

Misuse of Drugs Act 1971

Law

Statutory provisions: [section 4](#)

Restriction of production and supply of controlled drugs

(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 –

- (a) to produce a controlled drug; or
- (b) to supply or offer to supply a controlled drug to another.

(2) Subject to section 28 of this Act, it is an offence for a person –

- (a) to produce a controlled drug in contravention of subsection (1) above; or
- (b) to be concerned in the production of such a drug in contravention of that subsection by 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.

Statutory interpretation: [section 4\(2\)](#)

1. The words "to produce" a controlled drug, mean producing it by manufacture, cultivation or any other method (Section 37(1)). It includes changing a drug from one form to another ([R v Russell \(Peter Andrew\) \(1992\) 94 Cr App R 351](#)) and bulking out or splitting drugs ([R v Williams \(Darren\) \[2011\] EWCA Crim 232, \[2011\] 1 WLUK 525](#)).

Judicial interpretation: section 4(2)(b) and 4(3)(b)

2. The words “concerned in” occurring in section 4(2)(b) and section 4(3)(b) indicate that the accused must have a degree of knowledge. One cannot be concerned in producing or supplying a controlled drug if one is not aware of being involved in producing or supplying. The Crown must establish that the accused knew that he was involved in producing or supplying something, and must prove that the thing which he was concerned in producing or supplying was the controlled drug libelled in the charge ([Salmon v HM Advocate 1999 JC 67](#), 81 per Lord Justice General Rodger. [Carnall v HM Advocate 1999 SCCR 904](#), at paragraph [11]. See also [Sharkey v HM Advocate 2001 SCCR 290](#). [Cairns v HM Advocate \[2005\] HCJAC 22](#), 2006 JC 12). Being concerned in an activity imports participation in that activity. Participation implies knowledge of the activity. What is required is participation in an operation which has as its objective the supplying of something (material or a substance) which turns out to be a controlled drug, and knowledge that what one is involved in is a producing or supplying exercise ([Salmon](#), 97 – 98 per Lord Bonomy. [Cairns](#), at paragraph [5] per Lord Marnoch. [Dickson v HM Advocate 2001 JC 203](#) at paragraph [31]. [Aiton v HM Advocate \[2010\] HCJAC 15](#), 2010 JC 154 at paragraph [30] per Lord Bonomy).

3. Section 4(2)(b) and Section 4(3)(b) were purposely enacted in the widest terms and were intended to cover a great variety of activities both at the centre and also on the fringes of producing, supplying or dealing in controlled drugs.

Being concerned in supplying would, for example, in appropriate circumstances include the activities of financiers, couriers and other go-betweens, look-outs, advertisers, and many links in the chain of production and distribution. Being concerned in supplying controlled drugs would certainly include the activities of persons who take part in the breaking up of bulk, the adulteration and reduction of purity, division into deals and the weighing and packaging of deals. A person may be convicted of being concerned in the supplying of drugs even if no actual supply takes place, and the offence can relate to drugs supplied or to be supplied by the accused person himself ([Salmon](#), 89 (charge of trial judge, Lord Osborne)).

4. The concept of being concerned in supply is all-embracing, and consequently, evidence of actual supply may be subsumed into a s 4(3)(b) charge where the state of the evidence justifies that course. While it is not necessary for proof of a s 4(3)(b) charge that evidence of actual supply be led, it does not follow that such evidence is

not relevant to proof of such a charge, and it may competently be led ([HM Advocate v Grant \[2007\] HCJAC 71, 2008 SLT 339](#)).

5. If, in cases arising under section 4(3)(b) the accused is participating in the operation of producing or supplying, the doctrine of common law concert does not apply ([Salmon](#), 87 – 88 per Lord Justice General Rodger; [Clark v HM Advocate 2002 SCCR 675](#) at paragraph [12]; [Barclay v HM Advocate \[2020\] HCJAC 8, 2020 JC 175](#)). That decision also suggests that the doctrine does not apply in the case of contraventions of section 4(2)(b) of the 1971 Act. If accused persons were to be charged art and part, the degree of knowledge which the Crown has to prove is no different than if they were not so charged.

