

judgment

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The court clerk [*initial*]

DISTRICT COURT HAARLEM

Criminal-law sector

Location Schiphol

Three-judge criminal division

Prosecution number: 15/800013-09

Date of the Judgment: 26 March 2009

Judgment in defended action

Criminal judgment

This judgment was rendered following the public court hearing of 12 March 2009 in the case against:

Ondrej VALOUSEK,

Born 17 March 1978 in Moscow (former Soviet Union),

Residing in (161000) Prague, Navigatoryv 600 (Czech Republic).

1. Charges

The accused has been charged with the fact that:

He wilfully brought into Dutch territory, on or around 30 December 2008 at Schiphol, municipality Haarlemmermeer, a quantity of a material containing DMT (dimethylthiambutane), being DMT (dimethylthiambutane), which is a substance as referred to in the Opium Act List I [*Opiumwet Lijst I*], or qualified pursuant to (5) of section 3 (a) of that Act, or containing an (other) substance as referred to in the list I pertaining to the Opium Act, or qualified pursuant to (5) of section 3 (a) of that Act.

2. Preliminary questions

The Court has established that the summons is valid, that the Court itself is competent to take cognizance of the case, that the Public Prosecution Service [*Openbaar Ministerie*] is allowed to institute criminal proceedings and that there are no reasons to suspend the prosecution.

3. Judgment of the Court

3.1 Judicial finding of facts

The Court deems legally and convincingly proved that the accused has committed the charged fact, in such manner that

he wilfully brought into Dutch territory, on 30 December 2008 at Schiphol, municipality Haarlemmermeer, a quantity of a material containing DMT

(dimethylthiambutane), being DMT (dimethylthiambutane), a substance as referred to in list 1 pertaining to the Opium Act [*Opiumwet lijst I*].

Insofar the charges contained linguistic or typographical errors, these were corrected. Appearing from the proceedings of the court hearing, the accused was not harmed in his defence by these corrections.

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That which the accused was charged with additionally or differently than was accepted here as being proved, has not been proved. The accused must be acquitted of these charges.

3.2 Evidence

The Court concluded that the charged fact has been proved on the ground of the following evidence:

On 28 December the accused travelled from Rio de Janeiro via Paris to Amsterdam¹. On Tuesday 30 December 2008, staff of Customs at Schiphol, municipality Haarlemmermeer, found during a customs check of forwarded luggage, a wheeled suitcase and two rucksacks originating from Rio de Janeiro. During the check a total of five bags, containing a brown coloured liquid, was found in the suitcase and rucksacks. Luggage labels with the name of a person called Ondrej Valousek, originating from Rio de Janeiro, Brazil, were attached to the luggage. The luggage labels were marked with the numbers 4957 JJ 730668, 4957 JJ 730653 and 4957 JJ 730807². From each of the five bags a representative sample was taken, designated for the purpose of analysis and to be transferred to the Netherlands Forensic Institute [*Nederlands Forensisch Instituut, NFI*] in Rijswijk. The aforementioned sampling was registered with the District Royal Netherlands Military Constabulary [*Koninklijke Nederlandse Marechaussee*] at Schiphol under number 08-096450 1 - 5³. On 2 January 2009 the accused Valousek came to claim his luggage⁴. The accused handed over three claim tags with the following numbers: 4957 JJ 730668, 4957 JJ 730653 and 4957 JJ 730807⁵.

¹ The accused made a confession during a court hearing dated 12 March 2009.

² The report of findings and transfer as made out in the legal form dated 30 December 2008 (file section 2.2).

³ The report of narcotic drugs as made out in the legal form, dated 16 January 2009 (file section 2.8).

⁴ The report as made out in the legal form, dated 2 January 2009 (file section 2.3)

⁵ The report as made out in the legal form, dated 2 January 2009 (file section 2.4)

The NFI examined the samples. The NFI concluded that DMT (N,N-dimethyltryptamine) was shown to be present. List I pertaining to the Opium Act⁶ includes DMT. As the Court understood, N,N-dimethyltryptamine and dimethylthiambutane are two names for the same substance.

4. Criminal liability of the accused

The counsel of the accused took the stand that the actions of the accused are protected by Article 9 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR). The accused, as a member of the Santo Daime Church in Amsterdam, took with him from Brazil a liquid, the ayahuasca tea, destined for the Santo Daime Church in Amsterdam. This tea can only be prepared in Brazil in a ritual manner. During the worship services of the church the tea is used as a holy sacrament. The consumption of the tea is therefore an inextricable part of the worship service of this church. The ayahuasca tea contains DMT. The prohibition as included in the Opium Act, to import this tea, because of the DMT that the tea contains, forms however an unlawful infringement of the freedom of religion. The counsel concluded that the accused should be discharged from further prosecution because the proved facts do not constitute an offence, now that article 9 of the ECHR in this case obstructs the application of article 2 of the Opium Act.

