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Case Comment

R. v Aziz: producing and supplying controlled drugs - Misuse of Drugs Act 1971 s.28 - whether art.9 of the European Convention on Human Rights could read down s.28 so as to provide a defence of religious belief

Court of Appeal (Criminal Division): Hughes LJ., Macur J. DBE and Maddison J.: May 10, 2012; [2012] EWCA Crim 1063

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art.9

Case:

R. v Aziz (Peter Karim) [2012] EWCA Crim 1063; [2012] Crim. L.R. 801 (CA (Crim Div))

Crim. L.R. 801 The applicant, a qualified practitioner in alternative treatment techniques (a shaman), was convicted of producing a Class A controlled drug and supplying it to another. Clients, for a fee, were served with a brew called ayahuasca which contained B-Caapi and Chacruna. Chacruna contains dimethyltryptamine (DMT), a Class A controlled drug with hallucinogenic properties akin to LSD. The purpose of the ceremony was enlightenment and to provide clients with an opportunity for self-development and the purging of hidden and forgotten difficulties that might have limited their personal development. At trial the judge rejected an argument that s.28 of the Misuse of Drugs Act 1971 could be read down in reliance on art.9 of the European Convention on Human Rights in order to provide the applicant with a religious exemption. The applicant also sought leave to appeal on the question of whether, as a matter of law, making an infusion that contained Chacruna amounted to "producing" DMT by making a "preparation".

Held, inter alia, dismissing the application for leave to appeal, where a religious group, however well established, adopts as part of its rituals a deliberately unlawful act, the fact that it is a religious ceremony did not provide it with legal authorisation. Article 9 is a qualified right and art.9(2) states:

"freedom to manifest one's religion or beliefs shall be the 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 the rights and freedoms of others".

The prohibition on the possession and supply of a dangerous drug, whether Class A or otherwise, was clearly necessary in a democratic society for the interests of public safety, public order and health, and the provision to which the applicant was subject was prescribed by law. The judge was correct to rule as he did. Furthermore, the court had

"not the slightest doubt that making an infusion out of the B-Caapi and the Chacruna amounted to producing by making a preparation. It did in any ordinary language and it did in law. It is not a question of altering the chemical make-up of DMT. It is a question of putting it into a form in which it can be ***Crim. L.R. 802*** consumed, which is in any ordinary language preparation". (per Hughes L.J. at [4])

Cases considered: *Taylor [2001] EWCA Crim 2263; [2002] 1 Cr. App. R. 37*; *Thornton* [sic, *Thomson*] [2003] EWCA Crim 3477; *Williams and McCollin [2011] EWCA Crim 232*.

N. Lewin for the appellant.

Commentary

Given that this was an application for leave to appeal against conviction, it is understandable that the court's reasoning for refusing leave was shortly stated. However, two important points of principle arose.

The art.9 issue. Having regard to the reasoned judgment of the court in *Taylor [2002] 1 Cr. App. R. 37* (and in *Andrews [2004] EWCA Crim 947*, albeit not cited), the argument based on art.9 of the ECHR stood little prospect of success. There is a religious sect, with origins in the Amazon Rainforest, which receives communion by drinking ayahuasca as a sacramental tea (see *Gonzales v O Centro Espirita Beneficente Uniao do Vegetal, 546 US 418 (2006)*). Not all signatories to the three main UN drug conventions have declined, through the courts, to recognise a religious exemption for the use of ayahuasca (notably, the Netherlands: see, for example, *Ondrej Valousek* (District Court Haarlem, March 26, 2009). As the courts in *Aziz* and *Valousek* stated, art.9 is a qualified right but, whereas the Dutch court considered that it would have to investigate whether public health justifies a restriction of freedom of religion, English courts tend to regard that issue as prescribed by law by virtue of the three classes of controlled drug. This assumes that all drugs within a given class are equally harmful, and pays little regard to their purity, or potency, in the circumstances in which they are used. Arguably, a clearer evidence-based position on the harmful effects of "ayahuasca" brews and decoctions is warranted. For further reading, see (in relation to Rastafari cannabis use) M. Gibson, "Rastafari and Cannabis: Framing a Criminal Law Exemption" [2010] Ecc. L.J. 324.

