

CHAPTER 9

DRUG OFFENCES

The structure of drug offences

9.1 This Chapter is concerned with ‘drugs’, meaning psychotropic substances that may affect the workings of the mind. Solomon Islands, Kiribati and Tuvalu seek to limit or control their production, distribution and possession. Also like most other jurisdictions, Solomon Islands, Kiribati and Tuvalu draw a distinction between substances perceived to be more and less dangerous, with separate schemes of legislative control. At the cost of some oversimplification, it can be said that:

- the more dangerous drugs are subject to a legislative scheme designed primarily to *prohibit* them, with criminal liability for production, distribution or possession;
- the less serious drugs are subject to a legislative scheme designed primarily to *regulate* them, with criminal liability confined to unauthorised production or distribution, and with simple possession not being an offence.

9.2 Drug offences fall outside the Penal Codes, being governed by special legislation.

- The Solomon Islands Dangerous Drugs Act, Kiribati Dangerous Drugs Ordinance and the Tuvalu Dangerous Drugs Act contain a common scheme for the prohibition of the production, distribution and possession of the more dangerous drugs. This will be the focus of this Chapter. The three statutes will be designated the ‘Dangerous Drugs Acts’ in this chapter.
- The Solomon Islands Pharmacy and Poisons Act, Kiribati Pharmacy and Poisons Ordinance and the Tuvalu Pharmacy and Poisons Act contain a common regulatory scheme for medicines and poisons, including those with psychotropic qualities. These three statutes will be designated the ‘Pharmacy and Poisons Acts’ in this chapter.
- The Solomon Islands Liquor Act, Kiribati Liquor Ordinance and Tuvalu Alcoholic Drink Act contain regulatory schemes for alcohol. These will be designated the ‘Liquor Acts’ in this chapter.

Offences under the Dangerous Drugs Acts

9.3 The substances covered by the Dangerous Drugs Acts are not identified generically. Instead, the Acts identify specific substances that are the subject of offences. In an overly complicated scheme, there are three categories of substances with some variations between their provisions:

- Plants: ‘raw opium, Indian hemp and coca leaf’, including resins obtained from Indian hemp: SI Part I; Ki/Tu Part II.
- ‘Prepared opium’, meaning products obtained by a series of special operations and designed for consumption: SI Part II; Ki/Tu Part III; see definition in SI/Ki/Tu s 2.
- ‘Medicinal opium, morphine, cocaine and certain other drugs’, plus other proclaimed substances in Solomon Islands or contained in Schedules in Kiribati and Tuvalu: SI Part III; Ki/Tu Part IV; SI/Ki/Tu s 13. The listed other drugs include ‘any extract or tincture of Indian hemp (SI) cannabis (Ki/Tu)’.

9.4 The offences under the Acts or regulations made under their authority include:

- importing or exporting any category of drug: SI/Ki/Tu ss 4(2), 11, 14;
- cultivating the prohibited plants: SI/Ki/Tu ss 7, 8(a);
- manufacturing prepared opium and other drugs: SI/Ki/Tu ss 13(1)(a).
- selling or possessing drugs in the first two categories – plants and prepared opium: SI/Ki/Tu ss 8(b), 12(1)(a).
- possessing drugs in the third category, ‘medicinal opium, morphine, cocaine and certain other drugs’, in a place other than an authorised store: SI/Ki/Tu s 20. In addition, the Minister is given power to make rules controlling activities that include manufacturing, selling, possessing and distributing: SI/Ki/Tu s 15(1). See, for example, the Kiribati Dangerous Drugs Rules 1980.

The penalty scheme of the Acts is blunt and severe. The offences under the Acts all carry liability to imprisonment for ten years on conviction in the High Court and six months on summary conviction plus a fine.

9.5 A distinctive feature of the scheme is the mixing of possession together with activities associated with production and distribution in the same offences. In many jurisdictions, there are separate offences for possession and for production and distribution, with the former carrying less severe penal liability than the latter. Of course, the mode of involvement in drugs activities can still be taken into account in the exercise of sentencing discretion.