Regarding the invocation of Article 9 of the ECHR by the counsel, the Court reached the following viewpoint.

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Pursuant to article 9 (2) of the ECHR the freedom to practise a religion cannot be subjected to restrictions other than those that are stipulated by law and which are essential in a democratic society in the interest of public safety, for the protection of public order, health or public morals, or for the protection of rights and freedoms of others.

The accused took with him approximately 40 litres of ayahuasca tea from Brazil to the Netherlands. This tea contains DMT (N,N-dimethyltryptamine). This liquid was destined for the Santo Daime Church in Amsterdam. Mrs. Fijneman, pastor of the Santo Daime Church in Amsterdam and heard as a witness during the court hearing, confirmed that the accused was asked to take ayahuasca tea from Brazil to the Netherlands to be consumed during the worshipping services. The liquid in the luggage from the accused was destined for her church.

The Santo Daime religion came into being in Brazil around 1920 as a religion which uses the centuries old Indian rituals and customs, including the ritual use of the plant mixture ayahuasca, in combination with the Christian Catholicism that was brought from Europe. From there this religion spread throughout Brazil and since the nineties also to other countries, including the Netherlands. The ayahuasca is a tea which is given by the Santo Daime Churches to its members during services as a holy sacrament. The drink is made from two plants originating from the Amazon area, the so-called Banisteriopsis Caapi, a liana containing DMT and Psychotria Viridis, containing a so-called MAOI. The tea is prepared in a ritual manner. The plants are sought for in nature by men and women separately and processed. Subsequently the cleansed and crushed plants are boiled to a tea in a ritual that lasts many hours while church hymns are being sung. The entire process lasts approximately ten days. The tea resulting from this is for the church members a holy drink which transfers the Holy Spirit from the Santo Daime to the drinker of the tea.

Like the Amsterdam District Court in its judgment of 21 May 2001 (prosecution number 13/067455-09) this Court arrived at the opinion that the Amsterdam Church Ceflu Cristi-Ceu da Santa Maria (also known as the Santo Daime Church) should indeed be considered a religious denomination. The adhered doctrine must be considered a religious belief and the consumption of the ayahuasca tea, or Daime, should be considered as the most important sacrament within the worshipping services of the Santo Daime Church, as an essential part of the religious experience of the believers. According to the doctrine, this Daime transfers the holy spark during the worshipping services. The belief of the Santo Daime Church must therefore be considered a religious conviction, which religious conviction, as well as the administration of the holy sacrament during which this conviction is being expressed, enjoys the protection of Article 9 of the ECHR. For that matter, also the public prosecutor used this as a starting point in his demand.

On account of the Public Prosecutor Service, it was argued that the restriction of the right of the accused to a free performance of his religion is justified from a viewpoint of public health, with reference to the Supreme Court judgment dated 9 January 2007 (LJN AZ2497). The public prosecutor concluded on the basis of the judgment that the Supreme Court seems to distance itself from the actual review of the creation of the dangerous situation when using DMT in specific circumstances, such as in a religious context. Article 9 ECHR does not indemnify the accused. The legal prohibition of the possession/import of DMT is a restriction of the freedom of religion of the accused, necessary in a democratic society in order to

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protect health.

As a result the Court found the following.

DMT is a substance which is mentioned in an appendix to the Opium Act as list 1. Within the scope of public health it is forbidden to import substances which are mentioned on this list (article 2 of the Opium Act). This is one of the possibilities mentioned in Article 9 (2) of the ECHR to restrict the right to freedom of religion. According to established case law of the European Court for the Protection of Human Rights (ECHR), it should actually be reviewed whether the restriction on the exercise of a fundamental freedom in the interest of public safety, to protect public order, health or good morals, or to protect the rights and freedoms of others, is justified. Therefore, in this case, the Court will have to investigate whether public health justifies a restriction of freedom of religion.

For the benefit of the criminal proceedings of the Amsterdam District Court which lead to the aforementioned judgment, Prof. Dr. F.A. de Wolff has drawn up an expert's report regarding the ayahuasca tea in relation to the consumption thereof by the followers of the Santo Daime Church communion and public health. This expert's report was also published on the World Wide Web; the Court was able to take note thereof. The expert De Wolff described in his report how undesired effects of a mild nature, such as nausea, but also more serious symptoms of toxicity, can occur in the form of an increase in blood pressure, or an increased heart rate, for example. He also described the interaction between substances in ayahuasca and medicine or food. Questionnaires regarding the state of health of the individual participants in the meetings are made available to the participants and the expert is of the opinion that a reliable picture of the possible risks of consuming ayahuasca is given by these questionnaires and the provided health information, in which information is given regarding contraindications with regard to the consumption of ayahuasca in combination with certain food or medicines. According to the experts, the production of ayahuasca and the consumption of it during religious meetings is strictly regulated due to the religious context. Moreover, the consumption is related to rituals and always takes place in the presence of others who are familiar with the effects.