Preparation as "production". Of considerable practical importance is the conclusion of the court, in *Aziz*, that making an infusion out of B-Caapi and the Chacruna amounted to "producing" a controlled drug (DMT) by making a "preparation". In a line of cases that have considered the meaning of "preparation" for the purposes of the Misuse of Drugs Act 1971 (recently reviewed in *H [2012] EWCA Crim 525*), none have discussed the circumstances in which the making of a "preparation" is an act of "production" for the purposes of s.4 of that Act (see, for example, *Stevens [1981] Crim. L.R. 568*; *Cuncliffe [1986] Crim. L.R. 547*; *Hodder v DPP [1990] Crim. L.R. 261*). In *Harris [1996] 1 Cr. App. R. 369*, the court spoke of the "preparation of [cannabis] plants" as an act of production, but it is not evident that the court used the word "preparation" in the context in which it appears in Sch.2 to the MDA 1971.

Although the court, in *Aziz*, did not set out its reasoning, it is submitted that it was probably based on the wording of para.5 of Pt 1 (Class A) to Sch.2 to the Act, namely, that

"… any *preparation* or *other product* containing a substance or product for the time being specified in any of paragraphs 1 to 4 above [is a Class A controlled drug]". (emphasis added). ***Crim. L.R. 803***

A similar paragraph applies in respect of Classes B and C. The reasoning therefore runs that because a "preparation" is a controlled drug then it can be "produced" (s.4) by preparing it. The reasoning is straightforward but, without qualification, the potential consequences could be far-reaching and unintended especially as the tendency of the courts has been to give the expressions "preparation" and "other product" their "natural and ordinary meaning" (English law is not alone in that regard: see *Calabria v The Queen [1982] 151 C.L.R. 671 (Aus.)*). In *Russell (1992) 94 Cr. App. R. 351*, the Court of Appeal held that the conversion of one form of Class A drug into another form (e.g. "salt" to "base") of the same genus (e.g. cocaine) may be production within the meaning of s.4 of the MDA 1971. But, as the court made clear, the production was of a substance (although not by manufacture or cultivation but by "other method", MDA 1971 s.37(1)) with physical and chemical features *different from* the cocaine hydrochloride from which it sprang, albeit sharing the same generic term. By contrast, the problem posed by cases such as *Aziz* is that the chemical features of a drug (e.g. DMT), which naturally subsists in a plant, remain unchanged whether the plant is ground, powdered, boiled or chewed.

There are numerous non-controlled plants in which a controlled drug naturally subsists. For example, cathine and cathinone (Class C) naturally subsist in khat. Indeed, there are many plants that contain DMT (for example, *mimosa hostilis* tree bark). The mere packaging of such plants, even if styled a "product", would not warrant (it is submitted) the description "production" for the purposes of s.4 of the MDA 1971. However, the conclusion reached in *Aziz* may, by a parity of reasoning, lead to precisely that result. In *Hodder*, the court held (for the purposes of s.5) that psilocybin mushrooms, which had

been picked, packaged and frozen, were a "product" under para.5 to Pt 1 of Sch.2 of the Act. Applying what appears to be the reasoning in *Aziz*, it might be thought that H was also guilty of "producing" a controlled drug. But are the acts of baking a cake with cannabis, or making a "spliff", or even chewing plant material in which a controlled drug naturally subsists, acts of producing that drug? Unfortunately, there is no internationally recognised definition of a drug "preparation" or "product"; and, there is within Sch.2 to the 1971 Act, no statutory definition of either expression. Article 1(f) of the 1971 UN Convention on Psychotropic Substances defines "preparation" as

i) "Any solution or mixture, in whatever physical state, containing one or more psychotropic substances, or

ii) One or more psychotropic substances in dosage form".

