IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA317/2022
[2022] NZCA 418

BETWEEN	TE ATA PATRICIA MESMAN Appellant
AND	THE QUEEN Respondent

Hearing: 23 August 2022

Court: Cooper P, Mallon and Wylie JJ

Counsel: R J T George for Appellant
I S Auld for Respondent

Judgment: 7 September 2022 at 4 pm

JUDGMENT OF THE COURT

The appeal is dismissed.

REASONS OF THE COURT

(Given by Wylie J)

Introduction

[1] On 22 December 2021, the appellant, Te Ata Mesman, was convicted of attempting to possess the Class A controlled drug methamphetamine for the purpose of supply, contrary to s 6(1)(f) and (2) of the Misuse of Drugs Act 1975 and ss 72 and 311(1) of the Crimes Act 1961.

[2] Ms Mesman had earlier applied under s 147 of the Criminal Procedure Act 2011 for the charge to be dismissed.[1] She argued that it is not possible at law to attempt to possess a substance. This argument failed before Judge M J Callaghan in the District Court at Christchurch. He held that the offence is recognised in this country.[2] Ms Mesman then entered a guilty plea to the charge. She was sentenced in relation to the charge (and other drug and driving-related charges) by Judge Farish on 1 June 2022.[3] The sentence imposed was 12 months' intensive supervision with a range of conditions intended to help Ms Mesman address the underlying causes of her offending and to provide for her rehabilitation.[4]

[3] Notwithstanding her guilty plea, Ms Mesman appeals her conviction. She contends that attempting to possess a controlled drug for the purpose of supply is not an offence under New Zealand law. The appeal is opposed by the Crown.

Relevant facts

[4] On 23 April 2020, Ms Mesman engaged a courier company. She arranged to have a package delivered to her at a motel unit in Christchurch. She provided her name, phone number, email address and debit card information to the courier company. She had rented the motel unit the previous day for a number of days. She had paid for the accommodation in advance.

[5] Staff employed by the courier company inspected the package. They found a snaplock bag containing translucent crystals. The package was taken to the police. The crystals were analysed. They were found to be methamphetamine. The snaplock bag contained 7.2 g of the drug.

[6] On the afternoon of 24 April and on 25 April 2020, Ms Mesman telephoned, emailed and sent text messages to the courier company demanding delivery of the package. She asserted that the package contained urgent cancer medication.

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1 *R v Mesman* [2021] NZDC 19314.
2 At [24].
3 *R v Mesman* [2022] NZDC 10275.
4 At [14].

[7] The police executed a search warrant on the motel unit on 26 April 2020. Ms Mesman was present. She said that she had bought the methamphetamine from a friend and that she intended to use some of it herself and on-sell the remainder.

The appeal

[8] The appeal is brought pursuant to s 229(1) of the Criminal Procedure Act. This Court must allow the appeal if it is satisfied that a miscarriage of justice, as defined in s 232(4), has occurred. There must be a real risk that an error has affected the outcome of the trial or rendered it unfair. Trial in this context includes a proceeding in which an appellant has pleaded guilty.[5] It is however only in exceptional circumstances that an appeal against conviction will be entertained following a guilty plea.[6] The question in such appeals is whether a miscarriage of justice will result unless the appellant is able to impugn his or her plea.[7]

[9] Ms Mesman says that, on the admitted facts, she could not in law have been convicted of the offence charged because there is no such offence recognised by New Zealand law. The Crown accepts that, if the Court finds that the offence charged does not exist, conviction on the charge would be a miscarriage of justice, requiring that the appeal be allowed and the conviction set aside.[8]

The submissions

[10] The submissions made by Mr George on behalf of Ms Mesman can be summarised as follows:

(a) Possession is a state of affairs. A defendant is either in possession of something or not in possession of it and it does not matter whether the possession is active or passive.

