

DECREE

COURT OF APPEAL AMSTERDAM

Department criminal law

Case number: 23-003371-16

Date of decree: February 28, 2018

OPPOSITION

Decree of the Amsterdam Court of Appeal regarding the appeal to the verdict of the District Court of Noord-Holland on September 8, 2016 in the criminal case under case number 15-720119-15

against

Investigation of the case

This degree refers to the investigation at the appeal court session on January 31, 2018 and February 14, 2018 and, in accordance with the provisions of Article 422, second subsection, of the Code of Criminal Procedure, following the investigation in court at first instance.

The Public Prosecutor's Office filed an appeal against the aforementioned decree.

The Court of Appeal has taken note of the claim of the Advocate-General and of what has been put forward by the defendant and counsel.

Indictment

The defendant has been charged with the following:

She intentionally brought into The Netherlands, on or around July 14, 2015, in Schiphol, municipality of Haarlemmermeer, about 33,351.1 gram, in any case a quantity of a material containing DMT (dimethyltryptamine), being DMT (dimethyltryptamine), a substance referred to in list 1 of the Opium Act, or indicated by the fifth clause of Article 3a of that Act.

Appeal Verdict

The Court has dismissed the case against the defendant because the established facts do not constitute a criminal offense. This appeal verdict will be declared invalid because the Court of Appeal came to other decisions than the Court.

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 used by the court under 3.3 and adopts this evidence. Furthermore, the statement of the defendant at the hearing on January 31, 2018 is added to this:

“That which I am accused of is correct.

I did arrive at Schiphol on July 14, 2015. I did come from Brazil. I did have ayahuasca-tea in my possession. I know that it contains DMT (the Court of Appeal understands: dimethyltryptamine).”

Proven statement

The court of appeal considers it lawful and convincingly proven that the defendant committed the charge, on the understanding that:

she intentionally brought within the territory of the Netherlands 33,351.1 grams of a material containing DMT (dimethyltryptamine) on July 14, 2015 in Schiphol, municipality of Haarlemmermeer.

What is charged more or differently, has not been proven. The defendant must be acquitted from this.

Offense constituted by the fact

The defendant has imported bags of liquid from Brazil with a total weight of over 33 kilograms into The Netherlands. The liquid was the so-called ayahuasca tea, a drink made in Brazil that was intended for the Santo Daime church in Amsterdam.

The defendant, herself a member of that church and now in the leadership of the church, brought the tea to the Netherlands at the request of the then president of the church G. Fijneman, with the intention of having the tea used in the religious services of the church

community, in which she also participates. Ayahuasca tea contains dimethyltryptamine, further abbreviated and referred to as DMT, which is listed on the list of the Opium Act 1. The defendant had on her arrival in the Netherlands a letter from Fijneman of May 27, 2015, which stated, among other things, that the defendant "will arrive at Schiphol from Brazil on June 5, 2015 and will bring, as a member of Ceu da Santa Maria, Santo Daime from Brazil for our church community".

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 tea is made from a plant containing the psychoactive substance dimethyltryptamine and another plant containing a monoamine oxidase inhibitor (MAO inhibitor).

The combination of these two ingredients, DMT and the MAO inhibitor, produces a very strong psychoactive brew with a strong consciousness-changing effect. Within the Santo Daime church the entheogen ayahuasca is considered a sacrament. During the services ayahuasca is drunk communally.

The question that the Court of Appeal has to answer is whether the application of the aforementioned Opium Act provisions to the actions of the defendant constitute an unjustified infringement of her right to religious freedom.

The Advocate-General has argued that this is not the case. The counsel of the defendant has (primarily) argued the opposite and has argued that the case against the defendant should be dismissed because the established facts do not constitute a criminal offense, now that Article 9 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereafter: ECHR) stands in the way of the application of articles 2 and 10 of the Opium Act. The exchanged arguments, registered in the written closing statement and the written counsel's statement will, to the extent that they are relevant, be addressed further in what follows, with the following considerations of the Court of Appeal..

