

# Dealing in Drugs [*Matters*]: Hints and Tips for Young **Users** [*of Courts*]



CPD presented by

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# Misuse of Drugs Act

- **Common Offences**

- Supply – broad definition
  - commercial – less than trafficable
  - to a child – to Indigenous community
- Cultivation and manufacture
- Possession
- Receive / Possess tainted property

- **Alternative Verdicts** – table in s9 MDA

- **Strictly indictable offences v those capable of being dealt with summarily**

- Back up charges (duplicity)
- Transfer of summary charges to Supreme Court for sentencing

# Schedules to the Misuse of Drugs Act

- Commonly dealt with Drugs
- Schedule 1
  - Amphetamines, cocaine, heroin, MDMA (ecstasy), ketamine
    - Watch out quantities! Commercial quantity of ketamine is 0.10 gram
- Schedule 2
  - Cannabis oil, cannabis plant material, cannabis plant

# Strictly indictable matters

- Tainted property offence – s8(1) MDA - 25 years max
  - NB: not a “specified offence” under s55 Sentencing Act – does not attract mandatory 70% NPP under Sentencing Act – *The Queen v Cumberland* [2019] NTCCA 13
  - 70% NPP for specified offences in effect 1 July 2016
  - This was conceded in Paul Kolaka’s appeal against sentence where sentence reduced from 6 years with NPP 4 years 3 to head sentence of 4 years 10 months with NPP 2 years 5 months

# s36A – Declared Drug Trafficker

- s36A(1): DPP may apply to Supreme Court for person to be declared drug trafficker
- s36A(3): court must declare a person to be a drug trafficker if:
  - (a) the person has been found guilty by the court of an offence referred to in subsection (6)
  - (b) subject to subsection (5), in the 10 years prior to the day on which the offence was committed (or the first day on which the offence was committed, as the case requires), the person has been found guilty:
    - (i) on 2 or more occasions of an offence corresponding to an offence referred to in subsection (6); or
    - (ii) on one occasion of 2 (or more) separate charges relating to separate offences of which 2 or more correspond to an offence or offences referred to in subsection (6).
- s36A(6): sets out offences relevant for the purposes of subsection (3)
- S22(2) – must be dealt with on Indictment
- Despite s22(1), a person who is charged with an offence referred to in s36A(6) and who could, if found guilty of the offence, be declared under section 36A to be a drug trafficker is **not to be tried summarily** for the offence.

# Presumption for Possession

- S40(c) MDA: proof that a dangerous drug or precursor was at the material time in or on a place of which the person was:
  - (i) the occupier; or
  - (ii) concerned in the management or control;
- is taken to be proof that the drug or precursor was then in the person's possession unless the person proves that the person then neither knew nor had reason to suspect that the drug or precursor was in or on that place.
- Evidential burden on D to prove no knowledge or reason to suspect

# Common Law Position re: Possession

- At common law, in order for conduct to constitute criminal possession, two conditions must be met:
  - D knowingly had either physical possession or control of an object to ***the exclusion of any other person*** (other than another person having joint possession of it), and
  - D must have ***intended to possess*** the object (including some knowledge of its true nature). Mere access to or knowledge of the presence of an object without a present intention to possess it is not criminal possession.
- *He Kaw The v R* (1985) 157 CLR 523
  - Accused got life imprisonment for strict liability offence under s233(1)(b) Customs Act (Cth) for importation of 2.78 kg of heroin. He claimed he was unaware of the drugs planted on him.
  - Held: Prosecution needed to establish an intent in matters of significant criminality unless the presumption was rebutted.

# R v Filippetti (1978) 13 A Crim R 335

- Appeal against conviction was allowed (NSW CCA) on the basis that there was **insufficient evidence** to enable a jury to conclude that a large quantity of **cannabis was in the appellant's exclusive physical control**, in circumstances where a number of other occupants of the house in which the appellant lived had free access and use of the lounge room where the cannabis was concealed under a chair cushion. Street CJ with whom Slattery and Maxwell JJ concurred, stated:
- “At the centre of the Crown case, indeed crucial to it, was the issue of possession on the part of the appellant of the Buddha sticks ... It was not of course in his physical custody, being concealed in a chair in this communal lounge room. It was accordingly necessary, in order to justify the factual basis upon which the statutory deeming of supply would proceed, to establish that the Buddha sticks were in the appellant's exclusive physical control ... The finding of the Buddha sticks in the chair in this lounge room where all six occupants of the house apparently had equally free access, and so far as the evidence goes in fact made equally free use, would not readily establish that there was exclusive physical control of these Buddha sticks in any one of the occupants. Ultimately the matter appears to come down to the question of whether the Crown had satisfactorily produced material that the jury could regard as negating possession on the part of the other occupant of the house ... the inescapable fact is that there was not enough evidence to enable the jury to rule out the possibility that these Buddha sticks in fact were in the possession of one of the other occupants ... nor was there enough evidence to enable the jury to conclude beyond reasonable doubt that the buddha sticks in the chair were in the exclusive physical control of the appellant.” 337-339

## Section 37(6) Presumption of Supply

- S37(6)(a) – If sentencing a person charged with **traffickable quantity**  
– it is presumed that D intended to **supply** the drugs
- S37(6)(b) - If sentencing a person charged with **commercial quantity**  
– it is presumed that D intended to **supply for commercial gain**
  