(b) Before a defendant can be in possession of something, he or she must first procure or receive it. It is only once the defendant has procured or

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5 Criminal Procedure Act 2011, s 232(5).
6 *R v Le Page* [2005] 2 NZLR 845 (CA) at [16].
7 *Proctor v R* [2007] NZCA 289 at [4].
8 As in for example *McIntyre v R* [2017] NZCA 579, [2018] NZAR 43.

received the thing that he or she is in possession of it. Section 72 of the Crimes Act dealing with attempts applies only to attempted procurement; possession (being a state of affairs) cannot be attempted.

(c) Section 7(1)(a) and (2) of the Misuse of Drugs Act create the offence of procurement of a controlled drug. Possession and procurement are distinct concepts and there is no offence under the Act of procurement for the purpose of supply. A finding that there is no offence of attempted possession of a controlled drug is consistent with the scheme of the Act.

[11] Mr Auld, for the Crown, submitted as follows:

(a) A defendant who intends to bring about the state of affairs of having in his or her possession a controlled drug for the purpose of supply can do an act for the purpose of accomplishing that object. Section 72 of the Crimes Act can apply to that act.

(b) Procurement of a drug and possession of a drug are indistinguishable; both are complete once the defendant has possession of the drug. The offences of attempted procurement and attempted possession are likewise indistinguishable. Accordingly, the fact that there is no reference to the offence of procurement for the purpose of supply in the Misuse of Drugs Act is of no moment. Conduct that amounts to procurement for supply is caught by the offence of possession for supply.

(c) An interpretation of the Misuse of Drugs Act and the Crimes Act which recognises the offence of attempted possession of a controlled drug for the purpose of supply accords with the purpose and scheme of the Misuse of Drugs Act.

Analysis

[12] Ms Mesman was convicted under s 6(1)(f) and (2) of the Misuse of Drugs Act. Relevantly, those sections provide:

> **6 Dealing with controlled drugs**
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> (1) … [N]o person shall—
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> …
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> (c) supply or administer, or offer to supply or administer, any Class A controlled drug or Class B controlled drug to any other person, or otherwise deal in any such controlled drug; or
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> …
>
> (f) have any controlled drug in his [or her] possession for any of the purposes set out in paragraphs (c), (d), or (e).
>
> (2) Every person who contravenes subsection (1) commits an offence against this Act and is liable on conviction to—
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> (a) imprisonment for life where a Class A controlled drug was the controlled drug or one of the controlled drugs in relation to which the offence was committed:
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> …

[13] Methamphetamine is a Class A controlled drug.[9]

[14] As a result of the intervention of the courier company and the police, Ms Mesman did not come into possession of the methamphetamine. More importantly, it is not clear from the statement of admitted facts whether Ms Mesman ever came into possession of the package that originally contained the methamphetamine. We assume that she did not do so. That is the most benign view of the facts from her perspective. It is clear that had she come into possession of the methamphetamine, she would have intended to supply some of it to others. Presumably as a result of this admission, she was charged with attempted possession for the purpose of supply, pursuant to ss 72 and 311(1) of the Crimes Act. Relevantly, those sections provide:

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9 Misuse of Drugs Act 1975, s 2(1) and sch 1.

> **72 Attempts**
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> (1) Every one who, having an intent to commit an offence, does or omits an act for the purpose of accomplishing his or her object, is guilty of an attempt to commit the offence intended, whether in the circumstances it was possible to commit the offence or not.
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> (2) The question whether an act done or omitted with intent to commit an offence is or is not only preparation for the commission of that offence, and too remote to constitute an attempt to commit it, is a question of law.
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> (3) An act done or omitted with intent to commit an offence may constitute an attempt if it is immediately or proximately connected with the intended offence, whether or not there was any act unequivocally showing the intent to commit that offence.
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> …
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> **311 Attempt to commit or procure commission of offence**
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> (1) Every one who attempts to commit any offence in respect of which no punishment for the attempt is expressly prescribed by this Act or by some other enactment is liable to imprisonment for a term not exceeding 10 years if the maximum punishment for that offence is imprisonment for life, and in any other case is liable to not more than half the maximum punishment to which he or she would have been liable if he or she had committed that offence.
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> …

[15] There are conflicting High Court decisions on whether there is an offence of attempted possession of a substance for the purpose of supply.