Following the decree of this Court of February 24, 2012 in a similar criminal case such as this one, in the opinion of the Court of Appeal it can be taken as a fact - what on the part of the prosecution has not been disputed either - that the Santo Daime church originally founded in Brazil is an official church in which the religion inspired by Santo Daime is professed, that the consumption of ayahuasca tea belongs to the essential, holy sacrament of the religious services of that religion, without which consumption the religion cannot actually be professed, that the Ayahuasca tea for the Santo Daime Church can only be prepared in Brazil in accordance with the applicable procedure and rituals, so that imports into the Netherlands are necessary, and that by the church some control is performed on the import of the ayahuasca tea in the Netherlands.

With regard to this profession of religion, the defendant has a right to the protection of article 9, first clause of the ECHR, in which, among other things, the right to religious freedom is guaranteed; this includes the profession of religion in religious services.

Infringements of the right of religious freedom can only be justified if they meet the requirements of the second clause of article 9 of the 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 court therefore establishes that the enforcement of the criminalization of imports of DMT-containing ayahuasca is an infringement of the right to religious freedom as professed in the Santo Daime church. This infringement 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. It is also beyond discussion that the placement of DMT on list 1 of the Opium Act, that puts it within reach of the penalty clauses applicably to List 1, has taken place in order to protect 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 has answered this question negatively in the decree currently under appeal - the decree of this court of February 24, 2012. This was based on a judgment that can be summarized as follows: the import by the defendant of the ayahuasca tea in question for the purpose of controlled and ritual use thereof within the Santo Daime church in Amsterdam, accompanied by supervision and information, under the circumstances outlined by the court, results in a very small and consequently acceptable health risk.

The Advocate General, like the Public Prosecutor in the first instance, has argued that it was not up to the judge - in the context of testing whether the infringement of the right to religious freedom in a democratic society can be considered necessary – to test the concrete danger of DMT for health in the consumption of ayahuasca tea by Santo Daime congregants, since the risk to public health has been established in the abstract with the placement of DMT on list 1 of the Opium Act. The Advocate General has referred to the decree of the Supreme Court of January 9, 2007 and the decree of the European Court of Human Rights (hereafter: ECHR) in Franklin-Beentjes and Ceflu-Luz da Floresta against The Netherlands of May 6, 2014, which stipulates that a general prohibition of Ayahuasca (DMT) is permitted and does not constitute an unjustified infringement of the right to religious freedom. Counsel has argued against this point of view.

In accordance with the point of view of counsel, and following the aforementioned decree of this Court from 2012, the Court of Appeal considers that the omission of testing in the *concrete* would have as a consequence, that it would suffice in any evaluation of the legality of an infringement of the right to religious freedom to determine whether the infringement has been provided for by law and serves one of the purposes mentioned in Article 9, clause 2 of the ECHR. The separate answer to the question of whether this infringement is also necessary in a democratic society would then no longer be necessary, which, in the opinion of the Court of Appeal, cannot be intended, since it is contrary to the wording of Article 9, clause 2 of the ECHR. It also follows from the jurisprudence of the ECHR with regard to article 9 of the ECHR that a determination of the necessity of the infringement cannot in fact be omitted. To this end, it must be examined whether the infringement serves an urgent social need, and whether it is proportionate to the intended goal.

The Court of Appeal, however, is of the opinion that this testing in the concrete does not allow for a determination of the health hazard of the use of DMT (whether or not in the form of ayahuasca tea) *in general*. As the Supreme Court has also considered in the decree of 2007, it follows from the purpose and system of the Opium Act, as evidenced by the legal history, that list 1 contains substances which, among others for the purpose of implementing international treaty obligations, have been identified as substances that have been found to influence human consciousness and that if used by man can lead to damage to health and damage to society. The ECHR refers in Franklin-Beentjes (par. 48) to the “known effects” — *DMT can cause hallucinations, other possible effects include gastrointestinal reactions, such as nausea and vomiting. There is a possibility of more serious symptoms of acute toxicity, such as hypertension and increased body temperature, a rapid pulse rate and hyperventilation, sensory impairment in the limbs and difficulty walking*— and also points out that The Netherlands, as a contracting party to international treaties, is held to the prohibition of the possession and use of DMT (par. 49). This means that in determining the necessity of the infringement, the public health risk in general must be considered, and it is only tested whether *the circumstances of the present case can lead to the conclusion* that – considering all interests - it can be said that, in the concrete case of the import of the ayahuasca for the Santo Daime church, the risk to public health is so acceptable that the infringement of the right to religious freedom is not necessary.

