

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. Vanuatu seeks to limit or control their production, distribution and possession. Also like most other jurisdictions, Vanuatu draws 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 Code, being governed by special legislation.

- The Dangerous Drugs Act contains a scheme for the prohibition of the importation, distribution and possession of the more dangerous drugs. This will be the focus of this Chapter.
- The Sale of Medicines (Control) Act contains a regulatory scheme for medicines and poisons, including those with psychotropic qualities.
- The Liquor Licensing Act contains a regulatory scheme for alcohol.

One of the reasons for this proliferation of legislation is the detail of the regulations respecting authorised distribution.

Offences under the Dangerous Drugs Act

9.3 The Dangerous Drugs Act s 2 identifies specific substances that are the subject of offences: 308 of them at the time of the 2006 Consolidation. The list extends to any ‘preparation, admixture, extract or other substances...including any proportion of any of the substances mentioned’. In addition, there are generic references to ‘any narcotic drug’ and ‘any psychotropic drug’ ‘as defined by the United Nations International Narcotic Control Board’. The Minister responsible for health can vary the list by regulation: s 6.

9.4 Penalties are not specified for the individual offences in the Act. Instead, there is a general provision providing that every offence in the Act is punishable by 'a fine not exceeding VT 100 million or to a term of imprisonment not exceeding 20 years or to both such and imprisonment'.

9.5 The major offence under the Act is the 'importation, sale, supply or possession in Vanuatu' of any of the specified substance and materials: s 2. Curiously, production of drugs is not mentioned in s 2. However, the cultivation of cannabis is a separate offence under s 4. Permitting premises to be used for smoking cannabis is also an offence: s 5. It is unclear why cannabis but not drugs such as heroin, cocaine, amphetamine and methamphetamine should be subject to these additional offences.

9.6 A distinctive feature of the scheme is the mixing of possession together with importation, sale and supply in the same offence. In many jurisdictions, there are separate offences for possession and for 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.

9.7 The Dangerous Drugs Act includes some exemptions which are becoming common in modern drugs legislation: exemptions related to the medicinal use of drugs and to the handling of drugs which have been seized by police or customs officers:

- Section 3 exempts reasonable amounts of preparations carried into Vanuatu for personal use if appropriately labelled and accompanied by a letter from a medical practitioner.
- Section 7 exempts certain substances prescribed or dispensed by qualified medical practitioners or veterinary surgeons
- Section 10 makes it lawful for police or customs officers to seize prohibited substances that are found under conditions contravening the Act.

However, there is as yet no exemption relating to the 'controlled delivery' of drugs for the purpose of apprehending offenders.

Offences under the Sale of Medicines (Control) Act and the Liquor Licensing Act

9.8 The Sale of Medicines (Control) Act establishes a regulatory scheme for the sale of 'medicines', seeking to channel sales of these substances through registered pharmacists or other authorised persons. The Minister responsible for health may make regulations regulating the sale of medicines or prohibiting their sale except on prescription of a medical or dental practitioner or veterinary surgeon: s 7. Similarly, the Liquor Licensing Act seeks to channel sales of alcohol through licence holders: ss 3-11.

9.9 Possession of a substance is generally not an offence under these Acts. There are, however, some offences under the Liquor Licensing Act relating to consumption. It is an offence to open a liquor container in an off-licence and, in Port Vila and Luganville, to consume liquor other on private property or in places with an appropriate licence: s 16. It is also an offence for a person under the age of 18 to procure or consume liquor: s 17.

9.10 'Medicine' is defined in The Sale of Medicines {Control} Act s 2:

In this Act, unless the context otherwise requires –

"medicine" means any substance which is referred to in the article itself, or in advertisements or documents of any kind in terms calculated to lead to the use of the substance for the prevention or treatment of any ailment, infirmity or injury afflicting the human body;

Medicines can include substances that also fall within the scope of the Dangerous Drugs Acts. The two control schemes can therefore overlap in their application to selling drugs. A prosecutor has discretion over which offence to charge.

Possession

9.11 Possession is perhaps the most common drugs offence. However, possession is a complex concept which is undefined in the Dangerous Drugs Act. 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. For example, 'physical control' is used as a synonym for possession in the definition of theft in the Penal Code s 122. 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.

9.12 Two forms of possession are recognised as a matter of ordinary language: 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. For example, a person possesses a drug that is left with another person or in some place for future use. Joint possession by two or more persons is also recognised. 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 Warnemunde* [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 drugs 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]. In *Public Prosecutor v O'Connor* [2008] VUSC 19, Tuohy J said:

...knowledge is an element of possession, the concept of possession in law, whether it is specifically stated or not. The word possession and the concept of possession in the criminal law does not mean simply that something is on your person, in your hand or in your bag. It also carries with it the concept that you know that that something is on your person, in your hand, in your bag or otherwise in your custody and control. Possession is custody and control with knowledge of the thing possessed.

There has been some dispute about the scope of this requirement for knowledge in the concept of possession. 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. This fits with ordinary language. A person can exert control over something despite being mistaken about what it is, for example believing that a powder is aspirin when it actually heroin. 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.

9.15 The conduct elements of selling and supplying are also generally thought to include knowing of the existence of the thing sold or distributed. 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 Act? None are express. The general provision of the Penal Code s 6 (2) might appear to require intention or subjective recklessness for a drugs offence. However, this would only apply to the physical conduct involved in a drugs offence. Cases where fault is in issue are more likely to involve a claim of ignorance that a particular substance was an illicit drug. In Vanuatu, 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 Code s 12.

A mistake of fact shall be a defence to a criminal charge if it consists of a genuine and reasonable belief in any fact or circumstance which, had it existed, would have rendered the conduct of the accused innocent.

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 type of drug when they actually had another, they would still be liable for an offence: see **4.39**.
- 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 **4.41**. 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 Chapter 4 that this is a curious requirement for which it is difficult to discern a rationale.

9.17 The defence of honest and reasonable mistake of fact can be available for offences under the Sale of Medicines (Control) Act as well as the Dangerous Drugs Act. 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, drugs 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 Code: see **2.11**.

9.18 Thus, the Penal Code s 12 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: Code s 11.