



Neutral Citation Number: [2022] EWCA Crim 1248

Case No: **202103218 B5**

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM Swansea Crown Court

HHJ Vosper QC
Ind. No. T20200096

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 26/09/2022

Before :

LORD CHIEF JUSTICE OF ENGLAND AND WALES
MR JUSTICE SWEENEY
and
MR JUSTICE COTTER

Between :

Regina
- and -
LUKE STEVEN DERWOOD DATSON

Respondent
Appellant

Mr Dyfed Llion Thomas (instructed by Crown Prosecution Service) for the **Appellant**
Mr Michael McGarvey (instructed by **Clive Rees Associates**) for the **Respondent**

Hearing dates : **17 March 2022**

Approved Judgment

MR JUSTICE SWEENEY:

Introduction

1. In January 2021, the Appellant, then aged 31, stood trial before HHJ Vosper QC and a jury in the Crown Court at Swansea. After the conclusion of the prosecution case, and following a ruling of law by the judge, which was to the ultimate effect that the matters on which the Appellant proposed to rely did not, in law, afford him a defence, the Appellant pleaded guilty to three offences, as follows:

Count 1 – being knowingly concerned, in the period between 1 March 2019 and 30 March 2019, in a fraudulent evasion of the prohibition, in force by virtue of section 3(1)(a) of the Misuse of Drugs Act 1971 (“the MDA”) on the importation of cannabis, contrary to section 170(2) of the Customs and Excise Management Act 1979 (“the CEMA”).

Count 2 - being knowingly concerned, in the period between 16 April 2019 and 4 May 2019, in another fraudulent evasion of the prohibition, in force by virtue of section 3(1)(a) of the MDA, on the importation of cannabis, contrary to section 170(2) of the CEMA.

Count 3 - possession, on 20 April 2019, of a quantity of cannabis, with intent to supply, contrary to sections 5(3) and 4(1) of the MDA.

The Appellant was sentenced to three concurrent terms of 9 months’ imprisonment, suspended for 12 months. Count 4, in which the appellant was charged, in the alternative to Count 3, with simple possession of the same cannabis on 20 April 2019, was ordered to lie on the file.

2. The Appellant ultimately sought, 242 days out of time (the result of his otherwise timely application having been sent to an incorrect email address) to appeal against conviction. The Grounds that he advanced were as follows:
 - (1) In relation to Counts 1 & 2:
 - (a) He should have been judged on his genuine, although mistaken, belief that the goods were not prohibited.
 - (b) The correct interpretation of section 170(2) of the CEMA required the prosecution to prove fraudulent conduct - in the sense of dishonest conduct deliberately intended to evade the prohibition.
 - (2) In relation to Count 3:

The judge erred in law in not allowing the Appellant to avail himself of the defence provided by section 28(3)(b)(i) of the MDA.
3. On 17 March 2022, the case was listed before us as an application for an extension of time to apply for leave to appeal against conviction, having been referred by the Single Judge. Mr McGarvey and Mr Thomas (both of whom appeared below) represented, respectively, the Appellant and the Respondent. Having heard their submissions, we granted the extension of time and leave to appeal, treated the hearing as being the hearing of the appeal, allowed the appeal on its particular facts, and quashed all three convictions. Given that the operational period of the Appellant’s suspended sentences had expired without the commission of any offence during its course, there was no application for a retrial. We reserved our reasons, which we now give.

The facts

4. Taking the alleged offences in chronological order, the Respondent's case on Count 1 was that the Appellant had purchased the cannabis from a company called Green Brothers in Luxembourg, and that they had despatched it (in eight plastic bags in a box) via UPS to the Appellant's home address in Swansea. The box had been intercepted at the UPS parcel distribution unit in Swansea on 29 March 2021. Labels on the plastic bags purported to indicate that their contents had a THC level of less than 0.2%. However, on examination, the content of the bags had been found to be a total 11.678 kgs of mature cannabis female flowering head material, and thus to be controlled drugs, the importation of which was prohibited.
5. On Count 3, it was alleged that, when the Appellant was arrested at his home address on 20 April 2019, a further total of 221.2 grams of cannabis had been found in 3 plastic bags, which, on examination, had been found to be mature cannabis female flowering head material, and thus to be controlled drugs the possession of which was prohibited.
6. On Count 2, it was alleged that another box containing cannabis, which the Applicant had also purchased from Green Brothers in Luxembourg, had been intercepted at the UPS unit in Swansea on 3 May 2019. There were 4 plastic bags inside the box which had been found, on examination, to contain a total of 989 grams of mature cannabis female flowering head material – and thus again to be controlled drugs, the importation of which was prohibited.
7. The total street value of all the cannabis that was seized was said to be in excess of £100,000.
8. In interview, the Appellant asserted that he was a wholesale importer and supplier of cannabidiol ("CBD") products; that he had bought hemp flowers from Green Brothers in Switzerland; and that he had believed that he could lawfully import hemp that had a THC level of less than 0.2%. He asserted that such goods were openly available for sale in many high street shops including, for example, Holland and Barrett. The Appellant further asserted that:
 - (1) He had named his business CBS Wholesale Flowers because everything that he imported and sold in bulk (almost entirely to shops) derived from cannabis / hemp flowers.
 - (2) The flowers that he had bought were classified as being industrial hemp, which was different to street cannabis, because it contained less than 0.2% of THC, and was therefore not psychoactive.
 - (3) Green Brothers were based in Switzerland (i.e. outside the EEC) and had a warehouse in Luxembourg (i.e. inside the EEC). He had researched them, and their products, with care before doing business with them.
 - (4) The flowers that he had bought had been exported from Switzerland to the warehouse in Luxembourg, where the authorities had permitted their importation – thereby confirming that they were legal. That was because it was legal to import hemp with a THC content of less than 0.2%.
 - (5) Further, Green Brothers had imported the hemp into the UK, and he was only liable to pay for it after it had passed through Customs and had been delivered to his home address - thereby again confirming, in his mind, that it was legal.

