: supplying a controlled drug to ‘another person’. This column argues that the High Court of Australia should uphold Bell’s submission that the trial judge was wrong to withhold honest and reasonable mistake of fact from the jury. A person should not be convicted of a crime that s/he reasonably believed her or himself not to be committing. That is so even if s/he is intentionally committing some lesser crime. The High Court should reverse its past decisions that hold otherwise.

Please cite as:

Andrew Dyer, ‘A “Rational and Humane Criminal Code”? *Bell v Tasmania* and the Reach of Honest and Reasonable Mistake of Fact’ (2021) 43(3) *Sydney Law Review* 379.



This work is licensed under a Creative Commons Attribution-NonDerivatives 4.0 International Licence (CC BY-ND 4.0).

As an open access journal, unmodified content is free to use with proper attribution. Please email sydneylawreview@sydney.edu.au for permission and/or queries.

© 2021 Sydney Law Review and author. ISSN: 1444-9528

* Colin Phegan Senior Lecturer, The University of Sydney Law School, The University of Sydney, Camperdown, NSW, Australia; Director, Sydney Institute of Criminology.
Email: andrew.dyer@sydney.edu.au; ORCID iD: <https://orcid.org/0000-0001-6245-6773>.

I Introduction

In *R v Prince*,¹ the accused had been convicted of the statutory offence of unlawfully taking an unmarried girl who was under the age of 16 years out of her father's possession and against his will. But the jury had also found it possible that Prince believed on reasonable grounds that the girl, Annie Phillips, who 'looked very much older'² than 16 and had told him that she was 18,³ was 16 years or older. The question for the 16 judges who sat in the Court for Crown Cases Reserved in *Prince* was simple. Should Prince have been judged on the facts that he reasonably believed to exist?⁴ Or was he rightly convicted of an imprisonable offence that he had reasonably thought he was not committing? Fifteen judges found that Prince had been rightly convicted, Bramwell B holding that, even if the facts had been as Prince thought they were, he would still have been doing something 'wrong'.⁵ 'I do not say illegal', Bramwell B continued, 'but wrong.'⁶ In other words, because Prince would still have been taking the girl from her father without his consent, he would have been acting immorally. The lone dissident, Brett J, thought that the honest and reasonable mistake of fact defence⁷ operated more broadly than this. For Brett J, Prince should have been excused, because, if the facts had been as he reasonably thought they were, he would have been guilty of 'no criminal offence at all'.⁸

Nearly 80 years later, in *Bergin v Stack*, the High Court of Australia accepted that Brett J's approach was 'to be regarded as stating a *minimum* requirement'.⁹ For an accused to be able to rely on honest and reasonable mistake of fact, Fullagar J held, his or her claimed belief must have been in circumstances that, if they had existed, 'would have meant that no offence was being committed'.¹⁰ More recently,

¹ *R v Prince* (1875) LR 2 CCR 154 ('*Prince*').

² Ibid 155.

³ Ibid 156 (Brett J).

⁴ See Rupert Cross, 'Centenary Reflections on *Prince's Case*' (1975) 91(4) *Law Quarterly Review* 540, 540.

⁵ *Prince* (n 1) 174. Seven other judges concurred in Bramwell B's judgment at 173 (Kelly CB, Cleasby, Pollock and Amphlett BB, Grove, Quain and Denman JJ).

⁶ Ibid 174. See also 179 (Denman J).

⁷ At the time *Prince* was decided, honest and reasonable mistake of fact was a true defence: that is, something for the accused to prove. See, eg, *Sherras v De Rutzen* [1895] 1 QB 918, 921 (Day J); *Bank of New South Wales v Piper* [1897] AC 383, 389 (Privy Council); *Maher v Musson* (1934) 52 CLR 100, 105–6 (Dixon J), 109 (Evatt and McTiernan JJ). It is now well-established, in code and common law jurisdictions alike, that if there is evidence of honest and reasonable mistake of fact, the Crown must disprove this ground of exculpation: see, eg, *Brimblecombe v Duncan* [1958] Qd R 8, 12–15 (Philp J, Matthews J agreeing at 16), 22–3 (Stanley J); *He Kaw Teh v The Queen* (1985) 157 CLR 523, 534–5 (Gibbs CJ, Mason J agreeing at 546), 558–9 (Wilson J), 573–5 (Brennan J), 591–4 (Dawson J) ('*He Kaw Teh*'); *Attorney-General's Reference No 1 of 1989*; *R v Brown* [1990] Tas R 46, 55–61 (Neasey J) ('*Brown*').

⁸ *Prince* (n 1) 170.

