Singapore Journal of Legal Studies
[2004] 563–568

MISSTATED LAW: A MISSED OPPORTUNITY?

Ostrowski v. Palmer

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The High Court of Australia's decision in *Ostrowski v. Palmer*[1] raises significant questions about the respective roles, under the criminal law, of the mistake defence and the principle that ignorance of the law does not excuse. The High Court decided that a fisherman who believed that there was no prohibition against fishing in particular waters, because of what he was told by a public official, was unable to rely on the defence of mistake of fact. Three judgments were delivered in the High Court and each raises beguiling questions as to the rectitude of disallowing a defence, resting on ignorance or misstated law, in all cases. It may now be time to reconsider the approach to defences premised on a lack of awareness of the relevant law, particularly if such a misapprehension was induced by the relevant public authority.

Mr. Palmer, a professional fisherman, mistakenly believed he could fish in forbidden waters. Mr. Palmer's belief that he was permitted to fish in the prohibited waters was induced by the conduct of a public official. Mr. Palmer asked the government official for a copy of all the relevant fishing regulations which identified the waters in which fishing was prohibited. The public official purported to give Mr. Palmer a full set of regulations. The documents given to Mr. Palmer were, in fact, incomplete and did not identify all prohibited waters.

As a result, Mr. Palmer was caught, charged and convicted with fishing in the very waters he had believed were not restricted waters. The Full Court of the Supreme Court of Western Australia overturned Mr. Palmer's conviction on the basis of the mistake defence under section 24 of the *Criminal Code (Western Australia)*.[2] This section provides that a person who does an act under an honest and reasonable but mistaken belief in the existence of "any state of things" is not criminally responsible.

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1 *Ostrowski v. Palmer* [2004] H.C.A. 30 (judgment delivered 16 June 2004) [*Palmer*].

2 *Criminal Code Compilation Act 1913* (W.A.).

By comparison, section 76 of the *Penal Code*[3] of Singapore provides:

> Nothing is an offence which is done by a person who is, or who by reason of a mistake of fact and not by reason of a mistake of law in good faith believes himself to be, bound by the law to do it.

Section 79 of the *Penal Code* provides:

> Nothing is an offence which is done by any person who is justified by law, or who by reason of a mistake of fact and not by reason of a mistake of law in good faith believes himself to be justified by law, in doing it.

The High Court of Australia was unanimous in upholding the appeal, rejecting the decision of the Full Court of the Supreme Court of Western Australia. The High Court also considered section 22 of the *Criminal Code*, dealing with ignorance of the law.[4] McHugh J. said:

> Sections 22 and 24 should be construed with reference to the applicable common law principles relating to mistake of fact and mistake of law. In *Thomas v. The King*,[5] Dixon J noted that ss 22 and 24 (and the equivalent provisions in the other Code States) state 'with complete accuracy' the common law principle that a mistaken belief as to a matter of fact is a defence to a criminal or statutory offence, but a mistaken belief as to a matter of law is not a defence to such a charge.[6]

Gleeson C.J. and Kirby J. delivered a joint judgment. Their Honours viewed it as irrelevant to the question of guilt that the accused person was not aware whether the offence existed or whether the conduct constituted by those elements was an offence. The information provided to Mr. Palmer was not seen as an element of the offence created by the relevant regulation. The mistake made by the respondent was categorised as a mistake arising from the ignorance of law. Sections 22 and 24 was seen as rendering section 24 limited to mistake as to the existence of a state of things. In their Honours' view, section 24 would have provided the respondent with a defence, had Mr. Palmer, as a result of a navigational error, been under an honest and reasonable, but mistaken belief as to his location. In that event, it may have been that, if the real state of things had been as he believed, his conduct would not have contravened the relevant regulation, and he would have a defence under section 24.[7]

McHugh J. considered that the distinction between mistake of fact and mistake of law as "by no means a simple one".[8] His Honour closely considered the authorities dealing with charges of bigamy and concluded that Mr. Palmer's mistake was not a mistake of mixed fact and law, but rather a mistake of law. Mr. Palmer's earlier mistakes as to whether he had a complete set of fishing regulations and whether a regulation existed which prohibited fishing in the area explained how he came to form his mistaken view as where he could fish. These earlier mistakes were "nevertheless

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3 Cap. 224, 1985 Rev. Ed. Sing.
4 *Palmer*, *supra* note 1 at paras. 26-30.
5 *Thomas v. King* (1937) 59 C.L.R. 279.
6 *Palmer*, *supra* note 1 at para. 28.
7 *Palmer*, *ibid.* at para. 11.
8 *Palmer*, *ibid.* at para. 37.

preliminary to the commission of the offence".[9] His Honour accepted that it was ignorance of the law that caused him to make the mistake that he did. It was irrelevant to McHugh J., as it was to each of the other Justices, that Mr. Palmer's mistake was induced by the conduct of an employee of the public authority. Such a mistake did not, in their Honours' view, convert a mistake of law into a mistake of fact.