- (6) Thus he had been working in accordance with, and been protected by, the law in relation to industrial hemp.
 - (7) He had since ceased trading.
9. In an Amended Defence Statement, which was served shortly before the start of the trial, the Appellant variously reiterated, or additionally asserted, that:
 - (1) At all material times he had honestly believed that he was a customer of legal cannabis / hemp with a THC content of less than 0.2%.
 - (2) The cannabis / hemp had been supplied by a legal and licenced franchise known as Green Brothers in Switzerland. He had visited their premises in Switzerland on a number of occasions to satisfy himself that they were bona fide, and their website had indicated that all their products were legal, and that customs clearance had been obtained for them. He had therefore done the necessary due diligence.
 - (3) The actual export had taken place from Luxembourg where such export was, to the best of his knowledge, fully legal. The outside and inner packaging expressly stated that the content of each package was cannabis / hemp and gave the weight. Inside each consignment was a certificate of analysis as to the content of each package.
 - (4) Each time he had received Green Brothers' products he had had them independently analysed at his own expense - to guarantee that they were devoid of any psychoactive properties.
 - (5) He would repackage the hemp into smaller amounts for onward sale, and therefore lacked any intent to supply users with any product capable of giving them an illegal 'high'.
 - (6) As one of the Police Officers in the case had stated in a witness statement: "*It is a common misconception that products containing less than 0.2% THC are legal*".
 - (7) At no time did he have the requisite *mens rea* to possess or to supply illegal cannabis, and thus at no time did he knowingly deal with goods with intent to evade any prohibition or restriction fraudulently.
 - (8) He was not guilty of any possession offence under the MDA because, by reference to section 28(3)(b)(i), he was entitled to be acquitted if he proved that he neither believed nor suspected, nor had reason to suspect, that the substance or product in question was a controlled drug.
10. The Prosecution case at trial was that the Appellant had acted unlawfully in importing, possessing, and intending to supply, flowering heads (which were known as 'skunk' cannabis). Hemp was said to be a red herring. The Appellant, it was said, had known full well about cannabis, and had known that what he was doing (i.e. dealing in cannabis in contravention of the statutes referred to in the Indictment) was wrong.
11. Set against the background of the content of his interviews and Amended Defence Statement, the Appellant's case at trial was broadly to the effect that, at all material times, he had been running a legitimate business (CBS Wholesale Flowers) as an importer and supplier of CBD products, and that (albeit, as it had turned out, mistakenly) he had genuinely believed that he was lawfully importing, and in lawful possession of, cannabis / hemp with a THC level of less than 0.2%, which was therefore not the subject of a prohibition against importation, because it was not a

controlled drug. Therefore, in relation to Counts 1 & 2, he had not been “*knowingly*” concerned in “*fraudulent*” evasions of the prohibition on the importation of cannabis, contrary to section 170(2) of the CEMA. As to Count 3, the Appellant asserted that he was entitled to rely on section 28(3)(b)(i) of the MDA, and was therefore able to seek to prove that, as a result of his mistaken belief, he had “*neither believed nor suspected, nor had reason to suspect, that the substance in question was a controlled drug*”.

12. Whilst accepting that he did not have a licence to import hemp, the Appellant also sought to rely on aspects of The Hemp (Third Country Imports) Regulations 2002 (SI 2002 No.787) as supporting his mistaken belief, namely:

Regulation 3, which provides that:

“*No person shall import hemp from a third country –*

(a) *except under authority of –*

(i) *a licence; and*

(ii) *in the case of the importation of hemp seeds other than for sowing, an authorisation;*

(b) *unless the consignment of hemp imported is accompanied by the relevant consignment documentation; and*

(c) *in the case of true hemp or hemp seeds for sowing, where the variety of hemp imported has a THC content of more than 0.2 per cent.”*

Regulation 2(1), which provides that:

“.....

“*hemp*” *means one or more of the following –*

(a) *true hemp;*

(b) *hemp seeds for sowing;*

(c) *hemp seeds other than for sowing;*

.....

“*third country*” *means a country other than a Member State of the European Community; and*

“*true hemp*” *means harvested plant material of the species Cannabis sativa L, within the terms of the first indent of the first sub-paragraph of Article 5(2) of Council Regulation 1673/2000, whether or not the leaves and seeds have been removed, which is either –*

(a) *raw; or*

(b) *retted,*

and “retted” means a state where the fibres are still attached to the plant but have been loosened.

.....”

The judge’s ruling

13. The ruling arose in the context that the Appellant wished, as part of his case, to put a bundle of documents before the jury, to some of which the Prosecution objected. Thus, as touched on above, at the conclusion of the Prosecution case, the judge heard argument and ruled on the issues – upon the basis that in order to determine which, if any, of the documents were properly admissible, it was necessary to clarify the law with respect to the Appellant’s state of mind – in particular, to determine to what extent, if at all, his asserted state of mind provided a defence to the charges.