6. To secure a conviction, the prosecutor has to establish that there was a production or supplying operation, and that the accused was involved in a material way in one or more aspects of that operation. The case against any such accused has to be considered separately, in the sense that the accused is not to be convicted of being concerned in the drug production or supplying operation just because he/she/they was associating with others who plainly were actively involved in such an operation. The accused has to be shown to be personally, actively and knowingly involved in the operation ([Salmon](#), 86. Dicta in [Rodden v HM Advocate 1995 SLT 185](#) that it must be established for art and part guilt that there was knowledge on the part of each accused that drugs were involved, was, therefore, doubted). In the context of the accused's own actions, the accused's association with others who are engaged at the time in a production or supplying operation may be relevant to support an inference that the accused was actively and knowingly concerned in the operation ([Clark](#), at paragraph [12]). Similarly, there would appear to be little room for the special defence of incrimination ([Flanagan v HM Advocate 2012 JC 98](#)).

7. If a person is charged with offences under s4(3)(b) and 5(3) and the evidence relating to each charge is the same, then the jury can only convict of one. ([Kyle v HM Advocate 1988 SLT 601](#), 603 per Lord Justice Clerk Ross).

8. Where concern production or in supply is libelled throughout a period of time, the jury must be directed that it must be satisfied beyond reasonable doubt of the involvement of the accused throughout the period covered in any verdict of guilty ([Aiton v HM Advocate \[2010\] HCJAC 15, 2010 JC 154](#) at paragraph [50]).

9. Section 4A of the Act provides for an aggravation of the offence of supply of a controlled drug and provides as follows:

(1) This section applies if—

- (a) a court is considering the seriousness of an offence under section 4(3) of this Act, and
- (b) at the time the offence was committed the offender had attained the age of 18.

(2) If either of the following conditions is met the court—

- (a) must treat the fact that the condition is met as an aggravating factor (that is to say, a factor that increases the seriousness of the offence), and
- (b) must state in open court that the offence is so aggravated.

(3) The first condition is that the offence was committed on or in the vicinity of school premises at a relevant time.

(4) The second condition is that in connection with the commission of the offence the offender used a courier who, at the time the offence was committed, was under the age of 18.

(5) In subsection (3), a relevant time is—

- (a) any time when the school premises are in use by persons under the age of 18;
- (b) one hour before the start and one hour after the end of any such time.

(6) For the purposes of subsection (4), a person uses a courier in connection with an offence under section 4(3) of this Act if he causes or permits another person (the courier)—

- (a) to deliver a controlled drug to a third person, or
- (b) to deliver a drug related consideration to himself or a third person.

(7) For the purposes of subsection (6), a drug related consideration is a consideration of any description which—

- (a) is obtained in connection with the supply of a controlled drug, or
- (b) is intended to be used in connection with obtaining a controlled drug.

(8) In this section—

“school premises” means land used for the purposes of a school excluding any land occupied solely as a dwelling by a person employed at the school; and

“school” has the same meaning—

- (a) in England and Wales, as in section 4 of the Education Act 1996;
- (b) in Scotland, as in section 135(1) of the Education (Scotland) Act 1980;
- (c) in Northern Ireland, as in Article 2(2) of the Education and Libraries (Northern Ireland) Order 1986.

Statutory provisions: [section 5](#)

Restriction of possession of controlled drugs

(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.

(3) 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.

(4) 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.

(5) [Repealed]

(6) Nothing in subsection (4) or (5) above shall prejudice any defence which it is open to a person charged with an offence under this section to raise apart from that subsection.

Judicial interpretation: [section 5](#)

1. "Possession", where it occurs, has to be given its ordinary meaning. The concept of possession covers an article subject to the control of the possessor. "[T]he concept of control would imply knowledge that the article in question was subject to that control. Control is not a function of the unconscious" ([McKenzie v Skeen 1983 SLT 121](#), 122 per Lord Cameron). In the case of an accused charged with a contravention of section 5(2) where the substance in question was found in a container, the Crown has an initial burden of proving that the accused knew that he/she/they had the container in his/her/their control, and that it contained something which was proved to be the controlled drug described in the charge (*Salmon*, 76 - 77 per Lord Justice General Rodger). In other words, the Crown must show that the accused knew that the container held something, and that the accused had control over that, and that the contents of the container were in fact the drugs referred to in the charge ([Wali v HM Advocate \[2007\] HCJAC 11, 2007 JC 111](#) at paragraph [11]; *Salmon*, 80 per LJ-G Rodger; and dicta in [R v Lambert \[2001\] UKHL 37, \[2002\] 2 AC 545](#)). The trial judge should direct the jury, if they are not satisfied beyond reasonable doubt that the narrative set out in the previous sentence is proved, they should acquit the accused: but that, if they find these facts to have been proved, they should be directed to consider, where the defence raise the issue by putting forward evidence, whether on all the evidence, they are satisfied, that the accused neither knew nor suspected nor had reason to suspect, that the contents of the container comprised a controlled drug. If they are so satisfied, they must acquit (*Lambert*).