Callinan J. and Heydon J., delivering a joint judgment, were unrestrained in their condemnation of the conduct of the State in prosecuting Mr. Palmer as "mindless oppression".[10] However, their Honours also concluded that the mistake was one of law. Their Honours squarely considered that the task of the Court was to answer the question whether Mr. Palmer should be regarded mainly as having been ignorant of the law, an excuse which section 22 of the Code would deny him, or whether he had an honest and reasonable but mistaken belief in the existence of a state of things which, if they had existed, would have meant that he was not criminally responsible. In their Honours' view, the elements of the offence consisted of fishing in the embargoed waters, an activity which Mr. Palmer knew to be proscribed. This is a different mistake from, for example, a mistake as to the location of his vessel or his lobster pots. In these circumstances, Mr. Palmer was no less guilty than a motorist who has done everything reasonably possible to ascertain the speed limits on a stretch of roadway, but having failed to do so, in one or more instances, exceeds those speed limits because he is was unaware of them.[11]

Although sympathetic, their Honours stated that it would be a mockery of the criminal law if accused persons could rely on erroneous legal advice or their own often self-serving understanding of the law as an excuse for breaking it.

Each of the Justices considered the elements of the offence as the touchstone to determining whether a defence arose. It is striking that of the nine judicial officers who considered the matter, only two considered the matter as one raising a mistake of fact but all appeared to reach their decision with relative ease. This stands in stark contrast to the often expressed position that it is difficult to distinguish between mistakes of fact and mistakes of law.[12] P.H. Winfield[13] makes clear that mistake not only signifies a positive belief in the existence of something which does not exist but also may include "sheer ignorance of something relevant to the transaction in hand". Ignorance, especially, casts a shadow over any asserted clear blue lines of demarcation between mistakes of law and mistakes of fact and law. Even in *Palmer's* case, reference is made to the statement by Windeyer J. in *Iannella v. French*[14] that the distinction between mistakes of law and mistakes of fact is "by no means as easy as might first be expected".[15] Such a distinction between mistakes of fact and law has been removed in Australia, New Zealand and in England in civil cases dealing

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9 *Palmer*, *ibid.* at para. 51.
10 *Palmer*, *ibid.* at para. 70.
11 *Palmer*, *ibid.* at para. 90.
12 See *e.g*. *David Securities Pty. Ltd. and Others v. Commonwealth Bank of Australia* (1992) 109 A.L.R. 57 at para. 45, *Kleinwort Benson Ltd. v. Lincoln City Council* [1998] 3 W.L.R. 1095, *Iannella v. French* (1968) 119 C.L.R. 84 and *Griffin v. Marsh* (1994) 34 N.S.W.L.R. 104.
13 P.H Winfield, "Mistake of Law" (1943) 59 L.Q.R 327.
14 *Supra* note 12.
15 *Palmer*, *supra* note 1 at para. 37.

with restitution,[16] and by statute.[17] One rationale offered for the elimination of this distinction is the difficulty of determining which mistakes are factual. There is a perception of the inherent injustice of disallowing relief in circumstances where a causative mistake, even if one of law, led to a particular cause of action.

This inevitably leads to examination of why the distinction is maintained in relation to criminal law. In this regard, Gleeson C.J. and Kirby J. elevated the rule as relevant to the workings of British democracy.[18] At one level, it appears that expediency is the chief explanation for the rules. This, however, proves too much for within the qualifying concepts of "reasonable" and "honest", limiting the availability of a mistake of fact defence, there is probably sufficient control to limit the opening of any floodgates. Holmes, in *The Common Law*,[19] wrote that the true explanation of the rule is that justice to the individual is rightly outweighed by the larger interests on the other side of the scale. It has been remarked that this can be supported only the ground that "some innocent men should be condemned so that too many guilty men shall not escape".[20] This appears to challenge our conception of the true function of criminal law.

Another weakness in the approach adopted by Holmes is the recognition that, in England, the common law maxim, ignorance of the law is no excuse, may be held by a Court not to apply where lack of its publicity makes the law unknowable. An attempt to arrive at a result where Mr. Palmer was excused was made by Olsen A.U.J. in the Full Court of the Supreme Court of Western Australia. Olsen A.U.J. referred to a dictum of Smart J. in *Griffin v. Marsh*.[21] Smart J. stated:

> If any ultimate conclusion reached by an accused, including a conclusion of law, is vitiated or flawed by an earlier mistaken but honest and reasonable belief as to a relevant and important fact, usually the mistake should be regarded as one of fact.[22]

Such a principle found no favour with the High Court. McHugh J. dismissed such a proposition as novel and incapable of standing with the terms of section 22 of the *Criminal Code*, particularly in the context of strict liability offences. That this opportunity was missed is, it is submitted, in light of the above, unfortunate. It is doubly unfortunate when one considers three troubling difficulties with a strict and inflexible approach to the treatment of ignorance of law.

