

**SOUTH ISLAND LEGAL SERVICE CENTRE
CURRENT LAW 0527**

CHRISTCHURCH OFFICE

Ian McArthur Ext. 36459
Beverley Curtis Ext. 36452
Melanie Douglas Ext. 36550

DUNEDIN OFFICE

Keith Munro Ext. 33134

**Subject: Evidence - Private investigator - No entrapment - Search Warrant - Unlawful and unreasonable
R V K (CA, 7/06/2005; CA 420/04 & 96/05)**

K was awaiting trial on charges of theft from his employer and the sale of cannabis. The District Court had given a ruling excluding on public policy grounds the evidence of S, a private investigator retained by the employer, on making a cannabis purchase for K. The Court of Appeal allowed the Crown appeal on this ruling.

The CA noted that this was not an entrapment case due to evidence of K's predisposition to offending of this kind, and on the assumption that S's activities did not come to the notice of Police until after he purchased cannabis from K. The difference between this case and entrapment cases was that S was acting as a private individual. It held that the consideration favouring the admissibility of S's evidence was "that his lack of official status means that the crime in question was not State-created", though against this was the "undesirability of private individuals acting as agents provocateurs". These considerations "fall to be assessed in light of contemporary circumstances in which there are insufficient Police resources to investigate all suspected criminal offending".

The CA set out legal principles to be applied where the undercover agent is a private individual and not an agent of the state, and held that S's actions vis a vis K did not lie outside S's mandate, which was to address the theft and cannabis usage at work. It also found very little, if any, difference between the way this operation was run and an undercover Police operation.

Invalid search warrant

The DC also ruled that evidence obtained in regard to cannabis dealing in the work place by an invalid search warrant was admissible. The CA allowed K's appeal from this ruling. The Police had deferred the wind up phase of the operation until two months after the evidential purchase of cannabis was made. In those circumstances the threshold of believing on reasonable grounds that a search would provide evidence of drug dealing had not been met. The search should not be upheld as reasonable. Although there was scope for debate as to how the Courts should assess the reasonableness of a search carried out bona fide under an invalid warrant that debate had not occurred here.

Comment: (1) A private investigator acts as a private individual, and is not an agent of the State, and therefore their actions are not constrained by

factors constraining Police, eg, NZ Bill of Rights Act. However, care must be taken if Police are involved that the PI is not in effect acting as an agent of the Police. (2) It is important that even if a search warrant is held to be invalid, evidence and argument is put forward that the search was nevertheless reasonable in terms of the *Shaheed* case.

South Island Legal Service Centre (070705)