THE TRAFFICABLE QUANTITY PRESUMPTION IN AUSTRALIAN DRUG LEGISLATION

BY JOHN WILLIS*

[*In Australian drug legislation there is a common presumption that a person is in possession of proscribed drugs for the purpose of trafficking if that person has in his possession a quantity of such a drug in excess of that prescribed by the relevant legislation. In this article Mr Willis examines in detail and traces the development of the legislation relating to the trafficable quantity presumption. He argues that the presumption is in conflict with the fundamental principle of criminal law that a person is innocent until proven guilty. Mr Willis also argues that the presumption is based on unrealistic assessments of the quantities of proscribed drugs that a mere user is likely to require.*]

'In a case of this sort, when we are dealing with a public menace in this community, such as drug trafficking and drug addiction, we do not want to be too technical.'
Mr Sheahan M.L.A. speaking on *Poisons (Amendment) Bill* 1970.[1]

BACKGROUND

At the first meeting on Drug Abuse in February 1969 of Commonwealth and State Ministers responsible for drug control (that is those in charge of Customs, Health and Police, and the Attorney-General), the National Standing Control Committee on Drugs of Dependence[2] was formed. Its functions were to consider what steps could be taken by Commonwealth and State Governments together to combat all aspects of the drug problem in Australia including addiction, trafficking, treatment and education; and to make recommendations to Ministers on legislative and administrative action which should be taken.

The N.S.C.C., whose members are senior members of the Commonwealth and/or State departments of Customs, Health and Justice and the heads of State Police drug squads[3] recommended, *inter alia*, that possession of specified quantities or more of prohibited drugs should be *prima facie* evidence of trafficking, and this recommendation was accepted by the relevant Commonwealth and State Ministers attending the Third Ministerial Meeting on Drug Abuse.[4] The N.S.C.C. also determined what should be

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[1] New South Wales, *Parliamentary Debates*, Legislative Assembly, 1 September 1970, 5424.

[2] Hereinafter referred to as the N.S.C.C.

[3] Answer to Question No. 3846, Commonwealth of Australia, *Parliamentary Debates*, House of Representatives, 7 June 1974, 3157.

[4] *Press Release* by Hon. D. Chipp, Minister for Customs and Excise, 24 April 1970.

the quantity of each drug ('trafficable' or 'prescribed' quantity)[5] which would give rise to the presumption of trafficking.[6]

Legislation giving effect to these recommendations was enacted by the Commonwealth and all States in the period 1970-1976. This legislation, broadly speaking, was of two kinds:

(a) legislation which affected the actual offence of selling, supplying or trafficking — this was the method used in state legislation; and

(b) legislation which did not, on its face at any rate, affect the substantive offences in existence, but instead created a higher sentencing range for persons convicted of possession if a trafficable quantity was involved — this was the method employed by the Commonwealth in the Customs Act 1901-1975 (Cth).

STATE LEGISLATION

State legislation can be broadly divided into two types:

(a) There is an offence of being in possession of a prohibited drug for the purpose of sale, supply, gift *etc.* and a person proved to be in possession of more than the specified quantity is *deemed* to be in possession for the purpose of sale, supply or gift *etc.* This is the legislative scheme in W.A., Qld, N.S.W. and S.A.

(b) Possession by a person of more than the specified quantity of a drug is *evidence* that the person had the drug for the purpose of trafficking or sale. This is the legislative scheme in Victoria and Tasmania.

These two types of State legislation need separate consideration.

'Possession for the purpose' offences

The Queensland legislation is an example of this approach. Section 130(2) of the Health Act 1937-1971 (Qld) states:

> Save under and in accordance with the authority of a licence or other authorization provided by or under this Act a person shall not —
> (a) . . .
> (c) sell, give, supply or procure, or attempt so to do, or offer to sell, give, supply or procure, to or for another person or otherwise deal or trade in a dangerous drug or a prohibited plant or attempt so do to;
> (d) have in his possession a dangerous drug, or a prohibited plant for a purpose specified in paragraph (c) of this subsection.

Section 130 provides that the penalty on indictment for conviction of an offence against s. 130(2) is imprisonment with hard labour for life or a fine of $100,000.

[5] In this article, the amounts fixed under both Commonwealth and State legislation will be described in general discussion as the 'trafficable' or 'prescribed' quantity. In fact, State legislation variously uses the adjectives 'prescribed', 'specified' and 'permissible'. In the context of drug offences, the use of the word 'permissible' in the Poisons Act 1971 (Tas.) seems most infelicitous.

[6] *Supra* n. 2.

Section 130J sets out evidentiary provisions dealing with s. 130(2):

> Section 130J. Matters of proof respecting possession of drugs.
> (1) In a proceeding brought for an offence in relation to possession of a dangerous drug, a person who, contrary to section 130 of this Act, has in his possession —
> (a) a quantity of that drug in excess of a quantity prescribed under this Act for the purposes of this paragraph (a) in respect of that drug; or
> (b) a quantity of any substance containing that drug, which quantity exceeds the quantity prescribed under this Act for the purposes of this paragraph (b) in respect of that drug,
> shall be deemed to have possession of that drug for a purpose specified in paragraph (c) of subsection (2) of section 130 of this Act unless he shows the contrary.

The legislative scheme is tight, with the trafficable quantity provisions sufficing to change an offence of simple possession to the far more serious offence of possession for the purpose of sale etc. The offence established by s. 130(2)(d) requires the Crown to establish two elements; (a) possession, and (b) one of the purposes enumerated in s. 130(2)(c). Proof of the second element of the offence — the purpose element — is greatly facilitated by the trafficable quantity provisions of s. 130J(1), which create a rebuttable presumption of purpose from possession of a certain quantity of the drug. The onus of disproving the purposes set out in s. 130(2)(c) is cast on the defendant, who is thus required to prove a negative proposition — always a more difficult task than proving a positive proposition, and in this case rendered even more daunting by the breadth and vagueness of the purposes enumerated in s. 130(2)(c) which must be disproved.[7]

In some States, the defendant's position is more difficult because there is also a reverse onus of proof on 'possession'. Thus, s. 130J(2) of the Health Act 1937-1971 (Qld) states:

> (2) In respect of a charge of an offence against any provision of section 130 of this Act,
> (a) . . .
> (b) proof that a dangerous drug was at the material time upon premises occupied by or under the control of any person is proof that the drug was then in his possession unless he shows that he neither knew nor had reason to suspect that the drug was upon the premises;

Suppose a person, on whose premises more than the trafficable quantity of a dangerous drug was found, was charged with an offence under s. 130(2)(d). The Crown need prove only physical or *de facto* control over a trafficable quantity of the drug; this done, the defendant, to disprove the element of 'possession', must prove on the balance of probabilities that he did not know or have reason to suspect that the drug was on his premises. If he fails in this, he must, to avoid conviction under s. 130(2)(c), prove on the balance of probabilities that he did not have the drug for any purpose enumerated in s. 130(2)(c).

[7] See Goode M., *Drugs and the Law Research Paper* 7 (Royal Commission into the Non-Medical Use of Drugs South Australia) Adelaide 1979 172: Reviewed in (1980) 12 *M.U.L.R.* 595.

