



APPEAL COURT, HIGH COURT OF JUSTICIARY

[2025] HCJAC 35  
HCA/2024/000507/XC

Lord Justice Clerk  
Lord Matthews  
Lord Armstrong

OPINION OF THE COURT

delivered by LORD MATTHEWS

in

NOTE OF APPEAL AGAINST CONVICTION

by

DARREN DOUGALL

Appellant

against

HIS MAJESTY'S ADVOCATE

Respondent

**Appellant:** Brannigan, Whyte; Faculty Appeals Limited for Houston Law (Glasgow) Solicitors  
**Respondent:** Cross (sol adv) AD; the Crown Agent

13 August 2025

[1] In this appeal the appellant contends that on a proper application of EU law, as it applied to the UK at the material time, it was not an offence to import, possess or supply cannabis or certain derivatives if the material in question had a THC (tetrahydrocannabinol) content of less than 0.2%. Insofar as the Misuse of Drugs Act 1971 sought to criminalise such material it constituted an unlawful interference with the free market provisions of the Treaty on the Functioning of the European Union (TFEU), and in particular article 34 thereof.

[2] As we shall explain in due course, interesting though this point was, and based, as it was, on the case of *R v Margiotta* [2023] EWCA Crim 759, a decision of the Court of Appeal, counsel's careful arguments were doomed to fail from an early stage.

### **Background**

[3] The appellant operated an online shop in which he offered for sale hundreds of different items, many of which were styled, one way or the other, as various types of CBD products. CBD, or cannabidiol, is not a controlled drug. On 31 July 2020, three packages addressed to the appellant were intercepted by customs officers at Edinburgh Airport. They had each been sent from the USA and were labelled "tea". The packages were opened and each contained plant material which, once scientifically analysed, was found to be cannabis. Warrants were obtained and a substantial amount of material was seized from the appellant's home. Some were found to be cannabis, some THC, some CBD and some produced negative results. All this was agreed in a lengthy and helpful joint minute.

[4] When cautioned and charged on 8 September 2020, the appellant replied:

"I'd like to note that it is industrial hemp and that is not an illegal drug. It is hemp."

[5] In due course, the appellant went to trial on charges arising out of the circumstances.

He was convicted of four charges as follows:

Charge 1 narrated that on 31 July 2020 at Edinburgh Airport and elsewhere he was knowingly concerned in the fraudulent evasion of the prohibition on importation of cannabis imposed by section 3(1)(a) of the Misuse of Drugs Act 1971, contrary to the Customs and Excise Management Act 1979, section 170(2)(b).

Charge 2 was to the effect that between 29 March 2019 to 8 September 2020, he was concerned in the supplying of cannabis contrary to the Misuse of Drugs Act 1971, section 4(3)(b).

Charge 3 was to the effect that between the same dates he was concerned in the supplying of tetrahydrocannabinol contrary to section 4(3)(b) of the 1971 Act; and

Charge 4, with which this appeal is not concerned, was possession of a small amount of cocaine.

[6] A number of first diets called in court from 28 March 2022 onwards. Most of these were for the purposes of the defence instructing an expert. On the first day of the trial, 26 July 2024, there was presented for the first time a compatibility issue minute. It was not, as it should have been, intimated to the Advocate General for Scotland. The crux of it was that the scientific report did not differentiate between hemp and controlled substances or indicate the level of THC within any individual product. It simply identified all plants of the genus *cannabis sativa* as *cannabis*. That was wrong by virtue of EU law. The Lord Advocate had no power to act in a manner incompatible with the minuter's rights in terms of article 7 ECHR, which provided, *inter alia*, that no person should be held guilty of any criminal offence if the act or omission was not a criminal offence under national or international law at the time it was committed. The Crown had to demonstrate that the acts complained of were a crime during the libelled period and, for various reasons, the material could not now be tested so as to determine the appropriate levels of THC at the material time.

[7] Reference was made to *R v Margiotta, supra*.

[8] The sheriff, having heard submissions, refused to allow the compatibility issue minute to be received. In short, it came far too late. In due course that decision was challenged on appeal but leave to appeal was refused.

[9] That gives rise to a major hurdle in the way of the appeal.

[10] As the trial progressed, the appellant relied on the statutory defence in terms of section 28(3) of the 1971 Act, which applies, *inter alia*, to offences of being concerned in supplying of controlled drugs.

[11] Section 28(3) is in the following terms:

“Where in any proceedings for an offence to which this section applies it is necessary, if the accused is to be convicted of the offence charged, for the prosecution to prove that some substance or product involved in the alleged offence was the controlled drug which the prosecution alleges it to have been, and it is proved that the substance or product in question was that controlled drug, the accused—

(a) shall not be acquitted of the offence charged by reason only of proving that he neither knew nor suspected nor had reason to suspect that the substance or product in question was the particular controlled drug alleged; but

(b) shall be acquitted thereof—

(i) if he proves that he neither believed nor suspected nor had reason to suspect that the substance or product in question was a controlled drug; or

(ii) if he proves that he believed the substance or product in question to be a controlled drug, or a controlled drug of a description, such that, if it had in fact been that controlled drug or a controlled drug of that description, he would not at the material time have been committing any offence to which this section applies.”

