APPEAL COURT, HIGH COURT OF JUSTICIARY

[2025] HCJAC 32
HCA/2024/000495/XC

Lord Justice Clerk
Lord Doherty
Lord Armstrong

OPINION OF THE COURT

delivered by LORD BECKETT, the LORD JUSTICE CLERK

in

APPEAL AGAINST CONVICTION

by

CHOON SENG GAN

Appellant

against

HIS MAJESTY'S ADVOCATE

Respondent

Appellant: Paterson KC, sol adv; Paterson Bell Solicitors (for LB & Co, Solicitors, Glasgow)
Respondent: Farrell, AD; the Crown Agent

_____

1 August 2025

Introduction

[1] The appellant was found guilty at Glasgow Sheriff Court on a single charge of being concerned in the supplying of cannabis contrary to the Misuse of Drugs Act 1971 section 4(3)(b). In appealing against conviction, he contends that the sheriff misdirected the

jury by not telling them that they must be satisfied that the appellant knew he was involved in supplying prohibited drugs or at least that his involvement was with an illegal supplying operation. Secondly, he contends that the sheriff erred by failing to refer to the statutory defence under section 28 of the 1971 Act. Parties informed us that the question of a s 28 defence was not raised before the sheriff.

The Crown case

[2] Parties agreed most relevant facts in a joint minute. On 14 June 2023, two police officers stopped the appellant driving his Mercedes Sprinter minibus accompanied by a passenger, Mr Ming Fa Zheng, in Glasgow. Mr Zheng was sitting behind the appellant. The police recovered two suitcases containing between them 74 vacuum-sealed packages containing herbal cannabis with a total value of £241,700. The quantity of cannabis was suggestive of supply. The police also recovered £1,200 in £20 notes and £430 in mixed notes from the van together with clothing, food and tools. The van was in an untidy condition.

The appellant's defence

[3] The appellant intimated a special defence of incrimination blaming Mr Zheng. The appellant testified that he lived in London and had been working for 10 years as an unofficial tour operator/taxi driver. He had built a business of driving clients, mostly of Chinese origin, for airport transfers and journeys including tours to different parts of the United Kingdom.

[4] Mr Zheng, whom he had never met before, had called to arrange transport for him and his belongings between Manchester and Glasgow where Mr Zheng was going to live. The appellant collected Mr Zheng near a Chinese cash and carry in Manchester and drove

him to Glasgow. Mr Zheng paid him £430 in cash. The two suitcases found in the minibus belonged to Mr Zheng. The appellant had never seen them before. He believed they contained Mr Zheng's belongings, but he had no idea what those were. He did not understand Mr Zheng to be delivering the suitcases to someone else. The other £1200 cash was his own money. He did not have a credit card. He carried cash in case he needed it for food, petrol or accommodation. Such expenses for a trip like this could potentially amount to about £200. He denied all knowledge of the drugs and denied selling any drugs. He did not know that Mr Zheng's suitcases contained drugs. The vast majority of the appellant's evidence involved his being shown photographs depicting him with his vehicle and passengers, all taken after the date of the offence. A defence witness said that the appellant had driven him and his family to various places across the UK.

The sheriff's closing directions

[5] The sheriff adopted and summarised the standard directions he had given orally and in writing at the start of the trial. They included:

> "If you accept any piece of evidence, from wherever it comes, that shows that the accused is not guilty then you will acquit;
> If you do not fully accept that evidence but it raises a reasonable doubt then again you will acquit."

He gave a general direction at pp 16.24-17.4 of the transcript of his charge:

> "But basically, if you believe any evidence which suggests that he is innocent then you'd acquit the accused. But even if you didn't completely believe it but it left you with a reasonable doubt about guilt on the charge then you'd acquit."

He went on to deal with the incrimination, to define the constituents of the crime and the general effect of exculpatory evidence as detailed below.

[6] *Special defence of incrimination* at pp 20.25-21.7:

"The defence do not need to lead evidence in support of it, they don't need to prove it to any particular standard. You just consider any evidence relating to it along with the rest of the evidence. If it's believed, if you believe it, or if it raises a reasonable doubt then an acquittal must result."

[7] *Supplying* at p 23.6-23.15:

"The key words are being concerned in supplying. What does that mean? Well, it calls for three comments: supplying has its ordinary common sense meaning. It means it's parting with possession, you give us possession and that could take the form of either being involved in the sale or exchange or even gifting. So supplying means that you're parting with the possession for whatever reason."

