

lawyer: A.G.

DISTRICT COURT OF AMSTERDAM

Case number: 13/067455-99

[COPY]

Date of judgment: 21 May 2001

Contentious matter

ABRIDGED JUDGMENT

of the district court of Amsterdam, 4th three-judge division B, in the criminal proceedings against:

FIJNEMAN, Geerdina Johanna Cornelia

born at Tilburg on 26 March 1945,
registered address in the municipal personal records database
16-3 Van Kinsbergenstraat, 1057 PP Amsterdam, and in fact residing at that address.

The court has deliberated in view of the investigation at the hearings of 23 March 2001 and 7 May 2001.

1. Charges

The defendant has been charged with that which is set forth in the summons as altered at the hearing of 23 March 2001. Copies of the summons and the demand for alteration of the charges have been attached to this judgment as Annexes 1 and 2. The altered charges are deemed to be inserted herein.

2. Preliminary questions

At the hearing Counsel for the defense asserted that the Public Prosecutor should be barred from prosecuting because he has acted in violation of Article 9 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) and that in doing so he is seriously violating the principles of proper criminal prosecution.

The court's considerations with respect to the defense brought by Counsel for the defense are as follows:

In the opinion of the Court, the question whether in this case the defendant can invoke freedom of religion, as it is protected by Article 9 of the ECHR, relates to the punishable nature of the acts with which the defendant is charged and not to whether the Public Prosecution Service should be allowed to prosecute.

The court therefore rejects this defense.

3. Appreciation of the evidence

3.1 The court deems it legally and conclusively proved that

in Amsterdam on 6 October 1999 the defendant deliberately transported approximately seventeen and a half liters of liquid containing DMT ingredients to a meeting of the "Santo Daime" church community and had had this liquid present in her home.

4 The evidence

The court bases its decision that the defendant did in fact commit the acts considered proved on the facts and circumstances incorporated in the evidence.

5 Punishable nature of the acts

The argument put forward by the defense as the most consequential with respect to the non-punishable nature of these acts is that the liquid containing DMT does not come under the provisions of the Opium Act, in spite of the fact that the DMT is mentioned in the Act and is included in List 1 of the Opium Act. The defense argued that plants or parts of plants which are not included in the list do not come under the Opium Act, even if those plants or parts of plants contain substances which are included in the list. This follows from the order of the Supreme Court of the Netherlands made on 29 November 1994, Dutch Court Reporter 1995/292 (Qat Order).

The defense has also asserted that in the order made on 18 November 1997, Dutch Court Reporter 1998/213 (Mushroom Order), the Supreme Court of the Netherlands wrongly considered that pursuant to the Opium Act, as interpreted in the light of the Convention on Psychotropic Substances (hereinafter also referred to as: the Convention), plants and parts of plants which have undergone "any form of processing" must be regarded as preparations.

The defense referred to the letter from Herbert Schaepe, Secretary of the Board of the United Nations International Narcotics Control Board, submitted by the Public Prosecutor, which includes the following passage:

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, therefor subject to any articles of the 1971 Convention."

The defense also referred to the interpretation of the Convention in the Commentary on the Convention on Psychotropic Substances, done at Vienna on 21 February 1971.

According to the defense, this implies that - contrary to the order made by the Supreme Court of the Netherlands, following the advocate general, in the Mushroom Order - infusions of plants or parts of plants which contain a substance on the list, if they are the result of a simple preparation, fall outside the scope of the Convention and therefore fall outside the scope of the Opium Act.

The court can leave open the question whether - contrary to the order of the Supreme Court of the Netherlands in the Mushroom Order - infusions which are the result of a simple preparation fall outside the scope of the Convention and whether this means that they also fall outside the scope of the Opium Act, since in the opinion of the court it cannot be held that the liquid in question, the ayahuasca, is the result of a simple preparation.

The report of expert De Wolff states that the ayahuasca is prepared by combining the leaves of Rainha (*Psychotria viridis*), which contain DMT, with Jagube (*Banisteriopsis caapi*), which serves as a source of MAO inhibitors. Without these inhibitors DMT has no effect if taken orally.

The ayahuasca is therefore a blend of infusions of different plants, in which those different plants are necessary in order to achieve the desired effect. There is therefore no question of a simple infusion of one plant containing substances included in List I of the Convention.

The contents of the above-mentioned letter from Herbert Schaepe cannot affect this conclusion, if only because it is not implied by the Convention that the interpretation of the Convention by the United Nations International Narcotics Control Board must be regarded as official and binding.

The Court therefore rejects this defense.

Counsel for the defense further takes the view that the defendant's actions are protected by Article 9 of the ECHR. With respect to this view she has advanced the following arguments:

On 6 October 1999 the defendant led the church community CEFLU Cristi-Céu da Santa Maria, hereinafter also referred to as the Santo Daime Church. For the historical and international background of this church, Counsel for the defense refers to the expert's report by the Brazilian anthropologist E.J. Baptista de Neves MacRay, employed at the University of Bahia in Brazil.

