Chapter 16

Misuse of Drugs Act Offences

16.1 **Introduction**

The Misuse of Drugs Act 1971 (MDA) contains the main offences involving controlled drugs. The Act specifies in Schedule 2 the drugs which are subject to control. These are divided into three classes. The lists under each class are lengthy and include medicinal drugs as well as those drugs associated with addiction and drug abuse: Class A includes cocaine, crack, Ecstasy, heroin, LSD, “Magic Mushrooms” and opium; Class B includes amphetamine, cannabis, cannabis resin and codeine; Class C includes anabolic steroids, benzphetamine, and pemoline. The maximum sentences available for the various offences under the MDA vary according to the class of drug involved, Class A being the most serious. Applying the principle in *Courtie* [1984] AC 463 (see 3.3 *ante*), this means that each provision creates separate offences in respect of each class of drug; thus there are three offences of supplying a controlled drug under each paragraph of s.4(3) or of possession under s.5(2). A number of the offences under the MDA declare an activity unlawful unless it is authorised by regulations made under s.7. The current regulations are to be found in the Misuse of Drugs Regulations 2001. They enable, in particular, doctors, dentists, veterinary surgeons and pharmacists when acting in that capacity to possess and supply controlled drugs within defined circumstances.

Section 2 of the MDA has been amended by s.151 of the Police Reform and Social Responsibility Act 2011 by inserting a new s.2A and 2B to allow for temporary class drug orders to enable a rapid response to the development of new and potentially harmful substances. Substances and products that are made the subject of a Temporary Class Drug Order are treated as 'controlled drugs' and the penalties for Class B drugs apply. The Misuse of Drugs Act 1971 (Temporary Class Drug) Order 2012 (SI 2012 No. 980) came into force on 5 April 2012 listing substances subject to temporary control.

16.2 **Unlawful possession offences**

Section 5 MDA provides:

1) Subject to any regulations under section 7 of this Act for the time being in force, it shall not be lawful for a person to have a controlled drug in his possession.
2) Subject to section 28 of this Act and to subsection (4) below, it is an offence for a person to have a controlled drug in his possession in contravention of subsection (1) above.

The maximum penalty for unlawful possession when tried on indictment is seven years' imprisonment (Class A), five years (Class B) and two years (Class C).

16.2.1 **Possession**

Like many criminal statutes, the MDA fails to define a key concept upon which liability hinges. Section 37(3) provides that for the purposes of the Act "the things which a person has in his possession shall be taken to include anything subject to his control which is in

the custody of another". This falls a long way short of clearly specifying what constitutes possession. In *Warner v Metropolitan Police Commissioner* [1969] 2 AC 256 (where the issue was the meaning of "possession" under s.1(1) of the Drugs (Prevention of Misuse) Act 1964), the House of Lords held that the offence of possession was an absolute offence. The suggestion was that once possession of the controlled drug was established, no further mental element was required. **Possession itself, however, involves both physical and mental elements** (see *Lambert* [2001] UKHL 37, per Lord Hope). The mental element is necessary to distinguish possession from mere physical custody of an object. **What is necessary is that D has custody or control of the thing which is a controlled drug and that he knows he has it** albeit that he may not know what it is. In *Warner*, D picked up two boxes thinking that they contained perfume when, in fact, they contained drugs. The House of Lords held that as D possessed the container knowing it had contents, he possessed the items in the container. Lord Pearce stated (at p. 305):

> I think 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. This would comply with the general understanding of the word 'possess'. Though I reasonably believe the tablets which I possess to be aspirin, yet if they turn out to be heroin I am in possession of heroin tablets. This would be so, I think, even if I believed them to be sweets.

