

VERDICT AGAINST ANDRÉ

By Timothy J. Gluckman

Judgement on the 6th July 2007

Kassationshof (Appeal Court)

Court president Schneider,

Judges. Wiprächtiger, Ferrari, Favre, Mathys,

André appealing

against

State prosecutor of the Kanton of Freiburg, Zaehringenstrasse 1, 1700 Freiburg,
6P.250/2006

Grounds; arbitrary treatment (Art. 9 BV),

6S.580/2006

Charge

Offences against the Betäubungsmittelgesetz (Dangerous Drugs Act) (Art. 19),

Staatsrechtliche Beschwerde (6P.250/2006) und Nichtigkeitsbeschwerde
(6S.580/2006) Appeal against the decision of the Kantonsgerichts (Cantonal court)
Freiburg,

Appeal Court, 13th November 2006.

Circumstances of the case:

A.

ANDRÉ is accused of growing, purchasing and selling hemp and thereby breaching the drugs law: this between 1998 and 2004. He was first interviewed by the police on the 18th September 1998. There were contradictions between the THC values he himself stated and on the other hand the analyses by the Institut für Rechtsmedizin {IRM}(Institute for Forensic Medicine) at the University Bern. Further interviews by the police in Freiburg and Wallis followed and various seizures of hemp products

On the 23rd of May ANDRÉ was sentenced by the Kantonsgericht Wallis for offences against the Betäubungsmittelgesetz to a conditionally executable prison sentence of one month.

The "Institut de Police Scientifique et de Criminologie" (hereafter IPSC) gave their final report on 16th August 2000 (p. 5045 ff.)

Concerning the THC content of the seized hemp. The THC content ranged from almost zero to 37.1%.

In the IPSC report it stated that the THC acid when smoked would turn into THC.

The appellant (Andre) according to the court steadily increased his turnover between 1998 and 2002. Total turnover was 5.7 million Swiss francs, and a profit of 482,000. Concerning possible breaches of the law in 2003 2004, there will be further investigations, and will not be included in this verdict i.e. it may be the subject of a law case at a later date.

The courts of the See district sentenced Andre on the 24th August 2005 for selling cannabis on a business scale to 29 months in jail minus the 23 days he had already spent in the remand prison.

He was also asked to pay the town of Freiburg /Friburg; 150,000 swiss fr. as compensation. The seized cannabis was destroyed; undefined elements of A.'s property was also seized and used to offset the above-mentioned claim.

On the 4. November 2005 ANDRÉ appealed to the appeal court of the Kanton of Freiburg. On the 13. November 2006 it confirmed the decision of the first court that ruled against Andre.

C.

ANDRÉ_apealed on the grounds that the case against him was a breach of his constitutional rights. He filed for the decisions against him to be annulled.(* see comment below) a Nichtigkeitsbeschwerde

I. Constitutional basis

Andre stated the maxim "in dubio pro reo" should be applied in his favour. This maxim is to the effect that if the court is in doubt it should rule for the defendant. Secondly he argued against court's judgement that most of the cannabis sold by him would be used for drugging purposes i.e. offences against the drug law. ANDRE'S POSITION WAS THAT THIS WAS AN ARBITRARY DECISION AND NOT ONE BASED ON FACTS OR EVIDENCE: as he saw it the analysis made by the IPSC was more favourable to him than that made by the IRM. The court did not give any reason for preferring the findings of the IRM.

(This line of his argument concerns what the strength was of the products sold by him)

Andre: the reasoning of the appeal court that the IPSC had included droppings weak in THC and other parts of the plants was not scientifically based. Instead the IPSC's report states that only hemp flowers were analysed

The increase of the THC value by including the THC acid is not scientifically based.

There was also a legal dispute about what "arbitrariness" in a legal sense (in the Swiss constitution) really means. According to the court it means when the court bases its reasoning on assumptions concerning the actions in question which are clearly in contradiction to the facts.