The reversal of the onus on both elements of the offence could in some cases force the defendant to a painful choice of defences. It is clear that at the same trial a defendant cannot, with any credibility, state that he did not know that the drugs were on his premises and at the same time claim that he had the drugs for personal use only. A defendant who in fact did not know that the drugs were on his premises might well consider that the jury would be more likely to believe him if he admitted possession but insisted that he had the drugs for personal use only. To avoid the higher penalties for the 'possession for the purpose' offence, he might plead guilty to simple possession or perjure himself by admitting possession. Legislation which can produce such a result is inherently flawed.[8]

Possession of a trafficable quantity as evidence of selling or trafficking

Under this legislative scheme, the trafficable quantity provisions are not directly tied into specific offences defined in terms of 'possession', but operate as evidence that the person possessed the drugs for sale, supply or trafficking.

Section 32(5) of the Poisons Act 1962 (Vic.)[9] states:

> (5) Where a person (other than a person authorized by or licensed under this Act so to do) has in his possession —
> (a) the fresh or dried parts of any plant of the genus *Cannabis L.* in any form;
> (b) any resinous or other extract obtained from any plant of the genus *Cannabis L.* or from any part of that plant in any form; or
> (c) opium or any other drug of addiction or specified drug in any form —
> in a quantity which is more than the quantity specified in column 2 of Schedule Eleven in relation to the parts extracts or drugs specified in column 1 of that Schedule — the finding in his possession of those drugs or that extract or drug in that quantity shall be *prima facie* evidence that the person had those parts or that extract or drug in that quantity in his possession for the purpose of trafficking therein.

It should be noted that possession of more than the trafficable quantity is not evidence of trafficking, but evidence of possession for the purpose of trafficking, and there is not in Victoria or Tasmania any offence of 'possession for the purpose of trafficking'. In *Elem*,[10] the Court of Criminal Appeal of Victoria said of s. 32(5):

> Sub-section (5) is an evidentiary provision. It provides in substance that the finding in the possession of a person of a specified quantity of a specified drug is to be *prima facie* evidence that the person had that drug in that quantity in his possession for the purpose of trafficking therein. It does not of itself provide evidence of trafficking but it is nevertheless an important provision from the point of view of the Crown because once there is evidence of possession for the purpose

[8] A similar problem is present in a murder trial, where a defendant might wish to rely on self defence and provocation. In that case, the situation is resolved by the requirement that the trial judge direct on provocation if the evidence raises the issue, and by the more basic requirement at common law that the Crown must disprove either defence.

[9] The Poisons Act 1971 (Tas.) (s. 47(7)) makes proof that the accused had in his possession more than the maximum permissible quantity of a drug evidence that he had it for the purpose of sale, supply or trafficking.

[10] *R. v. Elem*, unreported, Court of Criminal Appeal of Victoria, Melbourne, 27 July 1979.

> of trafficking then slight evidence of acts which might amount to trafficking may be all that is necessary to complete the Crown case.[11]

This statement needs to be read in the light of the meaning of the word 'trafficking'. 'Trafficking' is not defined in either the Victorian or Tasmanian legislation; however, it was judicially interpreted in *Falconer v. Pedersen*[12] and that interpretation has been accepted in the interpretation of 'trafficking' in the Poisons Act 1971 (Tas.).[13] In *Elem*, the Court of Criminal Appeal accepted the definition of 'trafficking' given in *Falconer v. Pedersen*:

> That definition is that "traffic" in s. 32 rendered criminal the acts of a person knowingly engaged in the movement of the drugs specified in the section from the source to the ultimate user in the course of an illicit trade in such drugs, and that this was so whether or not any such act was performed without reward or on an isolated occasion or at the request of the ultimate user. The reference to an illicit trade in such drugs will be noticed. It will also be observed that although the act or acts constituting the trafficking alleged must be in the course of trade, the definition does not require the Crown to prove that an accused received anything in the nature of a reward for his part in the transaction. It is sufficient if the Crown proves that handling by the accused is in the course of trade.[14]

The broad scope of this interpretation means that in many cases the Crown's task of establishing trafficking once there is evidence of possession of more than the trafficable quantity is a comparatively simple one. In *Elem*, the Court, having insisted that the definition of 'possession' in s. 28 of the Poisons Act 1962 (Vic.) imposed on the accused the onus of proving on the balance of probabilities that he did not know that the goods in his control were drugs, stated of s. 32(5):

> The form of s. 32(5) differs from that of s. 28, but it has a similar effect. Although it is properly described as an evidentiary provision, it has the effect of attaching a particular quality to an accused's possession of a specified drug or of requiring him to show by evidence that his possession was not for the stated purpose.[15]

While on their face the Victorian and Tasmanian provisions still require the Crown to prove beyond reasonable doubt every element of trafficking, the trafficable quantity provisions will in many cases effectively compel the accused to lead or give evidence to disprove trafficking.

General Comment

Under both kinds of state legislation, the presumption generated by possession of more than the prescribed (trafficable) quantity appears to be that the whole amount of the drug possessed by the defendant is possessed for the forbidden purpose. The Victorian legislation is quite explicit:

> . . . the finding in his possession of those drugs or that extract or drug in that quantity shall be *prima facie* evidence that the person had those parts or that extract or drug in that quantity in his possession for the purpose of trafficking.[16]

Such a presumption simply does not square with reality, especially in the

[11] *Ibid.* transcript 8 f.
[12] [1974] V.R. 185.
[13] *R. v. Peacock* [1974] Tas.S.R. (N.C.) 112.
[14] *R. v. Elem*, transcript 11.
[15] *Ibid.* 9.
[16] Poisons Act 1962 (Vic.) s. 32(5).

case of the so-called 'hard' drugs, such as heroin. Many, perhaps most, addicts use part of their supply themselves and sell the rest to gain money to finance their next supply. As Burt C.J. said in *Kays*:[17]

> . . . in a case such as the present one it could well be a case (and they are quite common) in which the offence was committed for more than one purpose, so that a person acquires a parcel of heroin for the purpose of consuming some of it himself, selling some of it so as to finance, or, as they say in this area nowadays, so as to sustain his own addiction.[18]

If there is to be a presumption, it is surely basic that the presumption should be close to reality. One would have thought that the trafficable quantity provisions should operate to deem or be evidence that the person in possession of more than the minimum trafficable quantity had the amount in excess of that minimum for the purpose of sale, supply or trafficking.

It should also be noted that the trafficable quantity provisions catch not only commercial dealers, but also those who share drugs or give them to others without commercial gain.[19] Yet, to judge by the various parliamentary debates, the intention of the legislatures in introducing the trafficable quantity provisions was to facilitate the apprehension and conviction of commercial dealers.[20] To the extent that this was their aim it is difficult to see why the legislation has encompassed within its trafficable quantity provisions persons not commercially involved.

COMMONWEALTH LEGISLATION

The major drug offences in Commonwealth legislation are contained in the Customs Act 1901-1975 (Cth).

> 233B. (1) Any person who —
> (a) without any reasonable excuse (proof whereof shall lie upon him) has in his possession, on board any ship or aircraft, any prohibited imports to which this section applies, or
> (b) imports, or attempts to import, into Australia any prohibited imports to which this section applies or exports, or attempts to export, from Australia any prohibited exports to which this section applies, or
> (c) without reasonable excuse (proof whereof shall lie upon him) has in his possession or attempts to obtain possession of any prohibited imports to which this section applies which have been imported into Australia in contravention of this Act, or
> (ca) without reasonable excuse (proof whereof shall lie upon him) has in his possession or attempts to obtain possession of any prohibited imports to which

[17] *R. v. Kays* (1979) 25 A.L.R. 174.
[18] (1979) 25 A.L.R. 174, 175.
[19] For example Health Act 1937 (Qld) s. 130(2)(c); Police Act (W.A.), s. 94G.
[20] For example Mr Jago, N.S.W. Minister for Health, in introducing the trafficable quantity provisions stated: 'This will assist in discriminating between addicts and pedlars, as the quantity prescribed in respect of each drug will be set at such a figure as to take account of the quantity an addict is likely to have in his possession: New South Wales, *Parliamentary Debates*, Legislative Assembly, 20 August 1970, 5342. In the debate on similar legislation in South Australia, the Hon. R. C. DeGaris stated: 'Without this legislation it would be almost impossible to obtain a conviction for drug trafficking: it would be almost impossible to separate the drug traffickers from the drug users: South Australia, *Parliamentary Debates*, Legislative Council, 12 November 1970, 2631.

this section applies which are reasonably suspected of having been imported into Australia in contravention of this Act, or

(cb) . . .