⁹ *Bergin v Stack* (1953) 88 CLR 248, 262 (Fullagar J, Williams ACJ agreeing at 253, Taylor J agreeing at 277) (emphasis in original) ('*Bergin*').

¹⁰ Ibid.

in *CTM v The Queen*, six Justices made obiter dicta statements confirming this proposition.¹¹

In *Bell v Tasmania*,¹² the appellant ('Bell') asks the High Court to overrule *Bergin*.¹³ According to Bell, for a person to be acquitted on the basis of honest and reasonable mistake, it should be unnecessary for the relevant belief to have been in a state of affairs that, if they had existed, would have rendered his or her conduct 'non-criminal'.¹⁴ He submits that, instead, it should be enough that the accused might have believed on reasonable grounds that s/he was not committing *the particular offence at issue*.¹⁵ This submission raises important questions about criminal responsibility. In this column, I argue that the High Court should uphold it.

In the 20th century, the law relating to honest and reasonable mistake of fact developed in important respects. All such developments were protective of individual liberty. Some reflected a view that 'there should be a close correlation between moral culpability and legal responsibility'.¹⁶ Undoubtedly, it is 'a large step'¹⁷ for the High Court to set aside one of its past decisions, especially one that it has recently 'taken up'¹⁸ (even if, as here, only in obiter dicta). Nevertheless, in *Bell (HCA)*, it is a step that the Court should take. Such a ruling would continue the criminal law's progress away from 'the objective standards of early law'.¹⁹ Moreover, the decisions that Bell asks the Court to reconsider were perhaps not as carefully considered as they could have been. The facts in *Bergin* and *CTM* did not highlight, as the facts in *Bell* do, the injustice that the impugned rule can produce.

II The Proceedings So Far

Following an interaction between Bell and a girl aged 15, Bell was charged with rape²⁰ and supplying a controlled drug to a child²¹ (that is, a person aged under 18 years).²² The trial judge, Blow CJ, left with the jury the offence of having sexual intercourse with a person under the age of 17 years,²³ as an alternative to the rape charge. Bell admitted that he had had sexual intercourse with the complainant and

¹¹ *CTM v The Queen* (2008) 236 CLR 440, 447 [8], 453–4 [27] (Gleeson CJ, Gummow, Crennan and Kiefel JJ), 491 [174] (Hayne J), 497 [199] (Heydon J) ('*CTM*'). See also *R v Reynhoudt* (1962) 107 CLR 381, 385–6 (Dixon CJ), 389 (Kitto J), 395–6 (Taylor J), 399 (Menzies J), 408, 410 (Owen J) ('*Reynhoudt*').

¹² *Bell v Tasmania* (High Court of Australia, Case No H2/2020) ('*Bell (HCA)*').

¹³ Chauncey Aaron Bell, 'Appellant's Submissions', Submission in *Bell v Tasmania*, Case No H2/2020, 24 July 2020, [29]; Chauncey Aaron Bell, 'Appellant's Further Submissions', Submission in *Bell v Tasmania*, Case No H2/2020, 29 March 2021, [13] ('Bell Further Submissions').

¹⁴ *CTM* (n 11) 497 [199] (Heydon J).

¹⁵ Bell Further Submissions (n 13) [23].

¹⁶ *Wilson v The Queen* (1992) 174 CLR 313, 334 (Mason CJ, Toohey, Gaudron and McHugh JJ).

¹⁷ Transcript of Proceedings, *Bell v Tasmania* [2021] HCATrans 5, 881 (Kiefel CJ) ('Transcript of Proceedings (2021)').

¹⁸ *Ibid* 885 (Kiefel CJ).

¹⁹ *Thomas v The King* (1937) 59 CLR 279, 308 (Dixon J) ('*Thomas*').

²⁰ Contrary to *Criminal Code Act 1924* (Tas) sch 1 ('*Tasmanian Criminal Code*') s 185(1).

²¹ Contrary to *Misuse of Drugs Act 2001* (Tas) s 14 ('*Misuse of Drugs Act*').

²² *Ibid* s 3(1) (definition of 'child').