Concerning “in dubio pro reo” this can only be relevant when there are significant doubts concerning the defendant’s guilt, and not merely theoretical doubts which could always exist.

The differing results produced by the two institutes the IRM and the IPSC can be explained as follows, the court stated: the IRC looked at the total THC value according to the HPLC method; the IPSC looked at the Delta-9 level based on gas chromatography.

The court did not base its finding that the hemp in question was only used for “intoxicating” purposes. They looked at other factors and came to the conclusion beyond reasonable doubt the majority of the hemp / cannabis sold was for that purpose or could have been for that purpose. So objectively the preconditions for a guilty verdict under Art. 10 were fulfilled.

Andre argued in contrast that more than 50% of the hemp / cannabis sold was used for other purposes other than intoxication.

The court also concluded that the hemp on sale was above the threshold level of 0.3% (below 0.3% the cannabis is presumed to be uninteresting for purposes of intoxication. The court argued that those samples that were under 0.3% referred to analyses of the stalks and leaves and therefore not relevant. Sometimes no flowers were included in the samples to be analysed. After a lengthy consideration the court rejected Andre’s argument.

As a result the court decided that the predominant amount of the products sold contained more than 0.3% THC, and sometimes considerably more.

They also rejected the appellant’s claim that the original decision made by the court to the effect that the hemp was grown to obtain cannabis was an arbitrary decision i.e. it assumed that the decision by the lower court was evidentially based.

PART 2

Concerning the II. Nichtigkeitsbeschwerde (nullification complaint); this was about new laws that came into affect in January 2007. However the appeal court said the lower court had correctly ruled on the basis of the laws that were valid that the time it reached the original decisions.

Andre argued that THC levels are irrelevant; in terms of intoxication it is only the Delta 9-THC level that is significant. Andre argued that scientifically speaking only the half of the total mass of hemp could be used as cannabis and so he should be found guilty – if at all– only for half the punishment. Therefore the penalties of 29 months and 150,000 Swiss Fr. should be lowered correspondingly.

The judges argued that hemp is included in the drug laws. So whoever grows it or brings into commerce is guilty, and in serious cases such as this, one year in jail is minimum and possibly fines of up to a million swiss Fr.

The court decided against the opinion of André that it was significant that he was dealing with hemp which had more than 0.3% THC, and that he had intended to do so. He had disputed this.

The court assumed that he had been selling products with more than 0.3% THC. This was logical in the circumstances even if there was no direct evidence to this effect i.e. based on the analyses by the 2 institutes. The first court based its decision on the price of the products being sold remaining constant. The court said that the appellant must have taken it for granted or assumed that the products purchased would be used for purposes of intoxication.

The court did not find it significant that Andre only sold the products to people aged over 18, that he asked them to sign a form assuring that they would not use the products for purposes of intoxication. The fact that the turnover was stable or increased indicates that the products created satisfaction amongst those who bought them

Given that he had a turnover in those years of over 5 million Swiss Fr. in the years in question, the court had a correct base for the severity of the sentence.

The court in effect ignored all the surrounding circumstances e.g. compulsory written declarations by the users that they would not misuse the purchased products etc. Instead they reduced the matter to Andre selling cannabis for intoxication purposes to people who were prepared to pay the higher prices for it even if in some cases what was on sale was much weaker. It was usually sold in amounts of 20 to 100 grams. The court saw no reason to accept Andre's arguments. They saw the preconditions for a crime under the drugs law as having been fulfilled and saw no reason to change or reduce the verdict. The court assumed that even if not all of the hemp was used for psychoactive purposes but at least the most of it. So if the figure of 480,000 Swiss Fr. Profit is correct, then the fine of 150,000 was not unfair, and did not breach the principles of Swiss law.

André also has to pay the costs of this appeal to the national court. In addition the statutory fee of 4,000 Swiss Fr for such appeals.

Lausanne, 6. Juli 2007

Im Namen des Kassationshofes
des Schweizerischen Bundesgerichts