(d) aids, abets, counsels, or procures, or is in any way knowingly concerned in, the importation into Australia of any prohibited imports to which this section applies, or the exportation from Australia of any prohibited exports to which this section applies,

(e) . . .

shall be guilty of an offence . . . .

(2) The prohibited imports to which this section applies are prohibited imports that are narcotic goods and the prohibited exports to which this section applies are prohibited exports that are narcotic goods.

(3) A person who is guilty of an offence against sub-section (1) of this section is punishable upon conviction as provided by section two hundred and thirty-five of this Act.

There is no offence of 'trafficking' under the Customs Act 1901-1975 (Cth), and the 'trafficable quantity' provisions operate not on the offences, but at the sentencing stage. In 1971, when the trafficable quantity provisions were first introduced into the Customs Act 1901-1975 (Cth),[21] s. 235 stated:

Section 235

(1)(c) where the offence is an offence against subsection (1) of section two hundred and thirty-three B of this Act and the Court is satisfied that the narcotic goods in relation to which the offence was committed consist of a narcotic substance . . . that is not less than the trafficable quantity applicable to the substance — a fine not exceeding Four thousand dollars or imprisonment for a period not exceeding ten years, or both . . .; or

(d) In any other case — a fine not exceeding Two thousand dollars or imprisonment for a period not exceeding two years, or both . . .

(2) . . .

(3) . . . where the court of summary jurisdiction determines the proceedings, the court shall not impose a fine exceeding Two thousand dollars or sentence the defendant to imprisonment for a period exceeding two years, but may impose both a fine and a period of imprisonment. . . .

(4) Paragraph (c) of sub-section (1) of this section does not apply in the case of an offence where the Court is satisfied that the offence was not committed by the person charged for any purpose related to the sale of, or other commercial dealing in, the narcotic goods in relation to which the offence was committed.

The significance of the trafficable quantity is evident. If the offence involved less than a trafficable quantity, the maximum penalty was imprisonment for two years and/or a fine of $2000. However, if the offence involved a trafficable quantity, the maximum penalty on indictment was imprisonment for 10 years and/or a fine of $4000, unless the defendant could prove that the offence was not committed for any commercial purpose.

Since 1971, the sentencing structure under s. 235 has become progressively more complicated and more severe. In 1977,[22] when the trafficable quantities were increased, the sentencing arrangement remained essentially the same, and the maximum penalty for offences involving cannabis was not changed. However, the maximum penalty for offences involving 'narcotic' drugs other than cannabis was increased to imprisonment for

[21] Customs Act (No. 2) 1971 (Cth).
[22] Customs Amendment Act 1977 (Cth).

25 years and/or a fine of $100,000. In 1979,[23] the maximum penalties were further increased, in some cases to life imprisonment, and the new concept of a 'commercial quantity' was introduced. The 'commercial quantity' for the relevant drugs is set out in Schedule VIII of the Customs Act 1901-1975 (Cth) and is a very large quantity — for cannabis, 100 kilograms, for heroin 1.5 kilograms, and for opium 20 kilograms.

Section 235 of the Customs Act 1901-1975 (Cth) in its present form states, insofar as is relevant:

> Section 235
> (2) Subject to sub-sections (3) and (7), where —
> (a) a person commits an offence against . . . sub-section (1) of section 233B; . . . the penalty applicable to the offence is —
> (c) where the Court is satisfied —
> (i) that the narcotic goods in relation to which the offence was committed consist of a quantity of a prescribed narcotic substance that is not less than the commercial quantity applicable to that substance; or
> (ii) that the narcotic goods in relation to which the offence was committed consist of a quantity of a narcotic substance that is not less than the trafficable quantity applicable to that substance and also that, on a previous occasion, a court has —
> (A) convicted the person of another offence, being an offence against a provision referred to in paragraph (a) that involved other narcotic goods which consisted of a quantity of a narcotic substance not less than the trafficable quantity that was applicable to that substance when the offence was committed; or
> (B) found, without recording a conviction, that the person had committed another such offence — imprisonment for life or for such period as the Court thinks appropriate;
> (d) where the Court is satisfied that the narcotic goods in relation to which the offence was committed consist of a quantity of a narcotic substance that is not less than the trafficable quantity applicable to the substance but is not satisfied as provided in paragraph (c) —
> (i) if the narcotic substance is a narcotic substance other than cannabis — a fine not exceeding $100,000 or imprisonment for a period not exceeding 25 years, or both; or
> (ii) if the narcotic substance is cannabis — a fine not exceeding $4,000 or imprisonment for a period not exceeding 10 years, or both; or
> (e) in any other case — a fine not exceeding $2,000 or imprisonment for a period not exceeding 2 years, or both;
> (3) Where —
> (a) the Court is satisfied that the narcotic goods in relation to which an offence referred to in sub-section (2) was committed consist of a quantity of a narcotic substance that is not less than the trafficable quantity applicable to that substance, but is not satisfied as provided in paragraph (c) of that sub-section in relation to those narcotic goods; and
> (b) the Court is also satisfied that the offence was not committed by the person charged for any purposes related to the sale of, or other commercial dealing in, those narcotic goods, notwithstanding paragraph (d) of that sub-section, the penalty punishable for the offence is the penalty specified in paragrpah (e) of that sub-section; and
> (4) . . .
> (5) . . .
> (6) Where proceedings for an offence referred to in sub-section (2) are brought in a court of summary jurisdiction, the court may commit the defendant for trial or to be otherwise dealt with in accordance with law or, if the court is satisfied that it is proper to do so and the defendant and the prosecutor consent to it doing so, may determine the proceedings summarily.

[23] Customs Amendment Act 1979 (Cth).

(7) Where a court of summary jurisdiction determines proceedings summarily in accordance with sub-section (6), it shall not impose a fine exceeding $2,000 or sentence the defendant to imprisonment for a period exceeding 2 years, but may impose both a fine and a period of imprisonment in respect of the offence.

For offences determined summarily, the maximum penalty is 2 years' imprisonment and/or a fine of $2,000. For offences tried on indictment, there are now three tiers of maximum penalties prescribed, the primary factor in each case being the quantity of drug involved in the offence:

(a) if less than the 'trafficable quantity' of the drug is involved, the maximum penalty is 2 years' imprisonment and/or a fine of $2,000.
(b) if the offence involves not less than the 'commercial quantity' of the drug, the maximum penalty is life imprisonment.
(c) if the amount of the drug involved is not less than the 'trafficable quantity', but less than the 'commercial quantity', three situations are possible:
    (i) if a court has previously convicted the defendant of a 'drug' offence involving a trafficable quantity under the Customs Act 1901-1975 (Cth), or found, without recording a conviction that he had committed such an offence, the maximum penalty is life imprisonment.
    (ii) if the defendant does not fall under (i) — that is he has no prior conviction or offence proved — the maximum penalty depends on whether the defendant can establish on the balance of probabilities that the offence was not committed for any commercial purpose. If the defendant fails to do so, the maximum penalty is 10 years' imprisonment and/or a fine of $4,000 for offences involving cannabis, and 25 years' imprisonment and/or a fine of $100,000 for all other 'narcotic' drugs.
    (iii) if the defendant succeeds in disproving commercial purpose, the maximum penalty is 2 years' imprisonment and/or a fine of $2,000.

