POSSESSION OF A CONTROLLED SUBSTANCE FOR THE PURPOSE OF TRAFFICKING UNDER S.5(2) OF THE CDSA: ELEMENTS OF THE OFFENCE

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June 2015

Introduction

The offence of possession of a controlled substance for the purpose of trafficking is set out in subsection 5(2) of the *Controlled Drugs and Substances Act*, S.C. 1996, c.19 (the "CDSA"), which reads:

> (2) No person shall, for the purpose of trafficking, possess a substance included in Schedule I, II, III or IV.

The definition of "traffic" is contained in section 2(1) of the CDSA, which provides:

> "traffic" means, in respect of a substance included in any of Schedules I to IV,
> (a) to sell, administer, give, transfer, transport, send or deliver the substance,
> (b) to sell an authorization to obtain the substance, or
> (c) to offer to do anything mentioned in paragraph (a) or (b),
> otherwise than under the authority of the regulations.

There are four elements to the offence of possession for the purpose of trafficking:

1. That the accused was in possession of a substance.
2. That the substance was a prohibited substance under the *CDSA*.
3. That the accused knew the nature of the substance in question.
4. That the accused had possession of the substance for the purpose of trafficking.[1]

This offence is somewhat unique in that it encompasses both a complete (possession) and incomplete (trafficking) offence. In this regard, the offence necessarily encompasses the included offence of simple possession.[2] Where the Crown has failed to prove the offence of possession for the purpose of trafficking, it is an error of law for the trial judge to acquit without considering whether the evidence establishes the included offence of simple possession.[3]

The first three elements of the offence (possession, the nature of the substance, and knowledge of the nature of the substance) have been discussed in detail in the memoranda on "Possession of a Controlled Substance" and "Trafficking of a Controlled Substance". As such, the remainder of this memorandum

[1] The Honourable Mr. Justice David Watts, *Watts Manual of Criminal Jury Instructions*, 2d ed. (Toronto: Carswell, 2015) at p. 1107 at p. 1115
[2] *R. v. Natarelli* (2000), 239 O.A.C. 375 (C.A.).
[3] *R. v. Schritt* (2013), 106 W.C.B. (2d) 424, [2013] M.J. No. 128 (C.A.), cited in Bruce A. MacFarlane, Q.C., Robert J. Frater, and Chantal Proulx, *Drug Offences in Canada,* 3d ed. (Toronto: Thomson Reuters, 2014) at para 6.1735 at p.6-47

will focus on the fourth element – that the accused had the substance in his possession *for the purpose of* trafficking.

Actus Reus of the Offence

The *actus reus* of the offence is the mere possession of the controlled substance. As per the discussion of possession in the memorandum on "Possession of a Controlled Substance contrary to section 4(1) of the CDSA," this may take the form of physical possession, constructive possession, or joint possession. It is also important to note that the *actus reus* is made out regardless of the quantity of the drug held.

Mens Rea of the Offence – Intention

The *mens rea* of the offence is twofold: 1) the accused's knowledge of the drugs and 2) the accused's intent in possessing the drugs. The focus in this memorandum is on the latter element. As intent is a subjective state of mind, this must be discerned by reference to external facts and reasonable inferences. For a discussion on proof of the accused's state of mind by means of circumstantial evidence, see the memorandum on "Possession of a Controlled Substance" at p.4-5 and memorandum on "Trafficking" at p.8.

The intention to traffic need not exist at the moment the accused possessed the drugs, but may be formed at any time after s/he came into their possession.[4]

The following factors may be considered in determining whether the accused possessed the drugs *for the purpose* of trafficking.