[8] *Being concerned in supplying – activity* at pp 23.15-24.10

"Being concerned in requires an accused's active involvement in the supply chain, and that can take many forms in the centre or on the fringes of drug dealing from the people who are calling the shots and effectively in total control of all of this, to the simple street dealers. It covers financiers, it covers couriers, go-betweens, lookouts, advertisers, those who store drugs, those who break up bulk quantities, those who reduce their purity, divide them into deals and package them, and suppliers of single deals. So there is a whole series of potential involvement in the supply chain. It covers supply itself for any link in the chain or distribution from producer to ultimate consumer. It can relate to drugs supplied to or supplied by the accused, but he must be involved in some way like that."

Being concerned in supplying – knowledge at pp 24.10-25.13:

"Being concerned in supplying requires the Crown to prove some degree of knowledge on the part of the accused.

So what's required is proof that the accused personally was actively and knowingly involved in an operation to supply something. Not necessarily that it was a controlled drug. The Crown has to prove that what was actually being supplied was a controlled drug specified in the actual charge, namely cannabis. But the Crown does not need to prove that the accused knew that it was a controlled drug specified in the charge that was being supplied. So effectively it does require some form of knowledge.

So for the Crown to prove this charge you would need to be satisfied that there was an operation to supply something going on, that the accused was knowingly involved in it, that he was in fact, that what he was in fact supplying was the drug referred to in the charge, namely cannabis. And you have to decide if he was knowingly part of the supplying operation and to decide if what was being supplied was indeed cannabis."

[9] *The general effect of exculpatory evidence* at p 28.10-28.16

> "If the evidence of the accused or any evidence in the case from the defence, or if the case as a whole has left you with reasonable doubt about the Crown having proved the guilt of the accused on the charge, then you must acquit on that charge."

Submissions

Appellant

[10] The sheriff erred by failing to give clear directions that the Crown must prove that the appellant was knowingly involved in the supply of illegal drugs or that the supply operation involved an element of illegality. The appellant's evidence was that Mr Zheng had asked the appellant to take him and his belongings to Glasgow where he was going to live. This was not an unusual journey, the appellant had no idea what was in the suitcases, he did not open them and he did not know they contained drugs. Section 28(2) of the 1971 Act was engaged. Whilst it was not suggested to the sheriff that the defence relied on s 28(2), in the circumstances of this case it was a live issue. The sheriff should have given clearer and fuller directions to ensure that the jury understood that the Crown had to prove that the appellant knew that there was cannabis within the suitcases.

[11] No authority was advanced to support the appellant's first proposition but on the second, senior counsel referred to *Salmon* v *HM Advocate* 1999 JC 67, and particularly the opinion of the Lord Justice General at 73H-74E, and to *R* v *McNamara* (1988) 87 Cr App R 246. The circumstances in *Glancy* v *HM Advocate* 2001 SCCR 385 and *Aiton* v *HM Advocate* [2010] HCJAC 15, 2010 JC 154 were different.

Crown

[12] The Crown had to prove that the appellant was knowingly involved in an operation to supply something, and that that something was in fact, cannabis. The Crown did not

have to prove that the appellant was knowingly involved in the supply of illegal drugs: *Salmon*, *Aiton*. The sheriff had directed the jury appropriately.

[13] As in *Aiton*, the appellant's defence was one of simple denial. His evidence was that he was working as a taxi driver and was transporting Mr Zheng from Manchester to Glasgow unaware of the contents of the suitcases. The statutory defence in s 28 was not engaged. The sheriff was correct not to introduce it: *Aiton,* Lady Paton at para 27 and Lord Bonomy at para 34; *Hattie* v *HM Advocate* [2022] HCJAC 13, 2022 JC 100 at para 10.

The 1971 Act and judicial interpretation

[14] Section 28 provides:

> "28.— Proof of lack of knowledge etc. to be a defence in proceedings for certain offences.
>
> (1) This section applies to offences under any of the following provisions of this Act, that is to say section 4(2) and (3), section 5(2) and (3), section 6(2) and section 9.
>
> (2) Subject to subsection (3) below, in any proceedings for an offence to which this section applies it shall be a defence for the accused to prove that he neither knew of nor suspected nor had reason to suspect the existence of some fact alleged by the prosecution which it is necessary for the prosecution to prove if he is to be convicted of the offence charged.
>
> (3) Where in any proceedings for an offence to which this section applies it is necessary, if the accused is to be convicted of the offence charged, for the prosecution to prove that some substance or product involved in the alleged offence was the controlled drug which the prosecution alleges it to have been, and it is proved that the substance or product in question was that controlled drug, the accused—
>
> (a) shall not be acquitted of the offence charged by reason only of proving that he neither knew nor suspected nor had reason to suspect that the substance or product in question was the particular controlled drug alleged; but
>
> (b) shall be acquitted thereof—
>
> (i) if he proves that he neither believed nor suspected nor had reasons to suspect that the substance or product in question was a controlled drug; or

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

(4) Nothing in this section shall prejudice any defence which it is open to a person charged with an offence to which this section applies to raise apart from this section."