[16] In *R v Grant*, the defendant picked up a bag which he thought contained marijuana.[10] In fact the police had already removed the drug and replaced it with newspaper. The defendant was nevertheless charged with attempted possession of marijuana under the provisions of the then Narcotics Act 1965. The relevant section provided that no person was to have a narcotic in his or her possession. Mahon J held that:

> (a) having something in one's possession involves neither an act nor an omission:[11]

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10 *R v Grant* [1975] 2 NZLR 165 (SC).
11 At 168.

> [The offence] falls within that intermediate category in which liability consists in the involvement of the accused with specified facts or circumstances.

(b) having possession of something:[12]

> … represents not an act but the passive consequences of a prior act, namely, the act of acquisition of possession …

(c) s 72 of the Crimes Act requires that a defendant does or omits an act for the purpose of accomplishing his or her object:[13]

> The actus reus of an attempt is the commission of an act and is almost always an overt act: … Therefore, when s 72 requires as a criterion of liability an act coupled with an intention on the part of the offender to commit an offence, it can only refer, in my view, to the commission of an act as opposed to the acquisition by design or otherwise of some criminal status created by unlawful involvement in defined factual circumstances.
>
> … the only act of the offender capable in the abstract of description as an attempt is the act of acquiring or procuring possession, which is the very act by which the crime is consummated, whereas the act referred to in s 72 is, by implicit definition, an act antecedent to the commission of the substantive crime, as shown by subss (2) and (3) which prescribe the tests to be applied in determining whether the separate act comprising the alleged attempt is sufficiently connected with the subsequent act or conduct constituting the offence to amount to an attempt to commit that offence.

(d) possession of a proscribed drug will in most cases amount only to evidence of preparation for the commission of the specific crime in contemplation, and:[14]

> … as no act is involved the fact of possession will usually be evidence of an inchoate attempt which for policy reasons the law decides to designate as a substantive crime.

Accordingly, the Judge held that the defendant could not be charged with the offence of attempted possession of a narcotic because no such offence is known to the law in this country.[15]

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12 At 169.
13 At 169.
14 At 170.
15 At 171.

[17] Some five years later, Speight J in *R v Willoughby* considered *Grant*.[16] Two defendants were charged with conspiring with others to possess heroin for the purpose of supply. The two defendants met with one of the co-conspirators. The co-conspirator agreed to procure an ounce of heroin for them. Money was exchanged and one of the defendants obtained what she thought was a packet of heroin from the co-conspirator. She complained however that the packet did not contain the agreed amount of heroin and she returned it. Possession of the packet was not finally taken by either accused. The police did not recover the packet and there was no evidence that it in fact contained heroin. In a ruling given during the trial, Speight J concluded that the defendants could nevertheless be convicted of attempted possession of heroin for the purpose of supply. The Judge took a different view from Mahon J in *Grant* for two reasons:

(a) possession can be active or passive.[17] Active possession consists of positive control such as holding or transporting; passive possession arises when an article is in a person's power of control and the person permits it to remain in his or her control by omitting to take steps to disown it. An act or omission demonstrating control must always be proved in a case of possession; and

(b) the Misuse of Drugs Act (and the Narcotics Act under which *Grant* was decided) creates the offence of possession of a controlled drug for the purpose of supply.[18] Therefore, if a person has an intention to commit that offence and does an act such as purchasing or attempting to purchase a controlled drug to that end, the person's actions fall within the plain meaning of s 72 of the Crimes Act.

The Judge noted that if this view was not correct, there would be a "hiatus" in the Misuse of Drugs Act, because there is no offence of procurement of drugs for

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16 *R v Willoughby* [1980] 1 NZLR 66 (SC).
17 At 68.
18 At 68.

the purpose of supply.[19] He preferred "to read the statute as a whole and take a construction which avoid[ed] absurdity".[20]

[18] Neither case has been cited with any regularity in this country. The only detailed consideration given to them prior to the present case was by Judge Lance QC in the District Court at Auckland in 2005.[21] He preferred the reasoning in *Willoughby*, noting as follows:[22]

> I prefer the reasoning of Speight J to that of Mahon J principally because of his analysis of the statutory provisions and I do not overlook the convention that penal statutes should be interpreted restrictively. It seems to me, in simple terms, if an accused person has an intention to have a prohibited drug in his possession, and either actively or passively, does an act which is " … immediately or proximately connected …" for the purpose of securing possession he or she has committed an offence. It is an understandable concept and, in my view, meets policy requirements.