9.6 The Dangerous Drugs Acts do not systematically include some exemptions which are becoming common in modern drugs legislation, exemptions related to: the medicinal use of drugs; the handling of drugs which have been seized by police officers; and the ‘controlled delivery’ of drugs for the purpose of apprehending offenders. In Solomon Islands, Kiribati and Tuvalu these matters are largely left to the exercise of prosecutorial discretion.

Offences under the Pharmacy and Poisons Acts and the Liquor Acts

9.7 The Pharmacy and Poisons Acts establish separate regulatory schemes for the sale of ‘medicines or drugs’ and ‘poisons’. Both regulatory schemes seek to channel sales of these substances through registered pharmacists or other authorised persons. Sales by other persons are unlawful: see SI ss 44, 52(2); Ki ss 45, 53(2); Tu ss 29, 37(2). Importation of poisons is also unlawful without authorisation: SI s 52(1); Ki s 53(1); Tu s 37(1). Prescribed penalties for the offences are typically fines or relatively short terms of imprisonment, measured in months rather than years. Similarly, the Liquor Acts seek to channel sales of alcohol through licence holders: see SI s 57; Ki s 57; Tu s 92.

9.8 Possession of a substance is generally not an offence under these Acts. There is, however, an exception for a person under the age of 21 in Kiribati or under 18 in Tuvalu: it is an offence for the young person to possess liquor in a licensed premises or a public place: Liquor Acts Ki s 68(2)(b); Tu s 99(3)(b).

9.9 For poisons, the Pharmacy and Poisons Acts take the same approach as the Dangerous Drugs Acts to defining the subject-matter of the offences: ‘poisons’ are specifically listed in a Schedule: see Pharmacy and Poisons Acts SI s 2, Sch. B; Ki/Tu s 2, Sch. 3. The ‘Poisons Lists’ include many substances that, also fall within the scope of the Dangerous Drugs Acts, including cannabis. The two control schemes therefore overlap in their application to selling drugs. A prosecutor has discretion over which offence to charge.

Possession

9.10 Possession is perhaps the most common drug offence. However, possession is a complex concept which is undefined in the Dangerous Drugs Acts. The central idea is that of control. To possess a thing is to be in control of it, in the sense of being able to direct its movement or usage. Possession therefore generally requires some act of control or at least the making of a claim to the drug: see *Lai v R* [1990] WAR 151. Knowledge of the existence of a drug is not, by itself, sufficient to establish possession.

9.11 Two forms of possession are recognised by the law: actual physical custody and what might be called ‘constructive custody’. The term ‘constructive custody’ is used here to refer to a situation where the thing is physically separate from the person but the person is still held to be in control of it. ‘Possession’, ‘be in possession of’ and ‘have in possession’ are defined in the Penal Codes SI/Ki/Tu s 4(a) to include—

not only having in one’s own personal possession, but also knowingly having anything in the actual possession or custody of any other person, or having

anything in any place (whether belonging to or occupied by oneself or not) for the use or benefit of oneself or of any other person;

Thus, a person possesses a drug that is left with another person or in some place for future use.

9.12 Joint possession by two or more persons is recognised. The Penal Codes SI/Ki/Tus 4(b) provide:

if there are two or more persons and any one or more of them with the knowledge and consent of the rest has or have anything in his or their custody or possession, it shall be deemed and taken to be in the custody and possession of each and all of them;

Thus, when a drug is left with another person for safekeeping, both persons are in possession of it.

9.13 In some cases, the quantity of the drug involved may be so minute that effective control cannot be exercised over it. For example, it may be a mere trace that cannot be seen by the naked eye and is detectable only by scientific means. The High Court of Australia has ruled that there is no possession in such cases. In *Williams v R* (1978) 140 CLR 591 at 600; 22 ALR 195 at 202, Gibbs and Mason JJ said that there must be:

possession of such a quantity as makes it reasonable to say as a matter of common sense and reality that it is the prohibited plant or drug of which the person is presently in possession.