Section 4(3) provides:

"(3) Subject to section 28 of this Act, it is an offence for a person—
(a) to supply or offer to supply a controlled drug to another in contravention of subsection (1) above; or
(b) to be concerned in the supplying of such a drug to another in contravention of that subsection; or
(c) to be concerned in the making to another in contravention of that subsection of an offer to supply such a drug."

[15] We note that almost everything said by the Lord Justice General (Rodger) in *Salmon* was *obiter.* Mr Salmon's appeal succeeded on a combination of misdirections. His co-appellant Mr Moore's appeal was refused. In neither case was there a misdirection by virtue of an absence of directions under s 28. Nevertheless, his Lordship's analysis, *obiter,* of the interrelationship between s 28 and the offences in sections 4(3)(b) and 5(3) has been accepted and endorsed by authoritative benches in both Scotland and England. The five judge appeal decisions by the House of Lords in *R* v *Lambert* [2001] UKHL 37; [2002] 2 AC 545 and High Court of Justiciary in *Henvey* v *HM Advocate* [2005] HCJAC 10, 2005 SCCR 282 provide notable examples. In both cases, whilst approving the Lord Justice General's analysis in *Salmon*, the courts determined that the effect of the introduction of the Convention rights into domestic law by the Human Rights Act 1998 was to transform the legal burden on the accused under s 28 into an evidential burden. The Lord Justice General's analysis in *Salmon* was also applied in *Glancy, Aiton* and *Hattie*.

Salmon

[16] It is useful first to note the circumstances in *McNamara* on which the Lord Justice General commented. Mr McNamara was charged with possession of cannabis with intent to supply it (1971 Act s 5(3)) when he drove a motorbike on the back of which was a box containing 20kg of cannabis to the house of his co-accused. His evidence was that he thought he was delivering pornographic or pirate videos to a pub when he stopped off at his friend's house to collect his boots. The trial judge directed the jury that they had to determine if they were "sure that he had possession of the contents of the cardboard box, which admittedly was cannabis resin, and knew the box contained something" before outlining a s 28 defence. The material issue in the appeal was whether directions on possession were correct, the appellant contending that the judge should have said that the appellant required to know the content of the box. The Court of Appeal disagreed and, in refusing the appeal, determined that the effect of the 1971 Act was that the prosecution has the initial burden of proving that an accused person had and knew that he had, for example, a box under his control and that it contained something in order to establish possession. It must also establish that the thing was the drug alleged in the charge. Parliament then created a defence in s 28 and the court considered s 28(3) was apt. It placed a burden on an accused person to bring himself within its scope.

[17] In *Salmon*, the Lord Justice General noted that the offence in s 4(3) begins with the words "Subject to section 28…" and that s 28 specifies offences including s 4(3)(b). Section 28(2) states a wide general defence and s 28(3) identifies a particular example of the defence under s 28(2). It followed that in *McNamara* the court erred in considering that the appellant's defence arose under s 28(3). Mr McNamara did have a defence but it arose under s 28(2). It is designed to provide a defence to someone, such as the motorcyclist in

McNamara, who would otherwise fall to be convicted. These defences only operate when the prosecution has proved all it needs to prove to establish a person's guilt of certain offences including s 4(3)(b). He continued, at 74E:

> "…At that stage sec 28(2) provides that the accused is nonetheless to be acquitted if he proves that he neither knew nor suspected nor had reason to suspect the existence of a fact which the Crown required to prove, for example, that there was powder—which proved to be cocaine—or that there were tablets—which proved to be ecstasy—in the package which he was delivering or in the package which he possessed."

before explaining that the effect of s 28(3)(a) is that it is not a defence to a charge relating to one kind of controlled drug to say that the accused thought it was some other kind of controlled drug.

