

ABSTRACTSOME ASPECTS OF DRUG CONTROL LEGISLATION: A COMPARATIVE STUDY OF THE LAW OF SRI LANKA, SINGAPORE, HONG KONG AND CANADA.

A focal point of interest in this area of the law concerns the interrelation of significant aspects of modern drug control legislation with the theoretical underpinnings of mens rea - a doctrine rooted in the foundations of criminal liability throughout the spectrum of penal systems nurtured by the Common Law tradition.

In the context of legislation penalizing the possession of controlled drugs the courts of England have placed emphasis on the principle that there could not be possession of a controlled drug unless the accused knew that the substance in his control was a controlled drug. In other words, knowledge of the nature of the drug is an essential element of proof of possession. The position is no different in Canada and Sri Lanka. Statutory provisions in force in Hong Kong and Singapore, by contrast, incorporate a presumption of knowledge, once the factum of possession is established. The relative stringency of the law in the latter jurisdictions has been explained by the Court of appeal of Hong Kong on the ground that : " In Canada the Legislature did not find itself faced with problems so gravely affecting the social structure as did our Legislature when dealing with morphine and its derivatives."

As a rule no onus lies on a defendant in criminal proceedings to prove or disprove any fact. It is sufficient for his acquittal if any of the facts which, if they existed, would constitute the offence with which he is charged, is not established. Exceptionally, however, an enactment creating an offence expressly provides that, upon proof of the existence of certain facts, the existence of other facts which constitute necessary ingredients of an offence shall be treated as established unless the contrary is proved.

The effect of legislative provisions of this kind is that the burden of disproving an essential element of liability falls on the accused. The transfer of the burden is justified by considerations of policy such as the vulnerability of the community and the difficulty attendant on proof of the relevant element by the prosecution in accordance with the exacting standard required by the law in criminal cases.

The applicable body of law is constructed on two basic rules involved in reliance on a rebuttable presumption.

Firstly, there is the "rule of presumption" according to which the presumed fact must be found to exist until evidence tending to disprove it is adduced. However, the existence of a further fact has to be presumed only when the facts in respect of which direct evidence is given and which provide the foundation of the presumption are established. Although the inference from the proved facts is compulsory, in the absence of refutation, the courts of all the jurisdictions under review have strictly required that the facta probanda susceptible of proof by direct evidence be established unequivocally before the rebuttable presumption could be invoked. This approach reflects judicial solicitude for preservation of ethical values subsumed in the theory of mens rea.

Secondly, there is the rule which prescribes the amount of rebutting evidence required. The pervasive influence of notions of moral culpability as an indispensable component of legal guilt finds expression in the rule, established in all four jurisdictions in relevant contexts, that the extent of the burden borne in a criminal case by the defendant in regard to rebuttal of an adverse presumption should be equated with the standard of proof on a balance of probabilities rather than with that of proof beyond reasonable doubt. The choice of the less exacting standard, again, is predicated on judicial aversion to concepts approximating to strict or absolute liability in the field of criminal law.

In penumbral sectors of an area of modern law governed principally by statute, the major manifestation of judicial activism pertains to the construction of statutory provisions in conformity with common law doctrine and, indeed, the expression of fidelity to ideas derived from common law in defiance of explicit statutory imperatives. These developments are exemplified by the interpretation by the Hong Kong courts of the legislative provision that :

"Where it is proved that a person was found in, or escaping from any premises in which a dangerous drug was being manufactured, such person shall, until the contrary is proved, be presumed to have been manufacturing or doing an act preparatory to the manufacture of the dangerous drug."⁹⁵

The Court of Appeal in Hong Kong has declared that this provision " does not contain a presumption that the appellants knew that they were manufacturing a dangerous drug, it is merely a presumption that they were manufacturing. It goes no further than that. In order to secure a conviction there must be evidence apart from any presumption that the appellants had such knowledge." This interpretation, which is probably in conflict with the purport and intendment of the enacted provision, illustrates the depth of orthodox judicial commitment to postulates of mens rea.

One of the requisites of the rule of Law, in its application to criminal proceedings, is that a person should not be punished for an offence unless it has been established to the satisfaction of an independent and unbiased tribunal that he committed it. This involves the tribunal being satisfied that all the physical and mental elements of the offence with which he is charged, conduct and state of mind as well where that is relevant, were present on the part of the accused. In the opinion of the Privy Council, " what fundamental rules of natural justice do require is that there should be material before the court that is logically probative of facts sufficient to constitute the offence with which the accused is charged. The presumption as to the purpose of possession operative in Canada, and the presumptions regarding both animus and purpose which apply in Singapore and Hong Kong, furnish a substitute for evidentiary material of this kind. The departure signified by these presumptions from common law principles regulating modes of proof of facts is made less radical by the provisional character of the presumptions, in that they are capable of rebuttal, and by their evident compatibility with everyday experience. Nevertheless, the effect of the presumptions being to require the court to draw an inference which would ordinarily have been permissible but not mandatory, an inarticulate premise of current judicial attitudes to the scope of the presumptions is appreciation that there is a point beyond which their use could well impair public confidence in the adjudicative process, in the setting of criminal trials. Viewed from this standpoint, presumptions adverse to the accused, which emanate from presumed possession, as opposed to proved possession - a feature of the statute law of Singapore and Hong Kong - involve some measure of repugnance to common law concepts and assumptions which, throughout the evolution of the doctrine of mens rea, have been intuitively apprehended and jealously safeguarded against encroachment as rudiments of legality and due process.