The 1979 amendments have given even greater importance to the trafficable quantity provisions.[24] The defendant, convicted for the second time of an offence involving a trafficable quantity, is liable to a maximum penalty of life imprisonment, regardless of whether either or both offences were committed for non-commercial purposes. The defendant without such a prior conviction, who is convicted of an offence involving a 'trafficable quantity' (but not a 'commercial quantity') is liable to a maximum jail sentence of 10 years for cannabis and 25 years for all other 'narcotic' drugs, unless he can, under s. 235(3) prove that 'the offence was not

[24] In *R. v. Kays* Burt C.J., referring to the 1977 provisions of the Customs Act 1901-1975 (Cth) stated: 'Hence, one immediately sees how critical the quantity involved can be and one can see the tremendous effect it has upon the maximum punishment which can be imposed': (1979) 25 A.L.R. 174, 175.

committed for any purpose related to the sale of, or other commercial dealing in, the drug'.

The effect of s. 235(3) is not totally clear. While the Crown must satisfy the sentencing judge that the quantity of drugs involved is not less than the trafficable quantity, it is not clear whether the onus is the criminal onus of 'beyond reasonable doubt' or some lesser standard.[25] However, if the Crown does so satisfy the judge, the defendant to avoid the higher penalty ranges must prove on the balance of probabilities that the offence was not committed by him for any commercial purpose. It is not sufficient if he shows that his principal purpose was personal use; he must show that he had no commercial purpose.[26] It is also possible, in cases where other persons were involved in the offence, that the defendant, to avoid the higher penalty range, would have to prove that none of these other persons had any commercial purpose whether known or unknown to the defendant.[27]

The great difference between the maximum penalty applicable on a summary hearing and the maximum penalties applicable upon indictment has been criticized by Murphy J. as placing undue pressure upon defendants to forgo their right to trial by jury.[28] It has also been argued that the legislative arrangement under the Customs Act 1901-1975 (Cth), whereby after conviction factual issues have to be decided by the judge alone to determine the appropriate sentencing range, could well involve a breach of s. 80 of the Constitution which requires trial by jury for offences against Commonwealth law which are tried on indictment.[29] This argument has been rejected by the Courts of Criminal Appeal in New South Wales[30] and Queensland.[31] However, it still remains true that crucial elements in determining the penalty range and the penalty have been removed from the jury. This legislative arrangement has also been criticized on the grounds that procedural rules (such as inadmissibility of accomplice evidence against a co-defendant) operate only at the trial and not at the sentence hearing with the result that a defendant is least protected at the most essential stage of the process.[32]

TRAFFICABLE QUANTITY

The trafficable or prescribed quantity of a drug is clearly a vital element in the proof of serious criminal offences carrying maximum sentences of

[25] In *R. v. King* the Victorian Court of Criminal Appeal left the question open: (1979) V.R. 399, 404.
[26] *R. v. Kays* (1979) 25 A.L.R. 174, 176.
[27] *R. v. Fischer* (1973) 2 A.L.R. 74.
[28] *Beckwith* v. *R.* (1977) 51 A.L.J.R. 247, 254.
[29] Willis J., 'To What Extent is s. 235 of the Customs Act 1901-1975 (Cth) Invalid as Contravening s. 80 of the Constitution?' (1978) 52 *Australian Law Journal* 502.
[30] *R. v. Kayal* [1979] 2 N.S.W.L.R. 117.
[31] *R. v. Gardiner* (1979) 27 A.L.R. 140.
[32] Goode M., *op. cit.* 163.

up to life imprisonment. As such, it is essential that the amount prescribed for each drug should be both widely known and based on valid and accepted evidence of drug usage.

Widely Known

Legislation in all States and under the Customs Act 1901-1975 (Cth) sets out the prescribed or trafficable quantities either by a schedule to the Act or by regulations made under the Act.[33] Given the importance of these quantities, it should be a requisite that any change in these quantities be enacted as an amendment to the principal Act. Arguments about the flexibility and convenience of regulation[34] give too little weight to the vital issue that the law should be known and the reasons for and the desirability of proposed changes be publicly explained and justified in parliament. Provisions such as that contained in the Poisons Act 1962 (Vic.)[35] which allows the Governor in Council by proclamation published in the Government Gazette to alter the prescribed quantities are quite unacceptable.

Criteria for Determining the Trafficable or Prescribed Quantity of Drugs

On the 3rd May, 1979, Dr Blewett asked the Minister for Business and Consumer Affairs the following question on notice:

> What criteria are used by the Committee (*sc.* the N.S.C.C.) for determining what should be the appropriate trafficable quantity for each narcotic drug?[36]

The answer from the Minister was as follows:

> Trafficable quantities were introduced into Federal and State legislation in 1970/71. Quantities were determined by the N.S.C.C.
> Factors taken into consideration by the Committee were:
> — quantities specified in similar legislation overseas;
> — quantities of each particular drug which were seen to be consistent with personal use;
> — where no other information was available 50 times the maximum therapeutic dose shown in the British Pharmacopeia.
> In October 1976 the N.S.C.C. again considered the schedule of trafficable quantities in the light of a decision to increase the maximum penalty for offences involving trafficable quantities and the amounts then seen to be consistent with personal use. As a result it was recommended by the N.S.C.C. that the quantities specified in the schedule be increased by a multiple of 4.
> Federal legislation was amended in November 1977 to reflect both the revised schedule and the increased penalties.[37]

It can be seen from this answer that there have been two sets of

[33] For example The Customs Act 1901-1975 (Cth), Schedule VI; Poisons (Drugs of Addiction) Act 1976 (Cth), Schedule XI; Regulations Under the Narcotics and Psychotropic Drugs Act 1934-1977 (S.A.), s. 51.

[34] 'It is necessary to prescribe these quantities by regulation not only because it may be necessary to deal with changing patterns in drug distribution but also because of the wide range of drugs of dependence that will be controlled by the legislation.' The Hon. L. J. King, Attorney-General, speaking to the Dangerous Drugs Act Amendment Bill 1970 (S.A.), South Australia, *Parliamentary Debates*, House of Assembly, 28 October 1970, 2156.

[35] S. 32(6).

[36] Commonwealth of Australia, *Parliamentary Debates*, House of Representatives, 7 June 1979, 3157.

[37] *Ibid.*

trafficable quantities recommended by the N.S.C.C. and accepted by Commonwealth and State governments.