[18] We note the following passage at 78 G-H, where the Lord Justice General (Rodger) noticed the decision of the court in *McKenzie v Skeen* 1983 SLT 121 to the effect that possession of a container will generally infer possession of its contents, the Lord Justice General (Emslie) giving the leading opinion, not all of which is reproduced in the SLT report. Lord Cameron agreed and added that to prove possession the prosecution must establish that the possessor knew of the fact that he had the article that turned out to be a controlled drug even though it was not necessary to prove that the possessor knew that the article or substance was a drug. Lord Rodger continued:

> "Even though that approach has been enshrined in our law for more than 20 years, it can still seem surprising that, technically, for instance, a taxi driver who agrees in all innocence to collect a suitcase, which obviously contains something, and carry it to some destination will, when carrying the suitcase, be in possession both of the case and of the controlled drugs which it contains. This makes it all the more important to stress that sec 28(2) provides a complete defence for the taxi driver to any conceivable charge under sec 5(3). The role of sec 28(2) and (3) is therefore crucial in providing innocent people with a defence and it is therefore singularly unfortunate that the courts should have banished sec 28(2), in particular, from their sight."

[19] At 81C, the Lord Justice General considered the position for s 4(3) offences, notably s 4(3)(b). He explained that being "concerned in" supplying a controlled drug requires an awareness of supplying something. Accordingly, the prosecution must prove that an accused person knew that he was involved in supplying something and the prosecution must also prove that that something was the controlled drug specified in the charge. If so, the prosecutor has done all that is necessary to prove the charge, unless the person accused can establish one of the s 28 defences.

[20] So far as the facts of the case were concerned, police officers saw Mr Salmon and another man approach Mr Salmon's car in which Mr Salmon's brother occupied the driver's seat. Mr Salmon ran away and hid in a river some distance away before being arrested. The police found a bag containing cocaine on the back seat of the car and on searching Mr Salmon's house found potential bulking agents, books about drugs and £3750 in cash. Mr Salmon did not give evidence but relied on a police interview in which he said that he did not know the bag was in the car. The Crown presented the case on the basis that the evidence showed that Mr Salmon must have known both that the bag was there and contained drugs and the defence founded on his statement to the police and sought to dilute the significance of the circumstantial evidence. The judge directed that believing what Mr Salmon told the police would be a substantial step towards an acquittal but did not go on to say that if it raised reasonable doubt he should be acquitted.

[21] In these circumstances, there was no separate issue under s 28 and certainly not under s 28(3)(b)(i) as the judge had suggested. The judge had introduced an unnecessary complication. He also failed to make clear that the jury would have to be satisfied that Mr Salmon knew he was involved in supplying something. In referring to strict liability, he may have introduced doubt as to where the onus of proof lay. His failure to spell out that a

reasonable doubt arising from the statement would have led to acquittal was significant. In these circumstances, Mr Salmon's appeal was sustained.

[22] In the case of Mr Moore, the Lord Justice General explains that on the evidence the issues related to two bags containing drugs found in a car. One was secreted behind the dashboard. In relation to the other, Mr Moore said that when he was in the car someone had thrown it down, and he had picked it up and asked what it was at the very moment the police arrived. He was never in possession of it. In convicting Mr Moore of possession, the jury must have rejected his evidence and accepted evidence of another occupant that Mr Moore had handed him the bag and told him to ditch it. Since the jury must have rejected Mr Moore's evidence, there was no basis on which they could have been satisfied of the defence in s 28(2). Accordingly, there was no misdirection in his case. It is difficult to follow this aspect of Lord Rodger's reasoning. The point he makes would be relevant in considering whether a misdirection resulted in a miscarriage of justice. It does not appear to bear on the question of whether a s 28(2) direction was required.

[23] Lord Johnston explained, at 93A-B, that a s 28 direction would not be required unless the defence properly focussed the issue, but there was nothing to that effect in the opinions of the Lord Justice General or Lord Bonomy. Lord Johnston continued in *Salmon*:

> "…sec. 28 of the Act in general terms will not come into play where the basic defence being advanced on behalf of the accused, whether in cross examination or *a fortiori* by actual evidence is, in relation to sec 4(3)(b) of the Act (being concerned in supply) denial on the part of the accused of any knowledge that a scheme, of the type envisaged by your Lordship in the chair, was in existence."

[24] Lord Bonomy analysed the origins of the 1971 Act and noted that no Scottish court had previously examined the interrelationship between sections 4, 5 and 28. He reached the same conclusions on the requirements of knowledge as the Lord Justice General. At 97I-98D he stated in the context of a s 4(3)(b) offence:

> "…what is required is participation in an operation which has as its objective the supplying of material or of a substance which turns out to be a controlled drug, and knowledge that what one is involved in is a supplying enterprise. In relation to a charge of contravening sec 4(3)(b), a defence under sec 28(2) would be open to a person who was involved in some capacity in arranging for a delivery to be made, and knew he was arranging a delivery, but who thought that the delivery was of videos rather than of a controlled drug; he could prove that he had no reason to suspect that the supplying enterprise involved, for example, tablets, far less a controlled drug. In the same way, sec 28(3) would apply where absence of knowledge that a substance or product was a controlled drug was the issue.
>
> Thus it can be seen that what the Crown require to establish in order to prove a contravention of sec 4(3)(b) is that the accused played some part in an enterprise which had as its objective the supply of something which turned out to be a controlled drug. If his defence is that he was not involved in any enterprise or that he did not know there was an enterprise which had supplying of material as its ultimate objective, then that defence would be open to him in the ordinary way by relying on reasonable doubt. If, however, he was playing a role and knew that the objective was supplying material, there would be a case to answer and indeed, if these facts were not disputed, he would be convicted unless he established one of the defences open to him in terms of sec 28(2) and (3)."

He considered that s 28 was intended to alleviate a risk of injustice.

[25] At 100 A-B, he noted that in Mr Salmon's case the trial judge had directed that s 28 may have significance. Lord Bonomy went on to add that s 28(3) had no application to the live issues in the trial and he found it difficult to see that s 28(2) did either before stating:

> "The main issue was whether the appellant was concerned in a supplying operation and, in particular, whether he knew of such an operation. Apart from the bag of drugs in the back of the car, at his house there was other material, such as bags in which drugs might be packaged, bulking out or cutting agents, a substantial sum of money and certain books on the subject of drugs. There were, however, also issues over the extent of the appellant's knowledge of the presence of the bags and cutting agents and the source of the money. The principal issue in the trial, therefore, was simply whether the Crown had proved the basic elements they required to prove for conviction."

The trial judge had not adequately dealt with the knowledge that Mr Salmon must have. This was a material misdirection.

[26] In the case of Mr Moore, Lord Bonomy did not consider that a s 28 direction had been necessary, it was not a live issue in the trial. The judge gave clear directions that if the

jury were in reasonable doubt that Mr Moore only became aware of the bag and its contents because it dropped at his feet when the police arrived they should acquit. In these circumstances, there was no misdirection.

Glancy, Aiton and Hattie

[27] In *Glancy*, the accused was charged under s 4(3)(b) in respect of a substantial quantity of heroin and ecstasy tablets. He was one of three occupiers of a flat. He had retrieved the heroin from behind a drain pipe by reaching out of a window from the room used by another occupant, Gary Gibson, and showed it to police officers. He told the police that it was about two and a half ounces of heroin, but that it did not belong to him. He also directed the police to an area of flooring under which they found ecstasy tablets in an unoccupied bedroom. Mr Glancy admitted that certain other articles in the flat were used by him but only for drug taking. He had told the police that he used clingfilm for cutting up bags. In his evidence he denied any involvement in supplying drugs and denied making that comment. He denied any knowledge of the ecstasy tablets and denied directing the police to them. Mr Glancy did not rely on the s 28 defence but the trial judge gave directions on it. Mr Glancy maintained that whilst he knew what was going on, he had no involvement in it. He had been able to retrieve the heroin as he had seen his brother, a known drug dealer, placing the bag behind the pipe. The court considered that the issue of knowledge was not in dispute and the "substantive defence" was incrimination of Mr Glancy's brother and his stance that, albeit he knew what was going on, he was merely a spectator who had not allowed or permitted anything and had no part in the supply operation. The court concluded that by introducing s 28 and the issue of knowledge, the judge misdirected the jury and occasioned a miscarriage of justice.

[28] It may be doubted if what Mr Glancy was saying about the heroin actually did amount to a defence in circumstances where his brother was not the occupier of the room outside which it was stored. It might be inferred that by knowingly allowing him access for that purpose Mr Glancy was concerned in supply. Lord Coulsfield said the following in delivering the opinion of the court, at para 13:

> "Section 28 may come into play when there is an issue in the case as to whether the Crown have proved that the accused had sufficient knowledge of the nature of a substance found in his possession, or under his control, or with which he was in some way concerned, to justify a conviction under the 1971 Act… [Mr Glancy] maintained that he did not have control of, and was not concerned with, the drugs which were the subject-matter of the two charges of which he was convicted. As the advocate-depute accepted, therefore, there was no issue under section 28."