[19] *Grant* has been cited on a number of occasions in Australia, including in the High Court of Australia. In *Beckwith v R*, Gibbs J observed:[23]

> It was also submitted on behalf of the appellant that in the nature of things there cannot be such an offence as attempting to have in possession. It is of course obvious that it is possible to attempt to obtain or acquire possession of something. The words "has in his [or her] possession" are not synonymous with "gets possession of"; the latter expression connotes activity, the former a state of affairs.

The Judge went on to refer to *Grant*. He commented:[24]

> It would not be right to express any view as to the correctness of the decision in *Reg v Grant* … which may depend on the particular words of the New Zealand statutes. However, if a legislature provided in terms that it should be an offence to attempt to have possession of a narcotic there would in my opinion be no difficulty in giving effect to the intention so expressed. An act which would constitute an attempt to get possession of a narcotic would in those circumstances also be regarded as constituting an attempt to have possession of the narcotic. I am unable to agree that the only act which would be capable of being described as an attempt to have possession would be the act of getting possession.

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19 At 68.
20 At 68.
21 *R v G* [2006] DCR 1; and see *Ngamoki v R* HC Palmerston North T5/97, 7 November 1997. For academic comment, see Don Mathias *Misuse of Drugs* (online ed, Thomson Reuters) at [11.15].
22 At [42].
23 *Beckwith v R* (1976) 135 CLR 569 at 575.
24 At 575–576.

[20] Other Judges in Australia have referred to *Grant* without expressing a view as to whether they agreed with the views expressed by Mahon J.[25] In some states Judges have accepted that possession is not an activity but a state of affairs, relying on both *Beckwith* and *Grant*.[26]

[21] In our view, *Grant* was wrongly decided. We prefer the approach of Speight J in *Willoughby*.

[22] Parliament, in the Misuse of Drugs Act, has made it an offence for a person to have any controlled drug in his or her possession for any one or more of a number of proscribed purposes. Having a drug in one's possession for a proscribed purpose is a state of affairs. It is also an offence. A person who intends to bring about this state of affairs and commit this offence, and to that end does or omits an act for the purpose of accomplishing this object, also commits an offence under s 72 of the Crimes Act. The section criminalises attempts to commit any offence, whether under the Crimes Act or any other enactment.[27] The plain wording of s 72 makes it an offence to attempt to possess a controlled drug if the person who makes the attempt:

(a) intends to take or assume possession of the drug for one or more of the purposes proscribed by s 6(1)(f) of the Misuse of Drugs Act; and

(b) undertakes or omits an act to accomplish this purpose or those purposes, provided the act done or omitted was sufficient in law to amount to an attempt (s 72(2) and (3)).

[23] The statutory provisions are clear on their face and it is not necessary to strain their interpretation to reach this view. Some commentators have suggested that it is better English usage to allege an attempt to procure rather than an attempt to have possession.[28] Indeed, s 25(2)(b) of the Misuse of Drugs Act refers to attempts

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25 See for example *Nirta v R* (1983) 51 ALR 53 (FCA) at 63; *Commonwealth of Australia v Riley* (1984) 5 FCR 8 at 24; and *R v Carusi* (1989) 17 NSWLR 516 (NSWCCA) at 534.

26 See for example *R v Brauer* [1990] 1 Qd R 332 (QCCA) at 360; *Tasmania v Spence* [2008] TASSC 32, (2008) 17 Tas R 295 at [6]; *Dickfoss v Director of Public Prosecutions* [2012] NTCA 1, (2012) 31 NTLR 16 at [26]; and *Chenhall v Mosel* [2013] NTSC 19 at [8].