This approach was affirmed by the Court of Appeal in *McNamara* (1988) 87 Cr App R 246, for the purposes of 'possession' under the MDA and further confirmed in *Lambert*. In the latter case, D picked up a duffel bag at a railway station which was found to contain 2 kilograms of cocaine. He denied possession of the drugs seeking to rely on s.28 MDA that

he did not know or suspect, or have reason to suspect, the nature of the contents of the bag (see 16.5 *post*). Lord Slynn of Hadley stated (at para 16):

> This means in a case like the present that the prosecution must prove that the accused had a bag with something in it in his custody or control; and that the something in the bag was a controlled drug. It is not necessary for the prosecution to prove that the accused knew that the thing was a controlled drug let alone a particular controlled drug. The defendant may then seek to establish one of the defences provided in section 5(4) or section 28 of the 1971 Act.

Lord Hope of Craighead stated (at para 61):

> The physical element involves proof that the thing is in the custody of the defendant or subject to his control. The mental element involves proof of knowledge that the thing exists and that it is in his possession. Proof of knowledge that the thing is an article of a particular kind, quality or description is not required. It is not necessary for the prosecution to prove that the defendant knew that the thing was a controlled drug which the law makes it an offence to possess. I observe that Mr Owen [counsel for the defendant] did not submit that it was necessary for the prosecution to prove that the defendant was aware that the thing was a class A, B or C drug, as the case may be, although the class into which the drug falls will usually be relevant to any sentence he may receive.

What is required, therefore, is that there be a thing which is a controlled drug and there be awareness on the part of D that he has control of the thing whether or not he knows what it is.

It is not necessary that the quantity of the drug should be usable; but it must be a sufficient quantity to enable the court to find as a matter of common sense that it amounted to something – and if it was **visible, tangible and measurable** it was certainly something (see *Boyesen* [1982] AC 768). In *Marriott* [1971] 1 All ER 595, D was not in possession of cannabis resin where it was on a penknife and only detectable by a forensic scientist, D being unaware of any substance on the knife. In *Searle v Randolph* [1972] Crim LR 779, it was enough for D to pick up a cigarette containing cannabis and put it in his pocket, for him to be held to possess cannabis even though his belief was that it contained only tobacco.

D may be in joint possession with another, for example, where D and E pool their money and E purchases drugs for them both to use even though D is arrested before he gets his hands on any of the drugs; what is required is that each person has the right to say what should be done with the drugs (see *Strong* (1989) *The Times*, 26 January 1990). But mere presence in a place where drugs were, even with knowledge that they are there, is not sufficient as knowledge on its own does not equate with possession (see *Searle* [1971] Crim LR 592; *Strong*; *Bland* (1987) 151 JP 857). Likewise, a person does not possess something of which he is unaware even though it is found on his person; for example, where a drug is slipped into D's pocket without his knowledge (see *Warner* and *McNamara*). But, as an exception to this, where D orders drugs which are delivered through the post, he will be in possession of them upon their delivery even though they may be delivered when he is elsewhere or asleep (see *Peaston* (1978) 69 Cr App R 203).

A person remains in possession of a drug even though he puts it somewhere and forgets about it (*Martindale* [1986] 1 WLR 1042).

16.2.2 **Defence under s.5(4)**

Section 5(4) provides a defence specifically to the possession offence in s.5(2):

1) In any proceedings for an offence under subsection (2) above in which it is proved that the accused had a controlled drug in his possession, it shall be a defence for him to prove –

   (a) that, knowing or suspecting it to be a controlled drug, he took possession of it for the purpose of preventing another from committing or continuing to commit an offence in connection with that drug and that 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 a person lawfully entitled to take custody of it; or

   (b) that, knowing or suspecting it to be a controlled drug, he took possession of it for the purpose of delivering it into the custody of a person lawfully entitled to take custody of it and that 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.

These defences do not prejudice any other defence open to D (s.5(6)).

In the case of either defence, an intention to destroy the drug or deliver it to another is not sufficient to raise the defence; what must be proved is that reasonable steps were taken to do so. In *Murphy* [2003] 1 WLR 422 it was held that burying cannabis with the result that the forces of nature might eventually destroy the drugs, was not sufficient to bring D within s.5(4)(a) as it was for him to show that he had taken all such steps as were reasonably open to him to destroy the drug, and the acts of destruction had to be his. By analogy with *Lambert* (see 16.5 *post*) the burden of proof on D is assumed to be merely an evidential burden.

