

S 22 IGNORANCE OF LAW/HONEST CLAIM OF RIGHT

Essentially a pragmatic rule.

Keep the dichotomy separate in your mind.

Ignorance of the law affords an accused no excuse for an act or omission which would otherwise constitute an offence, unless knowledge of the law is an express element of the offence.

s22(1) reflects the notion that 'ignorance of the law is no excuse': *Iannella v French*.

- Mistaken as to whether or not law applies to X = mistake of law *Iannella v French*
- Mistake arising from interpretation of parameters of permit = mistake of law *Pusey v Wagner*
- Mistake as to effect of a traffic sign = mistake of law *West v Palmer*
- Invalid/incorrect information given by public servant = mistake of law *Ostrowski v Palmer*

Here, defence is raised by accused, satisfied on a balance of probabilities, then shifts to crown to rebut BRD.

UNLESS THERE IS: AN HONEST CLAIM OF RIGHT (relates to your legal relationship to something)

OFFENCE RELATING TO PROPERTY – ACT OR OMISSION DONE WITH RESPECT TO PROPERTY – EXERCISE OF HONEST CLAIM OF RIGHT – NO INTENT TO DEFRAUD

"Accused may be able to claim they were acting in the exercise of an honest claim of right under s 22"

Is honest claim of right an excuse or a defence?

Technically an excuse, a legal and evidentiary onus is borne by the defendant in raising some evidence of an event qualifying as an accident – *Woolmington v DPP*. The prosecution must negative the excuse beyond reasonable doubt to secure a conviction.

Has the accused committed an offence concerning property?

Broad view of what property is: *Walden v Hensler*

This inquiry relates to the statutory terms of the offence.

A person is not criminally responsible for an act done or omitted to be done by him with respect any property in the exercise of an honest claim of right and without intention to defraud: *Molina v Zaknich*; *Interim Advance Corporation Pty Ltd v Fazio*. What's claimed to be believed must negative an element of the offence – Deane J, *Walden v Hensler* (bush turkeys). *Walden* took broad view of applicable offences relating to property, rejected *Paskov* narrow view.

(NARROW VIEW IS: The offence must in essence be one where the accused has caused a person to be parted from their property or interfered with someone's right over or in

respect of property: *Pearce v Paskov* (underweight crayfish). Does not include offences merely 'affecting' property more generally: *Pearce v Paskov*)

eg. s 374 – stealing, defined s 371(2)(a) – 'intent to deprive'

Has the accused claimed an entitlement in or to the property subject of the charge?

Verify the property which the accused exercised a right over is in fact, the property to which the charge pertains. Eg. *R v Walsh* – killed another's cattle on his land. Had no relevant claim of right to the oxen themselves, thought he was exercising a right over his own land. S22 did not apply.

Did the accused believe they were themselves, or on behalf of a third party, entitled in some way to the property?

Subjective inquiry:

The accused's honest claim of right must be in fact but there is no requirement the belief is reasonable: *Molina v Zaknich*; *Clarkson v Aspinall*.

Accused is acting in an honest claim of right if she genuinely believes himself to be entitled to do what she is doing, even if though it may be unfounded in law or fact: *R v Pollard*; *Bernhard. Walden v Hensler*, found not to be a claim of right but in *Mueller v Vigilante* (man takes two indigenous boys crabbing) it was.

In summary:

- A. no requirement that the claim is reasonable
- B. claim must relate to the present facts – must be an assertion of an *existing* right: *R v Pollard*.
- C. belief does not need to be based in fact or law.

Is there any doubt that the accused held an honest and actual belief they were entitled to do as they did?

Identify succinctly the assertion the accused makes with respect to that property.

If relevant, has a permit or licence been issued leading the accused to form or influence their honestly held belief (means they have an honest claim of right)? Or did they believe they were not required to have a licence (no relevant claim)?

Olsen v Grain Sorghum Marketing Board; Ex parte Olsen [1962] Qd R 580.

How an accused's subjective understanding is characterised is therefore pivotal.

If the accused believed they could undertake activity without a licence where a licence is required by law, then there is a **no** s 22 claim.

However, if the accused either knew they were required to have a licence but believed that the terms of their particular licence permitted them to do what they did (*Interim Advance Corporation v Fazio* (debt collectors – s 22 applied) or that what they believed they were doing did not require a licence, they have a s22 claim of right: *Hollywood v City of*

Joondalup. To come within s 22 needs to be a claim 'in or to' property, not about the law [s22(1)]

If relevant: Is the offence a composite offence? Is so, can s 22 apply to one part of the offence and not the other?

Absent an intention to defraud...

NOT A POINT THE COURTS HAVE FOCUSED ON BUT JUST IN CASE:

The fact that dishonest means are used to obtain property does not include the possibility the person is acting with an honest claim of right: honest claim of right is attached to the belief in the entitlement and not the means by which the entitlement is obtained: *Nobel v Police; Harwood v SOWA* [2016]WASCA 8,23

Will be intent to defraud when:

- There is no claim at all; or
- There is a genuine claim which a man could prove if he adopted proper means but in respect of which, he uses documents which are not genuine; or
- Because he might have done a certain thing honestly it does not follow that he cannot be convicted if he uses false documents; the jury may well find an intent to defraud

"to defraud" = to deprive another of property by deceit (*Balcombe v de Simoni*)

Does it by unlawful means.

- Where collecting wife's wages armed with a knife, even though thought entitled to take money in that way (*Skivington*).
- To defraud is to deprive another of their property by deceit: *Balcombe v de Simoni*.

Differs from

- Unlawful means (even force) to obtain property. This may be made under an honest claim of right: *R v Jeffrey*
- If the offence contains an element of "intent to defraud", s 22 Code will not apply because the prosecution would have proved this element: ie. Stealing, s371(2)(a)

On the facts it was/wasn't known by [accused]...

What is the effect of s 22?

Full acquittal.