[29] In *Aiton*, Ms Aiton was charged along with five others with being involved in supplying large quantities of heroin from Glasgow to Inverness where a sixth person, indicted but who had absconded, ran a drug supplying operation. She was convicted of being concerned in supplying heroin and cannabis resin. She was the driver of a car, a long way from home. The police found various items in the car. There was a large block of cannabis resin in the driver's door pocket, some scales under the driver's seat which Ms Aiton said she used to check she was not short-changed when buying cannabis for her own use, and £1550 in cash in her handbag. She was unemployed. Police officers maintaining observations had seen her passenger, one of her co-accused, who had left her car and returned after transacting with a van under the control of another co-accused that Ms Aiton had parked close to. A package was passed from the driver of the van to Ms Aiton's passenger who returned to her car. Ms Aiton drove off with him and was stopped by the police who asked both of them to get out. Her passenger did so and, as he walked towards the police, dropped from his fleece a package, later found to contain 6 bags containing 1 ounce deals of heroin. Ms Aiton denied the cannabis resin was hers. She

thought her co-accused had left her car to urinate and she knew nothing of any package. The trial judge conflated appropriate directions on s 4(3)(b) with s 28 directions, suggesting that the jury must determine whether Ms Aiton was involved in the supply chain, that controlled drugs were being supplied and that she knew, suspected, or had reason to suspect her involvement related to drugs. She did not direct the jury that Ms Aiton must know that there was a supplying operation. All of the members of the court considered this to be a material misdirection and the conviction was quashed.

[30] Lord Osborne, who delivered the leading opinion, considered that in a context where it arises correct directions under s 28(3)(b) must be given, but he did not indicate whether this was such a case. Lady Paton considered that as Ms Aiton denied involvement in a supply operation and ignorance of the presence of the drugs ultimately discarded by her passenger it was unnecessary to direct the jury on s 28.

[31] Lord Bonomy analysed the situation more closely, explaining at para 30 the requirements under s 4(3)(b) as being: first, involvement in some way in an operation that had as its objective the supply of something; second, that the something was a controlled drug; and third, that the accused was aware of the operation. He added:

> "Proof of knowledge that a controlled drug was involved is not necessary. These are the basic requirements for conviction. However, if there is placed in issue in the course of the trial any question which arises under sec 28(2) or (3) , then as a fourth requirement the Crown must exclude that defence beyond reasonable doubt."

At para 34, he described Ms Aiton's defence as being that she had no connection with any supplying operation and did not know of a supplying operation, two of the three basic elements the Crown had to prove. Her denial of connection with the cannabis and heroin did not raise an issue under s 28. He explained:

> "… in my opinion that raised no matter falling under sec 28 , but was simply an element related to the absence of any connection with a supply operation and any

> knowledge thereof. Section 28(2) relates to the accused neither knowing of, nor suspecting nor having reason to suspect the existence of some fact which it is necessary for the prosecution to prove. While the existence of a supply operation is a fact that the appellant had to be shown to have knowledge of, it is clear from *Salmon v HM Advocate* that sec 28(2) does not arise in relation to knowledge of the existence of a supply operation. As a matter of logic it just cannot arise. The Crown are bound to prove as a basic requirement for guilt that there was such an operation and that the accused was aware of it. The sort of issue to which sec 28(2) is directed is, for example, knowledge of the existence of the substance which turns out to be a controlled drug. Where an accused thinks he is dealing with an illegal substance of a different nature, for example counterfeit videos or money rather than powder, then sec 28(2) would apply. Nor does any question under sec 28(3) arise. That subsection is engaged only when there is some issue over the knowledge of the nature of the substance, rather than knowledge of the substance itself which would fall under sec 28(2)."

As was the case for both appellants in *Salmon*, s 28 was not engaged in the appellant's trial. We note that in this example Lord Bonomy referred to an illegal substance. He ought not to be understood to be indicating that the substance of a different nature would require to be an illegal one. Plainly, there is no reason why that should be so.

[32] In *Hattie*, although the ground of appeal related to the absence of directions under s 28, the court was primarily concerned with the use of written introductory directions and, in particular, whether the trial judge ever made it clear that the appellant's statements to the police were admissible evidence and not hearsay. The appellant did not give evidence and his defence depended on what he said to the police. The appeal succeeded, the Crown conceding the point, on the ground of the judge's failure to direct that what the appellant told the police, when his defence depended on it, was evidence. Accordingly, the court's observations on s 28 are *obiter.* Understandably, given the concession and focus on what was then the novelty of introductory written directions, the opinion of the court delivered by the Lord Justice Clerk is succinct in dealing with s 4(3)(b) and s 28.