²³ Contrary to *Tasmanian Criminal Code* (n 20) s 124(1).

injected her with methylamphetamine; but he said that the intercourse was consensual and that the complainant had told him, and he believed, that she was 20 years old.²⁴ Blow CJ directed the jury that, if it were to consider the alternative charge, it had to acquit the accused if it thought it possible that he believed on reasonable grounds that the complainant was aged at least 17.²⁵ But his Honour refused to leave honest and reasonable mistake of fact with the jury on the drugs charge. As the Chief Justice explained:

When a person has sexual intercourse with a young person under the age of 17 years, and holds an honest and reasonable but mistaken belief that that young person has attained that age, that person engages in conduct which, if the belief were true, would be wholly innocent. That is not the case when someone supplies a controlled drug to a child whilst holding an honest and reasonable but mistaken belief that the child is someone who has attained the age of 18 years. That is because the supply of a drug to someone who has attained that age is not an entirely innocent act, but an offence contrary to s 26 of the *Misuse of Drugs Act* [supplying a controlled drug to another person].²⁶

His Honour pointed to the wording of s 14 of the *Tasmanian Criminal Code*, which provides that:

Whether criminal responsibility is entailed by an act or omission done 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.²⁷

If Bell's alleged belief had been accurate, Blow CJ observed, this would not have 'excuse[d]' his act of drug supply.²⁸ That act would still have been a criminal act — the summary offence²⁹ created by s 26. Moreover, Blow CJ continued, 'leading common law cases ... support the view'³⁰ that honest and reasonable mistake of fact only operates to excuse the accused who believes in a state of affairs that, if they had existed, would have rendered his or her conduct non-criminal.

The jury convicted Bell of supplying a controlled drug to a child, but did not reach a verdict on the rape count.³¹ At a retrial, a second jury found him not guilty of rape, but guilty of the alternative sexual charge.³² Evidently, it considered that the Crown had proved that Bell did not believe on reasonable grounds that the complainant was aged at least 17. It nevertheless remains possible that the first jury would have seen things differently, and would therefore have acquitted him of the

²⁴ *Bell v Tasmania* (2019) 279 A Crim R 553, 556–7 [11] ('*Bell (TASCCA)*').

²⁵ See *Tasmanian Criminal Code* (n 20) ss 14, 14B.

²⁶ *Tasmania v Bell* [2019] TASSC 34, [8] ('*Bell (TASSC)*').

²⁷ *Tasmanian Criminal Code* (n 20) s 14.

²⁸ *Bell (TASSC)* (n 26) [11]. See also at [4].

²⁹ *Misuse of Drugs Act* (n 21) s 18.

³⁰ *Bell (TASSC)* (n 26) [13].

³¹ *Bell (TASCCA)* (n 24) 557 [12].

³² *Ibid.*

drugs charge had Blow CJ left honest and reasonable mistake with it.³³ In the Tasmanian Court of Criminal Appeal ('TASCCA'), Bell claimed that Blow CJ had erred by not doing so.

Brett J took the most liberal approach in the TASCCA. According to his Honour, the facts of the present case showed the injustice that can be caused by the rule that Blow CJ applied. The offence with which Bell had been charged is a very serious offence, punishable by up to 21 years' imprisonment.³⁴ The offence that Bell said he thought he was committing is a much less serious offence, punishable by up to four years' imprisonment.³⁵ Why should a person be convicted of a significantly more serious offence than that which s/he reasonably believed her or himself to be committing?³⁶ Is there not a mismatch between culpability and liability in such circumstances? Nevertheless, Brett J felt constrained by authority to dismiss the appeal.³⁷ As his Honour noted, in cases such as *Bergin*, 'Australian judges' have 'cited with approval' Brett J's contention in *Prince* that, for the accused to be able to rely on honest and reasonable mistake of fact, his or her mistake must be such as to render him or her guilty of no criminal wrongdoing.³⁸

Likewise, Martin AJ (with whom Pearce J agreed)³⁹ observed that 'the essential principle as stated by Fullagar J' in *Bergin* 'has not been overruled' and, in fact, 'was confirmed by the majority in *CTM*'.⁴⁰ Moreover, his Honour, unlike Brett J,⁴¹ thought that Blow CJ had been right to hold that the word 'excuse' in s 14 of the *Tasmanian Criminal Code* 'means excused from any criminal offence'.⁴² Martin AJ did seem to accept that it might be problematic to convict a person of a major offence when that person reasonably believed that s/he was committing a minor offence.⁴³ But, despite the 'significant disparity'⁴⁴ between the maximum penalties for the s 14 and s 26 offences, his Honour held that the Chief Justice had been right to treat the accused's asserted belief as being irrelevant to his guilt of the former crime.⁴⁵

On 5 June 2020, Bell and Gageler JJ granted Bell special leave to appeal to the High Court against his conviction for the s 14 offence. '[O]n one view', Bell J said, the appellant was 'seeking a somewhat modest result'⁴⁶ — a result that would

³³ Ibid [14] 557.

³⁴ *Misuse of Drugs Act* (n 21) s 14.

³⁵ Ibid s 26.

³⁶ *Bell (TASCCA)* (n 24) 561–2 [30]–[31], 563 [33], 564 [37] (Brett J). See also on this point Paul A Fairall and Malcolm Barrett, *Criminal Defences in Australia* (LexisNexis Butterworths, 5th ed, 2017) 70 [2.42].