- D bears onus of proving that drugs were for personal use
- Ordinarily would require D to give evidence and be XX'ed
- Evidential burden to be discharged by D on balance of probabilities
- Prosecution bears onus of rebutting that evidence BRD

# Section 34 MDA - Forfeiture Provisions

- s34(3) Where a person is found guilty of an offence against this Act, the court by which the person is found guilty may, on application to it made on behalf of the Crown, order that any vehicle, vessel, aircraft, other conveyance, money, money's worth, valuable security, acknowledgement, note or other thing that relates to that offence be forfeited to the Crown.
- s34(6) A court empowered under this section to order the forfeiture of any vehicle, vessel, aircraft, other conveyance, money, money's worth, valuable security, acknowledgement, note or other thing may order that it be released or returned to a person referred to in subsection (5) or any other person.
- s36(13) For the purposes of this section, any vehicle, vessel, aircraft, other conveyance, money, money's worth, valuable security, acknowledgement, note or other thing shall be taken to relate to an offence if it:
  - (a) is an article referred to in section 120BA of the *Police Administration Act*;
  - (b) was used in the commission of an offence against this Act;
  - (c) was received or acquired directly or indirectly as or from the proceeds or part of the proceeds of the sale of a dangerous drug, precursor; or
  - (d) entitles a person, or is evidence that a person is entitled, to receive money or money's worth as the proceeds or part of the proceeds of the sale of a dangerous drug or precursor,
- whether or not the money, money's worth, valuable security, acknowledgement, note or other thing is or was at any time owned by or in the possession of the person found guilty.
- NOTE:
  - Forfeiture is discretionary – “may” (s34(3))
  - Argue that use of car / equipment predominantly for other legitimate purposes – eg car used predominantly for work
  - Argue whether order for forfeiture would be disproportionate to offending – eg work car used as one off for transport of drugs

# Section 37 Penalty Guidelines

- s 37(2) and (3) – mandatory minimum 28 days for certain offences
  - If sentence 7 years max or more OR less than 7 years but involves aggravating circumstances: court shall impose actual period of imprisonment of not less than 28 days
  - UNLESS court consider such penalty “should not be imposed” due to “particular circumstances” of the offence or offender
- Definitions
  - Aggravating circumstances
    - Second or subsequent offence
  - Commercial gain
  - Drug dependent person (invokes “particular circumstances” doing away with the mandatory 28 days)

## s37(2) - 'Particular Circumstances'

- Particular circumstances need to be identified before discretion is exercised not to sentence to mandatory minimum period of 28 days
- What constitutes “particular circumstances”?
  - Offender less than 21 years old – s37(2)
  - Offender is a “drug dependent person” – s37(5)
- *Midjumbani v Moore* [2009] NTSC 2, Riley J at [24]:
  - The expression “in the particular circumstances” is found in a similar provision in the Misuse of Drugs Act. The phrase was considered in the context of that Act in the judgment of Mildren J in *Duthie v Smith*;<sup>2</sup> which judgment was later followed by the Court of Criminal Appeal in *R v Day*.<sup>3</sup> The expression was there held to require the accused to establish **circumstances relative to the proscribed conduct constituting the offence sufficiently noteworthy or out of the ordinary to warrant a non-custodial sentence**. The circumstances do not need to be either rare or exceptional. In my view a similar approach should be adopted in relation to the provision now under consideration.

# “Particular Circumstances”

- Drug dependency:
  - If your client is drug dependent – should demonstrate to court that s/he is making attempts at rehabilitation, eg by referral to rehab:
    - Banyan House – generally no longer take ppl on bail
    - Forwaard
    - CAAPS – no longer take referrals from prisoners
    - Sunrise
    - Mission Australia – generally no longer take ppl on bail (but are know to make exceptions!
    - DASA (in Alice Springs)

# Sentencing: Roe Categories for Meth supply

## *The Queen v Roe* [2017] NTCCA 7

- Category 1 -
  - involves one off transaction by a single individual for commercial gain which is committed over a short and discrete period of time
  - Offender is relatively low positions in the drug supply chain
  - “starting point” for head sentence is 5 to 6 years
- Category 2
  - Involves conducting a drug trafficking business for a continuing period of time
  - higher up the level of the drug supply chain
  - May have small organisation in which they use other people as couriers and suppliers to drug users
  - “starting point” for head sentence is 7 to 10 years
- Category 3
  - drug trafficking syndicates of various sizes who are at relatively high levels in the drug supply chain
  - stand to make very large profits
  - Starting point of “approx. 50% the maximum sentence” of 13 years

# *Edmonds v R* [2019] NTCCA 01 at [25]:

Roe clarified

- Summary in Roe:
  - “does not operate, and is not intended to operate, as a ‘guideline judgment’
  - “operates as a broad categorisation of the dispositions made in those cases which were subject to review”
- “penalties referred to are indicative starting points before the application of any reduction to take account of a plea of guilty and remorse”
- “in each of those categories the penalty imposed may be lower (or higher) having regard to the particular subjective circumstances of the offender”
  - “However, the application of subjective factors cannot result in an outcome which is disproportionate to the crime ... the sentence cannot be less than the objective gravity of the offence requires.”
- objective circumstances of some cases may not fall comfortably or precisely within one or other of the categories

# Case Scenario Discussion

