

## Answers to self-test questions

### Chapter 12

#### 1. What is the meaning of 'possession' under s.5(2), Misuse of Drugs Act 1971?

'Possession' includes 'any thing subject to [the defendant's] control which is in the custody of another': s.37(3). In *Warner v Metropolitan Police Commissioner* [1969] 2 AC 256, the House of Lords held that knowledge is an essential element of possession because a person cannot be in possession of something if he is unaware that it exists. Lord Pearce stated that: '...the term "possession" is satisfied by a knowledge only of the existence of the thing itself and not its qualities and that ignorance or mistake as to its qualities will not excuse' (at 305). Where the drugs are in a container which is in the defendant's possession, the prosecution must prove that the defendant knew that he was in possession of the case containing the drug (i.e., proof of possession of the container) and that he knew that the case contained something (i.e., proof of possession of the contents). It does not matter that the defendant did not know that the case contained controlled drugs. See 12.1.1 for further information.

#### 2. What is a 'controlled drug' for the purposes of the Misuse of Drugs Act 1971?

According to s.2, Misuse of Drugs Act 1971, a 'controlled drug' is a drug on the list in Schedule 2 of the Act or in a Temporary Class Drug Order. Schedule 2 of the Act provides a list of controlled drugs. These are divided into three classes, A, B and C, in accordance with the harmful and/or dangerous nature of the drug. Class A drugs are the most dangerous drugs, include cocaine, methadone, opium, morphine, magic mushrooms, methylamphetamine ('crystal meth') and LSD. Class B drugs include cannabis, cannabis resin, amphetamine, barbiturates, ketamine, methylphenidate (or 'ritalin') and codeine. Class C drugs are less dangerous and include ketamine, diazepam, temazepam, and khat. A drug may be made the subject of a Temporary Class Drug Order by the Secretary of State in accordance with s.2A, Misuse of Drugs Act 1971. See 12.1.2 for further information.

#### 3. Explain when the defences under s.5(4), Misuse of Drugs Act 1971 apply.

Section 5(4) of the Misuse of Drugs Act 1971 provides two defences that only apply to the offence under s.5(2) (possession of a controlled drug). These defences apply where the defendant took possession of the drug, knowing or suspecting it to be a controlled drug, and:

- His purpose in doing so was to prevent someone else from committing an offence in connection with that drug, and as soon as possible after taking possession of it he took all such steps as were reasonably open to him to destroy the drug or to deliver it into the custody of someone lawfully entitled

to take custody of it (s.5(4)(a)), or

- His purpose was to deliver the drug into the custody of a person lawfully entitled to take custody of it, and as soon as possible after taking possession of it he took all such steps as were reasonably open to him to deliver it into the custody of such a person (s.5(4)(b)).

See 12.1.3.1.

#### **4. Who bears the burden of proof where the defence under s.28 is raised?**

In *R v Lambert* [2001] 2 WLR 211, the House of Lords held that the defences under s.28 only place an evidential burden on the defendant, as opposed to the legal burden. The reasoning for this decision was to ensure that s.28 is compatible with the presumption of innocence under article 6.2 of the European Convention on Human Rights. Therefore, the defendant bears the evidential burden only, but the prosecution bears the legal burden to disprove the defence. See 12.1.3.1 for further information.

#### **5. Explain the meaning of ‘produce’ for the purposes of s.4(2), Misuse of Drugs Act 1971.**

Section 37(1) partially defines ‘produce’ as ‘producing it by manufacture, cultivation or any other method’. It has been held that stripping the leaves from a cannabis plant, discarding the parts which were not usable and putting together those parts which were also constitutes production under s.8 by ‘any other method’: *R v Harris*; *R v Cox* [1996] 1 Cr App R 369. See 12.3.1.

#### **6. Identify the elements of the offences under s.4(3)(b) and (c), Misuse of Drugs Act 1971.**

Section 4(3) provides that it is an offence to supply or offer to supply a controlled drug to another, or to be concerned in the supplying of such a drug to another, or to be concerned in the making to another of an offer to supply such a drug. Under s.4(3)(b) and (c), the prosecution must prove that the defendant either:

- was concerned in supplying such a drug to another person (s.4(3)(b)), or
- was concerned in making an offer to supply such a drug to another person (s.4(3)(c)).

The leading authority on the elements that need to be proved for a conviction under s.4(3)(b) or (c) is *R v Hughes* (1985) 81 Cr App R 344. Robert Goff LJ held (at 348) that for such an offence to be committed, the prosecution must prove:

- (1) the supply of a drug to another, or the making of an offer to supply a drug,
- (2) participation by the defendant in an enterprise involving such supply, and
- (3) knowledge by the defendant of the nature of the enterprise, i.e., that it involved supply or the offer to supply of a drug.

See 12.3.2.

## **7. What was a 'legal high' and how has this area been reformed by the law?**

A 'legal high' is a psychoactive drug which does not fall within the list of 'controlled drugs' under the Misuse of Drugs Act 1971. These substances mimic the effects of some controlled drugs. The Psychoactive Substances Act 2016 made it an offence to produce, supply, offer to supply, possess with intent to supply, import or export psychoactive substances. The Act introduced a ban on any substance 'capable of producing a psychoactive effect': s.2(1)(a). It specifically excludes from its application substances such as food, caffeine, alcohol, medicines and nicotine (Schedule 1). See 12.5.