A "preparation" is subject to the same Convention controls as the psychotropic substance which it contains (art.3(1), UNC 1971). Notwithstanding that DMT appears in Sch.1 to the 1971 Convention, the International Narcotics Control Board informed the Netherlands' Ministry of Health, in a fax dated January 17, 2001, that:

"No plants (natural materials) containing DMT are at present controlled under the 1971 Convention on Psychotropic Substances. Consequently, preparations (e.g. decoctions) made of these plants, including ayahuasca are not under international control and, therefore, not subject to any of the articles of the 1971 Convention."

The INCB repeated that statement by letter dated June 2010 to the Executive Director of the ICEERS, Barcelona (Ref: INCB-PSY 151/10): and see the INCB Report 2010, paras 284–287; but note the broad construction of the word "preparation" adopted by the US Supreme Court in *Gonzales* (above), namely, that ****Crim. L.R. 804***

"*Hoasca* is a 'solution or mixture' containing DMT; the fact that it is made by the simple process of brewing plants in water, as opposed to some more advanced method, does not change that". (per Roberts C.J.)

How might the issue raised in *Aziz* be approached in order to avoid extreme results? It is submitted that one begins by recognising that paras 2–5 in Pt 1 to Sch.2 to the MDA 1971 (and similar paragraphs in relation to drugs of Class B and C) are merely *forms* of drug "substances" or drug "products" that are listed in para.1 (see *R. Fortson, Misuse of Drugs and Drug Trafficking Offences, 6th edn (Sweet & Maxwell, 2012), Chs 6-019–6-039*. On that basis, paragraphs subsequent to para.1 of Pts 1–3, do not create additional controlled drugs. The decisions of the Court of Criminal Appeal of South Australia in *Elrayes [2012] SASCFC 28* and *Willingham [2012] SASCFC 29*, which have taken that approach, are instructive (it is submitted). Thus, in *Elrayes* it was said that

"the whole point of mixing methylamphetamine with an acid to form a salt was to create a preparation that would allow the controlled drug, methylamphetamine, to be used in the human body". (per Gray J. at [49])

As a matter of English law, the act of converting the substance into a "salt" would also be to produce it (*Russell*, above).

The problem is knowing where to draw the line. The result may turn on the definition of the drug in question (consider *Harris* (above), in relation to cannabis plants). But there will be many instances when the act of shredding, dicing, crushing or even drying plant material neither changes the chemical features of the subsisting drug, nor extracts or separates it from the plant(see *H*, above, at [18].Thus, whether (for example) khat leaves are baled, or compressed into tablets, the cathine remains in the plant. Tableting may aid consumption, but even if tablets were held to be "preparations", or "products", cathine has not been produced.

Infusions and decoctions are more problematic. Where a solvent (e.g. water) is applied to plant material that leaches out a controlled drug, it would be more difficult to contend that the solution was

not a "preparation" or "product" that contains a controlled drug. But has there been an act of "producing" a controlled drug? In the case of ayahuasca brews, it would seem that it is the presence of alkaloids within material such as *Banisteriopsis caapi*, which is added to (e.g.) the *mimosa hostilis* tree bark (that contains DMT) that allows the human body to absorb the DMT into the bloodstream. However, arguably, the key issue for the purposes of the MDA 1971 is the means by which a controlled drug ceases to naturally subsist in a plant rather than the chemical mechanism by which the drug becomes active in the body. Accordingly, given that references to "producing a controlled drug" mean (by s.37(1) of the MDA 1971) "producing it by manufacture, cultivation or any other method, and 'production' has a corresponding meaning", it might be thought that the extraction of a controlled drug from plants would be "production" by "[an]other method". Although this construction is likely to find favour with the courts, some organic chemists would struggle to accept that the mere extraction of a drug from plants involves an act of "production" because nothing chemically new would be produced. However, as is so often the case, the law is shaped not only by science but also by policy.

Given the current lack of legal certainty, it is little wonder that a number of prosecutions, founded on whether something is a "preparation" or "other product" for the purposes of the MDA 1971, have been stayed (see *H*, and noting *Rimmington [2005] UKHL 63; [2006] 1 A.C. 459*).

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