Quantity of Drugs

The most common factor from which an inference may be drawn that the accused possessed drugs for the purpose of trafficking them is the quantity of drugs.[5] Quantity may be measured in terms of weight, value,[6] or purity.[7]

While possession of a small amount of narcotics may be consistent with possession for personal use and therefore unlikely to attract liability for this offence, possession of a large quantity of drugs will give rise to a rebuttable presumption that the accused possessed the drugs for the purpose of trafficking them. For example, where the quantity is so large as to constitute an unusually long supply (even for a heavy user), and where evidence establishes that the risk of police detection or theft would ordinarily deter

[4] *R. v. Whalen* (1974), 17 C.C.C. (2d) 162 (Nfld. C.A.) cited in Watts Manual of Criminal Jury Instructions at p. 1123
[5] MacFarlane *et al* at para. 6.160 at p.6-4, citing a long line of authorities in support of this proposition
[6] See *R, v. Flore*, 2013 BCPC 398 at paras 87-89
[7] MacFarlane *et al* at para 6.160 at p.6-4, citing a long line of authorities in support of this proposition

users from keeping such large quantities on hand, with the typical pattern being smaller purchasers, this may raise a rebuttable presumption that the large quantity seized was in the accused's possession for the purpose of trafficking.[8]

It is important to note, however, that the quantity of the drug is not conclusive of an intention to traffic. Depending on the circumstances and the evidence, an accused may be guilty of the offence even where s/he possesses a small amount of narcotics consistent with possession for personal use.[9]

Where the accused is in possession of a large quantity of drugs destined for *joint* consumers (e.g., himself and his friends), the accused will nonetheless be guilty of possession for the purpose of trafficking, regardless of ownership over the drugs. However, this would not apply in a situation where s/he is apprehended while in the presence of the other consumers – in which case each of them would be liable to a charge of joint possession of a controlled substance.[10]

In all cases, the trier of fact must look to circumstantial evidence to consider whether the accused had the drugs in his possession for personal use or for the purpose of trafficking.[11] In this regard, it may be necessary to consider the usage level of the accused – as a heavy user could reasonably be expected to possess a larger amount of drugs for personal use than a lighter, infrequent, or non-user. Alternatively, the trier of fact may consider evidence of what amount users in the community could be expected to consume or have in their possession on a regular basis.

Such information is often lead by expert evidence,[12] although it is important to note that expert evidence based on anecdotal experience may be given little weight and/or excluded altogether.[13] Further, where the expert evidence indicates that the quantity found in the accused's possession is equally consistent with possession for personal use as with possession for the purpose of trafficking, the trier of fact should be invited to convict on the lesser included offence of simple possession.[14]

The accused's mistaken belief as to the quantity of the drug delivered does not detract from his/her purpose of possessing it for the purpose of trafficking.[15] Thus, where an accused believes s/he is obtaining a large quantity of drugs (sufficient to support an inference that s/he was obtaining those drugs for the purpose of trafficking) but in actuality received a small quantity consistent with personal use, the *mens rea* of the offence may nonetheless be made out).[16]

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[8] *R. v. Wilcox*, 2014 BCCA 65 at paras 50-52

[9] *R. v. Chan* (2003), 18 C.R. (6th) 322, 178 C.C.C. (3d) 269 (Ont. C.A.) leave to appeal refused to S.C.C. (2004), 180 C.C.C. (3d) vi. (S.C.C.)

[10] *R. v. Young* (1971), 2 C.C.C. (2d) 560 (B.C.C.A.) and *R. v. O'Connor* (1975), 23 C.C.C. (2d) 110 (B.C.C.A.) and R v. Gardiner (1987), 35 C.C.C. (3d) 461 (Ont. C.A.) - all cited in MacFarlane et al at pp. 6.32-5 – 6-32.8

[11] *R. v. Tetreault*, 2008 BCSC 412

[12] MacFarlane *et al* at paras. 6.400-6.505 at p.6-20

[13] *R. v. Klassen,* [2004] 4 W.W.R. 351 (Man. Q.B.), cited in MacFarlane et al at para. 6.405 at p.6-21

[14] *R. v. Sikorski,* 2006 SKCA 43 and *R v. Perjalian* (2011), 274 C.C.C. (3d) 432 (B.C.C.A.), cited in MacFarlane *et al* at para 6.405 at p.6-21

[15] *R. v. Chan* (2003), 18 C.R. (6th) 322, 178 C.C.C. (3d) 269 (Ont. C.A.)