[33] Mr Hattie was indicted with two co-accused on, *inter alia*, three charges of being concerned in the supplying of controlled drugs. He ran a body repair shop in Airdrie set up

with help from a former co-accused, Mr Phee, whom he sought to incriminate. Mr Hattie also rented a yard in Shotts at the behest of Mr Phee. There was evidence that Mr Hattie had arranged for delivery of a compressor to the yard at Shotts. It was later found to be a container packed with drugs. Mr Hattie was identified as the man who instructed the delivery and gave the name of a business not matching the delivery address. A few days later he obtained money from a cash dispenser and gave it to a Mr Brown, another co-accused, who was hiring a van. Mr Hattie told the police he did so to help Mr Brown establish a delivery business from which Mr Hattie would be repaid. It transpired that Mr Phee had exhibited Mr Hattie's vehicle insurance documents to the hire company two weeks earlier. Mr Hattie denied knowing about that event and said he did not know where those documents were. They were later found in a drawer in his office. Once the van was hired, Mr Brown drove it to Mr Hattie's yard and loaded the container onto the van. Mr Brown was stopped by the police after driving the van to Cairnryan where the drugs were seized. It could be inferred that the compressor and container were one and the same. Mr Phee pled guilty to being concerned in the supplying of heroin. Mr Hattie and Mr Brown were convicted after trial.

[34] The police had interviewed Mr Hattie who said he had lent Mr Brown £200 to hire the van and went with him to the vehicle hire premises. The vehicle was not ready and was to be delivered to Mr Brown later. Mr Hattie knew nothing of what happened to the van after that. When told that the police had found a large grey container containing drugs in the van, Mr Hattie said he had never seen such a thing on any of his premises. Mr Brown never told him anything about the trip to Cairnryan. The defence was that Mr Hattie was an innocent dupe. The trial judge directed that the Crown must prove that Mr Hattie was knowingly involved in an operation to supply something and that it was in fact the drug or

drugs involved. The Crown did not have to prove that he knew that the something was drugs.

[35] The court agreed with the Crown's concession of the appeal because although Mr Hattie's statements did not give rise to a s 28 defence they contained a denial of involvement in the crime. On the former point, the court founded on the opinions in *Salmon*, and particularly on what the Lord Justice General said about cases fought on the basis of the Crown inviting inferences from circumstantial evidence and a defence being that the accused knew nothing about the drugs and was not involved in any supplying. Mr Hattie's comments that he thought Mr Brown would be making deliveries did not make his defence anything other than pure denial.

Decision

[36] We reject the first complaint articulated in the grounds of appeal. It was necessary for the Crown to establish that the appellant was knowingly involved in a supplying operation and that, in fact, a controlled drug was being supplied. That is what the sheriff told the jury, as set out at para [8] above. His direction was based on the court's observations in *Salmon*, and subsequent case-law, and was correct as far as it went.

[37] We have sympathy for the sheriff in relation to the second complaint. It would have been prudent for him to have raised with the parties whether s 28 was in issue. He did not do that, and no-one addressed him on it. Where s 28 is being relied upon the defence ought to make that clear. To that extent, we agree with Lord Johnston's observations in *Salmon.* Nevertheless, in the particular circumstances of this case, we are not persuaded that the point cannot now be considered on appeal.

[38] It is important to identify what the appellant's defence was. It appears to us that it had three strands. First, and simplest, the appellant's position was that he was helping a paying passenger to move house. Accordingly, he was asserting that he had no knowledge of a supplying operation, as the natural implication of his evidence is that he did not understand that his passenger intended to part with possession of the suitcases that in fact contained cannabis. That was a complete defence and the onus was on the Crown to overcome it beyond reasonable doubt. It did not raise a s 28 defence. Secondly, he maintained that if the facts disclosed that there was a supplying operation going on, it was exclusively attributable to his co-accused. Whilst doubts have been expressed about the applicability of a defence of incrimination to a charge under s 4(3)(b), the sheriff directed upon it, telling the jury that if they believed the appellant about it, or they were left in reasonable doubt by it, they must acquit. This strand did not raise a s 28 defence. The third strand arose from the appellant's evidence that his understanding was that the suitcases contained Mr Zheng's personal belongings, and that he did not know they contained drugs. In our judgement this strand did raise a s 28(2) defence.

[39] In his charge to the jury, the sheriff gave a standard direction on a special defence of incrimination, telling the jury that if they believed the appellant's evidence that Mr Zheng was responsible, or they were left in reasonable doubt they must acquit. That was a generous direction and, in the circumstances of this case, it was erroneous. However, the error was favourable to the appellant. In *Flanagan* v *HM Advocate* [2011] HCJAC 81, 2012 JC 98, the trial judge elected not to give a direction on the accused's special defence of incrimination in a s 4(3)(b) case. On appeal this court agreed that it had not been necessary. The court expressed doubt that there is room for a defence of incrimination in most cases under s 4(3)(b) because another person's involvement in the supply chain will not generally

exonerate the person accused. In any event, the judge's charge as a whole made it plain that if any evidence exculpating the appellant left the jury in reasonable doubt of his guilt, they must acquit.