The 1970 'trafficable quantities'

Mr Jago, N.S.W. Minister for Health in the second reading of the Poisons (Amendment) Bill 1970 which introduced the trafficable quantity provisions stated:

> At a conference of Commonwealth and State Ministers of various ministerial responsibilities on 24th April this year (1970) it was decided that the quantities should be as follows:
>
> | | | |
> |---|---|---|
> | Marijuana | 25 | grammes |
> | Hashish | 5 | grammes |
> | Cigarettes containing cannabis and tetrahydrocannabinol 40 only | | |
> | Opium | 5 | grammes |
> | Morphine | 0.5 | grammes |
> | Heroin | 0.5 | grammes |
> | Cocaine | 0.5 | grammes |
>
> Other narcotic drugs — Fifty times the maximum therapeutic dose as shown in the British Pharmacopeia or other recognized authorities.
> LSD and other hallucinogens — Ten times the maximum therapeutic dose of any hallucinogenic substance as shown in the extra pharmacopeia by Martindale or where hallucinogenic substances are presented in divided doses, that is capsules or impregnated paper, 10 or more divided doses of such hallucinogenic doses.
>
> | | | |
> |---|---|---|
> | Amphetamines | 0.5 | grammes[38] |

The actual regulation dealing with cigarettes containing cannabis is as follows:[39]

> Cannabis — 40 individual preparations containing any proportion of cannabis each of which is capable of being ignited and the smoke therefrom inhaled.

It is difficult to understand how the N.S.C.C. arrived at the quantities for cannabis (marijuana). 25 grammes is less than one ounce, and one ounce has traditionally been the normal amount sold to a simple user.[40] The recommendations of the N.S.C.C. were in part based on 'the pattern of usage known to drug law enforcement officers',[41] who were represented on the N.S.C.C. One would have expected that their opinion, based on closer contact with illicit drug activities, would have carried considerable weight with other members of the N.S.C.C. It would seem unlikely that, even in 1970, members of the various drug enforcement agencies considered that 25 grammes of cannabis was an amount inconsistent with personal use and an appropriate quantity to define as the trafficable quantity for cannabis.

The classification of 40 cigarettes each containing some cannabis as a trafficable quantity is even more surprising. The amount of cannabis under

[38] New South Wales, *Parliamentary Debates*, Legislative Assembly, 20 August 1970, 5342.

[39] Poisons Act 1971 (Tas.), Schedule 1.

[40] In evidence given to the Australian Royal Commission of Inquiry Into Drugs, a senior N.S.W. police officer stated: 'The deal is generally the smallest quantity of Indian hemp sold and usually refers to about 1 ounce in weight contained in a plastic bag.' Australia, *Report of the Royal Commission of Inquiry into Drugs* (1980), A258 f.

[41] See Answer by Mr Borthwick, the Victorian Minister of Health, to Question on Notice re criteria used by N.S.C.C. in fixing trafficable quantities; Victoria, *Parliamentary Debates*, Legislative Assembly, 12 September 1979, 2416 f.

such a classification could vary enormously. Such vagueness is quite inappropriate in relation to serious crimes. More basically, it raises the question of just what persons the N.S.C.C. were aiming to bring within the net of the trafficable quantity provisions. The dealer in marijuana normally disposes of packages of marijuana; he does not (unlike heroin dealers) go to the trouble of diluting the product and further packaging it in individual cigarettes. On the other hand, if the trafficable quantity provisions were intended to catch persons who shared their marijuana among friends on a non-profit basis, the cigarette classification at least has some point to it. But, legislatures, to judge by parliamentary debates, perceived the function of the trafficable quantity provisions as enabling more successful prosecutions of commercial dealers. The 40 cigarette classification is just not about such dealers.

With the other, so called 'hard' drugs, it is not at all clear just how the N.S.C.C. dealt with individual differences, degrees of addiction, availability of supply, and amounts normally kept by addicts. Was the trafficable quantity for heroin, for example, fixed by reference to a month's or a week's supply of a heavily addicted individual? Do heroin addicts keep supplies for longer than a month? Does this depend on the availability of further supplies? Unfortunately this sort of information, if in existence, is just not available. In matters involving serious offences, the criteria should have been freely available and widely discussed.

The schedule in the Customs Act 1901-1975 (Cth) setting out trafficable quantities for various drugs, which was inserted in accordance with the recommendations of the N.S.C.C., lists over 100 drugs, many of which are not well-known and have not been the subject of criminal prosecutions. One cannot help suspecting that trafficable quantities were attached to many of these drugs, more for the sake of completeness than for any need to convict persons trafficking or dealing in them. By contrast, the Customs Amendment Act 1979 (Cth) in setting out 'commercial quantities' of narcotic goods has limited the list to nine, all commonly used.[42]

The 1976 'trafficable quantities'

In 1976, the N.S.C.C. examined the schedule of trafficable quantities and recommended that the quantities be increased by a multiple of 4. This recommendation was accepted by the relevant government Ministers and introduced into most of the relevant drug legislation.

In an answer to a question on Notice about the criteria used in fixing trafficable quantities, Mr Borthwick, the Victorian Minister for Health stated:

> It was agreed that the revised schedule [of trafficable quantities] was more realistic.[43]

[42] Customs Amendment Act 1979 (Cth), Schedule VIII, s. 16.
[43] Victoria, *Parliamentary Debates*, Legislative Assembly, 12 September 1979, 2416.

The implication is clearly that the original trafficable quantities were too low.

In the second reading of the Customs Amendment Bill 1977 (Cth) which put into effect the revised trafficable quantities, Mr Fife, the then Minister for Business and Consumer Affairs, who introduced the Bill, put the matter in a slightly different way:

> In the light of the proposed substantial increase in penalties, the quantities decided upon are in most cases four times the quantity at present prescribed.[44]

The fixing of trafficable quantities by reference to the penalty is decidedly odd.

The trafficable quantity for cannabis is now 100 grammes (less than 4 ounces), an amount that is still very low, and one would have thought, quite consistent with non-commercial intentions, if not personal use. An exchange in the Victorian Legislative Council when these provisions were being debated is quite revealing:

> The Hon. D. G. Elliot: It is common for a user to have that amount (sc. 100 grammes of marijuana).
> The Hon. W. V. Houghton: It is not common for a user to have that amount.
> The Hon. D. G. Elliott: It is.
> The Hon. W. V. Houghton: A user would not be able to use that amount without killing himself.
> The Hon. D. G. Elliot: He would not be going to use it straight away.
> The Hon. W. V. Houghton: He would not carry with him a month's supply. In any case, the use of the drug is an offence.
> The Hon. D. R. White. Three and a half ounces is not a month's supply.[45]

If it were not for the serious nature of the legislation, one could heartily enjoy the high farce of the proceedings. The Hon. W. V. Houghton was the Minister for Health at the time, and was represented at the N.S.C.C. meeting by the permanent head (or his nominee) of the Health Department. He himself was one of the Ministers who accepted the recommendations of the N.S.C.C. Yet, in that exchange in parliament not only does he display a remarkable ignorance of the effects of marijuana, but it would appear that he has not considered just how long users might retain a supply of the drug for personal use. It would further appear from the exchange that at least two members of the Legislative Council considered that 100 grammes was too low a trafficable quantity for marijuana — itself an indication that the amount might still be unacceptably low.

The revised trafficable quantity for heroin is 2 grammes, and it is certainly arguable that this amount is still too low. Thus in *Kays*,[46] the defendant pleaded guilty to offences against s. 233B of the Customs Act 1901-1975 (Cth). The amount of heroin involved was 3.7 grammes, almost twice the trafficable quantity. Speaking of this amount, Burt C.J. stated:

[44] Commonwealth of Australia, *Parliamentary Debates*, House of Representatives, 2 November 1977, 2691.
[45] Victoria, *Parliamentary Debates*, Legislative Council, 30 November 1976, 4992.
[46] *R. v. Kays* (1979) 26 A.L.R. 174.