[16] *R. v. Chan,* (2003), 178 C.C.C. (3d) 269 (Ont. C.A.) leave to appeal to S.C.C. refused 180 C.C.C. (3d) vi.

This typically occurs in the case of a "controlled delivery" by police, where the accused may believe s/he is receiving a large quantity of drugs but may actually come to possess only a negligible amount (after the original stash is replaced by the police). It is interesting to note that, according to MacFarlane *et al,* police practice in Newfoundland and Labrador in the context of controlled deliveries has in fact been to remove *all of the drugs* before delivering them to the accused in what is known as "dry" controlled deliveries.[17] Nonetheless, in such cases the courts have found that the accused is nonetheless guilty of the *actus reus* (possession) and the *mens rea* (knowledge and intent to traffic) of the offence on the basis that police intervention was the only thing that thwarted the offence actually occurring.

In most cases of a controlled delivery, the contentious issue is the determination of the accused's knowledge of the drugs. This may be inferred from circumstantial evidence, including the circumstances surrounding the manner of acceptance, whether the package is opened or kept intact, and any subsequent handling or movement of the package.[18]

Finally, it is also important to note that, while quantity is not an essential element required to make out the offence, where the Crown has chosen to particularize the quantity of the substance in the indictment, it must prove that quantity beyond a reasonable doubt.

Other Circumstantial Evidence

Drug paraphernalia is an obvious piece of circumstantial evidence that may give rise to an inference that the accused was a drug trafficker. According to MacFarlene *et al,* "items such as weighing scales, packaging materials and dilutant may tend to suggest an intention to subdivide and distribute, while other things such as roach clips, bent spoons, and syringes may tend to suggest that the accused was a drug user."[19] The fact that the drugs themselves are packaged into small baggies or the like may give rise to an inference of possession for the purpose of trafficking.[20]

The presence of firearms may also be relevant and admissible to support an inference that the accused was involved in a drug trafficking enterprise.[21] As would evidence of the accused's association with other drug traffickers.[22]

As well, "documents found in the possession of an accused are admissible to show the accused's knowledge of their contents, or to establish the accused's connection to or state of mind with respect to the transaction or matters to which the documents relate."[23] For example, such documents may contain

[17] Para. 6.1383 at p.6-40
[18] *R, v. Rahmani* (2013), 105 W.C.B. (2d) 140, [2013] O.J. No. 894 (C.A.)
[19] Para., 6.1800 at p.6-4 – p.6-5, citing a long line of authorities in support of this proposition
[20] *R. v. Black,* 2014 BCCA 192 at para. 38
[21] *R. v. Lauzon,* 2013 ONSC 541 at paras. 67-68
[22] MacFarlanee *at al* at paras. 6.320 – 6.330 at p.6-18 – 6.19
[23] MacFarlane *et al* at para. 6.240 at p.6-6

lists of clients, drug network associates, drug prices, financial records, transactions, score sheets and the like.[24]

The circumstances surrounding the accused's apprehension may also give rise to an inference of knowledge and possession for the purpose of trafficking – for example, where the accused is found wearing gloves and exchanging boxes in a secluded location.[25]

In the recent case of *R. v. Baldree*,[26] the Supreme Court of Canada established that drug calls made to the accused's telephone are presumptively inadmissible hearsay and cannot be used to support an inference that that the accused is a trafficker. However, in some circumstances, a large quantity of calls might establish sufficient reliability and necessity (because it would be unreasonable to require the Crown to locate and produce every caller as a witness) to be admissible as evidence supporting the inference that the accused was a trafficker.[27] A trier of fact would have to consider both the number of calls received and the content of those calls. Most recently, the British Columbia Court of Appeal held that drug calls made to an accused's telephone are admissible as circumstantial evidence of the knowledge of the purpose for which the drugs are kept.[28]