[40] Whilst we heard no submissions on the point, we do not consider that there was room for a defence of incrimination in the circumstances of this case. Mr Zheng being guilty of the offence would not necessarily exculpate the appellant. If Mr Zheng told the appellant he was transporting drugs, or if the appellant suspected or ought to have suspected from all of the circumstances surrounding the trip that drugs were being transported, both would be guilty of an offence under s 4(3)(b). The real issue was not a defence of incrimination, it was the appellant's state of knowledge.

[41] The exculpatory part of the appellant's evidence was, first that the appellant did not know that there was a supplying operation as he did not know of Mr Zheng doing anything other than wishing to move his possessions from one home to another. It involved no parting with possession and therefore was not, according to the appellant's account of his state of knowledge, a supplying operation. The onus was on the Crown to disprove that beyond reasonable doubt. There was no evidential burden on the appellant. Secondly, the appellant said his understanding was that the suitcases contained Mr Zheng's belongings, and that he did not know they contained cannabis. The implication was that he was not privy to Mr Zheng's knowledge about the cases' actual contents and that he did not know, suspect or have reason to suspect that they contained controlled drugs.

[42] The appellant's evidence that he was, in effect, a driver hired by his customer to help him move home distinguishes this case from the factual situations in the appeal judgments we have considered. In *Salmon* the Lord Justice General's example of a taxi driver delivering a suitcase from one person to another looks closer to a supply situation than helping

someone to move house. The person providing the suitcase to the taxi driver is parting with possession and the taxi driver delivers it to someone else. In reality, it does not seem likely that a reputable courier service or taxi driver contracted to deliver a suitcase or parcel would be prosecuted if the evidence disclosed no more than an ordinary delivery transaction, even if it turned out that a case or parcel contained drugs. Nevertheless, if there was such a prosecution, as both the Lord Justice General and Lord Bonomy explained in *Salmon*, the fact that the driver or courier was knowingly involved in a supplying operation and the fact that the thing supplied was a controlled drug should not result in his conviction because he would have a s 28(2) defence.

[43] The appellant said that he did not know that there was cannabis in the suitcase. On his account, if accepted, the jury could readily infer that he did not suspect and had no reason to suspect that cannabis was involved. In these circumstances the sheriff ought to have directed the jury on the defence in s 28(2). An appropriate direction would have been that if the jury concluded that the appellant was knowingly involved in a supplying operation, he should nevertheless be acquitted if he did not know, suspect or have reason to suspect that the suitcase contained a controlled drug or if the jury were left in reasonable doubt about that. The failure to give such a direction was a misdirection. However, in one respect it was favourable to the appellant, because the jury were not directed to consider whether the appellant suspected or had reason to suspect that the contents of the suitcases may be drugs.

[44] We have considered very carefully whether the absence of directions on the s 28(2) defence has resulted in a miscarriage of justice. We have concluded that it has not, for the following reasons.

[45] First, we consider that, read as a whole, the sheriff's directions made it clear to the jury that if any of the appellant's evidence raised a reasonable doubt about his guilt they should acquit him. The written directions at the start of the trial informed the jury that acceptance of any piece of evidence showing that the accused was not guilty should result in acquittal, and that the same outcome should follow if they did not fully accept the evidence but it raised a reasonable doubt about the accused's guilt. In his charge, the sheriff reminded the jury of the written directions, adopted them, and urged the jury to read them again. He gave the general direction recorded at pp 16.24-17.4 of the transcript (see para [5] above). Importantly, towards the end of the charge (see para [9] above), he directed that if the evidence of the accused or any evidence in the case from the defence or the case as a whole left them in reasonable doubt they must acquit.

[46] Secondly, there was a conspicuously favourable but erroneous direction on incrimination. In law, the incrimination of Mr Zheng did not lead to acquittal but the sheriff told the jury that if they believed it, or if it raised a reasonable doubt, they should acquit.

[47] Thirdly, it can be taken from the jury's guilty verdict that they rejected the appellant's evidence that he was not knowingly involved in a supplying operation. Therefore, at the very least, they must have been satisfied that he knew that the cases were to be delivered to someone else. It follows that they rejected at least part of the appellant's account. Having disbelieved him in relation to that, and having rejected his "incrimination" of Mr Zheng, it is fanciful that, had a s 28(2) direction been given, they would have believed the remainder of the appellant's account or entertained a reasonable doubt about his guilt because of it.

[48] There has been no miscarriage of justice. The appeal is refused.