First, in circumstances where an accused has acted on advice of a government official responsible for the administration of a particular statute, it appears insensible, if the accused has done what he ought to have done by making enquiry, to prosecute so responsible an accused. As Waller and Williams write, "Why should he be required by the law to assume that responsible government officials do not know their own

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16 See *Lipkin Gorman (a firm) v. Karpnale Ltd.* [1992] 4 All E.R. 512 and *David Securities Pty. Ltd. and Others v. Commonwealth Bank of Australia* (1992) 109 A.L.R. 57.

17 See *Property Law Act 1969* (W.A.), ss. 124 and 125 and *Judicature Act 1908* (N.Z.) ss. 94A and 94B.

18 *Palmer*, *supra* note 1 at paras. 2–3.

19 Cited in Waller and Williams, *Criminal Law Text and* Cases, 6th ed. (Sydney: Butterworths, 1989) at para. 13.27.

20 *Ibid.* at para. 13.26.

21 *Supra* note 12.

22 *Ibid.* at para. 118.

business?"[23] Indeed, were any defence based upon certain Canadian cases,[24] ultimately rejected by both the Full Court of the Supreme Court of Western Australia and the High Court, along the lines that Palmer should have been acquitted on the basis that the mistake was induced by an official agency of the State, then, more than likely, the authority would run the defence that the "office lady" who presented the regulations to Mr. Palmer, could not be taken to know the true position. This, of course, works inequitably because regulatory authorities can be heard to plead their ignorance in circumstances where an accused cannot.

This appears to have made some sense to Denning L.J. in *Falmouth Boat Construction Co. v. Howell*[25] where it was stated that whenever government officers, in their dealing with a subject, take on themselves to assume authority in a matter with which the subject is concerned, he is entitled to rely on their having the authority which they assume. The House of Lords[26] did not accept a broader principle but accepted that in criminal proceedings, it would be a material factor that the actor had thus been misled, if knowledge is a necessary element of the offence. It may well be time to expand the circumstances where the law may take cognisance of how an actor was misled about the state of the law.

Second, it appears beyond argument that crimes are of two main types. There are certain rules of conduct, widely accepted, that prevent offences that all would except are wrong. Murder, rape, assault and other stealing offences are of this type. The other type of offence is different. It may involve a breach of a prohibition necessary for the welfare of the community. Liquor and licensing offences may be good examples of this. It would be difficult to create a clear blue line of separation but this does not validate disregard of the difference. It has been argued forcibly that while it easy to see why a person accused of murder cannot be heard to say "I did not know murder was prohibited", it becomes more difficult to see the reason why a lack of knowledge is not relevant where, in the context of the second type of crime, a person has legitimately made a mistake. An announcement by the Court of that mistake will, of itself, make public the offence and go towards ensuring the mistake is not repeated in future. In the announcement lies the means to close the floodgates.[27]

The third reason concerns a policy objective. Rigid rejection of any exculpatory effect for misstated law subdues the policy of promoting the finality of litigation. Failure to recognise any defence based upon ignorance or misstatement of law will mean that, in many instances, an aggrieved accused will look for a remedy, against the authority that misled him, outside the criminal law. This is exactly what has happened in the case of Mr. Palmer who is, apparently suing the State of Western Australia for compensation for the loss of his fishing business.[28]

Although different language is used, sections 22 and 24 of the West Australian *Criminal Code* and sections 76 and 79 the *Penal Code* are similar in effect. It is

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23 *Supra* note 19 at para. 13.20.

24 See *R v. MacDougall* (1982) 142 D.L.R. (3d) 216 and *R v. Jorgensen* [1995] 4 S.C.R. 55.

25 *Falmouth Boat Construction Co. v. Howell* [1950] 2 K.B. 16.

26 *Falmouth Boat Construction Co. v. Howell* [1951] A.C. 837.

27 *Supra* note 19 at paras. 13.23-13.24.

28 See transcript of ABC news program, Mick O'Donnell, "Conviction sinks honest fisherman's business", online: Australian Broadcasting Corporation <http://www.abc.net.au /7.30/content/2004/s1133513.htm>.

submitted that if presented with the same facts, it is likely that a Singaporean court would deliver judgment similar to their Honours' judgment in *Palmer*. This, of course, ignores whether this would be the best result.

It has been argued, in another context,[29] that mistakes of law need not and should not be seen as merely another kind of mistake. Accepting this, and accepting the policy objectives behind the rule that ignorance affords no excuse, it still seems insensitive and unwieldy for the criminal law to be incapable of relieving responses in all cases of mistakes as to law. More so, in cases of misstated law. To think that change is not possible would, at least, invest petty officials with pernicious power.

[29] J. M. Finnis, "The Fairy Tale's Moral" (1999) 115 L.Q.R 170.