

DECREE (*)

Court of Appeal Amsterdam

Case number 23-001916-09

Date of decree: February 24, 2012

OPPOSITION

Decree of the Court of Appeal Amsterdam regarding the appeal to the verdict of the Court of Haarlem of March 26, 2009 in the criminal case under case number 15-800013-09 against

Ondrej V.

Born in Moscow (previously the Soviet Union) on

Address: Prague 6, Czech Republic

Investigation of the case

This decree refers to the investigation at the original court session of March 12, 2009, and the appeal court session of February 10, 2012.

The Court of Appeal has taken notice of the claim of the Attorney General, and of what has been put forward by the defendant and counsel.

Indictment

The defendant has been charged with the following:

He intentionally brought into the Netherlands, on or around December 30, 2008, in Schiphol, municipality of Haarlemmermeer, an amount of a material containing DMT (dimethylthiambutene), whereas DMT (dimethylthiambutene) is a substance referred to in list I of the Opium Act, or indicated by the fifth clause of article 3a of that Act, or contains a substance referred to in list I of the Opium Act, or indicated by the fifth clause of article 3a of that Act;

Appeal verdict

The appeal verdict will be declared invalid, due to a somewhat different judicial finding of fact.

Judicial finding of fact

The Court of Appeal considers it lawfully and convincingly established that the defendant has indeed committed the actions that he has been charged with, i.e.:

He intentionally brought into the Netherlands, on December 30, 2008, in Schiphol, municipality of Haarlemmermeer, an amount of a material containing DMT (dimethylthiambutene).

Means of evidence

The Court of Appeal grounds its conviction that the defendant has committed the actions that have been established on the facts and circumstances that have been put forward in the evidence, and adopts this evidence.

Offense constituted by the fact

The defendant has brought into the Netherlands from Brazil five bags with liquid with a total weight of more than 40 kilograms. The liquid was the so-called ayahuasca tea, a beverage prepared in Brazil, which was intended for the Santo Daime church in Amsterdam. The defendant, himself a member of that church, brought the tea into the Netherlands at the request of the minister of that church, ms. Fijneman, with the intention of delivering the tea there, and have it be used for the religious service of the church, in which he also partakes himself. Ayahuasca tea contains (as part of the way it is prepared) dimethyltryptamine or dimethylthiambutene, abbreviated as DMT, a substance that is listed on List I that is part of the Opium Act. The import of DMT is prohibited in article 2 under A of the Opium Act; an infringement of this prohibition has been deemed a criminal offense in article 10 of the Opium Act.

The question that the Court of Appeal needs to answer is, whether the application of these provisions of the Opium Act to the actions of the defendant constitute an unjustified infringement of his right to religious freedom.

The Attorney General has argued that this is not the case. The counsel of the defendant has argued the opposite. The arguments that were exchanged, registered in the written closing statement of the Attorney General and the written counsel's argument, will, to the extent that they are relevant, be addressed further in what follows.

To the judgment of the Court of Appeal it can be taken as a fact – which has not been contested by the Public Prosecutor – that the Santo Daime church, originally founded in

Brazil, is an official church, in which the on Santo Daime based religion is professed, that the consumption of ayahuasca is part of the essential, holy sacrament of the religious services of that religion, that without this consumption the religion cannot actually be professed, that the ayahuasca tea can only be prepared in Brazil according to the appropriate procedures and rituals from plants (that contain DMT by nature), and that the church regulates the import of the ayahuasca tea into the Netherlands.

Based on this profession of religion, including the consumption of ayahuasca tea, the defendant has a right to the protection of article 9, first clause, European Convention for the Protection of Human Rights and Fundamental Freedoms (hereafter: ECHR), in which among other things the right to religious freedom is guaranteed; this includes the profession of religion in services. Infringements of the right to religious freedom can only be justified if they comply with the demands as put in the second clause of article 9 ECHR, which reads as follows:

“Freedom to manifest one’s religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of rights and freedoms of others.”

The current infringement of the right to religious freedom has been addressed by formal law, now that the import of DMT has been deemed a criminal offense in article 10 and article 2 of the Opium Act. There is also no discussion that the placement of DMT on List 1 of the Opium Act, that puts it within reach of the penalty clauses applicable to List 1, has taken place for the protection of public health. Therefore, the question remains whether this infringement of the right to religious freedom in a democratic society has to be deemed *necessary*.

The Court of Appeal has answered this question in the negative, based on a judgment that can be summarized as follows: consuming the ayahuasca tea within the context of the religious services of the Santo Daime church does not involve considerable risks for public health.

The Attorney General has argued, as the public prosecutor argued originally, that it is not up to the judge to test the concrete danger of DMT to the public health in case of consumption of ayahuasca tea by members of the Santo Daime church, because the danger to public health has been established in the abstract by the placement of DMT on List 1 of the Opium Act, and that the Supreme Court (of The Netherlands) has ruled, in its decree of January 9, 2007 (AB 2007, 181; LJN AZ2497) that with this the need for a prohibition of the use of DMT has been established, and that this leaves no room for a testing in the concrete of the danger that the use of DMT under specific circumstances poses. The counsel for the defense has disagreed with this view, and has put forward arguments against it.