27 *Police v Radhi* [2014] NZCA 327, [2014] NZAR 1019 at [34]; leave to appeal was declined in *Radhi v Police* [2014] NZSC 135.

28 Simon France (ed) *Adams on Criminal Law* (online ed, Thomson Reuters) at [MD7.02].

to procure a controlled drug. Statutes however have never been a safe haven for the grammarian and the interpretation we prefer does no violence to the legislative provisions. Rather, the conclusion we have reached is consistent with the overarching purpose of the Misuse of Drugs Act — namely to prevent the misuse of drugs, to classify controlled drugs based on the risk of harm each drug poses to individuals or to society by its misuse, and to criminalise various drug-related activities including the manufacture, supply, sale and administration of controlled drugs. We agree with Speight J that unless there is an offence of attempted possession of a controlled drug for the purpose of supply, there would be a gap in the Act.

[24] We acknowledge that s 7(1) of the Misuse of Drugs Act provides that no person shall procure any controlled drug, that s 25(2) refers to attempts to procure a controlled drug, and that procurement is the getting of possession of a controlled drug for oneself.[29] The offence in s 7(1) is a separate offence. It is subject to a lesser penalty than the offence of possession of a controlled drug for the purpose of supply in s 6(1)[30] and the Act does not refer to an offence of procurement of any controlled drug for the purpose of supply. The actus reus involved in attempted procurement and attempted possession for supply is however the same. It is the mens rea that differs. An attempt to possess for supply and an attempt to procure for oneself could be separately charged in respect of the same batch of a controlled drug if the defendant intended to use some of the drug personally and supply the rest to others. The same act can result in the commission of more than one offence, depending on the purpose for which the act is undertaken. Accordingly, we do not think it matters that the Misuse of Drugs Act does not explicitly refer to an offence of procurement of a controlled drug for the purpose of supply.

[25] The conclusion we have reached is also consistent with the approach taken by the courts in this country over a number of years. Judges in both the High Court and District Court have accepted, albeit without detailed discussion, that there is an offence of attempted possession of a prohibited substance or thing.[31] Further, this Court has

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29 *R v Mills* [1963] 1 QB 522 (Crim App).

30 Compare Misuse of Drugs Act, s 6(2) and s 7(2).

31 See for example *R v Chien* [2019] NZDC 4956; *R v Agu* [2017] NZHC 248 (both sentencing for attempted possession of methamphetamine for supply); and *R v Anchondo* [2018] NZHC 1978 (sentencing for attempted possession of cocaine for supply).

recognised that there is an offence of attempted possession of a controlled drug or other item. We note the following:

(a) Various sentence appeals have proceeded on the basis that there is an offence of attempted possession of controlled drugs.[32]

(b) In *Liu v R*, the trial Judge granted the Crown leave to substitute a charge of possession of ephedrine for the purpose of supply with the lesser charge of attempted possession for the purpose of supply, given the appellant never actually collected the drug.[33] This Court observed that it was "incontrovertible that Mr Liu's purpose was to supply the consignment to others" and dismissed the appeal.[34]

(c) In *Carson v R*, the appellant pleaded guilty to possession of LSD for the purpose of supply.[35] It was discovered after sentencing that the LSD tablets did not in fact contain LSD or any other illegal drug. This Court agreed with counsel that the conviction should be quashed and a retrial ordered, which would allow the Crown to seek to lay an amended charge of attempted possession for the purpose of supply.[36]

(d) In *Lenaghan v R*, the appellant was found guilty by a jury of possessing the precursor substance hypophosphorous acid with the intention that it be used for the purpose of manufacturing methamphetamine.[37] The appellant had ordered 2.5 litres of hypophosphorous acid from a chemical supply company and paid the purchase price. When he went to pick up his order, he received a polystyrene box labelled as containing hypophosphorous acid. The police however did not analyse the chemical found in the polystyrene box to determine whether it was in fact hypophosphorous acid. On appeal, one of the issues was