The Advocate General referred to information on the website of the Trimboos Institute as an answer to the question of August 16, 2017: "what is ayahuasca", which describes the risk of using ayahuasca, especially for people with mental health problems, and the danger of a combination of this drug with other drugs, with alcohol, with certain medications and with certain types of food. From the information it is also clear that in the days after the use of ayahuasca side effects can also occur. Attention is also drawn to the risk of ayahuasca during pregnancy and lactation.

It is also mentioned that the use of ayahuasca, like other psychedelic substances, can be risky for those predisposed to psychosis and schizophrenia, and that the use in combination with some medicines can cause serious health risks. The Advocate General has also argued that there is a huge increase of non-religious, uncontrolled use of ayahuasca, with all the attending dangers to public health.

The defense has indicated that the Santo Daime church shares this general concern, but that in the specific case of the Santo Daime churches there is no health hazard. She has referred to, among other things, a report of clinical chemist and toxicologist F.A. Wolff, Ph.D. from 2000, drawn up on behalf of a previous criminal case, and other reports that confirm De Wolff's conclusions. Counsel further argued, as has been confirmed by the defendant, that the Santo Daime church, which has only about 140 members in The Netherlands, in view of the possible effects of ayahuasca tea lets its members, and others who want to participate in a service, complete questionnaires about their health during an intake, provides information about contraindications for the use of ayahuasca tea in combination with certain foods and medicines, and supervises the consumption of the tea, whereas also transport, storage and distribution of the tea take place according to strict rules. And furthermore she mentions that on January 16, 2018 a foundation has been established, "Clareia", which among other things aims to enable the legal authorities to check the import of the tea.

Regarding this, the Court considers the following.

The Court is - with the Advocate General – of the opinion that the precautionary measures put forward by the defense are currently not sufficient to reduce the public health risks of the import of the ayahuasca (and thus the use) to an acceptable level. The Court takes into account that the use within the church of ayahuasca and the manner in which ayahuasca is obtained, imported and stored is not sufficiently verifiable, in view of the following factors:

- The intake of the users of the ayahuasca tea is not carried out by physicians or in connection with the use of this drug for this purpose trained persons, and it fully relies on the honesty of the prospective user, so that there is a risk that people conceal relevant matters because they would very much like to participate in the service and want to use ayahuasca tea at the service. Even if the Court were to base itself on Prof. De Wolff's report of April 24, 2000, the undesirable effects mentioned therein after taking ayahuasca (page 5 of the report), are no longer manageable with the current size of the church services. The Wolff also mentions that "both the intended effects and the toxic effects are dependent on the dose that is used. The dose is difficult to determine with preparations of a natural origin, such as ayahuasca.". From the church reports submitted by counsel, it appears that the services are not just visited by permanent members, but also by 'guests'. In 2017, for example, the services were attended by a total of 2352 guests, compared with 2871 members. With these guests it is not known how they will respond to ayahuasca tea. Moreover, it cannot be excluded

that they are attracted to consuming the ayahuasca tea as such, without looking for faith, but use the service to consume the means.

- Monitoring and supervision take place before and during the service, whereas certain health consequences can also occur afterwards.
- In addition, although the church has established regulations regarding the import into The Netherlands, the transportation, the storage and the serving of the tea, the reliability of these systems depends on the reliability of the individuals who are engaged in this, and is therefore partially unverifiable. For example, the supply of ayahuasca is currently stored by board members at home. At the session of the Court, the defendant stated that "the tea is stored at home by several people from the Santo Daime church".
- From the administration of both churches submitted by the defense from 2013 to the present, it can be concluded that ayahuasca is brought into The Netherlands by many different persons, in any case more than just board members of the church. The defendant stated at the hearing at the court that "if anyone goes to Brazil, we ask them to bring back the tea with them". The Court also points out that the letter that the defendant carried on Schiphol on July 14, 2015 had a different date of entry of the Santo Daime into Schiphol (June 5, 2015) than the actual date of entry of defendant into The Netherlands (July 14, 2015), which suggests that this letter was apparently also issued for a (different) entry at Schiphol, on June 5, 2015.