³⁷ *Bell (TASCCA)* (n 24) 564 [37]–[38].

³⁸ Ibid 563 [33] quoting Fairall and Barrett (n 36) 70 [2.42].

³⁹ *Bell (TASCCA)* (n 24) 554 [1].

⁴⁰ Ibid 568 [56].

⁴¹ Ibid 562–3 [32].

⁴² Ibid 568 [57].

⁴³ Ibid 570 [68].

⁴⁴ Ibid 570 [69].

⁴⁵ Ibid 571 [70].

⁴⁶ Transcript of Proceedings, *Bell v Tasmania* [2020] HCATrans 77, 226–8 ('Transcript of Proceedings (2020)').

prevent ‘absolute liability [from] attach[ing] ... to an element of criminal liability, namely, the age of the recipient of the drug’.⁴⁷ In my view, this is the correct view. Insofar as criminal law principle is concerned, the step that Bell is asking the High Court to take is a small one — which, moreover (as argued below in this column), would expand on 20th century legal developments regarding criminal responsibility.

There is a complication, however. When *Bell (HCA)* came on for hearing on 3 February 2021 before Kiefel CJ, Gageler, Keane, Edelman and Steward JJ, various Justices seemed to think that the source of the ‘defence’ of honest and reasonable mistake of fact in Tasmania is not s 14 of the *Tasmanian Criminal Code*, but the common law.⁴⁸ On this view, which Steward J appeared to believe⁴⁹ was reflected in Tasmanian authority,⁵⁰ if the ‘statute constituting the offence’⁵¹ does not exclude honest and reasonable mistake expressly or by necessary implication,⁵² ‘the common law [relating to honest and reasonable mistake] comes into operation’.⁵³ This, then, raises the question of what the common law is. More particularly, it raises the question of whether the common law, as stated in *Bergin* and *CTM*, should be changed in the manner advocated by Bell. Indeed, the same question seemingly arises even if s 14 creates the ‘defence’, because, as Burbury CJ stated in *R v Martin*, ‘the content ... of mistake of fact as a defence recognised by the *Code* must ... be ascertained from the common law *as judicially determined from time to time*’.⁵⁴

Because of the importance of this question — that is, because, in this respect, the step that Bell is asking the Court to take is *not* a modest one — Kiefel CJ adjourned proceedings, to enable the State and Territory Attorneys-General to intervene should they wish to do so.⁵⁵

III Why the Appeal Should be Allowed

A Three 20th Century Developments

In the 20th century, the law concerning the common law ‘defence’ of honest and reasonable mistake of fact became more favourable to the accused. Indeed, one of these liberalising developments seems to have occurred in *Bergin* itself.

⁴⁷ Ibid 397–8.

⁴⁸ Transcript of Proceedings (2021) (n 17) 196–202, 206–8 (Kiefel CJ), 710–14 (Keane J), 143–159, 299–307 (Steward J).

⁴⁹ Ibid 299–307.

⁵⁰ See *Brown* (n 7) 55–6, 61 (Neasey J, Nettleford, Cox, Underwood and Wright JJ agreeing at 63).

⁵¹ *Tasmanian Criminal Code* (n 20) s 14.

⁵² *R v Martin* [1963] Tas SR 103, 149 (Neasey J) (‘*Martin*’).

⁵³ Transcript of Proceedings (2021) (n 17) 206–7 (Kiefel CJ). See also *Criminal Code Act 1924* (Tas) s 8.

⁵⁴ *Martin* (n 52) 110 (Burbury CJ) (emphasis added). See also at 111; *Brown* (n 7) 56. As we have seen, in *Bell (TASCCA)* (n 24) Brett J, who appeared to consider that s 14 is the source of honest and reasonable mistake in Tasmania (at 558 [16]), construed that section as he did primarily because of ‘the weight of [common law] ... authority’ (at 564 [37]) and despite his doubts as to the correctness of such a construction: at 562–3 [32].

⁵⁵ Transcript of Proceedings (2021) (n 17) 986–94.

The first noteworthy development is suggested by the inverted commas around the word ‘defence’ in the immediately prior paragraph.⁵⁶ Until the High Court’s decision in *He Kaw Teh v The Queen*,⁵⁷ it seemed that, where honest and reasonable mistake of fact applied and was raised by the accused, it was for the accused to prove on the balance of probabilities that s/he had the relevant exculpatory belief.⁵⁸ In *He Kaw Teh*, the High Court unanimously held that this approach was no longer justified. Once there is evidence of honest and reasonable mistake, their Honours held,⁵⁹ it is for ‘the prosecution to establish ... [the defendant’s] guilt’⁶⁰ by proving beyond reasonable doubt that s/he made no such mistake. And, in *R v Brown*, the TASCRA accepted that the same applied ‘to all crimes under the *Criminal Code* and to which the *Criminal Code* applies’.⁶¹ As Neasey J explained, because the ‘defence’ in Tasmania was ‘in essence the common law defence, the relevant onus of proof also fell to be determined according to the existing common law’.⁶²

Two other developments are of greater significance to Bell’s argument in the High Court.