> This was a modest amount brought in. Although it was in excess of the trafficable quantity, it would only make up to something like 32 shots, according to the evidence of the convicted person, and it would only last a person who was addicted to heroin some five or six days. It is important, I think, to appreciate that we are dealing with an amount of heroin which could well be imported for personal consumption.[47]

More fundamentally, given individual differences, degrees of addiction, varying strengths of drugs and fluctuations in their availability, it would appear that the task of setting trafficable quantities which even approximate the habits of the various drug users is well nigh impossible. As Goode has said:

> Apart from the inherent arbitrariness of the amount, it is obvious that there really is no 'normal' user amount. . . .[48]

There is a wider feature of trafficable quantity legislation which needs consideration. The importance of the actual amounts prescribed for various drugs and their enactment in legislation must tend to give those amounts a special validity in the eyes of the community. The amounts, based as they are on the recommendations of the authoritative N.S.C.C., will be seen as almost conclusive evidence of drug practice in the community. Judges, magistrates and juries who administer laws based on trafficable quantity provisions are required to accept the assumptions underlying those amounts, and will inevitably be influenced in their perceptions of drug usage by their contact with these laws. Laws based on inaccurate or dubious assumptions can thus mislead the community and make the task of developing and implementing appropriate methods of controlling the 'drug problem' all the more difficult.

Sentencing

The trafficable quantity provisions are likely to create considerable difficulties in sentencing — difficulties typically associated with strict liability offences and reverse onus provisions.[49] Since in much drug legislation, the onus of proof is reversed on the issue of 'possession', the trafficable quantity provisions further highlight these difficulties. A simple example will illustrate the kind of problem. Suppose a person on whose premises 120 grammes of cannabis are found is convicted by a jury in Queensland of the offence of being in possession of cannabis for the purpose of selling.[50] Under the legislation[51] the person is deemed to be in possession for the purpose of selling if he has more than the prescribed quantity unless he proves the contrary. A conviction by a jury might mean

[47] (1979) 26 A.L.R. 177.
[48] Goode M., *op. cit.* 166.
[49] See Fox R. S. and O'Brien B. M., 'Fact-finding for Sentencers' (1975) 10 *M.U.L.R.* 163; Thomas D. A., 'Establishing a Factual Basis for Sentencing' [1970] *Criminal Law Review* 80; McConville M., 'Sentencing Issues: Judge and Jury' (1974) 11 *University of Western Australia Law Review* 230.
[50] Health Act 1937 (Qld), s. 130(2).
[51] Health Act 1937 (Qld), s. 130J.(1).

simply that they were not sure that he possessed the drug for sale. If the trial judge is likewise not sure that he possessed the drug for sale, must he sentence on the basis that the defendant had the drug for sale? What if, instead the trial judge is satisfied on the balance of probabilities that he had the drug for personal use and not for sale? Is he still bound to sentence on the basis that he had the drug for sale, or can he go behind the jury's verdict and decide that one interpretation of the jury's verdict was that they were not sure about his purpose? Could he, in other words, sentence a defendant convicted of possession for sale, on the basis that he was not in possession for the purpose of sale?

This situation is different from the normal criminal trial where the Crown must prove all elements of the offence beyond reasonable doubt. It is quite clear that even if the judge disagrees with the jury's verdict, he must in sentencing accept as proved beyond reasonable doubt at least the minimum elements of the offence consistent with the jury's verdict.[52] On the assumption that the jury's verdict is reasonable, there is no interpretation of the jury's verdict which could be consistent with the defendant's innocence of the offence charged.

The problem with sentencing on reverse onus provisions came up in *Elem*,[53] a decision of the Court of Criminal Appeal of Victoria. In that case, the defendant was convicted of trafficking in heroin contrary to s. 32 of the Poisons Act 1962 (Vic.). The defendant had been arrested leaving the Ansett Flight Terminal at Melbourne with a parcel which was found to contain 5.5 grams of heroin (more than the prescribed quantity). The defendant claimed that he did not know that there was heroin in the parcel and that he was simply picking it up for a friend. The Crown's case was essentially that the defendant was in control of the heroin. Since the jury convicted him, it is clear that he was not successful. He was sentenced to 6 years' jail with a minimum of 4 years. The defendant appealed unsuccessfully against conviction and sentence, and in dealing with the appeal against sentence, the Court of Criminal Appeal stated:

> Then when passing sentence, His Honour said that the only conclusion open to him was that the jury believed that the applicant knew that drugs were in the parcel. In this also His Honour was clearly wrong. The jury's verdict involved no necessary finding that the applicant knew that drugs were in the parcel. They might have convicted him upon the basis that they were not persuaded on the balance of probabilities that he had no knowledge of the contents of the parcel which he controlled and which was deemed by s. 28 to be in his possession. These errors would ordinarily have required this Court to quash the sentence and impose the sentence which in all the circumstances we thought was proper. Having taken into account, however, all that was said on the plea we do not think that a different sentence should have been passed.[54]

[52] *R. v. Harris* [1961] V.R. 236.
[53] *R. v. Elem*, unreported, Court of Criminal Appeal of Victoria, Melbourne, 27 July 1979.
[54] *Ibid.* 21.

It would appear that the judge can go behind the jury's verdict in a reverse onus situation,[55] as he often must in other situations, for example, manslaughter,[56] where the jury's verdict allows more than one interpretation of the legal route by which the jury reached their verdict. The proposition is in accord with the general principle that a judge in sentencing must form his own view of the facts. As Lowe J., speaking for the Court of Criminal Appeal of Victoria, stated in *Harris*:[57]

> [The judge] has to form his own view of the facts, and to decide how serious the crime is that has been committed, and how severely or how leniently he should deal with the offender. The learned judge, in forming his view of the facts, must not of course, form a view which conflicts with the verdict of the jury, but so long as he keeps within those limits, it is for him and him alone to form his judgment of the facts.[58]

The difficulty of the reverse onus situation is that the jury's verdict of guilty is consistent with a finding of facts by the trial judge that the defendant was in effect innocent. Supposing that the trial judge in *Elem* was satisfied that the defendant did not know that drugs were in the parcel, on what basis should he sentence? Is he entitled to act on his belief that the defendant did not know that the contents of the parcel were drugs, or is he estopped by the jury's verdict from so acting and permitted to sentence only on the ground that the question of the defendant's knowledge is uncertain? Regrettably, the Court of Criminal Appeal in *Elem* in concluding that six years was an appropriate sentence did not spell out what view they took of the defendant's knowledge, nor the approach that should be taken by a sentencing judge in such circumstances. They were content to confirm the sentence by taking into account 'all that was said on the plea', and, noting that the quantity of heroin involved had a street value of $5,600, simply stated that 'those who traffic in such amounts of the drug must expect a substantial prison sentence'.[59]

In a number of States,[60] it has been stated that the Woolmington

[55] See also *R. v. Kayal*, where Street C.J. stated: 'Mr Murray [counsel for the appellant] quite properly seeks to have the matter viewed upon the basis that the jury was merely not satisfied that he had discharged the civil onus of proving ignorance rather than that the jury had positively found that his claim of ignorance was false'; (1979) 2 N.S.W.L.R. 117, 124. However, in *R. v. Gronert*, a case involving a reverse onus under the *Narcotic and Psychotropic Drugs Act* 1934-1970 (S.A.), Sangster J. expressed the opinion that 'the appellant, having been convicted, must be sentenced for the offences of which he has been convicted by whatever procedural route the convictions were arrived at'; (1975) 13 S.A.S.R. 189, 200.