2. Section 5(3) requires the Crown to prove, in addition to possession, an intent to supply. Proof of intent to supply can be inferred from surrounding circumstances or from the quantity or form of the drugs (*Salmon*, 79 per Lord Justice General Rodger).

Statutory provisions: defence

Section 28

Proof of lack of knowledge etc to be a defence in proceedings for certain offences

(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.

Judicial interpretation of statutory defence

1. Section 28(2) provides the accused with a defence that he was justifiably ignorant of some fact that it was necessary for the Crown to prove in discharging the initial onus. If, for example, the Crown prove that the accused was in possession of a container holding tablets of a controlled drug, the accused will be acquitted if he was justifiably ignorant of the fact that there were tablets in the container ([Salmon](#), at 78 – 79 per Lord Justice General Rodger; and [R v Lambert](#) [2001] UKHL 37, [2002] 2 AC 545).
2. Section 28(3) is concerned only with a situation where the Crown have proved, or the accused has admitted, that the substance or product found in his possession was the controlled drug described in the charge. Section 28(3)(a) negatives any defence based on the contention that the accused did not know that the substance or product in question was the controlled drug described in the charge rather than another controlled drug (for example, if he thought he was involved in supplying Ecstasy when it fact it was heroin), But section 28(3)(b)(i) affords a defence to an accused who thought that the tablets in question were not a controlled drug, and that he was justifiably ignorant of the true position (for example, that he thought that he was involved in a scheme for a black market sale of some (uncontrolled) “lifestyle” drug and that the tablets were tablets of that lifestyle drug). In addition, section 28(3)(b)(ii) affords a defence to a doctor authorised to possess or supply particular controlled drugs. If that doctor is found in possession of controlled drugs which are not covered by his authority, it is a defence if the Crown fails to disprove his belief that they were ([Salmon](#), 72, per Lord Justice General Rodger; and [R v Lambert](#)).
3. The facts necessary for any defence under section 28 can be proved on the basis of uncorroborated evidence ([Salmon](#), 75, per Lord Justice General Rodger; and [R v Lambert](#)).

Burden of proof in statutory defence

1. Having regard to article 6(2) of the ECHR, [section 3\(1\) of the Human Rights Act 1998](#) and dicta in [R v Lambert](#), a defence under section 4(2) or (3), 5(2), (3) or (4) of the 1971 Act does not imply a legal or persuasive burden on the accused to prove the statutory defence on a balance of probabilities. The defence imposes merely an evidential burden on him, that is to say, the accused has to raise the issue of the defence (by pointing to evidence before the jury); but the burden of proof remains

on the Crown who must then prove beyond reasonable doubt that the defence is not made out (*R v Lambert*; [*Henvey v HM Advocate* \[2005\] HCJAC 10, 2005 SLT 384](#)).

2. Not all defences to drugs charges involve recourse to section 28. Accordingly it may not always be necessary to refer to the statutory defence but reference should be made to the line of defence if raised at trial ([*Glancy v HM Advocate* 2001 SCCR 385](#) at paragraph [13]. *Aiton* highlights the importance of determining whether the accused has raised a statutory defence). In [*Choon Seng Gan v HM Advocate* \[2025\] HCJAC 32](#), the Appeal Court at paragraph [37], noted that where section 28 is being relied upon the defence ought to make that clear.

3. However, if a section 28 defence is not raised by the defence, careful consideration should be given to whether it is a live issue and whether directions on it should be given. Claiming lack of knowledge of the presence of a package does not raise a section 28(2) defence. In *Aiton* at paragraph [30], Lord Bonomy stated:

“[30] The net effect of these cases is that in a charge of being concerned in the supply of a controlled drug under sec 4(3)(b) of the 1971 Act the Crown will ordinarily require, depending on the circumstances, to establish either three or four things. In all cases the Crown must prove: (1) that the accused was involved in some capacity in an operation that had as its objective the supply of something; (2) that the ‘something’ was a controlled drug; and (3) that the accused was aware of the operation. Proof of knowledge that a controlled drug was involved is not necessary. These are the basic requirements for conviction. However, if there is placed in issue in the course of the trial any question which arises under sec 28(2) or (3), then as a fourth requirement the Crown must exclude that defence beyond reasonable doubt.”