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32 See for example *R v Halsey* CA221/96, 15 November 1996; and *R v O'Donnell* CA101/96, 1 August 1996.
33 *Liu v R* [2017] NZCA 573, [2018] 2 NZLR 697.
34 At [45].
35 *Carson v R* [2008] NZCA 270.
36 At [4] and [10].
37 *Lenaghan v R* [2008] NZCA 123.

whether there was an adequate evidential basis for the jury's conclusion that the appellant had possession of hypophosphorous acid. This Court held that there was, but also noted that had it taken a different view, it would have substituted a conviction for attempted possession.[38]

(e) In *Nichols v R*, the appellant was convicted of attempted possession of unauthorised goods under the Biosecurity Act 1993.[39] He had arranged with a co-offender, Mr Nitschke, to import prohibited reptiles into New Zealand. However, Mr Nitschke was apprehended at the airport and charged under s 154(f) of the Biosecurity Act, which provided that:

> Every person commits an offence against this Act who … [h]as unauthorised goods in his or her possession or control, knowing that they are unauthorised goods.

Relevantly, unauthorised goods meant goods that were in a place that was not a transitional facility, a biosecurity control area or a containment facility. Mr Nitschke could only be convicted of attempted possession of unauthorised goods because, as he was apprehended in a biosecurity area of the airport, the reptiles never became unauthorised goods. However, had he not been apprehended, and had he achieved his object of bringing the reptiles through biosecurity, he would have then been in possession of unauthorised goods. One of the appeal grounds was that the trial Judge failed to properly direct the jury concerning the circumstances in which a person may be convicted of an attempt to possess goods where possession of such goods is unlawful. It was submitted that this:[40]

> … would have exposed a contentious legal issue namely whether it is generally possible to commit an offence of "attempting to possess" something.

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38 At [18].
39 *Nichols v R* CA26/98, 7 July 1998.
40 At 10.

This Court said:[41]

> Whatever may have been the situation of Nitschke when he was dispossessed of the reptiles as regards any "biosecurity control area" or "transitional facility" his object was to carry the reptiles past those areas without clearance whereupon they would be unauthorised goods. His possession then would have been of those unauthorised goods.
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> It was not an allegation of acquiring possession of, or attempting to possess, goods of which he was already in possession. It was a case of attempting to get himself into the location where his possession would be of unauthorised goods (as defined). The offence of knowingly being in possession of unauthorised goods requires a state of affairs elements of which are possession, goods within the definition of unauthorised goods and knowledge. *Attempting to bring unauthorised goods into the country would be to attempt to bring about the prohibited state of affairs.* When bringing goods into the country without clearance the element of possession does not change but the status of the goods changes to unauthorised goods once they are beyond a biosecurity control area and do not have clearance. *To attempt to do that is to attempt to have in your possession unauthorised goods.* In fact that is what the evidence showed Nitschke was convicted of …

These various decisions, either expressly or implicitly, proceeded on the basis that attempted possession of a prohibited item or substance for the purpose of supply can be an offence in New Zealand. We do not consider that they were wrong to do so.

[26] The view we have taken is also consistent with the way in which the same issue has been approached in various overseas jurisdictions.[42]

[27] Each case of course falls to be determined by reference to the applicable statutory provisions in issue. It is, in our view, clear from s 6 of the Misuse of Drugs Act and s 72 of the Crimes Act that there is an offence of attempted possession of a controlled drug for the purpose of supply in this country. The charge was properly laid and Ms Mesman's plea cannot be impugned.

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41 At 10–11 (emphasis added).

42 See *People v Siu* 271 P 2d 575 (Cal Dist Ct App 1954) at 577; and *People v Foster* 91 NE 2d 875 (NY 1950) at 876 (United States); *Beckwith v R*, above n 23 (Australia); *Docherty v Brown* 1996 SCCR 136 (HCJAC) (Scotland); *R v Chan* (2003) 178 CCC (3d) 269 (ONCA) at [47]–[70]; and *R v Codina* (1999) 132 CCC (3d) 338 (ONCA) at [17] (Canada).

Result

[28] For the reasons we have set out, the appeal is dismissed.

Solicitors:
Crown Law Office, Wellington for Respondent