16.2.3 **Possession with intent to supply**

Section 5(3) provides:

> Subject to section 28 of this Act, it is an offence for a person to have a controlled drug in his possession, whether lawfully or not, with intent to supply it to another in contravention of section 4(1) of this Act.

Section 4(1) MDA (15.3 *post*) prohibits the production or supply of a controlled drug subject to regulations under s.7 MDA. The maximum penalty for possession with intent to supply when tried on indictment is life imprisonment (Class A) and fourteen years' imprisonment (Class B and Class C). The s.5(3) offence is one of **ulterior intent** (see 3.2.4 *ante*). 'Intent to supply' means an intent on the part of the possessor of the drugs to supply; an intention that the drug should be supplied by another person does not suffice (see *Greenfield* (1983) 78 Cr App R 179). Likewise, where two people are in joint possession, they could only be convicted of a joint venture to supply where both had an

intention to supply; mere knowledge on the part of one that the other intended to supply is not sufficient (see *Downes* [1984] Crim LR 552). Of course D can be convicted as a secondary party if he knows his co-possessor intends to supply the drug and he intentionally assists or encourages him to possess with that intent.

As with the possession offence under s.5(2), all that is required for the s.5(3) offence is that the prosecution prove that D had a controlled drug in his possession with intent to supply the substance which was in his possession; a mistake as to the nature of that substance is irrelevant (see *Leeson* [2000] 1 Cr App R 233). In *Leeson* D was convicted of possession of cocaine (Class A) with intent to supply. On appeal, he argued unsuccessfully in his defence that his conviction was unsafe because he believed the drug was amphetamine (Class B). the Court of Appeal held all that was required by s.5(3) was for the Crown to prove possession of a controlled drug together with the intention to supply, it was not necessary to prove possession of a particular controlled drug notwithstanding that a specific drug had been named on the charge.

For the defence under s.28 see 16.5 *post*.

In *Taylor* [2002] 1 Cr App R 37, D, a Rastafarian, was found in possession of a large amount of cannabis which he claimed he intended to supply to others for religious purposes. The prosecution were prepared to concede that this was his purpose but were not prepared to concede that a conviction would involve a breach of his rights under Articles 8 (right to respect for private life) or 9 (right to freedom of religion) under the European Convention of Human Rights. The trial judge ruled that the ECHR was engaged

but that the limitations on cannabis supply were necessary and proportionate for the public safety and for the protection of health. He concluded that the MDA fulfilled the United Kingdom's obligations under The Single Convention on Narcotic Drugs 1961 and the United Nation's Convention against illicit traffic in narcotic drugs and psychotropic substances adopted in 1988. Following this ruling, D pleaded guilty and appealed. The Court of Appeal upheld the trial judge's ruling additionally doubting whether the answer would be any different if the prosecution had been for simple possession under s.5(2).

Taylor was followed in *Aziz* [2012] EWCA Crim 1063, [2012] Crim LR 801 where D, a qualified alternative treatment practitioner, was convicted of producing and supplying a Class A drug. D served clients a brew he produced called ayahuasca which has hallucinogenic properties. It contains dimethyltryptamine (DMT) which is a Class A controlled drug. Ayahuasca has its origins with an Amazon Rainforest religious sect who use it in some of their ceremonies. At trial D sought to argue that his use of the potion was to provide clients with enlightenment and thus was a religious activity and that s.28 MDA should be read down in reliance on art.9 ECHR. The trial judge rejected this argument and D applied for leave to appeal his conviction. The Court of Appeal were similarly unimpressed and refused leave to appeal as art.9 is a qualified right, art.9(2) stating that the freedom to manifest one's religion or beliefs is subject to "such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety for the protection of public order, health or morals…". The Court regarded the prohibition on the possession and supply of Class A drugs as being clearly necessary for the interests of public safety, public order and health, and the provision to which D was subject was prescribed by law, namely the MDA.