14. As to the facts, the judge recorded that it was accepted that the Appellant had ordered a quantity of female flowering head material from Green Brothers, which had been despatched via UPS from Luxemburg to his address in Swansea, and that two such packages had been intercepted. The defence, said the judge, was that the material that the Appellant had ordered, and which was delivered, contained less than 0.2% THC and was therefore properly described as hemp rather than cannabis, and (although he accepted that hemp was a variety of cannabis sativa) the Appellant had believed (albeit incorrectly) that it was lawful to import, to possess, or to sell, any part of the cannabis sativa plant that had a THC content of less than 0.2%. For the purposes of the ruling the judge assumed that the Appellant's erroneous belief had been genuinely held.
15. The judge continued that the first issue for determination, which related to Counts 1 & 2, was as to the *mens rea* required under s.170(2) of CEMA. The question posed was whether the Appellant's asserted genuine, but erroneous, belief that the goods were not prohibited from importation could provide a defence to those Counts. In that regard the judge recorded that two principal submissions had been made on behalf of the Appellant. Firstly, that the inclusion of the word "knowingly" in section 170(2) meant that the Appellant fell to be judged on the facts as he believed them to be (i.e. his mistaken belief that the drugs were hemp and were not prohibited from importation). Secondly, that the inclusion of the word "fraudulent" in s.170(2) meant that the Prosecution had to prove that the Appellant had acted dishonestly, in the sense of dishonest conduct deliberately intended to evade the prohibition. The Prosecution argued that those submissions were misconceived.
16. Both submissions were rejected by the judge, who concluded that the mistake that the Appellant had made did not afford him a defence to Counts 1 & 2.
17. As to the word "knowingly", the judge concluded that it was well established that a mistaken belief as to the type of controlled drug was not a defence. By reference to *Hussain* [1969] 2 QB 567 he further concluded that a mistaken belief in the nature of the item imported was not a defence, provided that it was believed that a prohibited item was being imported. The judge nevertheless recognised that, in some cases, a mistaken belief would provide a defence - citing an extract from the judgment of this court, given by Lord Lane CJ, in *R v Taaffe* [1983] 1 WLR 627 (which was later approved by the House of Lords – see [1984] 1 AC 530). In the extract Lord Lane CJ underlined that it was plain from the use of the word "knowingly" in section 170(2) that the prosecution had the task of proving the existence of *mens rea*. Therefore *Taaffe*, who had imported cannabis, but asserted that he had mistakenly believed that it was currency, the importation of which was not prohibited (albeit that he believed that it was) was to be judged on the facts as he believed them to be, namely that he was importing currency. However, his mistake of law as to the effect of importing currency did not turn the importation into a criminal offence. To that extent, Lord Lane CJ concluded, *Taaffe's* views on the law as to the importation of currency were irrelevant.
18. Against that background, the judge concluded that the Appellant was not mistaken as to the facts. He had believed that what he was importing was the female flowering head of a variety of the cannabis sativa species of the genus cannabis, and that was precisely what was being imported. His mistake was thus not a mistake of fact but a

mistake of law. He had believed that the importation was lawful, but it was a general proposition that mistakes of law do not provide a defence to criminal charges – at least mistakes as to the criminal law. The judge underlined that in *R v Taaffe* (above) Lord Lane CJ had made clear that the Appellant’s views on the law of the importation of currency were irrelevant. In the result, the judge concluded that the Appellant’s case was the opposite of *Taaffe’s* in that he had known what he was importing, but had wrongly thought that it was legal, whereas *Taaffe* did not know what he was importing and had wrongly thought that that what he thought he was importing was illegal.

19. The judge next observed that it would be surprising if a mistake of law, which provided no defence, should somehow negate mens rea and provide a defence by reference to the use of the word “fraudulent” in s.170(2) of the CEMA. The judge referred to the judgment of this court in *Attorney-General’s Reference (No. 1 of 1981)* [1982] QB 848, which was given by Lord Lane CJ - the central issue in which was the true construction of the word “fraudulent” in section 170(2). The judge cited a number of extracts from the judgment, but did not include the court’s ultimate conclusion. The judge concluded that it was not necessary for the Respondent to prove that the Appellant had acted fraudulently. Rather, it was necessary for the Respondent to prove that the evasion was fraudulent – i.e. was deliberate and calculated to defeat the prohibition contained in section 3(1)(a) of the MDA. The judge continued that his view that that the word “fraudulent” did not add to the mens rea that needed to be proved was reinforced by the speech of Lord Steyn in *R v Latif R v Shahzad* [1996] 1 WLR 104 (albeit that that case was principally concerned with other matters)). The Respondent’s argument in that case that section 170 should be read as if it provided “if any person is fraudulently and knowingly concerned in any fraudulent evasion” was rejected by Lord Steyn who concluded that there was no justification for adding the words “fraudulently and” as an additional ingredient to the offence under s.170(2). Thus, the judge concluded, the Appellant’s submission that the Respondent had to prove that he had acted dishonestly was not correct. Dishonesty and fraud were not parts of the mens rea of the offence. What the Respondent had to prove was that the Appellant was knowingly involved in the importation, and that he knew that cannabis was being imported, and that he was concerned in that importation – which elements were not disputed on the instant case.
20. As touched on above, the second issue for determination, which (given the Appellant’s admission that he intended to supply to others) related essentially to Count 3, was whether, by virtue of section 28(3)(b)(i) of the MDA, the Appellant’s mistaken belief that the drugs found at his home were not prohibited could provide him with a defence. The judge did not refer to any authority. However, he gave a number of examples of the way in which, in his view, section 28 of the MDA was intended to function, as follows:
 - (1) A person charged with possession of cocaine who said and proved that he thought, on reasonable grounds that he was in possession of amphetamine, was nevertheless guilty of possession of cocaine because, under section 28(3)(a), he was not to be acquitted simply because he proved that he did not know that it was cocaine.
 - (2) On the other hand if the person proved that he thought, on reasonable grounds, that the substance was flour, he was to be acquitted under section 28(3)(b)(i),

because he had proved that he did not believe that the substance was a controlled drug.

- (3) In both those cases the mistake was one of fact. However, if a person was proved to be in possession of a drug which was controlled, but asserted credibly, and on reasonable grounds, that he did not believe it to be a controlled drug, that would be a mistake of law and would provide no defence.
21. Against that background, the judge concluded that if the Appellant's mistake had been that the substance was not a controlled drug at all, but was something other than a controlled drug, that would have been a mistake of fact upon which he could have relied. However, where (as in the Appellant's case) the mistake was that the drug that he knew that he was in possession of was not controlled, that would be a mistake of law, which could not be relied on. The argument advanced on behalf of the Appellant was fallacious - in that it had equated the words "was a controlled drug" in section 28(3)(b)(i) with the words "that the drug was controlled". The Appellant, the judge further concluded, had known exactly what he was in possession of, it was in fact a controlled drug, and therefore he could not avail himself of the defence under s.28(3)(b)(i) by saying that he did not believe that it was controlled.
 22. As indicated above, the judge's ultimate conclusion was that the mistake upon which the Appellant sought to rely, did not afford him a defence to any of the charges in the Indictment.