4. The Appeal Court in *Choon Seng Gan v HM Advocate* determined that the previous authorities do not imply that section 28 only arises where a party raises the defence. While the absence of a direction, in the particular circumstances of the case, did not amount to a miscarriage of justice, the court concluded the sheriff should have directed on section 28 where it arose from the appellant’s evidence, even though the defence did not raise it and the sheriff was not addressed on it. The court explained:

“[43] The appellant said that he did not know that there was cannabis in the suitcase. On his account, if accepted, the jury could readily infer that he did not suspect and had no reason to suspect that cannabis was involved. In these circumstances the sheriff ought to have directed the jury on the defence in

s28(2). An appropriate direction would have been that if the jury concluded that the appellant was knowingly involved in a supplying operation, he should nevertheless be acquitted if he did not know, suspect or have reason to suspect that the suitcase contained a controlled drug or if the jury were left in reasonable doubt about that.”

5. To discharge the evidential burden on the accused, he has to point to evidence before the court which, if believed, could be taken by a reasonable jury to support his defence. The evidence would have to show that the accused neither knew nor suspected nor had reason to suspect the existence of the fact alleged by the prosecution which it was necessary for the prosecution to prove. The Crown would then require to meet that defence, and to satisfy the jury beyond reasonable doubt that it should be rejected. If the jury believe evidence that the accused neither knew, nor suspected nor had reason to suspect the existence of the relevant fact, he must be acquitted. Even if they are not prepared to go so far as to believe that evidence, but are left in reasonable doubt about that matter, he must be acquitted (*Henvey*, at paragraph [11]).

6. Where there is no issue as to whether the accused did not know or suspect or have reason to suspect the relevant fact, there is no need for the jury to be given directions in regard to section 28. In a section 4(3)(b) case, where no such issue is raised on the evidence, the conviction will depend on whether the jury are satisfied that the accused knew he was concerned in the supplying of something and are further satisfied that that thing was a controlled drug. If, on the other hand, there is evidence which, if believed, could support a defence under section 28, the jury will require to be directed that they must acquit if they accept that evidence, or are left in reasonable doubt about the matter (*Henvey*, at paragraph [12]).

7. In *Choon Seng Gan* the court explained that there may be other defences in addition to section 28(2) at paragraph [38]:

“[38] It is important to identify what the appellant’s defence was. It appears to us that it had three strands. First, and simplest, the appellant’s position was that he was helping a paying passenger to move house. Accordingly, he was asserting that he had no knowledge of a supplying operation, as the natural implication of his evidence is that he did not understand that his passenger intended to part with possession of the suitcases that in fact contained cannabis. That was a complete defence and the onus was on the Crown to

overcome it beyond reasonable doubt. It did not raise a s 28 defence. Secondly, he maintained that if the facts disclosed that there was a supplying operation going on, it was exclusively attributable to his co-accused. Whilst doubts have been expressed about the applicability of a defence of incrimination to a charge under s 4(3)(b), the sheriff directed upon it, telling the jury that if they believed the appellant about it, or they were left in reasonable doubt by it, they must acquit. This strand did not raise a s 28 defence. The third strand arose from the appellant's evidence that his understanding was that the suitcases contained Mr Zheng's personal belongings, and that he did not know they contained drugs. In our judgement this strand did raise a s 28(2) defence."

Section 23(4)

(4) A person commits an offence if he—

(a) intentionally obstructs a person in the exercise of his powers under this section; or

(b) conceals from a person acting in the exercise of his powers under subsection (1) above any such books, documents, stocks or drugs as are mentioned in that subsection; or

(c) without reasonable excuse (proof of which shall lie on him) fails to produce any such books or documents as are so mentioned where their production is demanded by a person in the exercise of his powers under that subsection.

POSSIBLE FORM OF DIRECTION ON MISUSE OF DRUGS ACT 1971

Section 4(2)(a): production of a controlled drug

"Charge.... is a charge of producing a controlled drug. It alleges a contravention of the Act mentioned in the charge. Read short, that makes it a crime for you to produce a controlled drug. The drugs involved (specify) are classified under the Act as Class A/B/C controlled drugs respectively. The key words are "to produce a controlled drug".

