



MEDICAL MARIJUANA

R. v. Krieger, 2003 ABCA 85

Date: 20030318
Dockets: 01-00011-A
01-00288-A

IN THE COURT OF APPEAL OF ALBERTA

THE COURT:

THE HONOURABLE MR. JUSTICE WITTMANN
THE HONOURABLE MR. JUSTICE COSTIGAN
THE HONOURABLE MR. JUSTICE LoVECCHIO

BETWEEN:

Docket: 01-00011-A

HER MAJESTY THE QUEEN

Appellant

- and -

GRANT WAYNE KRIEGER

Respondent
(Accused)

Appeal from the Judicial Stay of Proceedings by
THE HONOURABLE MADAM JUSTICE L.D. ACTON
Dated the 11th day of December, 2000

AND BETWEEN:

Docket: 01-00288-A

HER MAJESTY THE QUEEN

Appellant

- and -

GRANT WAYNE KRIEGER

Respondent
(Accused)

Appeal from the Acquittal by
THE HONOURABLE MADAM JUSTICE L.D. ACTON
Dated the 20th day of June, 2001

MEMORANDUM OF JUDGMENT
DELIVERED FROM THE BENCH

COUNSEL:
S.A. Couper
J. Henchey
For the Appellant
A. Iovinelli
For the Respondent

MEMORANDUM OF JUDGMENT
DELIVERED FROM THE BENCH

Costigan, J.A. (for the Court):

[1] The Respondent was charged with possession of marihuana for the purpose of trafficking contrary to s. 5(2) of the Controlled Drugs and Substances Act, S.C. 1996, c. 19 and unlawful production of marihuana contrary to s. 7(1) of the Act.

[2] The Crown appeals a voir dire ruling which struck down s. 7(1) and also appeals the Respondent's acquittal by a jury of the s. 5(2) charge.

[3] As to the voir dire ruling, the Crown says that the trial judge applied the wrong test in finding that the Respondent was deprived of his s. 7 Charter right to security of his person in the face of evidence that there were other untried and effective legal alternative treatments. We are not satisfied that the trial judge applied the wrong test, nor are we satisfied that the evidence established other effective alternatives. At best, the evidence on the effectiveness of the alternatives was equivocal. In those circumstances, the trial judge was entitled to find that the Respondent's right to security of his person was infringed by denial of a treatment which the evidence established was effective.

[4] The Crown also says that the trial judge erred in failing to find that the

deprivation accorded with the principles of fundamental justice. The Crown says a s. 56 exemption, for which the Respondent did not apply, would have accorded with the principles of fundamental justice because the Respondent had an available supply from his own grow operation.

[5] We agree with the trial judge that s. 56 creates an absurdity because there was no legal source of marihuana. That absurdity is not removed by the fact that the Respondent had a personal supply at the time the charge was laid. There was no evidence as to how long the supply would last nor as to the duration of the potential s. 56 exemption.

[6] Nor are we satisfied that the trial judge imposed a positive obligation on the Crown to ensure a supply. The trial judge struck s. 7(1). Her order imposed no obligation.

[7] Therefore, we dismiss the appeal as it relates to the voir dire ruling.

[8] On the verdict of acquittal, the Crown argues that the trial judge erred in finding an air of reality to the defence of necessity and in her charge to the jury on that defence.

[9] The second prong of the defence of necessity requires that the act must be inevitable, unavoidable and afford no reasonable opportunity for an alternative course of action that does not involve a breach of the law.

[10] In both her analysis of whether the defence had an air of reality and in her charge to the jury on the second prong, the trial judge focussed on whether there was a legal source of marihuana rather than focussing on whether there was a legal alternative course of action available to those said to be in imminent peril. In doing so she erred. That error undercuts both her decision to put the defence to the jury and her explanation of the defence to the jury.

[11] In the result, the acquittal cannot stand. Accordingly, we order a new trial on the s. 5(2) charge.

APPEAL HEARD on December 4, 2002
MEMORANDUM FILED at Calgary, Alberta
this 18th day of March, 2003

Costigan, J.A.