Submissions on appeal

23. In the combination of his written and oral submissions, Mr McGarvey argued, in summary, that:
 - (1) In accordance with the decision of the House of Lords in *R v Shivpuri* [1987] 1 AC 1 (in which the decision of this Court in *Hussain* [1969] 2 QB 567 was endorsed), on Counts 1 & 2 section 170(2) of the CEMA required proof that the Appellant knew, at the material time, that the goods imported were subject to a prohibition, and therefore the Appellant's assertion that, at the material time, he believed that the goods were not the subject of a prohibition, raised an issue as to whether the requisite knowledge was proved by the Respondent – such proof being essential to guilt.
 - (2) In accordance with *Attorney-General's Reference (No. 1 of 1981)* [1982] QB 848, on Counts 1 & 2 it was also essential for the Respondent to prove fraudulent conduct by the Appellant - in the sense of dishonest conduct deliberately intended to evade the prohibition. Therefore, the Appellant's assertion that he had not acted fraudulently, because he had genuinely believed that the goods were not subject to a prohibition raised an issue as to whether another element of the offence was proved by the Respondent – such proof also being essential to guilt.
 - (3) In accordance with the decision of the House of Lords in *R v Taaffe* [1984] 1 AC 539, the Appellant should have been judged in accordance with the facts as he believed them to be – namely that the goods were not prohibited.
 - (4) Given the terms of section 28(3)(b)(i) of the MDA, the judge had erred in ruling that the Appellant had no defence in relation to Count 3.
 - (5) In all those circumstances, the judge's ruling was wrong.

24. In the combination of his written and oral submissions, Mr Thomas argued, in summary, that:
- (1) As to Counts 1 & 2, in accordance with the decision of this court in *Taaffe* [1983] 1 WLR 627, under section 170(2) of the CEMA the required mens rea of the offence is simply “*knowledge that the substance which was being imported was a drug, or certainly a substance of some sort, the importation of which was prohibited*”.
 - (2) Against the background that in *Attorney-General’s Reference (No. 1 of 1981)* (above) the court held that “*what has to be fraudulent is not behaviour towards a customs officer but the evasion or attempted evasion of the prohibition*”, the Respondent had to prove that the evasion was fraudulent, and that it was deliberate and calculated to defeat the prohibition. The Respondent did not have to prove that the Appellant had acted fraudulently (in the sense of dishonest conduct required for other offences).
 - (3) The mistake asserted by the Appellant was a mistake of law, not of fact, and therefore did not avail him.
 - (4) In any event, it was not disputed that the Appellant knew that the imported goods were a species of the genus cannabis, and that the importation of controlled drugs was prohibited, and that what was actually imported was, in each instance, a controlled drug, and those facts were sufficient to establish guilt on Counts 1 & 2.
 - (5) As to Count 3, section 28(3)(b)(i) of the MDA was considered by the House of Lords in *R v Shivpuri* (above). In particular, at p.17C of the report Lord Bridge concluded that: “*Thus, on a charge of possessing a Class A drug.....and on proof that the drug in possession of the accused was in fact of Class A, it will be no defence for him to persuade the jury that he believed it to be of Class B or Class C In other words the only mens rea required for the offence of possessing a drug in any specified class is knowledge that it was a controlled drug...*” The same reasoning applied in the Appellant’s case, and therefore he could not rely on the section.
 - (6) Overall, the judge had correctly applied the law, and his ruling was right.

Legal framework

Section 170(2) of the CEMA & associated sections of the MDA

25. Section 170(2) of the CEMA provides, in so far as material, that:
- “Without prejudice to any other provision of the Customs and Excise Acts 1979, if any person is, in relation to any goods, in any way knowingly concerned in any fraudulent evasion or attempt at evasion –*
-
- (b) *of any prohibition or restriction for the time being in force with respect to the goods under or by virtue of any enactment; or*
-
- He shall be guilty of an offence under this section and may be detained.”*
26. Section 3 of the MDA provides that:
- “(1) Subject to subsection (2) below –*

- (a) *the importation of a controlled drug; and*
- (b) *the exportation of a controlled drug,*
are hereby prohibited.
- (2) *Subsection (1) above does not apply –*
 - (a) *to the importation or exportation of a controlled drug which is for the time being excepted from paragraph (a) or, as the case may be, paragraph (b) of subsection (1) above by regulations under section 7 of this Act or by provision made in a temporary drug class order by virtue of section 7A; or*
 - (b) *to the importation or exportation of a controlled drug under and in accordance with the terms of a licence issued by the Secretary of State and in condition with any conditions attached thereto.”*

27. Section 2 of the MDA provides that:

“In this Act –

- (a) *the expression controlled drug means any substance or product for the time being specified –*
 - (i) *in Part 1, II or III of Schedule 2.”*

28. Cannabis is a Class B drug which is specified in Part II of Schedule 2 of the MDA. It is defined, in section 37(1), as follows:

“In this Act, except in so far as the context otherwise requires, the following expressions have the meanings hereby assigned to them respectively, that is to say –

.....

Cannabis (except in the expression ‘cannabis resin’) means any plant of the genus Cannabis or any part of any such plant (by whatever name designated) except that it does not include cannabis resin, or any of the following products, after separation from the rest of the plant, namely –

- (a) *mature stalk of any such plant,*
- (b) *fibre produced from mature stalk of any such plant, and*
- (c) *seed of any such plant.*

Authorities – section 170(2) of the CEMA

29. The immediate predecessor to s.170(2) of the CEMA was the similarly worded section 304(b) of the Customs and Excise Act 1952. The principal authorities in relation to the constituent elements of that offence, namely *Hussain* (above) and *Hennessey* (1978) 68 Cr.App.R. 419, have since been approved and followed in numerous cases involving the true construction of s.170(2) – including *Taaffe* (CA) (above); *R v Taaffe* (HL) (above); *R v Shivpuri* (PC) (above); *Ellis* 84 Cr.App.R. 235 (CA); *Siracusa* (1990) 90 Cr.App.R. 340 (CA); *R v Latif*, *R v Shahzad* (HL) (above); and *R v Forbes* [2002] 2 AC 512 (HL).

30. *Hussain* (above), a seaman, was convicted of being knowingly involved in the fraudulent evasion of the prohibition on the importation of 10 packages of cannabis that had been found hidden in his cabin. At p. 571/2 of the report, Widgery LJ (as he then was), giving the judgment of the Court, said:

“...It seems perfectly clear that the word “knowingly” in section 304(b) is concerned with knowing that a fraudulent evasion of a prohibition in respect

of goods is taking place. If, therefore, the accused knows that what is on foot is the evasion of a prohibition against importation and he knowingly takes part in that operation, it is sufficient to justify his conviction, even if he does not know precisely what kind of goods are being imported. It is, of course, essential that he should know that the goods which are being imported are goods subject to a prohibition. It is essential that he should know that the operation with which he is concerning himself is an operation designed to evade that prohibition and evade it fraudulently. But it is not necessary that he should know the precise category of the goods the importation of which has been prohibited....”.