The Drugs Act 2005 by section 2 amended section 5 MDA so as to insert new subsections (4A) to (4C). That section was never brought into force and has since been repealed (by the Policing and Crime Act 2009, schedule 8(13)). Had the section been brought into force, a significant procedural change would have been effected. If it had been proved that D, charged with possession with intent to supply, was in possession of an amount of a controlled drug exceeding an amount to be prescribed by regulations, D would have been assumed to have had an intent to supply unless evidence was adduced sufficient to raise an issue he may not have had such intent. That would have effectively created a rebuttable presumption of intent to supply where the amount of the drug possessed exceeds a certain level.

16.3 **Supplying or offering to supply a controlled drug**

Section 4 MDA provides:

> (1) Subject to any regulations under section 7 of this Act for the time being in force, in shall not be lawful for a person –
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> (a) to produce a controlled drug; or
>
> (b) to supply or offer to supply a controlled drug to another.
>
> …
>
> (3) Subject to section 28 of this Act, it is an offence for a person –
>
> (a) to supply or offer to supply, a controlled drug to another in contravention of subsection 1 above; or
>
> (b) to be concerned in the supplying of such a drug to another in

contravention of that subsection; or

(c) to be concerned in the making to another in contravention of that subsection of an offer to supply such a drug.

There is no offence under s.4(3) if the conduct is authorised under regulations made under s.7. The offences under s.4(3) are also subject to the defence provided by s.28 (see 16.5 *post*). The maximum penalty for s.4(3) offences when tried on indictment is life imprisonment (Class A) and fourteen years' imprisonment (Class B and Class C). The Drugs Act 2005 inserted a new s.4A into the MDA which specifies an aggravating feature for sentencing purposes of supply of a controlled drug. If D is aged 18 or over and either (i) the offence was committed on or in the vicinity of school premises at a time when they are in use by children under 18 (or an hour before or after that time), or (ii) D used a courier who was under 18 to either deliver the controlled drug to a third person or to deliver 'a drug related consideration' to himself or a third person (*viz* the payment which D receives from the recipient of the drug or which D uses to pay his supplier), the court must treat this fact as an aggravating feature of the offence and must state in open court that the offence is aggravated in this way.

16.3.1 **Supply**

Section 37(1) provides that 'supplying' includes distributing. Thus, where D by arrangement purchases drugs for himself and E, while each are in possession of the drugs from the outset because of their agreement, D will nonetheless be guilty of supply when he provides E with his share (see *Buckley* (1979) 69 Cr App R 371 and *Denslow* [1998] Crim LR 566). The usual case, where D passes custody and control of a controlled

drug to another, presents no difficulty (see *Mills* [1963] QB 522). Similarly, passing for example, a cannabis reefer from one person to another so that each can take a puff amounts to supply (see *Moore* [1979] Crim LR 789).

Question

If D passes a package of drugs to C for safekeeping and, subsequently, C returns the package to D, is there one or two acts of supply or none?

In *Maginnis* [1987] AC 303, the House of Lords drew a distinction between the "custodier" and the "depositor". Lord Keith of Kinkel, giving a speech with which three other members of the House of Lords agreed, stated (at p.309):

> The word 'supply', in its ordinary natural meaning, conveys the idea of furnishing or providing to another something which is wanted or required in order to meet the wants or requirements of that other. It connotes more than the mere transfer of physical control of some chattel or object from one person to another. No one would ordinarily say that to hand over something to a mere custodier was to supply him with it. The additional concept is that of enabling the recipient to apply the thing handed over to purposes for which he desires or has a duty to apply it.