"To produce" means to manufacture, cultivate or produce by any other means.
(Where appropriate – "It includes changing a drug from one form to another and bulking out or splitting drugs.")

For the Crown to prove this charge, you would need to be satisfied that:

- The accused produced something
- The accused knew that he had produced something and
- What he produced was [the controlled drug]

Section 4(2)(b): to be concerned in the production of a controlled drug

"Charge..... is a charge of being concerned in the production of a controlled drug. It alleges a contravention of the Act mentioned in the charge. Read short, that makes it a crime for you to be concerned in the production of a controlled drug. The drugs involved (specify) are classified under the Act as Class A/B/C controlled drugs respectively. The key words are "to be concerned in the production of a controlled drug".

"To produce" means to manufacture, cultivate or produce by any other means.

(where appropriate – "It includes changing a drug from one form to another and bulking out or splitting drugs.")

'Being concerned in' requires the accused's active involvement in the production. The accused requires to be participating in the enterprise. That can take many forms such as allowing his premises to be used, supplying equipment, providing funds or ordering raw materials. This is not an exhaustive list. He must be involved in some way in the production operation.

'Being concerned in' production also requires the Crown to prove some degree of knowledge on the part of the accused. What is required is proof that the accused personally was actively and knowingly involved in an operation to produce something. The Crown has to prove that what was actually being produced was the controlled drug specified in the charge. But the Crown does not need to prove that the accused knew it was the controlled drug specified in the charge which was being produced.

For the Crown to prove this charge, you would need to be satisfied that:

- There was an operation to produce something

- The accused was knowingly involved in it; and
- What he was in fact supplying was the drugs referred to in the charge.

Where more than one accused involved

“As I have said, a charge of this sort can cover a wide range of activities in the production operation. Different people can be involved, in different ways, in different places, and at different times. One person’s function may be unconnected with, or connected with, another person’s function, or run in conjunction with it. In the production situation everybody involved in the production operation commits a crime. Each one is guilty of the whole charge, because he is part of the production operation. So, each person who is proved to have knowingly taken part in the production operation is guilty of the whole charge, as it is labelled in the indictment.

In this case there is more than one person accused on this charge. Here the Crown say the evidence shows they were knowingly part of a production operation. The defence say no such conclusion can be drawn. In deciding this you might find it helpful to look at the evidence in stages:

- (1) decide if there was a production operation. If that is not proved, the Crown could not prove this charge
- (2) decide what each accused did, on his own, and along with others
- (3) decide if he was knowingly part of the production operation.
- (4) decide if what was being produced was (specify drug).

If you conclude there was such a production operation, that an accused knowingly took part in it, and that it was the drug (specify) that was being produced, you would convict him of this charge.” (adapt the last sentence where there is a statutory defence)

If a section 28 defence arises on the evidence (accused thought the production operation was producing something that could not be associated with controlled drugs)

In this case the accused [in his/her/their statement to the police] says [he/she/they] thought what was being produced was something completely different from drugs [e.g. cigarettes] and so should be acquitted. If you accept that evidence, and thought that it supported the conclusion that the accused neither knew nor suspected, nor

had reason to suspect, that what was being produced was of the nature of a drug, you would acquit the accused. You have to judge this matter objectively.

It is for the Crown to satisfy you beyond reasonable doubt that the explanation should be rejected. Evidence to support the accused's position does not need to be corroborated. The accused does not need to prove it to any particular standard. If what the accused says is believed, or if it raises a reasonable doubt, an acquittal must result. It is for the Crown to exclude lack of knowledge, or suspicion, or reason to suspect beyond reasonable doubt.

Section 28(3) (accused thought (for example, the pills) were not controlled drugs) [adapt as appropriate]

"In this case the accused (in his/her/their statement to the police) says he/she/they neither knew nor suspected nor had reason to suspect that the pills that were being produced were controlled drugs, but he/she/they thought they were (e.g. aspirin), and so he/she/they should be acquitted. If you accept that evidence, and thought that it supported the conclusion that the accused neither knew nor suspected, nor had reason to suspect, that what was being produced was a controlled drug, you would acquit the accused. You have to judge this matter objectively.