We have seen that, in *Prince*, eight judges held that the accused’s honest and reasonable mistaken belief that Annie Phillips was 18 years old did not excuse him, because Prince had ‘knowingly done a wrongful act, viz. taking the girl away from the lawful possession of her father against his will’.⁶³ In *Bergin* however, as suggested above, the High Court seemed to accept the more liberal rule stated by Brett J. An accused would not be prevented from relying on honest and reasonable mistake of fact simply because, if his or her belief were accurate, s/he would still have been acting immorally. Rather, Fullagar J suggested that an accused would be acquitted on this basis if, however morally dubious his or her conduct was, s/he believed on reasonable grounds that s/he was committing ‘no offence’.⁶⁴ Indeed, as early as 1889, in *R v Tolson*,⁶⁵ some judges had indicated their support for Brett J’s rule — or even the rule for which Bell now contends in *Bell (HCA)*. For Stephen J (with whom Grantham J agreed), Brett J in *Prince* had established ‘unanswerably’ that implied in every English criminal charge was the principle that the accused would be excused if s/he had a reasonable belief that s/he was committing no criminal offence.⁶⁶ Elsewhere in his judgment, Stephen J expressed the principle even more broadly. ‘I think it may be laid down as a general rule’, his Honour said, ‘that an alleged offender is deemed to act under that state of facts which he in good

⁵⁶ See, eg. *CTM* (n 11) 446 [6] (Gleeson CJ, Gummow, Crennan and Kiefel JJ).

⁵⁷ *He Kaw Teh* (n 7).

⁵⁸ See, eg. *Reynhoudt* (n 11) 389 (Kitto J), 395–6 (Taylor J), 399–400 (Menzies J), 408, 410 (Owen J); *Martin* (n 52) 123 (Burbury CJ), 142–3 (Crawford J), 154–5 (Neasey J).

⁵⁹ *He Kaw Teh* (n 7) 534–5 (Gibbs CJ, Mason J agreeing at 546), 558–9 (Wilson J), 573–5 (Brennan J), 591–4 (Dawson J).

⁶⁰ *Woolmington v Director of Public Prosecutions* [1935] AC 462, 481.

⁶¹ *Brown* (n 7) 61.

⁶² *Ibid* 55.

⁶³ *Prince* (n 1) 179.

⁶⁴ *Bergin* (n 9) 262.

⁶⁵ *R v Tolson* (1889) 23 QBD 168 (‘*Tolson*’).

⁶⁶ *Ibid* 190.

faith and on reasonable grounds believed to exist when he did the act alleged to be an offence'.⁶⁷ As the Attorney-General of Queensland has noted, intervening in *Bell (HCA)*, s 24(1) of the *Queensland Criminal Code*⁶⁸ gives effect to this broader approach.⁶⁹ The Attorney-General has persuasively argued that, when drafting s 24, Sir Samuel Griffith was influenced by s 420 of the Draft Code of Criminal Law for England, one of whose drafters was Stephen J.⁷⁰

The other noteworthy development, most evident in the majority's approach in *Thomas v The King*,⁷¹ is a hostility to attempts to attach a culpability requirement only to some actus reus elements of particular offences.

In *Tolson*, the accused fell 'within the very words of the statute', which made it a felony for a person 'being married, [to] marry any other person during the life of the former husband or wife'.⁷² That said, a jury had found that, when she married for a second time, Mrs Tolson reasonably believed that her first husband was dead.⁷³ A majority of the Court for Crown Cases Reserved held that this belief excused Mrs Tolson. 'At common law', Cave J announced, 'an honest and reasonable belief in the existence of circumstances, which, if true, would make the act ... an innocent act has always been held to be a good defence.'⁷⁴ Yet, in *R v Wheat*, the Court of Criminal Appeal thought that Cave J had stated the principle 'too widely'.⁷⁵ That Court held that if the appellant had believed on reasonable grounds, though wrongly, that he was divorced at the time of his second marriage, he would still have been guilty of bigamy.⁷⁶ Mrs Tolson, Avory J stated, did not intend to marry during her husband's life.⁷⁷ But the person who remarries when reasonably believing her or himself to be divorced *does* intend to perform this act.⁷⁸

As Latham CJ noted in *Thomas*,⁷⁹ however, the act of bigamy, in fact, is marrying someone in circumstances where: (a) the accused is married; and (b) his or her former wife or husband is alive. If it is an excuse reasonably to believe that circumstance (b) does not exist, why should the position be different if the accused reasonably believes in the absence of circumstance (a)?⁸⁰ For, as Dixon J showed, if an absolute liability standard applied to *either* circumstance (a) or (b), some morally innocent actors would be convicted of a serious offence.⁸¹ The aversion to liability

⁶⁷ Ibid 188.