In these circumstances the custodier, C, would be liable to conviction for the s.4(3)(a) offence on returning the package to D. While in possession of the package C would also be liable to conviction for the s.5(3) offence of possession with intent to supply. D's deposit of the package with C, however, confers no benefit upon C and does not amount to a supply (see also *Dempsey* (1985) 82 Cr App R 291). Lord Keith explained C's liability

to conviction on the basis that D, being originally in unlawful possession of the drugs, has no right to require the return of the drugs package to him by C. He stated:

> Indeed it is the duty of the custodier not to hand them back but to destroy them or to deliver them to a police officer so that they may be destroyed. The custodier in choosing to return the drugs to the depositor does something which he is not only not obliged to do, but which he has a duty not to do.

Thus, a supply takes place only if the transfer of drugs from one person to the other is for the purposes of the recipient. This is so regardless of the motives of the person making the transfer; in *X* [1994] Crim LR 827 there was a supply even though D claimed that he was a police informant and had passed the drugs to R so that he could sell them on to an undercover officer and be arrested.

16.3.2 **Offering to Supply**

An offer to supply may be by words or conduct and whether or not they constitute an offer is a question of fact for the tribunal of fact (*Prior* [2004] Crim LR 849). The offence is, in effect, akin to an inchoate offence as there need be no supply. The offence is complete on the offer being made even though the thing offered is not a controlled drug or even if D does not have in his possession a controlled drug or even intend to carry out his offer (see *Goodard* [1992] Crim LR 588; *Gill* (1993) 97 Cr App R 215; and *Showers* [1995] Crim LR 400). Once the offer has been made the offence is committed even if D purports to withdraw the offer (*Prior*). Where an offer is not genuine, and the offeree knows this (as where he is an undercover police officer and aware that D does not have any drugs to

supply), there is still an offence unless the offer is so obviously a joke that it cannot be regarded as an offer in any real sense (see *Kray*, unreported, 10 November 1998). When determining whether or not there has been an offer, it is not helpful to refer to the principles of contract law on 'offer and acceptance' (*Dhillon* [2000] Crim LR 760).

16.3.3 **Being concerned in the supply of, or the making of an offer to supply, a controlled drug**

A person may be concerned in the supply of a controlled drug or in the making of an offer to supply a controlled drug. What is required is:

a) either the supply of a controlled drug to another or the making of an offer to supply a controlled drug;
b) participation by D in the enterprise involving either the supply or offer to supply; and
c) knowledge on the part of D of the nature of the enterprise, i.e. that it involved supply of a controlled drug or an offer to supply such. (see *Hughes* (1985) 81 Cr App R 344.)

The approach of the courts to s.4(3)(c) is to regard it as a wide offence. That catches people who may be at some distance from the actual making of the offer, reflecting the fact that persons at the top of the supply chain, the brains and organisers, may be quite a bit removed from those nearer the end users (see *Blake* (1978) 68 Cr App R 1). The person who constitutes "another" for the purposes of s.4(3)(b) and (c) cannot be someone charged in the same count, but it can be someone charged in other counts in the same

indictment again reflecting the desire to catch participants within the same supply chain (see *Adepoju* [1988] Crim LR 378).

In *Coker* [2019] EWCA Crim 420, the Court of Appeal held that a jury direction on an offence under the Misuse of Drugs Act 1971 s.4(3)(b) which suggested that there needed to be proof that there had either been a supply of a class A drug, or an offer to supply it, was impermissible as it risked the accused being convicted of a separate offence under s.4(3)(c).

16.4 **Production of a controlled drug**

Section 4(2) MDA provides:

> (2) Subject to section 28 of this Act, it is an offence for a person –
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> (a) to produce a controlled drug in contravention of subsection (1); or
>
> (b) to be concerned in the production of such a drug in contravention of that subsection by another.

There is no offence under s.4(2) if the conduct is authorised under regulations made under s.7. The offences under s.4(2) are also subject to the defence provided by s.28 (see 16.5 *post*). The maximum penalty for s.4(2) offences when tried on indictment is life imprisonment (Class A) and fourteen years' imprisonment (Class B and Class C).