31. *Hennessey* (above) also involved the importation of cannabis. His defence was that he had believed that he was importing ‘blue’ films – albeit that he (correctly) believed that the films were subject to a prohibition. At trial, the judge had directed the jury that:

“Knowingly, in this section of this statute, is concerned with knowing that a fraudulent evasion of a prohibition in respect of goods is taking place. It is not a question of knowing whether you have got a particular commodity in your pocket, or container or car, and there is quite a considerable amount of legal authority for that proposition. If, therefore, an accused person knows that what is afoot is the evasion of a prohibition against importation and he knowingly takes part in that operation, it is sufficient to justify his conviction under this section of the Act, even if he does not know precisely what kind of goods are being imported.”

32. At page 422 of the report, Lawton LJ, who gave the judgment of this Court, said:

“By directing the jury in these terms Judge Abdela was following, as he told the jury he was, the judgment of Widgery LJ (as he then was) in Hussain.....In that case the appellant had submitted that the trial judge should have directed the jury that the prosecution had to prove that the accused knew what was the subject of the prohibited importation. Mr Godfrey made the same submission in this case. The Court in Hussain rejected the submission. Mr Godfrey boldly submitted that that this court had been wrong to do so and that we should not follow Hussain. We intend to follow it for the best of reasons, it was correctly decided. On his own story, Hennessey did know that he was concerned in a fraudulent evasion of a prohibition in relation to goods. In plain English he was smuggling goods. It matters not for the purpose of conviction what the goods were as long as he knew that he was bringing into the United Kingdom goods which he should not have been bringing in...”

33. *Taaffe* (above) also involved the importation of cannabis. His defence was that he had thought that he was importing currency, which was not prohibited – albeit that, at the material time, he had mistakenly believed that the importation of currency was prohibited. The trial judge ruled that he had no defence. He appealed to this Court. At page 629G of the report, Lord Lane CJ, who gave the judgment of the Court, said:

“One starts from the premise that this is not an offence of absolute liability. It is plain from the use of the word “knowingly” in section 170(2) that the prosecution have the task of proving the existence of mens rea, the mental element of guilt. Mens rea in this context means the mental element required

by the particular statute on the part of the defendant before the prosecution can succeed.

What then in this case was the relevant mental element which section 170(2) required to be proved? It seems to us that it was primarily knowledge that the substance that was being imported was a drug, or certainly was a substance of some sort, the importation of which was prohibited. We say “relevant”, because there were no doubt other facets of the mental element which are not here in issue...”

34. At page 630F – 631C/D of the report, Lord Lane CJ continued:

“It is essential that the defendant should know, in the ordinary sense of the word “know”, that the goods being imported are goods subject to a prohibition, though on the basis of the decisions in Reg v Hussain [1969] 2 QB 567 and Reg v Hennessey 68 Cr.App.R. 419, he may not know the precise nature of the goods.

The matter can be approached from another angle. We turn to the decision in Sweet v Parsley [1970] AC 132, and to a passage, where Lord Diplock, after citing what Stephen J said in Reg v Tolson (1889) 23 Q.B.D. 168, 187, said, at p.163:

“even when the words used to describe the prohibited conduct would not in any other context connote the necessity for any particular mental element, they are nevertheless to be read as subject to the implication that a necessary element of the offence is the absence of a belief, held honestly and upon reasonable grounds, in the existence of facts which, if true, would make the act innocent. As was said by the Privy Council in Bank of New South Wales v Piper [1897] AC 383, 389, 390, the absence of mens rea really consists in such a belief by the accused”. We say in passing that it is doubtful, in the light of subsequent decisions, whether the words “on reasonable grounds” should still be included, but it is not necessary for us to embark on any inquiry as to that.

What then if the jury in the present case had been asked to decide the matter and had come to the conclusion that the appellant might have believed that what he was importing was currency and not prohibited drugs? He is to be judged against the facts as he believed them to be. Had this indeed been currency and not cannabis, no offence would have been committed. Does it make any difference that the appellant thought wrongly that by clandestinely importing currency he was committing an offence? Mr Aylwin strongly submits that it does. He suggests that a man in this situation has to be judged according to the total mistake that he has made, both the mistake with regard to the fact of what he was carrying and also mistake of law as to the effect of carrying that substance. We think that submission is wrong. It no doubt made his actions morally reprehensible. It did not, in our judgment, turn what he, for the purpose of argument, believed to be the importation of currency into the commission of a criminal offence. His views on the law as to the importation of currency were to that extent, in our judgment, irrelevant.”

35. The Crown appealed to the House of Lords – see *R v Taaffe* (above). Dismissing the appeal, Lord Scarman (who gave the principal speech) said, at page 546 – 547C/D of the report:

“Lord Lane CJ construed the subsection under which the respondent was charged as creating not an offence of absolute liability but an offence of which an essential ingredient is a guilty mind. To be ‘knowingly concerned’ meant, in his judgment, knowledge not only of the existence of a smuggling operation but also that the substance being imported into the country was one the importation of which was prohibited by statute. The Respondent thought he was concerned in a smuggling operation but believed that the substance was currency. The importation of currency is not subject to any prohibition. Lord Lane concluded, at p.631:

‘[The respondent] is to be judged against the facts that he believed them to be. Had this indeed been currency and not cannabis, no offence would have been committed.’

Lord Lane CJ went on to ask this question:

‘Does it make any difference that the [respondent] thought wrongly that by clandestinely importing currency he was committing an offence? The Crown submitted that it does.’

The court rejected the submission: the respondent’s mistake of law could not convert the importation of currency into a criminal offence: and importing currency is what it had to be assumed that the respondent believed he was doing.