⁶⁸ *Criminal Code Act 1899* (Qld) sch 1 ('*Queensland Criminal Code*').

⁶⁹ See, eg, Attorney-General (Qld), 'Submissions for the Attorney-General for the State of Queensland (Intervening), Submission in *Bell v Tasmania*, Case No H2/2020, 27 April 2021, [17] ('A-G (Qld) Submission') quoting *Anderson v Nystrom* [1941] St R Qd 56, 70 (Philp J).
A-G (Qld) Submission (n 69) [27], [33]–[34].

⁷⁰ *Thomas* (n 19).

⁷¹ *Tolson* (n 65) 171 (Wills J).

⁷² Ibid 181 (Cave J).

⁷³ Ibid.

⁷⁴ *R v Wheat* (1921) 2 KB 119, 126.

⁷⁵ Ibid 125.

⁷⁶ Ibid.

⁷⁷ Ibid.

⁷⁸ Ibid.

⁷⁹ *Thomas* (n 19) 292.

⁸⁰ Ibid.

⁸¹ Ibid 302, 309–11.

without culpability, his Honour observed, ‘is deeply embedded in our criminal law’.⁸² It is submitted that the same aversion — which admittedly has been perceived more readily by some judges⁸³ than others⁸⁴ — should lead the High Court in *Bell (HCA)* to hold that Blow CJ misdirected the jury about the culpability requirement for the s 14 offence. That said, it is necessary to deal with two counterarguments.

B Two Arguments in Favour of Dismissing Bell’s Appeal

I noted above that, when granting Bell special leave to appeal, Bell J observed that, according to Blow CJ’s direction at trial, the ‘under the age of eighteen years’ element of the s 14 offence was an absolute liability element.⁸⁵ According to that direction, the Crown needed only to prove that Bell intentionally supplied the drug⁸⁶ to a person who was *in fact* under the age of 18. It must be conceded that there is an obvious difference between such an approach and that which Latham CJ and Dixon J condemned in *Thomas*.⁸⁷ Under Blow CJ’s approach, there is no danger of convicting a person who is morally innocent. Rather, a person who fully intended to commit a lesser crime is convicted of a more serious crime, the *actus reus* of which s/he unwittingly performed. This is justified, the Attorney-General of Tasmania submits, because once a person engages in criminal activity, s/he ‘run[s] the risk’ of committing a greater crime than s/he intended.⁸⁸

The Tasmanian Attorney-General here refers to some remarks of Brett J in *Prince*,⁸⁹ but not all of the examples with which his Lordship illustrates the principle just noted support the Attorney-General’s submission. Take, for instance, the person who ‘strikes with a dangerous weapon, with intent to do grievous bodily harm, and kills’.⁹⁰ In many jurisdictions, this person will be convicted of murder⁹¹ though s/he displays no subjective fault concerning the result (death) that s/he has caused. But s/he certainly displays objective culpability. S/he surely ought to have foreseen that death might result from his or her conduct. It follows that, whether such a person’s ‘change of normative position’ justifies his or her being held liable for murder,⁹² such a case is different from that of *Bell (HCA)*. In the latter case, if the accused

⁸² Ibid 300.

⁸³ See, eg, *Reynhoudt* (n 11) 387 (Dixon CJ), 389 (Kitto J); *He Kaw Teh* (n 7) 529–30 (Gibbs CJ), 583–4 (Brennan J), 590–1, 594 (Dawson J).

⁸⁴ See, eg, *Reynhoudt* (n 11) 394–5 (Taylor J), 402 (Menziez J), 405–6 (Owen J).

⁸⁵ Transcript of Proceedings (2020) (n 46) 30–40.

⁸⁶ See *Tasmanian Criminal Code* (n 20) s 13(1); *Vallance v The Queen* (1961) 108 CLR 56, 64 (Kitto J), 68–9 (Taylor J), 71–2 (Menziez J).

⁸⁷ As noted by Ashworth, who nevertheless disapproves of holding a person liable for a much more serious offence than s/he reasonably believed her or himself to be committing: Andrew Ashworth, ‘Should Strict Criminal Liability be Removed from All Imprisonable Offences?’ (2010) 45 *Irish Jurist* 1, 13–14.