Also taking into account that in recent years there has been a sharp increase in interest in the use of ayahuasca, especially outside the religious setting, the Court is of the opinion, all things considered and deviating from the Court and this Court of Appeal in the decree of February 24, 2012, that it must be concluded that in view of the above, the application of the relevant Opium Act provisions, and thus the infringement of the religious freedom of the defendant in a democratic society is necessary to protect public health, since now also the testing in the concrete of the import, possession and use of ayahuasca in the present case leads to the conclusion that there is an unacceptable danger to public health.

The Court is of the opinion that no other contingencies have become plausible that exclude the constitution of a criminal offense, therefore, this constitutes a criminal offense.

That which has been proven implies:

deliberate action in violation of the prohibition provided in article 2 under A of the Opium Act.

Penalisation of the defendant

Counsel has pleaded for subsidiary dismissal of all prosecution on the basis of the absence of all guilt (AVAS) in the defendant, because the defendant could not know that it was not allowed for her to import ayahuasca, in short because of the confidence she could derive from the interpretation of the Senior Inspector for Opium Act Affairs of VWS in a letter of 2001, from judicial decisions from 2001, 2006 and from the decree of the Amsterdam Court of 2012, in which the case against all defendants was dismissed, and the confiscated ayahuasca was returned to the church, and furthermore from the decision of the public prosecutor's office, in which the cassation appeal against the aforementioned decree of the Amsterdam court was withdrawn, and from the decisions of the public prosecutor's office where the confiscated ayahuasca was returned to the church.

The Court considers that an exclusion of culpability, as referred to here, is only valid if it is plausible that there has been an excusable unawareness of the unlawfulness of the conduct that she has been charged with. There can only be such an unawareness if the defendant, at the time of committing the offense, was convinced that her conduct was not unlawful. The mere circumstance that in individual criminal cases it was decided that the ayahuasca had to be returned and/or that the case against the defendants in question was dismissed, is insufficient to derive the justified confidence that it was also allowed for the defendant to bring ayahuasca (containing DMT) into The Netherlands.

Also the aforementioned letter from the Inspector from 2001 (whether or not in connection with the judicial decisions) did not mean that the defendant in 2015 could think that she was allowed to import DMT. Moreover, the highest courts - the Supreme Court in 2007 and the ECHR in 2014 - decided differently in a similar issue, as mentioned above.

One would think that the defendant - in view of her intention to bring ayahuasca into The Netherlands from Brazil - would obtain further information about the lawfulness of this intended conduct. The Court is therefore of the opinion that the defendant is not allowed an appeal to excusable unawareness with regard to the conduct constituting a criminal offense. The Court rejects this defense.

Moreover, no other contingencies have become plausible that exclude the penalisation of the defendant with regard to the established facts, therefore, the defendant is punishable.

Application of article 9a of the Penal Code

The District Court of Noord-Holland has dismissed the case against the defendant with regard to the established facts.

The Advocate General has requested that the defendant be convicted of the charges to a fine of 1000 euros, subsidiary 20 days in custody, and suspended community service for the duration of 60 hours, alternatively 30 days in custody, with a probationary period of 2 years.

According to an extract from the Judicial Documentation regarding the defendant dated January 10, 2018, she has never been convicted under any criminal law.

All things considered, the Court considers it advisable to determine that, in view of the circumstances of this case as indicated above, although these are insufficient to assume no culpability, no sentence or measure will be imposed.

DECISION

The Court of Appeal:

Declares the verdict that is being appealed invalid, and renders justice anew.

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

Declares that anything that the defendant has been charged with more than or different from what has been proven, has not been proven, and dismissed such charges against the defendant.

Declares that the established facts constitute a criminal offense, qualifies this as mentioned above, and declares the defendant punishable.

Determines that no sentence or measure will be imposed with regard to the established facts.

This decree has been delivered by the multiple criminal court of the Amsterdam Court of Appeal, in which participated Mr. M.M.H.P. Houben, mr. I.M.H. van Asperen de Boer-Delescen and M. Lolkema, in the presence of mr. S.M. Schouten, court clerk, and has been pronounced at the public hearing of this court of February 28, 2018.