It is for the Crown to satisfy you beyond reasonable doubt that the explanation should be rejected. Evidence to support the accused's position does not need to be corroborated. The accused does not need to prove it to any particular standard. If what the accused says is believed, or if it raises a reasonable doubt, an acquittal must result. It is for the Crown to exclude lack of knowledge, or suspicion, or reason to suspect beyond reasonable doubt."

Section 4(3)(b): being concerned in the supplying of a controlled drug

"Charge is a charge of being concerned in the supply of drugs. It alleges a contravention of the Act mentioned in the charge. Read short, that makes it a crime for you to be concerned in supplying a controlled drug to another person.

The drugs involved (specify) are classified under the Act as Class A/B/C controlled drugs respectively. That's not in dispute. The key words are 'being concerned in supplying'. That calls for three comments. 'Supplying' has its ordinary and common-sense meaning. It's parting with possession. It covers any form of supply – sale, exchange, barter, gift.

'Being concerned in' requires the accused's active involvement in the supply chain. That can take many forms, at the centre or on the fringes of drug dealing, from the big barons to the street dealers. It covers financiers, couriers, go-betweens, look-outs, advertisers, those who store drugs, those who break up bulk quantities, reduce their purity, divide them into deals, or package them, and suppliers of single deals. It covers supply itself, or any link in the chain of distribution from producer to ultimate consumer. It can relate to drugs supplied to, or supplied by, the accused. He must be involved in some way like that.

"Being concerned in supplying" also requires the Crown to prove some degree of knowledge on the part of the accused. What is required is proof that the accused personally was actively and knowingly involved in an operation to supply something, but not necessarily that it was a controlled drug. The Crown has to prove that what was actually being supplied was the controlled drug specified in the charge. But the Crown does not need to prove that the accused knew it was the controlled drug specified in the charge which was being supplied.

For the Crown to prove this charge, you would need to be satisfied that:

- (1) There was an operation to supply something
- (2) the accused was knowingly involved in it
- (3) what he was in fact supplying was the drugs referred to in the charge."

Where more than one accused involved

"As I've said, a charge of this sort can cover a wide range of activities in the distribution chain. Different people can be involved, in different ways, in different places, and at different times. One person's function may be unconnected with, or connected with, another person's function, or run in conjunction with it. In the supply situation everybody involved in the distribution chain commits a crime. Each one is guilty of the whole charge, because he's part of the distribution chain from producer to ultimate consumer. So, each person who is proved to have knowingly taken part in the supply chain is guilty of the whole charge, as it's libelled in the indictment.

In this case there's more than one person accused on this charge. Here the Crown say the evidence shows they were knowingly part of a distribution chain. The defence say no such conclusion can be drawn. In deciding this you might find it helpful to look at the evidence in stages:

(1) decide if there was a supplying operation. If that's not proved, the Crown couldn't prove this charge

(2) decide what each accused did, if anything, on his own, and along with others

(3) decide if he was knowingly part of the supplying operation

(4) decide if what was being supplied was (specify drug).

If you conclude there was such a supplying operation, that an accused knowingly took part in it, and that it was the drug (specify) that was being supplied, you could convict him of this charge."

Aggravations applicable to section 4(3) offences

You will see that this offence is said to be aggravated as a consequence of what is set out in the aggravation. In terms of the legislation, an offence in terms of section 4(3) of the legislation is aggravated if it is committed in certain circumstances. This results in the offence being viewed more seriously and has a bearing on the sentence imposed in the event of the accused being convicted of the offence. For the offence to be aggravated the accused has to be aged 18 years or older.

In this case it is claimed that the offence is committed on or in the vicinity of school premises. For the aggravation to apply the school premises must be being used by persons under 18 years of age or within one hour of school starting or ending. [If necessary define school premises in terms of section 4A(8)]

Or

In this case it is claimed that the accused at the time of the commission of the offence used a person as a courier and that person was under the age of 18 years. The accused uses that person as a courier if he causes or permits him to deliver the substance in question to another or deliver consideration related to drugs to the accused or someone else. Such consideration covers anything of value - money, material items – which is obtained in connection with the supply of such a substance or is intended to be used in connection with obtaining such a substance.

In considering the aggravation, might I suggest that you consider this charge in the following way. You firstly consider whether the offence detailed in the charge was committed by the accused. If you do not consider this to be the case, the aggravation does not concern you.