[56] *Supra* n. 49.

[57] *R. v. Harris* [1961] V.R. 236.

[58] [1961] V.R. 237.

[59] *R. v. Elem*, unreported, Court of Criminal Appeal of Victoria, Melbourne, 27 July 1979, 21. For a similar approach see *R.* v. *Kayal* [1979] 2 N.S.W.L.R. 117, 124, *per* Street C.J.

[60] This position has been enunciated most fully in South Australia. It has also been adopted in Tasmania; see *Nash v. Haas*, unreported, Supreme Court of Tasmania, Hobart, 15 February 1972, and seems to have accepted in N.S.W. (Rinaldi F., *Essays in Australian Penology* 48, Canberra 1976).

principle applies to sentencing as well as to the trial. Bray C.J. stated in *Law v. Deed*:[61]

> I think . . . that the principle by which the defendant has the benefit of any reasonable doubt applies through all criminal law and to matters of penalty as well as to matters of guilt or innocence except in the case of the defence of insanity or in the case of any statutory provision to the contrary.[62]

It is not clear how the exception specified by Bray C.J. 'in the case of any statutory provision to the contrary' operates at the sentencing stage. In *Beresford*,[63] where the defendant had pleaded guilty to drug charges (not involving a reverse onus) under the Narcotics and Psychotropics Act 1934-1970 (S.A.), the Full Court of South Australia insisted that the defendant's statement that he supplied the drugs only for social, non-profit purposes was 'at least reasonably possible', and hence:

> that the case must therefore be dealt with on the basis most favourable to the defendant. . . .[64]

However, the Court stated:

> This is not an occasion where any onus was thrown on the appellant to prove the facts. If there were any such onus, then it is at least open to doubt whether a self-serving statement made by him would be of any avail; but the onus is not upon him, and the version which he gave is at least reasonably possible.[65]

In cases where the trafficable quantity presumption places on the defendant the onus of disproving an intention to sell, it would appear from *Beresford* that the onus remains on the defendant at the sentencing stage. The *dicta* in *Beresford* were made in a case where there was no jury verdict, since the defendant had pleaded guilty. Under s. 5 of the Narcotics and Psychotropics Act 1934-1970 (S.A.), a person knowingly in possession of more than the prescribed quantity of a drug is deemed to have that drug in his possession for the purpose of sale. In a case where the defendant had been convicted by a jury of an offence under this provision it would follow from *Beresford* that the sentencing judge would be bound by the jury's verdict to the extent that he could not make a positive finding of fact that the defendant did not have the drugs for the purpose of sale. However, the onus on the defendant would extend only as far as the statutory presumption and no further. Since there is no statutory presumption applying to the words 'sell' or 'sale', the trial judge would have to interpret the kind of sale that was intended on Woolmington principles. Thus, if the defendant raised only a reasonable doubt that the sale was not profit-oriented the judge would be required to treat the intended sale as one of a non-profit kind — for example buying for friends who were expected to reimburse him.

[61] [1970] S.A.S.R. 374.
[62] [1970] S.A.S.R. 378.
[63] *R. v. Beresford* [1972] 2 S.A.S.R. 446.
[64] [1972] 2 S.A.S.R. 449.
[65] [1972] 2 S.A.S.R. 449.

Such an approach, while it has a certain logical consistency, does not seem very satisfactory. On the key element of the defendant's intention in possessing the drug, the judge in fact receives virtually no guidance from the jury's verdict, save to restrict him from sentencing on the basis that the defendant had no intention to sell. From the defendant's point of view, it enables a sentencing judge to form a view of his intention which might well be far more culpable than the jury thought. In other words, given the wide range of interpretations that could be put on the jury's verdict of 'guilty', it downgrades the function of the jury and effectively transfers to the judge the determination of a key element in the offence, but in a manner that can only work against the defendant. Moreover, given the lack of direction that the judge receives from the jury's verdict, there is a further risk that the judge in sentencing will rely more on the nature of the drug and the quantity involved, rather than on the defendant's actual intention. However, in assessing culpability it would seem that the nature and quantity of the drug, while clearly relevant issues, are matters that are essentially secondary to the determination of the defendant's actual intentions.

The 'trafficable quantity' provisions in the Customs Act 1901-1975 (Cth)

Unlike State legislation, the trafficable quantity provisions operate only at the sentencing stage. Once a defendant has been convicted of, say, possession of narcotic goods which have been imported into Australia, the judge has two functions: he must first determine the appropriate sentencing range and then he must determine the appropriate sentence within that range.

Two different situations merit discussion:

A person whose case comes under s. 235(3) of the Customs Act 1901-1975 (Cth): In the case of a person with no prior conviction for a drug offence under the Customs Act 1901-1975 (Cth) involving a trafficable quantity, once the Crown has established that the offence involved a quantity of the drug that was less than the 'commercial quantity', but not less than the 'trafficable quantity', the higher sentencing range set out in s. 235(2)(d) of the Customs Act 1901-1975 (Cth) is applicable unless the defendant can satisfy the judge on the balance of probabilities that the offence was not committed for any purpose related to sale or commercial dealing.[66]

The Court of Criminal Appeal of Victoria has held in *King*[67] that the defendant's failure to discharge that onus does not mean that the judge is to sentence him on the assumption that the offence was committed (either by him or anyone else) for sale or commercial dealing.

[66] Customs Act 1901-1975 (Cth), s. 235(3)(b).
[67] *R. v. King* [1979] V.R. 399.

> If no attempt is made on behalf of an accused under s. 235(3) to avoid the higher penalties or if such an attempt fails, the higher penalties provided for in s. 235(2)(c) [now s. 235(2)(d)] remain applicable but the actual sentence is to be determined according to the nature and degree of the accused's involvement in the relevant activity. The circumstance that the negative proposition referred to in sub-s. (3) is not established does not justify the conclusion that the opposite positive proposition, that the offence was committed for a purpose mentioned in the sub-section, is established. . . .
> The presence of sub-s. (3) must at least prevent the court, proceeding to sentence within s. 235(2)(c), [now s. 235(2)(d)], from doing so upon a finding that, or upon the basis that it is proved that the offence was not committed for any purpose related to sale or other commercial dealing. It must proceed upon the basis that the offence related to a quantity of a narcotic substance which was trafficable in the dictionary sense, (sc. marketable) and was committed for purposes, which at best for the accused, are unknown.[68]

The guidance given to the sentencing judge is disquietingly vague, and could well tend to draw his primary attention from the intentions of the defendant and give too much weight to the quantity of the drug involved.

There are also statements in *King* which could be interpreted as placing not only an evidentiary onus, but also the substantive onus on the defendant to prove matters in mitigation of the offence.

> A court must sentence a man upon the case made out by the Crown in evidence or appearing from the depositions, but it none the less looks to him to put forward material in mitigation of the offence. The applicant's failure to *prove* on the hearing of the plea any mitigating circumstances of the offence, as opposed to mitigating factors personal to himself, is a relevant matter. In the case of drug offences, very often only the offender will be in a position to *prove* the true extent of his involvement in commercial dealing. The extent of his participation will hardly ever appear from overt acts which the Crown will be able to prove. If the offender does not give evidence, he can hardly complain if the court declines to draw inferences in his favour.[69]

To the extent that the Court of Criminal Appeal is placing the onus on the defendant to prove mitigating factors or to disprove aggravating circumstances, it seems contrary to the approach taken by that Court in *Herszfeld*.[70] In that case, the Court accepted the trial judge's finding that the higher penalty range was applicable since the defendant had not established that the offence was not committed for any commercial purpose, but, in deciding that the sentence was manifestly excessive, relied in part on the fact that:

> it was not shown that the applicant had intended to sell either the powder, or the heroin contained therein, or that she had been acting as an agent for anybody who did intend to sell it.[71]

The position is most unclear and at the very least needs clarification.