My Lords, I find the reasoning of the Lord Chief Justice compelling. I agree with his construction of section 170(2) of the Act of 1979; and the principle that a man must be judged on the facts as he believes them to be is an accepted principle of the criminal law when the state of a man’s mind and his knowledge are ingredients of the offence with which he is charged..... For the reasons given by the Lord Chief Justice in the Court of Appeal, with whose judgment I fully agree, I would answer the certified question in the negative and dismiss the appeal.”

36. *Shivpuri* (above) was convicted of attempting to be knowingly concerned in harbouring or dealing with goods (heroin) the importation of which was prohibited, contrary to section 170(1) of the CEMA. The Privy Council, see e.g. the speech of Lord Bridge at page 17 of the report, approved the decision in *Hussain* (above) and concluded that, under section 170(1) of the CEMA, it was sufficient to prove that the person knew that the goods concerned were prohibited goods, and that, irrespective of the different penalties attaching to offences in connection with the importation of different categories of prohibited goods, no proof was required that he knew the goods to be of a particular category. Accordingly, it was immaterial that the appellant had been unsure of the exact nature of the substance in his possession, in that, in any event, he had believed that he was dealing with either heroin or cannabis and that both were prohibited.
37. In *Ellis* (above), the appellants were variously charged with being knowingly concerned in the fraudulent evasion of the prohibition on the importation of cannabis. They had each sought a ruling at first instance as to whether their belief that they were importing pornographic films, which they knew to be subject to prohibition, and which were in fact subject to prohibition, afforded them a defence. In each instance the judge, on those assumed facts and relying on *Hennessey* (above) ruled against them, whereupon they had pleaded guilty. On appeal it was contended that, in view of the decision in *R v Shivpuri* (above), *Hennessey* was no longer good law. The judgment of the Court was given by O’Connor LJ, and included an extensive review

of the authorities to which we have already referred. Having first reviewed the decision in *Hussain* (above), including citing the statement of the law that we have set out in para 30 above, he opined that:

“There was a clear statement of the law construing section 304 of the 1952 Act. The 1979 Act was a consolidating statute and, as will appear later in our judgment, there is no difference to be made in construing section 170.”

O’Connor LJ then went on, amongst other things, to consider in detail the judgments and speeches in *Hennessey*, *Taaffe*, and *Shivpuri*, and the possible effect on them of the decision in *R v Courtie* (a buggery case - into the detail of which it is unnecessary to go), ultimately concluding (at page 246-247) that both *Hussain* and *Hennessey* remained good law.

38. In *Siracusa* (above) the appellants had been convicted of conspiracy to contravene section 170(2)(b) of the CEMA. In giving the judgment of the Court (which ultimately decided that an agreement to import heroin could not be proved by an agreement to import cannabis) O’Connor LJ said, at page 343 of the report, by reference to *Hussain*, *Shivpuri* and *Ellis*, that:

“In cases where controlled drugs are imported into this country and a substantive offence is charged as a contravention of section 170(2)(b), the particulars of the offence identify the drug and the class to which it belongs so that the appropriate penalty is not in doubt. Case law has established that although separate offences are created as a result of the different penalties authorised, the mens rea is the same. The prosecution must prove that the defendant knew that the goods were prohibited goods. They do not have to prove that he knew what the goods in fact were. Thus it is no defence for a man charged with importing a Class A drug to say he believed that he was bringing in a Class C drug, or indeed any other prohibited goods.”

39. In *R v Latif*, *R v Shahzad* (above) the appellants had been convicted of an offence contrary to section 170(2) of the CEMA, relating to the attempted importation of 20 kgs of heroin from Pakistan. The heroin had been brought to England by a British customs officer who, although acting on the instructions of his superiors, had had no licence under section 3(2)(b) of the MDA to import the drugs. The Court of Appeal rejected the concession made by the prosecution that the officer had committed an offence contrary to section 170(2) - because the Court concluded that he had not acted fraudulently. On appeal to the House of Lords, the prosecution argued that the section should be read as if it provided that: “if any person is.....*fraudulently and knowingly* concerned in any fraudulent evasion”. That was rejected by Lord Steyn (who gave the principal speech) at page 112C of the report – saying that there was no justification for an additional ingredient to the offence. As to the ingredients of an offence contrary to the combination of section 170(2) of the CEMA and section 3 of the MDA, Lord Steyn continued, at page 114 B/D:

“The ingredients of that offence are: (a) the goods in question are subject to a prohibition on importation under statutory provision; and (b) a fraudulent evasion or attempted evasion has taken place in relation to those goods; and (c) the accused was involved in that fraudulent evasion or attempted evasion; and (d) the accused was involved in that fraudulent evasion or attempted evasion “knowingly””

40. *Forbes (above)* was convicted of two offences contrary to section 170(2) of the CEMA - each in relation to a video containing footage of indecent photographs of boys under the age of 16. His defence was that he had agreed to import two other films which he believed to be subject to prohibition, but which were, in fact, subject to no such prohibition. The trial judge directed the jury that, if they accepted that defence, the defendant was entitled to an acquittal, and further directed them that the prosecution had to establish that the defendant knew that he was importing prohibited material, but not that he knew “the very films” that he was carrying. The Court of Appeal dismissed his appeal. On appeal to the House of Lords it was held that it was an established general principle, on prosecution for an offence under section 170(2)(b) of the CEMA, for the prosecution to prove that a defendant knew that the operation on which he was engaged involved prohibited goods and was designed to evade a prohibition on their importation. It was not necessary also to prove that the defendant knew the nature of the goods in question; and that the application of that principle gave rise to no injustice since, for the purposes of section 170(2), a defendant was to be judged on the basis of the facts as he believed them to be, so that a defence was available to him where the goods that he was carrying, in fact and contrary to his belief, were not subject to prohibition. Thus the appeal was dismissed.
41. At paras 6-8 of the speeches in *Forbes*, Lord Slynn underlined that the correctness of the decision in *Hussain* had been accepted in *Hennessy* and had been approved by the House of Lords in both *Taaffe* and *Shivpuri* (all above); and that the decision in *Taaffe* “also accepted that for the purpose of section 170(2) of the 1979 Act a defendant must be judged on the facts as he believed them to be, such matter being an integral part of the inquiry as to whether he was knowingly concerned in a fraudulent evasion of a prohibition on importation”. Lord Hope, at paras 25-28, expressed similar views, observing that “The law as laid down in *R v Hussain* has not been questioned judicially for over 30 years”. Lord Hutton, having quoted the passage from the judgment in *Hussain* that we have set out in para 30 above, continued, at para 52: “The principle stated by Widgery LJ in relation to knowledge contains two parts. The first part is that the prosecution must prove that the defendant knew that the goods which he is carrying are goods subject to a prohibition. The second part is that if the prosecution proves such knowledge it is not necessary for it to prove that the defendant knew what kind of goods he is carrying. The issue for the jury becomes blurred if they are required to consider the knowledge of the defendant as to the kind or category of goods which he is carrying.”
42. The true construction of the words “*fraudulent evasion or attempt at evasion*” in section 170(2) of the CEMA was considered by this Court in *Attorney-General’s Reference (No. 1 of 1981)* (above). At first instance the judge had ruled that “*fraudulent*” required a specific deceit of a customs officer on duty at the time. The question posed by the Attorney-General, for the consideration of the Court, was whether the prosecution had to prove fraudulent conduct in the sense of (1) acts of deceit practised on a customs officer in his presence or merely (2) conduct deliberately intended to evade the prohibition or restriction with respect to, or the duty chargeable on, goods as the case may be. Giving the judgment of the Court, Lord Lane CJ concluded (at p.856 C-E) as follows:

“It seems to us to be a misinterpretation of Parliament’s intention, and a path to absurdity, to make guilt depend on whether a customs officer is met and deceived on the one hand, or simply intentionally avoided on the other. In the result, we have come to the conclusion that the presence of the word “fraudulent” in section 170(2) of the Customs and Excise Management Act 1979 has the effect that, in prosecutions under that provision for fraudulent evasion or attempted evasion of a prohibition or restriction with respect to goods or duty chargeable thereon, the prosecution must prove fraudulent conduct in the sense of dishonest conduct deliberately intended to evade the prohibition or restriction with respect to, or the duty chargeable on, goods as the case may be. There is no necessity for the prosecution to prove acts of deceit practised on a customs officer in his presence.”

That was the ultimate conclusion of this Court to which the judge in this case did not refer when dealing with this issue – see para 19 above.

43. *Attorney-General’s Reference (No. 1 of 1981)* (above) was followed in *R v Panayi (No. 2)*, *R v Karte* (1989) 1 WLR 187, in which the issue for this Court was whether (as the judge had directed the jury at trial) it was sufficient under s.170(2) of the CEMA for the prosecution to prove that the Appellants (who were transporting a huge quantity of cannabis by yacht) had known that they were running the risk of entering territorial waters and had nevertheless gone on to take that risk. The Appellants complained that there were two elements missing from the judge’s directions namely that, as required by *Attorney-General’s Reference (No. 1 of 1981)*, dishonesty had to be proved, along with the fact that they knew that they were entering territorial waters and thereby importing the cannabis. The Court concluded (at pp. 192 F-H & 193H) as follows:
- “We take the view that the Act of 1979 is clear in its terms, and that what the prosecution have to prove is that these accused were knowingly concerned in any fraudulent evasion or attempted fraudulent evasion. In simple terms they cannot be knowingly concerned in the fraudulent evasion unless they intend dishonestly to evade the restriction. They cannot knowingly be involved in the evasion if one of the essential ingredients, namely, the fact that they are in territorial waters, is unknown to them; provided that they never had any intention of entering the United Kingdom territorial waters. If they had the intention to evade the prohibition, the mere fact that they were further on in their journey than they anticipated would not assist them..... knowingly requires knowledge at the time of the offence. Further, intention is an Important ingredient of this offence...”*
44. We have already cited (see para. 39 above) the subsequent decision of the House of Lords in *R v Latif*, *R v Shahzad* – in which it was concluded that proof of knowing involvement in a “fraudulent evasion” was required. Plainly, that decision did not overrule the decisions of the Court of Appeal in *Attorney-General’s Reference (No. 1 of 1981)* and *R v Panayi (No. 2)*, *R v Karte* (above) as to the true construction of the words “fraudulent evasion” – neither of which were referred to in *Latif*.

Mistake of fact

45. In short summary, the law in relation to mistake of fact is simply an application of the general principle that the prosecution must prove its case. It is long established that

(save in cases of strict liability) a genuine belief in factual circumstances which, if true, would make a Defendant's conduct innocent may result in the prosecution not being able to prove a requisite element of the offence, which may include any necessary mens rea – see e.g the following decisions of the House of Lords: *DPP v Morgan* [1976] AC 182, *R v Taaffe* (above), *DPP v B* [2000] 2 AC 428, *R v K* [2002] 1 AC 462, and *R v Forbes* (above).

Mistake of law

46. Also in short summary, ignorance, or mistake, of the criminal law of England & Wales is generally no answer to a criminal charge. However, that may not be the case where the offence expressly makes relevant the Defendant's knowledge or belief as to the legality of his, or another's, action. In such a case, absence of the requisite knowledge or belief via ignorance or mistake of law may result in a live issue as to whether the prosecution have proved (whether in whole or in part) the mens rea of the offence – see e.g. *Secretary of State for Trade and Industry v Hart* [1982] 1 AER 817

Sections 3, 4 & 28 of the MDA

47. Section 4(1) of the MDA provides that:
“Subject to any Regulations under section 7 of this Act, or any provision made in a temporary class drug order by virtue of section 7A, for the time being in force, it shall not be lawful for a person:

(b) to supply or offer to supply a controlled drug to another.”
48. Section 5 of the MDA provides, in so far as material, that:
“(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.

49. Section 28 of the MDA, in so far as relied upon by the Appellant, provides as follows:
“(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 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 the 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.*

.....”

