IN THE SUPREME COURT OF NEW ZEALAND

SC 86/2013
[2013] NZSC 122

BETWEEN	WILLIAM DUFFIELD MCKEE Applicant
AND	THE QUEEN Respondent

Court:	McGrath, Glazebrook and Arnold JJ
Counsel:	Applicant in person B Windley for the Respondent
Judgment:	14 November 2013

JUDGMENT OF THE COURT

The application for leave to appeal is declined.

REASONS

Introduction

[1] Mr McKee was convicted, following a jury trial in the District Court, on four charges of supplying cannabis and one charge of cultivating cannabis. He was sentenced to 12 months home detention.

[2] His appeal against conviction was dismissed by the Court of Appeal but his sentence was reduced to one of six months home detention.[1] He now applies to this Court for leave to appeal against that decision.

---

1 *McKee v R* [2013] NZCA 387.

Background

[3] Mr McKee is the contact person and facilitator of the website for the "GreenCross" organisation which promotes the medicinal use of cannabis and law reform to decriminalise such use.[2]

[4] An undercover police officer made contact with Mr McKee through the GreenCross website in February 2010. In March 2010, after purchasing hemp oil, the constable emailed Mr McKee asking for some cannabis, using the term "raw medicine".[3] Mr McKee told the constable that only GreenCross members were able to obtain cannabis and invited the constable to join the organisation.

[5] The constable joined GreenCross and subsequently purchased various quantities (between 5–17 grams) of cannabis leaf from Mr McKee on four separate occasions between June 2010 and May 2011. This led to the charges of supply of cannabis.

[6] The cultivation charge related to the discovery of 66 cannabis plants of varying sizes located in the course of a search of Mr McKee's home on 8 July 2011.

Grounds of application

[7] Leave to appeal to this Court is sought on the grounds that:

(a) The trial judge's directions were improper;

(b) The conviction and sentence was in breach of the New Zealand Bill of Rights Act 1990 (Bill of Rights). Section 8(2)(c) of the Misuse of Drugs Act 1975 should have been interpreted in a manner which does not preclude a person from cultivating and supplying raw cannabis for medicinal purposes; and

(c) There was entrapment by the police.

---

[2] Mr McKee consumes cannabis as an effective means of pain relief. Mr McKee was injured in a hit and run accident shortly before his 21st birthday and, as a result, had one leg amputated.

[3] The undercover officer had been asked "Would you like some raw medicine?" in an e-mail from Mr McKee on 20 February 2010 after the purchase of hemp oil. "Raw medicine" was it appears a reference to cannabis.

Jury directions

[8] On the first ground, Mr McKee argues that the jury directions were incomplete. In his submission, the Judge failed to instruct the jury:

> that it is also their right and their primary and permanent duty, to, judge the justice and rightness of the law, and to hold all laws invalid, that are, in their opinion, unjust or oppressive, and all persons guiltless in violating or resisting the execution of such laws.

[9] This submission is misconceived. A jury's duty is to apply the law in accordance with the judge's instructions.

Bill of Rights

[10] Mr McKee submits that his conviction and sentence were in breach of ss 8 and 9 of the Bill of Rights in that the cultivation of cannabis was the only means available to benefit his life and health. His conviction was also discriminatory, contrary to s 19 of the Bill of Rights.

[11] There was no medical evidence before the Court that would suggest that Mr McKee's life is threatened by an inability to use raw cannabis. Nor is there evidence as to why the synthetic form of cannabis, which is available by medical prescription,[4] does not suffice to provide similar benefits to his health as raw cannabis.[5]

[12] There is thus no evidential foundation for Mr McKee's submission that his ss 8 and 9 rights are in issue. Nor is the right to be free from discrimination under s 19 engaged. We thus do not need to address what the position (with regard to s 8(2)(c) of the Misuse of Drugs Act or otherwise) would be if those rights were engaged.

---

[4] Persons who have a medical endorsement under s 8(2)(c) of the Misuse of Drugs Act can be prescribed Saltivax; see at [22] of the Court of Appeal decision.

[5] There is no current Ministerial approval to prescribe cannabis in its raw form (pursuant to regulations) and no licences for cultivating medicinal cannabis have currently been issued. It appears from information placed before this Court that this is because of concerns as to the inability to control dosage and potency, the risk of contaminants, and the harm associated with smoking. This information was included in a bundle of material provided by Mr McKee and said to constitute new evidence. The "new" evidence provided does not advance Mr McKee's case.

Entrapment

[13] Mr McKee submits that the undercover officer had wrongfully entrapped him into supplying cannabis.

[14] As pointed out by the trial judge and the Court of Appeal, a claim of entrapment or incitement is properly dealt with by excluding evidence and not as a defence. This means that the jury was properly directed to put the issue of entrapment to one side.

[15] But if, because of entrapment, there should have been an order excluding the evidence of supply, then this would mean that the conviction was obtained on the basis of evidence that should have been excluded. If inadmissible evidence is led that would be capable of affecting the verdict, then this would give rise to the risk of a miscarriage of justice. This means that the fact that entrapment is an admissibility issue and not a defence was not the answer to the appeal.[6]

[16] It is, however, clear that there was no evidential foundation for the complaint of entrapment. In this regard it is significant that there was an offer by Mr McKee to sell "raw material" (cannabis) to the constable contained in the e-mail of 20 February 2010.[7]

Result

[17] The application for leave to appeal is declined.

Solicitors:
Crown Law Office for the Respondent

---

6 Contrary to the Court of Appeal approach at [28].
7 See at n 3 above.