MacFarlane *et al* offer the following additional guidelines when considering evidence of the admissibility and use of drug calls made to an accused's telephone:

> Other extrinsic evidence concerning the calls may provide sufficient indicators of reliability: did the calls occur over an extended period of time? Is it possible to identify the callers? If so, is there any basis to believe that they have a motive to implicate the accused/ if there were many calls, is there a basis to believe that the callers colluded? Did the callers use different media – such as a mix of traditional cellphone calls as well as social media such as Twitter? Did the calls originate from different locations within a city, or from different cities or countries? For instance, the indicia of reliability may be strong if a series of calls came in from several provinces as well as, for instance, drug sources jurisdictions such as Florida and Columbia.
>
> Intrinsic evidence arising from the calls themselves may similarly address the issue of reliability. For instance, in the last scenario described above (calls from other provinces/Florida/Columbia), did the content of the calls tend to suggest that the assertions in the call are reliable – by, for instance, tracking the steps taken by others in a drug conspiracy to which the accused evidently belongs? Does the rest of the evidence in the case furnish circumstantial indicators of reliability – for instance, through police surveillance – tending thereby to suggest that the key assertion in the call ("I'd like to buy some drugs from the accused") is similarly reliable? The Supreme Court did not address the issue of intrinsic evidence, but by parity of reasoning it would seem appropriate to consider the content of the calls themselves to assess their admissibility.[29]

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[24] E.g., see *R. v. Giroux,* 2013 BCPC 275 at para. 33
[25] *R. v. Goodkey,* 2013 BCSC 1429 at para. 69
[26] [2013] S.C.J. No. 35 (S.C.C.)
[27] See for example *R. v. Polat* (2013), 106 W.C.B. (2d) 2, 2013 QCCA 471 at paras. 12-16 and 26; and *R. v. Belyk* (2014), 9 C.R. (7th) 400 (Sask. C.A.) at para. 4 – both cited in MacFarlane *et al* at para 6.296 at p.6-17
[28] *R. v. Williams* (2009), 246 CC.C. (3d) 443 (B.C.C.A.).
[29] Paras. 6.297-6.298 at p. 6-17

Evidence of unexplained wealth may also support an inference that the accused was involved in drug trafficking activities. This typically comes in two forms. The first is evidence of a large amount of cash found in the accused's possession, particularly cash found in small denominations. The second is evidence of the accused's apparently lavish lifestyle that is unexplained by legitimate activities.

Contrarily, evidence of financial need or pressure may give rise to an inference that the accused's was in possession of a controlled substance for the purpose of trafficking (and therefore for the purpose of making money).[30] In this regard, the trier of fact may be entitled to look at evidence that the accused is receiving some form of government financial assistance as evidence of an economic motive to commit the crime. However, such evidence alone is insufficient to support such an inference, and a jury ought to be appropriately cautioned as to reasoning prejudice (i.e., that financially disadvantaged individuals are more likely to be involved in criminal activity).[31]

Finally, it is important to mention that Proof of the fact that the accused was found transporting drugs at the time he had them in his possession (e.g., where the drugs are found in the accused's motor vehicle) is not itself conclusive proof of the purpose for which the accused had the drugs in his possession.[32]

Additional Ingredients

Before concluding, it should be noted that, as with all drug offences, where the Crown alleges additional specific ingredients – such as that the accused possessed a specific substance with the intention of selling (or another mode of trafficking) it to a specific person – the Crown must prove each of those allegations beyond a reasonable doubt.

[30] MacFarlane *et al* at paras. 6.340 to 6.390 at pp. 6-19 – 6-20.
[31] *R. v. Mensah* (2003), 9 C.R. (6th) 339 (Ont. C.A.) at para. 10, leave to appeal to S.C.C. refused [2003] 2 S.C.R. ix, cited in MacFarlane *et al* at para. 6.390 at p.6-20
[32] *R. v. Blanchard,* 2010 NLTD 69 at para. 36