Authorities – section 28 of the MDA

50. Section 28 of the MDA, and the then authorities in both Scotland and England & Wales, were the subject of penetrating analysis by the High Court of Justiciary in *Salmon v HM Advocate* [1999] JC 67, which was applied by the House of Lords in *R v Lambert* [2002] 2 AC 545 (in which it was also concluded that the burdens imposed on the accused in section 28 are evidential rather than persuasive). The correct approach to the question of whether there is evidence sufficient to raise an issue under the relevant subsection for the jury’s consideration is one for the trial judge to answer by exercising judgement in the light of the evidence in the case. Helpful guidance in that regard can be found in the decision of the High Court of Justiciary in *Henvey v HM Advocate* [2005] HCJAC 10 at para 11.
51. In the course of giving the judgment of the Court in *Salmon v HM Advocate* (above) the then Lord Justice General, Lord Rodger, concluded, amongst other things, that:
 - (1) Section 28(3) introduces a defence, and thus provides a basis on which an accused person is to be acquitted, even though he would otherwise fall to be convicted. It is a particular example of the wider class of situations covered by section 28(2).
 - (2) The first part of section 28(3) shows that it concerns the situation where it is necessary for the prosecution to prove that “some substance or product” involved in the 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 the controlled drug.
 - (3) Section 28(3)(b)(i) is intended to deal with the limited situation in which, for example, the Crown have proved that the accused possessed, say, tablets which are proved to be ecstasy tablets, but he says that he was mistaken about the nature or quality of the tablets.
 - (4) Other examples of the appropriate operation of section 28(3)(b)(i) included:
 - (a) The accused providing sufficient evidence that he thought that the tablets were aspirin, and that he neither suspected nor had reason to suspect that they were controlled drugs.
 - (b) The accused providing sufficient evidence that he thought that the tablets were some (uncontrolled) lifestyle drug and that therefore he neither knew nor suspected, or had reason to suspect, that they comprised a controlled drug.

Appeal after a guilty plea

52. In *R v Tredget* [2022] 4 WLR 62 this Court re-affirmed the various circumstances in which, notwithstanding a guilty plea, it may be submitted that the resultant conviction was unsafe. The circumstances include (see para 155 of the judgment) when the plea(s) of guilty was / were compelled as a matter of law by an adverse and wrong ruling by the trial judge which left no arguable defence to put before the jury. It is for the Appellant (see para 173) to demonstrate the matters vitiating the plea.

Reasons

53. The cases that we have cited show that the ingredients of the offence of being knowingly concerned in a fraudulent evasion of the prohibition on the importation of goods, contrary to section 170(2) of the CEMA, are well-settled and clear.

54. It is not necessary for the prosecution to prove that the defendant knew what the goods in fact were. What the prosecution must prove is that:

- (1) The goods in question were subject to a prohibition on importation under statutory provision.
- (2) A fraudulent (i.e. dishonest and deliberate) evasion has taken place in relation to those goods.
- (3) The accused was involved in that fraudulent evasion.
- (4) The accused was involved in that fraudulent evasion “knowingly”, in that he knew at the time that:
 - (a) The goods (whatever they were) were subject to a prohibition on importation.
 - (b) The evasion was dishonest and deliberate.

55. It is not, of course, necessary for the prosecution to prove that the accused knew the chapter and verse of the prohibition on importation, only that he knew that the goods (whatever they were) were subject to a prohibition. The circumstances of the evasion will often give rise to an inference that such was the case, but wider evidence may also be relevant.

56. The offence therefore expressly makes relevant an accused’s knowledge as to the legality of his, or another’s, action. A genuine mistaken belief of law, at the material time, that goods were not subject to a prohibition, does not amount to knowledge that they were subject to a prohibition. Rather, such a mistaken belief can be relied upon to assert that the prosecution have failed to prove an essential ingredient of the offence.

57. The case that the appellant wished to advance on Counts 1 & 2 in relation to his knowledge or otherwise of a prohibition, was, in short, that:

- (1) He was acting under a mistake of fact that the substance the subject of each Count was hemp / cannabis which had a THC content of less than 0.2%,
- (2) He was also acting under a mistake of law that, therefore, in each instance, the substance was not a controlled drug and thus was not prohibited from importation.

- (3) Thus the prosecution had not proved that, at the material time, he had known that the goods were subject to a prohibition.
58. Although the advancement of that case faced some difficult factual obstacles, in our view the Appellant was entitled in law to advance it, and the judge erred in ruling that he was not. In particular, the judge's reliance on part of the judgment of Lord Lane CJ in *Taaffe* (above) was misconceived. *Taaffe's* views on the law of the importation of currency (which was not, in law, prohibited) were irrelevant not because they involved a mistake of law, but solely because they could not turn an importation of currency (which was what *Taaffe* believed he was involved in) into an offence.
59. The judge also erred in his decision in relation to the construction of the word "fraudulent" in section 170(2). He was bound by the decisions of this Court in *Attorney-General's Reference (No. 1 of 1981)* and *R v Panayi (No. 2)*, *R v Karte* (both above), and his reliance on the former, without referring to the conclusion of the Court (which was to the contrary of his own conclusion) was wrong. As was his reliance, in that regard, on *R v Latif* *R v Shahzad* (above).
60. As indicated above, what the prosecution had to prove included proof that a fraudulent (i.e. dishonest and deliberate) evasion had taken place and that, at the material time, the appellant had known that to be the case. The appellant wished to advance the case that the evasion was not fraudulent and/or that he had not known that it was, and that therefore the prosecution had not proved their case. He was entitled to do so – albeit that, again, he faced some challenging factual obstacles in seeking to do so.
61. The judge reached his conclusions in relation to the construction of section 28(3)(b)(i) of the MDA without reference to the authorities that we have cited above, and upon the basis that the section involved a persuasive (rather than an evidential) burden. In the result, as the examples given by the Court in *Salmon v HM Advocate* (above) make clear, he fell into error. The Appellant was entitled to seek to rely on section 28(3)(b)(i), albeit (in accordance with the authorities) subject to review at the end of all the evidence, when it would have been open to the judge to decide whether or not the appellant had discharged the evidential burden upon him and thus whether the jury should be directed to consider the issue - in relation to which the appellant also faced some challenging factual obstacles.
62. The pleas of guilty that followed were thus compelled by adverse and wrong rulings by the judge, which left no arguable defence to be put before the jury, and thus we concluded that the appellant had demonstrated matters that vitiated those pleas.
63. Therefore, we allowed the appeal.