This is so even if the person knew of the existence of the trace: see *R v Warnemünde* [1982] Qd R 49. However, there is no specific requirement for a measurable or useable quantity. Indeed, although it was suggested in *Williams*, above, that the drug would have to be discernible to the naked eye, this is probably best regarded only as a rule of thumb. Control itself remains the crucial issue.

Mental elements of drug offences

9.14 There is a basic mental element included in the physical concept of possession. To control something, the person must know of its existence: *Taber v R* [2005] HCA 59; (2005) 225 CLR 51 at [143]. There has been some dispute about the scope of this requirement. The preponderance of opinion, however, is to the effect that the concept of possession requires a person to know of the existence of the thing but not to know what it is: *Clare v R* [1994] 2 Qd R 619. Moreover, at least for possession without actual physical custody, there must be an intention to exercise control over it: see *State of Western Australia v R* (2007) 33 WAR 483; WASCA 42 at [26], [81].

These mental states are required to establish the conduct elements of possession. The conduct elements of selling or distributing are also generally thought to include knowing of the existence of the thing sold or distributed

9.15. In all these instances, the proscribed conduct cannot be sensibly described without at least implied reference to some mental element. Knowledge of the existence of the thing is not a supplementary requirement added to the conduct. It is an integral part of the conduct. The expression 'mental element in the *actus reus*' is sometimes used to describe this phenomenon.

9.16 Are there additional fault elements for offences under the Dangerous Drugs Acts? None are express and their implication is excluded by the scheme of criminal responsibility under Penal Codes SI/Ki/Tu s 9: **4.2-4.4**. In some other jurisdictions, there are requirements for knowledge that or recklessness as to whether a substance is an illicit drug. A mistake of fact about the character of a substance can therefore sometimes provide a defence whether or not the mistake is reasonable. However, in Solomon Islands, Kiribati and Tuvalu, a mistake about the character of a substance can only be raised by way of a defence of honest and reasonable mistake of fact under the Penal Codes s 10.

9.17 The Penal Codes SI/Ki/Tu s 10 provide:

A person who does or omits to do an act under an honest and reasonable, but mistaken, belief in the existence of any state of things is not criminally responsible for the act or omission to any greater extent than if the real state of things had been such as he believed to exist.

For an acquittal under this provision:

- The mistake must be not only honest but also objectively reasonable.
- The mistake must be such that, if the facts had been such as they were believed to be, no offence would be committed. A person is judged on the supposed facts. Thus, if a person believed they had one category of drugs when they actually had another, they would still be liable for an offence in relation to the other category.
- The mistake must involve a 'positive' belief and not just mere inadvertence or ignorance, no matter how reasonable that state of mind might be: see **4.25**. The defence is not available to a person who possesses a dangerous drug having no idea what the substance is but, quite reasonably, never contemplating the possibility that it might be something classified as a dangerous drug. It was argued in **4.27** that this is a curious requirement for which it is difficult to discern a rationale.

9.18 The defence of honest and reasonable mistake of fact can be available for offences under the Pharmacy and Poisons Acts as well as the Dangerous Drugs Acts. Both legislative schemes are subject to the same general provisions on criminal responsibility. This provides a point of contrast to jurisdictions which draw inspiration from contemporary principles of criminal responsibility at common law. Questions have often been raised about whether, under common law principles, drug offences are offences for which fault elements or mens rea should be imported and, if not, whether they should be treated as offences of strict liability or absolute liability. Most commonly the answer has been that offences akin to those in the Dangerous Drugs Acts are offences of mens rea whereas lesser drugs offences involve either strict liability or absolute liability. However, these questions do not arise under the principles of criminal responsibility incorporated in the Penal Codes: see **2.11**.

9.19 Thus, the Penal Codes SI/Ki/Tu s 10 can, in some limited circumstances, provide a defence when a person did not know the identity of a substance. However, there is no defence for a person who was aware of the identity of a substance but did not know that it was classified as a dangerous drug. Ignorance of the legal status of the substance is not a defence, because of the principle that ignorance of the law is no excuse: Penal Codes SI/Ki/Tu s 7.