Section 37(1) defines “produce” to mean “producing it by manufacture, cultivation or any other method”. “Any other method” includes, for example, the preparation of cannabis plants by discarding the unusable parts and putting together those parts that are usable (see *Harris* [1996] 1 Cr App R 369); and the conversion of one controlled drug, cocaine hydrochloride into another controlled drug, free base cocaine (“crack”) which is a chemically and physically different substance (see *Russell* (1991) 94 Cr App R 351). “To be concerned in the production” requires D to take an identifiable role in the production which is not satisfied where, for example, D simply permits others who were producing the drugs to use his kitchen (see *Farr* [1982] Crim LR 745). But this decision should be seen as narrowly confined to its facts and should not preclude D being convicted as a secondary party assisting or encouraging the commission of the offence by the principals.

16.5 **Defences**

Section 28 MDA provides:

> (1) This section applies to offences under any of the following provisions of this Act, that is to say section 4(2) and (3), section 5(2) and (3), section 6(2) and section 9.
>
> (2) Subject to subsection (3) below, in any proceedings for an offence to which this section applies it shall be a defence for the accused to prove that he neither knew of nor suspected nor had reason to suspect the existence of some fact alleged by the prosecution which it is necessary for the prosecution to prove if he is to be convicted of the offence charged.

(3) Where in any proceedings for an offence to which this section applies it is necessary, if the accused is to be convicted of the offence charged, for the prosecution to prove that some substance or product involved in the alleged offence was the controlled drug which the prosecution alleges it to have been, and it is proved that the substance or product in question was that controlled drug, the accused –

(a) shall not be acquitted of the offence charged by reason only of proving that he neither knew nor suspected nor had reason to suspect that the substance or product in question was the particular controlled drug alleged; but

(b) shall be acquitted thereof –

(i) if he proves that he neither believed nor suspected nor had reason to suspect that the substance or product in question was a controlled drug; or

(ii) if he proves that he believed the substance or product in question to be a controlled drug, or a controlled drug of a description, such that, if it had in fact been that controlled drug or a controlled drug of that description, he would not at the material time have been committing any offence to which this section applies.

(4) Nothing in this section shall prejudice any defence which it is open to a person charged with an offence to which this section applies to raise apart from this section.

As subsection (4) makes clear, general defences, such as duress, remain unaffected. There is no defence of medical necessity, however, where D is in possession of, is cultivating or is supplying cannabis in order relieve pain (see *Quayle* [2005] 2 Cr App R 34; *Altham* [2006] 2 Cr App R 8). A defence of medical necessity, if it existed, would enable D to conduct otherwise unlawful activities without medical diagnosis or prescription which would conflict with the purpose and effect of the legislative scheme which includes the regulations under s.7.

The Misuse of Drugs (Amendments) (Cannabis and Licence Fees) (England, Wales and Scotland) Regulations 2018 has made some cannabis-based products available to be prescribed for medicinal use. The Regulations apply only to cannabis-based product "for medicinal use in humans", which the Explanatory Memorandum describes as "a preparation or other product, other than Sativex [a cannabis-based medicine licensed for the treatment of multiple sclerosis related spasticity], which:

a) is or contains cannabis, cannabis resin, cannabinol, or a cannabinol derivative (not being Dronabinol or its stereoisomers);

b) is produced for medicinal use in humans; and

c) is a medicinal product or a substance or preparation for use as an ingredient of, or in the production of a medicinal product."

(For more information, see the Explanatory Memorandum to the 2018 Regulations: http://www.legislation.gov.uk/uksi/2018/1055/pdfs/uksiem_20181055_en.pdf).

Section 28 comes into play after the prosecution have proved all the elements of the offence which they must prove in order to obtain a conviction under the relevant provisions noted in s.28(1). Subsection 2 provides a defence for D to prove that "he neither knew of nor suspected nor had reason to suspect the existence of some fact" which the prosecution have to prove to establish guilt of the offence charged. In *Lambert* [2001] UKHL 37 the House of Lords held that the burden of proof imposed under s.28 is not that of proof on the balance of probabilities as this would be to place a legal burden on D which would be contrary to Article 6 ECHR. Their Lordships avoided a declaration of incompatibility by interpreting s.28 so as to avoid conflict and holding that the burden on D was simply an evidential burden.