[12] Section 28(3) does not apply to the offence of importation of a controlled drug but that may not matter particularly in this case. The advocate depute drew our attention to *R v Datson* [2022] EWCA Crim 1248 where the Court of Appeal held that the ingredients of an offence contrary to section 170(2) of the Customs and Excise Management Act 1979 were well settled and clear. It was not necessary for the prosecution to prove that the defendant knew what the goods being imported in fact were. Rather what they had to prove was that (1) the goods were subject to a prohibition on importation under statutory provision; (2) a fraudulent (meaning dishonest and deliberate) evasion had taken place in relation to those goods; (3) the accused had been involved in that fraudulent evasion; and (4) the accused had been involved in that fraudulent evasion “knowingly” in that he knew at the time both that the goods (whatever they were) were subject to a prohibition on importation and the evasion was dishonest and deliberate. It followed that the offence expressly made relevant an accused’s knowledge as to the legality of his or another’s action. A genuine

mistaken belief in law at the material time that goods were not subject to a prohibition could be founded upon by the defence.

[13] During the course of his evidence, the appellant repeatedly made it clear that he thought, for various reasons, that the material was not subject to any prohibition and the trial judge left it to the jury on the basis that if they accepted his evidence or it left them in reasonable doubt they should acquit.

[14] Leave to appeal was granted on the basis of what were said to be misdirections. The directions which were challenged in the note of appeal were to the following effect:

“in some of the speeches yesterday something was said to you about your not knowing whether any of the products that the accused admits that he was selling was what ... was described, I think, as the ‘strong stuff’ and whether it was strong enough to cause a high or whether it was low and had a low THC content. Now, it is correct to say we do not know what the THC levels are and that’s because the levels are irrelevant to the issue of whether or not the material is cannabis within the meaning of the Misuse of Drugs Act, and I will come on to say a bit more about that when I direct you on the law, but what it means is that you mustn’t speculate or guess about what the levels were. You have no evidence about the levels and that’s because the levels are irrelevant to the task that is before you”

and

“you’ve heard some evidence from the accused about what he says he thought the law was. Now, he mentioned, I think, something about agricultural product, about there being, for example, very little THC in what he referred to as ‘hemp’. He said something about European Union law, I think, and about tea, perhaps being a novelty product.

Now, as a matter of law, if that is the accused’s understanding of the law about these controlled drugs then he is wrong. Cannabis, THC and cocaine are prohibited and controlled drugs, irrespective of their strength. Now, his belief about that matter might be relevant to his defence to these charges, and of course I’m going to come back to that, but it does not affect the fact that, as a matter of law cannabis, THC and cocaine are prohibited drugs in the United Kingdom.”

It is argued that these are misdirections in that they overlook *Margiotta*.

[15] It is therefore convenient to look at that case.

[16] In *Margiotta* the respondents were charged with being knowingly concerned in the fraudulent evasion of a prohibition on the importation of cannabis and being concerned in the supply of cannabis.

[17] Packages of plant material dispatched to the respondents had been intercepted and gave rise to the charges.

[18] The prosecution was stayed by a Recorder on the basis that, having regard to article 34 TFEU, it was not a criminal offence for the respondents to import and sell the imported material, having regard to its chemical composition. There was no dispute that the imported material was cannabis but the level of THC, the psychoactive element of cannabis, did not exceed 0.2%.

[19] The court heard detailed argument on the relevant EU instruments and set these out in their opinion. It is not necessary to rehearse these for present purposes.

[20] EU law applied at the time of the offences. It was also applicable at the time of the offences in this appeal.

[21] Articles 34 to 36 of the TFEU provide as follows:

“Quantitative restrictions on imports, and all measures having equivalent effect, shall be prohibited between Member States.

Quantitative restrictions on exports, and all measures having equivalent effect, shall be prohibited between Member States.

The provisions ... shall not preclude prohibitions or restrictions on imports, exports or goods in transit, justified on grounds of public morality, public policy or public security; the protection of health and life of humans, animals or plants; the protection of national treasures possessing artistic, historic or archaeological value; or the protection of industrial and commercial property. Such prohibitions or restrictions shall not, however, constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States.”

[22] The court pointed out that true hemp had been a useful product for millennia and had been used in the manufacture of such products as rope, textiles, paints and cosmetics.

Subject to certain conditions, trade in hemp was protected in terms of the common agricultural policy. At the material time, the concentration of THC in it had to be no more than 0.2%.