If, on the other hand, you consider that the offence was committed by the accused, you then move on to consider whether this aggravation applies to the charge. If you were satisfied that the aggravation applies, then you would convict the accused of the offence and the aggravation. If you were not, you would simply convict the accused of the offence itself.

If a section 28 defence arises on the evidence (accused thought container held something which could not be associated with drugs)

“In this case the accused (in his/her/their statement to the police) says he/she/they thought what was in the container / bag was something completely different from drugs (e.g., SIM cards, cigarettes), and so he/she/they should be acquitted. If you accept that evidence and thought that it supported the conclusion that the accused neither knew nor suspected, nor had reason to suspect, that what was in the container / bag was of the nature of a drug, you would acquit the accused. You have to judge this matter objectively.

It is for the Crown to satisfy you beyond reasonable doubt that the explanation should be rejected. Evidence to support the accused’s position does not need to be corroborated. The accused does not need to prove it to any particular standard. If what the accused says is believed, or if it raises a reasonable doubt, an acquittal must result. It is for the Crown to exclude lack of knowledge, or suspicion, or reason to suspect beyond reasonable doubt.”

Section 28(3) (accused thought the (for example pills) were not controlled drugs)

“In this case the accused (in his/her/their statement to the police) says he/she/they neither knew nor suspected nor had reason to suspect that the tablets in the container/bag were controlled drugs, but he/she/they thought they were (e.g. aspirin), and so he/she/they should be acquitted. If you accept that evidence, and thought that it supported the conclusion that the accused neither knew nor suspected, nor had reason to suspect that what was in the container/bag was a controlled drug, you would acquit the accused. You have to judge this matter objectively.

It is for the Crown to satisfy you beyond reasonable doubt that the explanation should be rejected. Evidence to support the accused’s position does not need to be corroborated. The accused does not need to prove it to any particular standard. If what the accused says is believed, or if it raises a reasonable doubt, an acquittal must

result. It is for the Crown to exclude lack of knowledge, or suspicion, or reason to suspect beyond reasonable doubt."

Section 5(2): simple possession

"Charge is a charge of being in possession of drugs. It alleges a contravention of the Act mentioned in the charge. Read short, that says it is not lawful for you to have a controlled drug in your possession.

The drugs involved (specify) are classified under the Act as Class A/B/C controlled drugs respectively. That is not in dispute.

The key word is "possession".

"Possession" does not necessarily mean ownership. Possession requires knowledge and control. Knowledge involves awareness, knowing of something's existence. Control does not just mean being readily within reach. It is wider than that. You can have control of something that is stored elsewhere. It is having a say in what happens to it.

For the Crown to prove this charge, you would have to be satisfied that the accused was in possession, in the sense I have explained, of the controlled drug referred to in the charge."

If a section 28 defence arises on the evidence (accused thought container held something which could not be associated with drugs)

"In this case the accused (in his/her/their statement to the police) says he/she/they thought what was in the container/bag was something completely different from drugs (e.g., SIM cards, cigarettes), and so he/she/they should be acquitted. If you accept that evidence, and thought that it supported the conclusion that the accused neither knew nor suspected, nor had reason to suspect that what was in the bag/container was of the nature of a drug, you would acquit the accused. You have to judge this matter objectively.

It is for the Crown to satisfy you beyond reasonable doubt that the explanation should be rejected. Evidence to support the accused's position does not need to be corroborated. The accused does not need to prove it to any particular standard. If what the accused says is believed, or if it raises a reasonable doubt, an acquittal must result. It is for the Crown to exclude lack of knowledge, or suspicion, or reason to suspect beyond reasonable doubt."

Section 28(3) (accused thought the (for example pills) were not controlled drugs)

"In this case the accused (in his/her/their statement to the police) says he/she/they neither knew nor suspected nor had reason to suspect that the tablets in the container/bag were controlled drugs, but he/she/they thought they were (e.g. aspirin), and so he/she/they should be acquitted. If you accept that evidence, and thought that it supported the conclusion that the accused neither knew nor suspected, nor had reason to suspect that what was in the bag/container was a controlled drug, you would acquit the accused. You have to judge this matter objectively.

It is for the Crown to satisfy you beyond reasonable doubt that the explanation should be rejected. Evidence to support the accused's position does not need to be corroborated. The accused does not need to prove it to any particular standard. If what the accused says is believed, or if it raises a reasonable doubt, an acquittal must result. It is for the Crown to exclude lack of knowledge, or suspicion, or reason to suspect beyond reasonable doubt."