The Court of Appeal is of the opinion that in the aforementioned decree (with regard to a statement of complaint regarding confiscated ayahuasca tea), the expressions used by the Supreme Court tend in the direction of the interpretation defended by the Public Prosecutor. On the other hand, the court had in its judgment of that case attached importance to the statement of the defendant that it was also possible for her to profess her religion *without* the

ayahuasca tea, and the considerations of the Supreme Court have to be viewed in that light. The counsel for the defense has made a reasonable case for the fact that the defendant in that case was not a member of the Santo Daime church. The present case under consideration, however, does involve a member of the Santo Daime church, and for him the consumption of the ayahuasca tea is essential for professing his religion. The Court of Appeal sees, just as the Court of Haarlem, in the aforementioned decree of the Supreme Court no impediment for a concrete testing.

A different view would, moreover, in a case such as the present one, lead to the conclusion that the rightfulness of the infringement of the right to religious freedom can be based solely on the fact whether this infringement has been anticipated by the law, and serves one of the purposes mentioned in article 9, second clause, ECHR. A separate answer to the question whether this infringement was also *necessary* (in a democratic society) would then no longer be needed, which contradicts the wording of article 9, second clause, ECHR, and which therefore cannot have been the intention of the Supreme Court. It also follows from the sentences of the European Court for the Protection of Human Right and Fundamental Freedoms with regard to article 9 ECHR, that an assessment of the necessity of the infringement in the concrete cannot be omitted.

The Court of Appeal has taken notice of a report, written for an earlier case, of April 24, 2000 by F.A. de Wolff, Ph.D., clinical chemist and toxicologist in Amsterdam, which had been provided originally by the defense. This report concerns especially the results of an investigation into the effects on health of the use of the ayahuasca tea within the context of the Santo Daime church. According to the findings of Wolff, DMT has a hallucinogenic effect, and its consumption can be accompanied by nausea and vomiting. However, the doses of DMT that participants in a Santo Daime ritual consume, are in his opinion relatively low-effective. The conclusions of Wolff are (page 9 of the report):

1. that the use of ayahuasca can in individual cases result in health risks,
2. that the education that the Santo Daime church provides to participants of their religious services is generally correct and adequate,
3. that the limited availability of ayahuasca, and the strictly regulated circumstances in which its use takes place, provides a protection against misuse by church members, and
4. that it is, according to current scientific insights, not likely, taking into account points 1 to 3, as well as the limited size of the Santo Daime church, that the use of ayahuasca constitutes a danger to public health.

The other reports, originally provided by the defense, insofar as they can be characterized as written by experts, give no reason to doubt the findings and conclusions of Wolff. The Court of Appeal also agrees with the considerations of the Court of Haarlem that there appear to be no new developments or new insights, that would necessitate the conclusion that these findings and conclusions can no longer be considered valid.

The NFI has reported, in the present case under consideration, that the indicative concentration of DMT in the samples of the ayahuasca tea that were investigated varied from

0.4 gram to 1.2 gram per liter of liquid, corresponding to percentages of 0.04 to 0.12. According to the NFI, these values are “an order of magnitude comparable to the values that have been found in the literature for so-called ayahuasca beverages.”

The counsel for the defense has also argued, which has been confirmed by the defendant, that the Santo Daime church, which has only about 140 members in the Netherlands, in consideration of the possible effects of the ayahuasca tea, has its members fill out questionnaires concerning their health, provides education on contra-indications for the use of the ayahuasca tea in combination with certain food items and medicines, and oversees consumption of the tea.

Based on the aforementioned, the Court of Appeal is of the opinion that the import of the defendant of the aforementioned ayahuasca tea, for the sake of its (controlled) consumption, as is customary within the Santo Daime church in Amsterdam, in combination with regulation and education (which appear credible and sufficient to the Court of Appeal), under these circumstances provides a very small, and therefore acceptable, danger for health. Further, in weighing on the one hand the importance for (public) health of prohibiting (and prosecuting) the import of DMT, and on the other hand the very small health risks connected to the consumption of the ayahuasca tea in the religious services of the Santo Daime church, it must be concluded that the application of the Opium Act provisions in question are not necessarily as intended in article 9, second clause, ECHR.

This implies that articles 2 and 10 of the Opium Act must not be applied, that his established actions therefore do not constitute a criminal offense , and that the case against the defendant must be dismissed.

DECISION

The Court of Appeal:

Declares the appeal verdict invalid, and renders justice anew.

Declares, as considered above, that it is established fact that the defendant has committed the actions that he has been charged with.

Declares the established facts as not constituting a criminal offense, and dismisses the case against the defendant.

Orders the restitution to the defendant of the impounded material:

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Five bags with brown liquid, with a weight of 40.60 kg

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(*) This is an English Translation from a Santo Daime member in the Netherlands of the official Dutch publication (see here: <http://ljn.rechtspraak.nl/> and fill in after LJN: BV6888, and below 'zoeken' or type: <http://zoeken.rechtspraak.nl/detailpage.aspx?ljn=BV6888>).