⁸⁸ Attorney-General (Tas), ‘Submissions of the Attorney-General for the State of Tasmania (Intervening), Submission in *Bell v Tasmania*, Case No H2/2020, 27 April 2021, [17].

⁸⁹ Ibid citing *Prince* (n 1) 169–70.

⁹⁰ *Prince* (n 1) 169.

⁹¹ See, eg, *Crimes Act 1900* (NSW) s 18(1)(a).

⁹² See generally Andrew Ashworth, ‘A Change of Normative Position: Determining the Contours of Culpability in Criminal Law’ (2008) 11(2) *New Criminal Law Review* 232.

might have believed on reasonable grounds that the complainant was 20 years old, he displayed neither subjective nor objective blameworthiness. The supply of drugs *to a child* lay ‘outside the scope of foreseeable risk’.⁹³ Why should a person be held responsible for a crime that s/he reasonably believed her or himself not to be committing?⁹⁴ If s/he intended to commit some other crime,⁹⁵ that merely establishes that s/he should be held liable for that other crime.⁹⁶

Another argument might be used to defend Blow CJ’s approach in *Bell* (TASSC). During the hearing on 3 February, Edelman J said to counsel for Bell:

[O]ne of the examples that is given in ... it might be *Prince’s Case*, is a situation where a person is charged with an offence of sexual assault on a girl under the age of 10 ... and defends that with, hypothetically, a defence that he thought the girl was 11 or 12. You are not suggesting, are you, that that would suffice to establish an excuse?⁹⁷

Edelman J’s memory was accurate. In *Prince*, Blackburn J, with whom nine other judges concurred, noted that the Act in question made it a felony for a man to have carnal knowledge of a girl ‘under the age of ten years’, and a misdemeanour for him to have carnal knowledge of a girl ‘above the age of ten years, and under the age of twelve years’.⁹⁸ His Lordship then pointed out that, if honest and reasonable mistake were available as a defence to the former charge, the man who had carnal knowledge of a nine-year-old girl, reasonably believing her to be ten, would be guilty of neither the felony nor the misdemeanour. He would lack the mens rea for the felony. He would not have performed the misdemeanour’s actus reus. Parliament could not have intended to allow for so ‘monstrous’ a result, his Lordship thought.⁹⁹

This “knock-out” argument¹⁰⁰ seems not to assist the Crown in *Bell* (HCA). If the s 26 offence prohibited the supply of a controlled drug to ‘a person aged eighteen years or above’, and if honest and reasonable mistake were available to someone charged with the s 14 offence, a person who supplied a controlled drug to someone whom s/he might reasonably, but mistakenly, have believed was 18 or over would be guilty of no offence. But s 26 instead prohibits the supply of a controlled drug ‘to another person’. Therefore, if honest and reasonable mistake is a ‘defence’ to the s 14 charge, and if a person might reasonably have believed that s/he was supplying drugs to a person aged 18 or over, s/he would still clearly be guilty of the s 26 offence. Indeed, it could be argued that Blackburn J’s argument works both ways. By drafting ss 14 and 26 in the way it did, it might be said that the Tasmanian

⁹³ Ibid 252.

⁹⁴ Or, for an unforeseeable result. See, eg, New South Wales Law Reform Commission, *Complicity* (Report No 129, December 2010) 159–61 [5.79]–[5.83].

⁹⁵ See *Reynhoudt* (n 11) 400 (Menzies J).

⁹⁶ It is worth noting that, where the Crown must prove subjective fault in respect of all circumstance elements of an offence, its failure to prove such fault concerning one of those circumstances will cause the prosecution to fail. This is so even if the fault that the accused has displayed in respect of the other elements makes him or her guilty of a lesser offence. See, eg, *ibid* 387 (Dixon CJ).

⁹⁷ Transcript of Proceedings (2021) (n 17) 591–4, 598–600.

⁹⁸ *Prince* (n 1) 171.

⁹⁹ *Ibid*. See also *Tasmania v QRS* (2013) 22 Tas R 180.

¹⁰⁰ *Cross* (n 4) 542.

Parliament failed, by necessary implication, to exclude honest and reasonable mistake in relation to the former offence.