Section 5(3): possession with intent to supply

"Charge is a charge of being in possession of drugs with intent to supply. It alleges a contravention of the Act mentioned in the charge. Read short, that makes it a crime for you to have a controlled drug in your possession with intent to supply it to another person.

The drugs involved (specify) are classified under the Act as Class A/B/C controlled drugs respectively. That is not in dispute.

The key words are "possession with intent to supply".

"Possession" does not necessarily mean ownership. Possession requires knowledge and control. Knowledge involves awareness, knowing of something's existence. Control does not just mean being readily within reach. It is wider than that. You can have control of something that is stored elsewhere. It is having a say in what happens to it.

(where drugs concealed in a container)

Here the drugs were in a [bag]. For the accused to be in possession of them he must have known of the [bag's] existence, and that it contained something, even if he did not know exactly what. He must also have control over the [bag] and its contents. If

there is other evidence that what the bag contained was the drug referred to in the charge, that is enough for possession by the accused.

“Intent” is a state of mind, to be inferred or deduced from what has been proved to have been said or done.

“Supply” has its ordinary and common sense meaning. It is parting with possession. It covers any form of supply – sale, exchange, barter, gift. The Crown does not need to prove the supply was to be to any particular person.

For the Crown to prove this charge, you would have to be satisfied that:

(1) The accused was in possession, in the sense I have explained, of the controlled drug referred to in the charge

(2) That possession was with intent to supply it to some other person.”

If a section 28 defence arises on the evidence (accused thought container held something which could not be associated with drugs)

“In this case the accused (in his/her/their statement to the police) says he/she/they thought what was in the container/bag was something completely different from drugs (e.g, SIM cards, cigarettes), and so he/she/they should be acquitted. If you accept that evidence and thought that it supported the conclusion that the accused neither knew nor suspected, nor had reason to suspect that what was in the container/bag was of the nature of a drug, you would acquit the accused. You have to judge this matter objectively.

It is for the Crown to satisfy you beyond reasonable doubt that the explanation should be rejected. Evidence to support the accused’s position does not need to be corroborated. The accused does not need to prove it to any particular standard. If what the accused says is believed, or if it raises a reasonable doubt, an acquittal must result. It is for the Crown to exclude lack of knowledge, or suspicion, or reason to suspect beyond reasonable doubt.”

Section 28(3) (accused thought the (for example pills) were not controlled drugs)

“In this case the accused (in in his/her/their statement to the police) says he/she/they neither knew nor suspected nor had reason to suspect that the tablets in the container were controlled drugs but he/she/they thought they were (e.g. aspirin) and so he/she/they should be acquitted. If you accept that evidence and thought that it supported the conclusion that the accused neither knew nor suspected, nor had

reason to suspect that what was in the bag was a controlled drug, you would acquit the accused. You have to judge this matter objectively.

It is for the Crown to meet that defence and to satisfy you beyond reasonable doubt that the explanation should be rejected. Evidence to support the accused's position does not need to be corroborated. The accused does not need to prove it to any particular standard. If what the accused says is believed, or if it raises a reasonable doubt, an acquittal must result. It is for the Crown to exclude lack of knowledge, or suspicion, or reason to suspect beyond reasonable doubt."

Section 23: powers to search and obtain evidence

Section 23(4)(a)

The offence is committed by a person who intentionally obstructs a police officer exercising his powers to search for drugs/seize and detain items found in the course of a drugs search. The person has to have acted intentionally. Acting recklessly or accidentally is not enough. To determine someone's intention look at all the circumstances surrounding the incident and consider whether you can infer that they had the appropriate intention.

Obstruction includes actual physical hindrance or restraint or doing anything which is done with the intention to hinder officers in carrying out their search or seizure. So it can cover a person physically struggling with police who are trying to search him. It can also cover the scenario in which a person swallows something or throws something away when he sees police officers approaching. So it covers any circumstances in which a person tries to avoid a search taking place. The Crown does not have to prove that the accused actually had drugs on his person or that drugs were in the property. The Crown does not have to prove that a drug was swallowed. The crux of the charge is intentional obstruction of the search or seizure. So, for the Crown to prove this charge, it has to show that:

- "(1) The constable was exercising his powers to search for drugs/seize and detain items found in the course of a drugs search,
- (2) The accused obstructed the officer and
- (3) The accused intentionally acted in the way described."