Where, as in *McNamarra* (1988) 87 Cr App R 246, D is in possession of a box which contains cannabis resin and he claims that he believed the box contained videos, he is not saying that he did not believe the substance to be cannabis resin but that he did not believe there was cannabis resin there. If, in addition, he gives evidence that he neither suspected nor had reason to suspect that a controlled drug was in the box, he would be raising the s.28(2) defence (the Court of Appeal in *McNamarra* mistakenly believed he would be raising the s.28(3) defence: see *Salmon v HM Advocate* [1998] Scot HC 12). The question whether D had 'no reason to suspect' is an objective and not a subjective matter, and voluntary intoxication on the part of D must be ignored (see *Young* [1984] 2 All ER 164). Section 28 does not apply to offences of conspiracy (see *McGowan* [1990] Crim LR 399), nor does it apply to an offence of offering to supply a controlled drug where the offer is made by words (see *Mitchell* [1992] Crim LR 723).

Where D's claim is that he was mistaken as to the actual controlled drug, for example, thinking a box contained anabolic steroids tablets when it actually contained Ecstasy tablets, he is precluded by s.28(3)(a) from raising a defence. Where his claim relates to the nature of the substance and is, for example, that he thought the tablets were aspirin (which are not controlled) and they turn out to be Ecstasy, he is raising the s.28(3)(b)(i) defence. If D is, for example, a doctor or pharmacist who is entitled under regulations made under s.7 MDA to possess certain controlled drugs in his professional capacity, and he claims he believed the tablets were Valium (whose generic name is diazepam which is a Class C drug) and that he possessed them in his professional capacity, he would be raising the s.28(3)(b)(ii) defence. Where, however, D simply denies any knowledge of the box or its contents, he is not raising any defence under s.28 (see *Salmon v HM Advocate*). Where D claims that he knew that the contents of the box were Ecstasy but did not know that Ecstasy was a controlled drug, he is not raising a s.28 defence but is claiming ignorance of law which is no defence (see 3.6.2.2 *ante*).

16.6 **Occupiers and those concerned in management of premises**

Section 8 MDA provides:

> A person commits an offence if, being the occupier or concerned in the management of any premises, he knowingly permits or suffers any of the following activities to take place on those premises, that is to say –
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> (a) producing or attempting to produce a controlled drug in contravention of section 4(1) of this Act;

(b) supplying or attempting to supply a controlled drug to another in contravention of section 4(1) of this Act, or offering to supply a controlled drug to another in contravention of section 4(1);

(c) preparing opium for smoking;

(d) smoking cannabis, cannabis resin or prepared opium.

The maximum penalty for s.8 offences when tried on indictment is fourteen years' imprisonment in respect of Class A, B and C drugs.

The prohibited activity has to take place *on* the premises D occupies or manages. In *McGee* [2012] EWCA Crim 613 a police search of D's home uncovered drugs (cocaine and heroin) and drugs paraphernalia (wraps, cutting agent and a press) that would be used for the preparation of drugs for supply. The items were found in D's son's bedroom, the utility room and a garden shed. There was ample evidence from which a jury could properly infer that D's son, a heroin addict, was engaged in the supply of drugs. The prosecution focused on the issue of knowledge and the judge directed the jury that the issue for them was whether D knowingly permitted the supply of drugs, knowledge for these purposes including "turning a blind eye" to her son's activities. D appealed on the basis that there had been no proof that any actual supply of drugs had taken place *on* the premises. The Court of Appeal, applying *Auguste* [2003] EWCA Crim 3329, allowed the appeal and quashed the conviction stating (at para 9):

> We accept that there can be no doubt … that with drugs of this quantity there was an obvious intention to supply them to third parties. It is impossible to suggest otherwise. However, that does not establish the element of this offence. It is

> necessary for the supply actually to take place on the premises. The section does not say "from the premises". Counsel conceded that had the house been burnt down together with all the drugs and the drugs paraphernalia, it could not possibly be suggested that any drugs had been supplied to anyone merely because they had been brought into the premises, stored and packaged with that object in mind. It may well be that the son did indeed pass drugs to third parties on the premises, but the fact is that there was no evidence of that before the jury.