C *The Constitutional Consideration*

What about the argument that the High Court must be slow to depart from its earlier decisions and that, even if the *Bergin* rule is unjustified, the Court should exercise restraint? It is true that there were no dissenting reasons in *Bergin* and that, in *CTM*, six Justices accepted the correctness of the rule stated in that earlier case.¹⁰¹ This factor points towards restraint.¹⁰² But, while it might be difficult to argue that the *Bergin* rule has ‘led to considerable inconvenience’,¹⁰³ it is hard to see how it has ‘achieved ... [any] useful result’.¹⁰⁴ What is ‘useful’ about a rule that attaches liability to accused persons for crimes that they reasonably supposed themselves not to be committing?¹⁰⁵ Further, it is less easy than it was in a case such as *Miller v The Queen*¹⁰⁶ to say that the relevant rule has been ‘carefully worked out in a significant succession of cases’¹⁰⁷; and that rule has certainly not been acted on to the extent that the *Miller* rule had been.¹⁰⁸ Concerning the former of these considerations, it is noteworthy that in *Bergin* the offence that the respondent intended to commit (selling liquor outside lawful trading hours for a club)¹⁰⁹ was of comparable seriousness to the offence with which he was charged (selling liquor without a licence).¹¹⁰ Accordingly, the facts did not bring into focus the unjust consequences that can be caused by the rule stated in that case. And, as indicated above, in *CTM* the *Bergin* rule was not squarely at issue. Further, and returning to *Miller*, the injustice liable to result from any decision by the Court to follow *Bergin* seems less ‘abstract’¹¹¹ than that identified by the appellants in that case. The High Court has before it a man who might have been convicted of a much more serious offence than the one he reasonably thought himself to be committing.

¹⁰¹ *CTM* (n 11) 447 [8], 453–4 [27] (Gleeson CJ, Gummow, Crennan and Kiefel JJ), 491 [174] (Hayne J), 497 [199] (Heydon J).

¹⁰² See, eg, *John v Federal Commissioner of Taxation* (1989) 166 CLR 417, 438 (Mason CJ, Wilson, Dawson, Toohey and Gaudron JJ) (*‘John’*).

¹⁰³ *Ibid.* Though maybe the appellant in *Bell (HCA)* would disagree.

¹⁰⁴ *Ibid.*

¹⁰⁵ See Gageler J’s comments in *Magaming* about another established rule that facilitates penal severity: *Magaming v The Queen* (2013) 252 CLR 381, 408 [82].

¹⁰⁶ *Miller v The Queen* (2016) 259 CLR 380, 399–400 [39] (French CJ, Kiefel, Bell, Nettle and Gordon JJ), 418 [106]–[107] (Gageler J) (*‘Miller’*).

¹⁰⁷ *John* (n 102) 438 (Mason CJ, Wilson, Dawson, Toohey and Gaudron JJ).

¹⁰⁸ In fact, in some of the cases where the *Bergin* rule has been applied, it was probably inapplicable: see, eg, *R v Iannazzone* [1983] 1 VR 649, 655–6; *R v Dib* (2002) 134 A Crim R 329, 337 [35], 344 [76]. Cf *Miller* (n 106) 400 [39] (French CJ, Kiefel, Bell, Nettle and Gordon JJ).

¹⁰⁹ *Bergin* (n 9) 262.

¹¹⁰ *Ibid.* 255.

¹¹¹ *Miller* (n 106) 400 [39] (French CJ, Kiefel, Bell, Nettle and Gordon JJ).

IV Conclusion

Commenting on the majority's decision in *Tolson*, Dixon J said that '[i]t is difficult to see how, consistently with any humane or liberal system of law ... any other conclusion could be reached.'¹¹² And when re-reading some of his Honour's judgments, for the purposes of writing this column, I was struck once more by his abhorrence of guilt without blameworthiness.¹¹³ In this, Sir Owen Dixon was right. It is unknown whether, had his Honour sat in *Bergin*, Dixon CJ would have assented to the view stated there.¹¹⁴ But, whatever he would have held, the current High Court should allow the appeal in *Bell (HCA)*. If Bell's account is possibly true, he did act culpably. Nevertheless, his liability should match the culpability he displayed. He should not be convicted of a crime that he had good grounds for believing he was not committing.

¹¹² *Thomas* (n 19) 302.

¹¹³ See especially *ibid* 299–304, 309–11; *Proudman v Dayman* (1941) 67 CLR 536, 540 (Dixon J) ('*Proudman*'); *Reynhoudt* (n 11) 386–7 (Dixon CJ).

¹¹⁴ Sir Owen Dixon never directly considered the point. Cf *Proudman* (n 113) 540–1 (Dixon J). That said, in *Reynhoudt*, his Honour, referring to the offence of assaulting a police officer in the execution of his duty, said that 'it seems to me that the general doctrine that a guilty mind is needed is not satisfied ... by a mere reliance on the intent necessary to the assault independently of the additional elements of the crime': *Reynhoudt* (n 11) 387 (Dixon CJ). Cf *Prince* (n 1) 176.