A person whose case comes under s. 235(2)(c)(ii) of the Customs Act 1901-1975 (Cth): In the case of a person who has a prior conviction for a offence under the Customs Act 1901-1975 (Cth) involving a trafficable quantity and who has committed another offence involving a quantity of

[68] [1979] V.R. 405.
[69] [1979] V.R. 406, author's emphasis.
[70] *R. v. Herszfeld*, unreported, Court of Criminal Appeal of Victoria, Melbourne, 8 September 1976.
[71] *Ibid.* 9.

drugs less than the 'commercial quantity', but not less than the 'trafficable quantity', the penalty prescribed is 'imprisonment for life or for such period as the Court thinks appropriate'.[72]

In such a case, there is no statutory provision by which the defendant can bring himself into a lower sentencing range by proving on the balance of probabilities that the offence was not committed for any commercial purpose. However, the defendant's purpose is clearly a highly relevant matter in fixing the actual sentence.[73] Since there is no reverse onus, on the principles enunciated in *Law v. Deed*[74] and in *Beresford*,[75] the defendant should be given the benefit of any reasonable doubt about a matter relevant to sentencing. Hence, if the defendant stated that his possession of that quantity of drugs was for personal use, and this version of the facts was reasonably possible, the defendant should be sentenced on that basis. In some situations, it could then well be that a defendant with a prior drug conviction would be better placed in terms of sentencing than if he had no prior drug conviction. This seem a rather anomalous situation. More generally, it seems inappropriate that judges should be required to apply significantly different principles in dealing with what are essentially similar sentencing situations.

General Comment

It is clear that reverse onus provisions impose considerable sentencing difficulties on judges, largely by depriving them of guidance from the jury on issues vital to sentencing; and these difficulties bear down more heavily in the case of drug offences which carry very large maximum penalties. If the reverse onus provisions are to remain, there is an urgent need for the development of workable guidelines for judges. However, the difficulties the courts have experienced in dealing with these issues could well be an argument for the repeal of the reverse onus provisions or, at least, their modification.[76]

Law Enforcement

The stated aim for introducing the trafficable quantity provisions was to aid law enforcement,[77] it being allegedly very difficult to prosecute traffickers successfully under the previous laws. It may be doubted whether these

[72] Customs Act 1901-1975 (Cth), s. 235(2)(c)(ii).
[73] For example *R. v. Piercey* [1971] V.R. 647.
[74] [1970] S.A.S.R. 374.
[75] *R. v. Beresford* [1972] 2 S.A.S.R. 446.
[76] For a similar statement, see *R. v. Kennedy* (1979) 25 A.L.R. 367, 393, *per* Roden J.
[77] For example Mr Jago, Minister for Health, New South Wales, *Parliamentary Debates*, Legislative Assembly, 20 August 1970, 5341; Hon. R. C. De Garis, South Australia, *Parliamentary Debates*, Legislative Council, 12 November 1970, 2631.

provisions will materially aid prosecutions,[78] or, if they do, whether the result is desirable.

Where large amounts of a drug are involved, the trafficable quantity presumption seems unnecessary. In a case where a person is found in possession of a large quantity of, say, cannabis (for example 10 kg), it is highly probable that the Crown, without any reliance on a trafficable quantity presumption, would be able to prove beyond reasonable doubt trafficking or an intention to traffic. In cases, where the quantity of drugs involved is not far over the trafficable quantity, two different cases merit discussion: (a) the person known to the police as a dealer about whose activities the police have been unable to gain sufficient evidence to directly prove trafficking; and (b) the person who has that quantity for personal use or sharing with friends. In the case of the dealer, the trafficable quantity presumption may lead to a conviction for trafficking or possession for the purpose of trafficking, but in the absence of any other solid evidence the penalty is unlikely to be substantially more than for simple possession.[79] In the case of the non-dealer, the police may use the threat of a trafficking charge to coerce a plea of guilty to simple possession or alternatively achieve a conviction for trafficking. This latter alternative is all the more possible given the breadth and vagueness of the offences covered by the trafficable quantity presumption. Neither alternative is desirable: the former is unnecessary and potentially unjust; the latter simply 'pumps up the importance of relatively trivial breaches of the law'.[80]

More generally, the difficulty of convicting 'traffickers' can be a self-fulfilling prophecy. It is not at all clear that drug trafficking is notably more difficult to prove than other serious offences — for example white-collar crime, arson insurance fraud.[81] Indeed, the number of successful prosecutions consequent on police discovery of large drug hauls seems evidence to the contrary. The trafficable quantity provisions, based upon the assumption that drug trafficking is difficult to detect, are likely to provide either a defeatist attitude in enforcement agencies or an over-zealous

[78] See South Australia, *Final Report of the Royal Commission into the Non-Medical Use of Drugs* (1980), 237 f. where it was stated: 'Nothing has been presented to us to suggest that in practice the reverse onus provision achieves the objective of convicting dealers who would otherwise remain undetected. Indeed the view was put to us by an experienced Crown prosecutor that the provision is ineffective in securing convictions, is artificial in its operation and should be repealed.'

[79] In *R. v. Robinson* (1969) Crim.L.R. 207, the Court of Appeal strongly disapproved of the giving of hearsay evidence on sentence that a person, convicted of possession of a small amount of cannabis, was believed to be a major distributor of drugs.

[80] Goode M., *op. cit.* 173.

[81] *Cf.* the remarks of Culliton J.A., who delivered the leading judgment in *Larier*, a Canadian drug case: 'It was contended that proof of knowledge as to the character of the substance would place upon the Crown a difficult, if not impossible burden. I cannot agree with the contention. Proof of knowledge is no more difficult than the proof of intent in any criminal prosecution. . . . A jury, on properly established facts, should experience no more difficulty in finding knowledge than it does in finding intent' *R. v. Larier* (1960) 129 C.C.C. 297, 312 (Saskatchewan Court of Appeal).

infringement of the proper bounds of police practice. The trafficable quantity provisions can give the police an easy way out and lead to sloppy police work, or generate violations of civil liberties and the community's standards of justice, which in the long run will do more harm than the evils which they were seeking to eliminate.

CONCLUSION

There are strong reasons for believing that it is impossible to establish with any acceptable degree of accuracy quantities for each drug which would be an accurate determinant of a possessor's intentions. Moreover, even if such estimates were possible, it is very doubtful whether trafficable quantity provisions serve any valid purpose. For large amounts of drugs, the presumption is unnecessary; for amounts not far above the trafficable quantity, the presumption can produce injustice. Put simply, if a large amount of a drug is involved, the jury will convict of trafficking; if an amount is only slightly over the trafficable quantity, on that evidence alone the jury should not convict.

Paradoxically, the extent of the community's concern about drugs is demonstrated by its preparedness to abandon basic principle in an attempt to combat the problem. It has been said with more than a degree of truth that in a society where a consensus morality is lacking, the law tends to become the community's morality. In the area of drugs, this has a good deal of truth. The present drug laws not only express and (perhaps) engender moral attitudes about drugs, but, more fundamentally, in their abandonment of basic principle represent an acceptance of expediency and potential injustice. The moralizing stance of the drug laws rests on a morally unsound base.