16.6.1 **Meaning of 'occupier'**

The term 'occupier' should be interpreted in a commonsense way avoiding an overly narrow or legalistic approach (*Tao* [1977] QB 141). In *Tao* the Court said that this could be determined by asking:

> Who, on the facts of the particular case, cold fairly be said to be in occupation of the premises in question so as to have the requisite degree of control over those premises to exclude from them those who might otherwise intend to carry on those forbidden activities… [and] who can fairly be said to be "the occupier" for the purpose of [section 8].

Consequently "the occupier" is not limited to persons who are tenants or who have some other legal estate in the premises. In *Tao* a student who had a study bedroom in a college hostel was held to be "the occupier" as his contractual licence gave him sufficient exclusivity of possession whether or not he could exclude the college authorities. This was confirmed in *Read v DPP* (1997 unreported). In *Coid* [1998] Crim LR 199, D was the

cohabitee of the tenant and lived with her most of the time. He was held to have sufficient control over the premises to be an occupier. This leaves the decisions in *Mogford* (1970) 63 Cr App R 168 and *Campbell* [1981] Crim LR 595 open to doubt. In the former sisters were found not to be occupiers when they allowed cannabis to be smoked in their parents house when the parents were away. In the latter C, who lived with his mother, was not an occupier when he similarly held a party when she was away.

16.6.2 **Meaning of 'concerned in the management of premises'**

A person manages premises where he runs, organises and plans the use of the premises (see *Josephs* (1977) 65 Cr App R 253), but he must be involved in more than menial or routine duties (see *Abbott v Smith* [1964] 2 QB 662). A person may "manage" premises even though he has no lawful right or title to be on the premises. Thus, for example, the organiser of a rave who takes over an empty warehouse, without the consent of the owner, to put on a rave would be the manager of the premises and liable to conviction if he permitted Ecstasy to be supplied to those attending the rave.

16.6.3 **Meaning of 'knowingly permits or suffers'**

The word 'knowingly' is superfluous as to permit or suffer something to take place requires knowledge as was decided by the House of Lords in *Sweet v Parsley* [1970] AC 132 (4.3.2.1 *ante*) when considering the meaning of 'permits' in the precursor to this offence (see *Thomas* (1976) 63 Cr App R 65). Indeed, 'permits' and 'suffers' appear to mean the same thing. What is required is knowledge that the relevant activity is taking place and an unwillingness to prevent it. 'Knowledge' may be actual, but wilful blindness, in closing

one's eyes to the obvious, will suffice (*Thomas*). Proof of knowledge of the precise nature of the drug in question is not necessary (see *Bett* [1999] 1 WLR 2109). An unwillingness to prevent the activity may be inferred from a failure to take reasonable steps which were readily available to prevent it, for which purpose the test is objective and D's belief that the steps were reasonable is irrelevant (*Brock* [2001] 1 WLR 1159). The Court of Appeal in *Bradbury* [1996] Crim LR 808, in a confused judgment, suggested that acquiescence in an activity is not the same as permitting it suggesting that assistance or encouragement was required. It is difficult to reconcile this decision with *Thomas* and *Brock* and Professor Smith's commentary on *Bradbury* suggests acquiescence is not different to permitting.

Further Reading

M. Gibson, 'Rastafari and Cannabis: Framing a Criminal Law Exemption' [2010] Ecc LJ 324.

P. Case, 'The NICE guideline on medicinal cannabis: keeping Pandora's box shut tight?' (2020) 28(2) Med L Rev, 401-411