[23] Given the facts which were established in the court below, and the argument which was presented there, the court in *Margiotta* had, it respectfully seems to us, little choice but to make the decision which they did. They followed clear European authority. However, it was made plain that they had not heard and could not hear any argument as to article 36, which we have set out above. We shall return to this.

#### **Submissions for the appellant**

[24] The thrust of these was that *Margiotta* made it plain that the level of THC was not irrelevant. Furthermore, it affected the appellant's defence based on his knowledge and understanding. That defence was underpinned by his understanding of the THC levels, which, in the course of his evidence, he was not allowed to speak about.

#### **Submissions for the Crown**

[25] All that had to be proved was that the substances were the controlled drugs specified and that was agreed. There was no European issue before the court. It was open to the appellant to run a section 28 defence and he had done that. His defence was relevant also to the importation charge in terms of *R v Datson, supra*. It was fully before the jury and he gave detailed evidence about his position. The sheriff allowed him to speak to that. He made it plain that he thought the drugs were legal and he had no reason to suspect otherwise. The sheriff had no choice but to say that the THC levels were irrelevant. There was no evidence

as to what they were. What mattered was his belief what they were, at least for the purposes of his defence.

### **Analysis and decision**

[26] As we indicated at the outset, this appeal was doomed insofar as it relied on EU law.

It was agreed that the substances were the controlled drugs in question. There was no agreement as to the level of THC in them but that is not required for the purposes of the Misuse of Drugs Act 1971, as a matter of domestic law. If it were to be argued that as a matter of European law the material was not illegal, in terms of European law, that required a compatibility issue minute. The nub of the argument is really that the Crown have no power to act incompatibly with European law by prosecuting the appellant under the provisions of the Misuse of Drugs Act 1971 which, when they do not specify a particular level of THC, are incompatible with EU law. That is plainly a compatibility issue.

[27] There was ample opportunity for such an issue to be raised during the progress, if that is the right word, of the case through the Sheriff Court but nothing was done until the last minute.

[28] This is not a mere technicality. While *Margiotta* must be given every respect, it seems clear from reading the opinion that the judges might have been sympathetic to an argument based on article 36 TFEU, which the Crown were foreclosed from raising. Even if any of the material in this case was covered by article 34, we are quite sure that the Advocate General, if the matter had been intimated to her, might well have intervened and presented such an argument. Leaving all that aside, in the absence of a compatibility issue minute, this case has to be decided only on the basis of domestic law. The various substances having been agreed to be what the Crown allege them to be, that is effectively the end of the matter.

[29] There was no evidence as to the THC levels. There was evidence of some packaging which purported to set out certain levels and evidence of labelling to similar effect but none of this spoke for itself. The appellant gave evidence as to what his understanding was. He was allowed to develop that as far as it could be developed.

[30] Given that there was no actual evidence of the levels, the sheriff was quite correct to say that the levels were irrelevant. She could not have done otherwise.

[31] We understood counsel's submission to be that if the levels had been shown, for example to be under 0.2%, then that would have bolstered his understanding. However, since there was no evidence, not only was there nothing to boost his understanding but there was nothing to undermine it. His understanding was really all that mattered and he was able to make that obvious to the jury.

[32] It was necessary for the sheriff to tell the jury what the law was and in terms of the domestic law, which was the only one applicable in the circumstances, that the THC levels are indeed irrelevant to the question of whether the materials are the controlled drugs specified. The sheriff was correct to direct the jury that as a matter of law there does not require to be a calculation about the strength of the concentration of drugs for them to be controlled.

[33] She reminded the jury that the appellant said something about European law and she told them that if that was his understanding of the law then he was wrong. Cannabis, THC and cocaine were prohibited and controlled drugs irrespective of their strength. She went on, however, to say that his belief about that might be relevant to his defence to these charges. Whether that might have been generous in terms of the section 28(3) defence may be a question for another day.

[34] She reminded the jury that his position was that he did not know and had no reason to believe that the material which was intercepted at Edinburgh Airport and recovered by the police from his home were controlled drugs. That was a potential defence to charges 1, 2 and 3.

[35] She later went on to develop her directions on this. The jury were told that if they accepted his evidence and it supported the conclusion that he neither knew nor suspected nor had a reason to suspect that what was intercepted or recovered were controlled drugs then they would acquit him.

[36] In considering that, they could look at his evidence about his state of knowledge, about whether he knew that there were prohibitions in place in the United Kingdom and if he did what steps did he take to make sure that the material did not contravene those prohibitions. She reminded the jury that it was for the Crown to meet the defence and satisfy them beyond reasonable doubt that it should be rejected.

[37] We can detect no error in what was said. The actual levels of THC were irrelevant in the circumstances of this case. That was particularly so since there was simply no evidence about them. The appellant was able to give his evidence about his understanding of what the substances were. There has been no miscarriage of justice.

[38] The appeal is refused.