On the basis of that above, the expert De Wolff concluded that the consumption of ayahuasca can involve health risks in individual cases; that the information provided by the Santo Daime Church is generally correct and adequate; and that the limited availability of ayahuasca and the strictly regulated circumstances in which the consumption of it takes place, form a protection against misuse. In view of this, the final conclusion of the report is that, also taking into consideration the limited size of the Santo Daime Church, according to the current scientific knowledge, it is not likely that that the ayahuasca consumption will cause a public health risk.

Furthermore, expert De Wolff stated with regard to the combination of ayahuasca-cannabis that the lack of scientific research into the combined effect of these substances does not give any cause for the amendment of the conclusions, now that he had taken this into account when drawing up his report and that there is insufficient evidence that the conclusions in the report would not be valid.

It was not made clear that afterwards further facts, views and/or circumstances were brought forward

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on the basis of which the conclusions from this report would no longer be valid. Neither did the public prosecutor invoke this.

Considering the insight into the composition of and the health risks related to ayahuasca as given in the report of De Wolff, the Court assumes that the drinking of it within the religious context of the Santo Daime Church does not involve any notable risks for public health. Although in individual cases the substance DMT which is present in the Daime could be a possible health risk, the information provided about this and the controlled consumption within the religious community form in the opinion of the Court sufficient safeguard against unacceptable health risks in those cases in which the consumption of the tea should be advised against.

The accused Valousek has stated during the court hearing that he is a member of the Santo Daime Church in Amsterdam. Also it became apparent during the court hearing that the ayahuasca tea that is consumed in the context of religious performances can only be ritually prepared in Brazil and given that process and the rituals related to it, there is no alternative in the Netherlands. The import of ayahuasca tea from Brazil is therefore of the essence for the members of the Amsterdam Santo Daime Church in order to be able to practise their religion. The import of that ayahuasca tea from Brazil to the Netherlands is covered by a number of safeguards. Mrs. Fijneman stated during the court hearing as a witness under oath that the ayahuasca tea can only be transported by people who are a member of the Santo Daime Church. Previously she confirmed that the accused is a member of the Santo Daime Church. The members of the Santo Daime Church must take a vow that they work for the church. In Brazil the tea can be obtained from Mr. Caparelli, who is connected to the church organization in Brazil and who ritually prepares the tea. When a person comes to him to collect ayahuasca tea, he subsequently verifies with Mrs. Fijneman whether this person is indeed authorized to collect the liquid for her, before actually handing over the liquid.

Considering that mentioned above, the Court arrived at the opinion that in the case of the accused, the prohibition given by law and based on the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances to import DMT, forms such an infringement of the freedom of religion that this infringement cannot be considered necessary in a democratic society, now that DMT forms a part of the holy ayahuasca tea that is only prepared in Brazil and forms an essential part of the religious conviction for the members of the Santo Daime Church, as a consequence of which

prohibition the Santo Daime Church cannot receive its most important sacrament within its religious conviction during the worship service.

Further in this case a weighing-up of the interests must be made between on the one hand the interests of the accused and the other members of the Santo Daime Church that no infringement is made regarding their right to freedom of religion, guaranteed by the ECHR, and on the other hand the interest of the State to meet its obligation arising from the Convention to prohibit DMT. Given the great weight that should be attached to the freedom of religion and the circumstance that, as is considered above, the import of the ayahuasca tea is assured with safeguards en that no notable health risks are attached to the ritual consumption of the ayahuasca tea within the closed gatherings of the church community, the Court is of the opinion that the protection of freedom of religion must be granted a greater weight in this case. As a result of this, article 2 of the Opium Act should in this case not apply.

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The public prosecutor invoked the ruling of the Supreme Court dated 9 January 2007 (LJN AZ2497). This ruling however does not lead the Court to another judgment. The comment of the accused made during the court hearing that the consumption of the ayahuasca tea is not necessary for the practice of her religion and that not consuming it does not stand in the way of practising, brings about that the case under consideration of that ruling is entirely different from the present case. What is more, a review in concrete terms did not take place.

The accused will be acquitted from all criminal proceedings now that the facts proved do not lead to a criminal offence under these circumstances.

5. Decision

The Court:

Declares proved that the accused has committed the charged fact as stated previously under 3.

Declares not proved what was charged additionally or differently than that which is above considered proved and acquits the accused thereof.

Declares the proved facts not punishable and acquits the accused of all criminal proceedings relevant to this.

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6. Composition of the Court and date of the judgment

This judgment was pronounced by
W.A.F. Jansen, presiding judge
Ph. Burgers and P.P.J. van der Meij, judges
in the presence of the court clerk D.M.A. Richelle
and pronounced at the public court hearing dated 26 March 2009.

P.P.J. van der Meij was unable to co-sign this judgment.

[*Signature*]

[*Signature*]

[*Signature*]