The tea which was given to the members of this church during its worship service, ayahuasca, contained the substance DMT, which is prohibited by virtue of Section 2 of the Opium Act. However, the use of ayahuasca is an integral part of the worship service of this church. The prohibition therefore constitutes an unlawful restriction of the defendant's religious freedom.

According to Counsel for the defense, the expert's reports which have been submitted, by experts including Dr R. Kranenborg, theologian and religious studies expert at the Vrije Universiteit of Amsterdam, Dr F.A.M. Snelders, historian at the Vrije Universiteit of Amsterdam, the letter from B.C. Labuschagne, lawyer and philosopher of law at the University of Leiden, and the report by the expert Professor Dr F.A. de Wolff, clinical chemist and toxicologist, provide sufficient grounds for this conclusion.

The court considers as follows:

Pursuant to Article 9, paragraph 2 of the ECHR, the freedom to practice one's religion can be subjected to no other restrictions than those which are provided for by law and are necessary in a democratic society in the interest of public safety, for the protection of public order, health or decency or for the protection of the rights and freedoms of others.

The defendant was arrested in a space which, as appears from the description made by the reporting officer, obviously served as a church. In this space, the reporting officer saw an altar at which two persons were pouring a brown liquid from jugs into small glasses and distributing them to people who were waiting. On the altar the reporting officer also found joints.

As evidenced by the report of police expert R. Jellema dated 15 October 1999, these 17.5 liters of brown liquid contained approximately 3 - 4 grams of DMT or N-N-dimethyltryptamine, a substance included in List 1, subsection C of the Opium Act. The cigarettes contained cannabis.

In the aforementioned report by the anthropologist MacRae it is stated that the Santo Daime religion originated in Brazil in about 1920 and that in it Indian and African influences were

combined with Christian values and ideas. New rituals were added to old customs such as drinking ayahuasca.

In accordance with the Articles of Association of the church community CEFLU Cristi-Céu da Santa Maria dating from 20 April 1995, of which the defendant was one of the founders, the objective of the church community is to practice and reflect upon the doctrine of the Santo Daime. The church community is affiliated with the Centro Eclético da Fluente Universal Raimundo Irineu Serra-CEFLURIS, whose headquarters are at Céu do Mapiá in Brazil. The objective of the community is based on that of the CEFLURIS and can also be more closely described as to examine, study and put into practice the Doctrine of Santo Daime and by means of its work and rituals to awaken the divine spark in mankind, with a view to integration with Divinity.

The historian Snelders concludes in his report, mentioned above, that the use of psychoactive substances, particularly hallucinogens, was an integral part of many pre-industrial cultures and that this use still takes place in syncretic religions which have arisen since the 19th century and have combined traditional usage with Christian religious ideas. The Santo Daime church can be placed in this history of the use of psychoactive substances.

The theologian and religious studies expert Kranenborg states in his report, mentioned above, that from the point of view of religious phenomenology the combination of hallucinogenic substances and religion is important in many religions. The use of entheogens always takes place communally, within a ritual framework. Ayahuasca is one of the most frequently used entheogens. Since the Santo Daime Church has chosen to use this substance as a method of procuring a religious experience, it is essential to religious life and religious practice and it can also be said that the Santo Daime Church cannot do without this substance.

On the basis of these expert's reports and the Articles of Association, the Court is of the opinion that the Amsterdam church CEFLU Cristi-Céu da Santa Maria must in fact be regarded as a church community. The doctrine professed must be regarded as a religious creed and the use of the tea, ayahuasca, or the Daime, being the most important sacrament in the worship of the Santo Daime church, must be regarded as an essential part of the religious life of the faithful. The defendant declared at the hearing that the Santo Daime church gives her support and strength and that the ayahuasca is used as a sacrament together with dancing and the singing of hymns. The defendant's conviction must therefore be regarded as a religion, which, together with the practice of the holy sacrament in which this religion is expressed, enjoys the protection of Article 9 of the ECHR.

By virtue of the Convention on Psychotropic Substances and the prohibition in Section 2 of the Opium Act and the occurrence of DMT on List 1 of that Act, DMT is a prohibited substance. The Public Prosecution Service has argued that the restriction of the defendant's right to practice her religion freely is justified for reasons of public health.

The Public Prosecution Service has not asserted that other purposes mentioned in Article 9 of the ECHR, such as public order or public decency, justify an infringement in this case. It is true that a statutory prohibition is involved which was made in the interest of a legitimate purpose, stated in the second paragraph of Article 9 of the ECHR, namely public health, but it is not sufficient for the court to establish that the Opium Act serves that legitimate purpose. Pursuant to court decisions made by the European Court of Human Rights, the court must assess in concrete terms whether in the present case public health does in fact justify a restriction of religious freedom.

In his expert's report - written at the request of the supervisory judge - Professor Dr F.A. de Wolff describes how unwelcome effects of a mild nature, such as nausea, but also more serious symptoms of toxicity may occur, for example a rise in blood pressure or an accelerated heart beat. He also discusses the interaction between substances in ayahuasca and those in medicines and foods. He is

of the opinion that a reliable picture of the possible risks involved in using ayahuasca is provided by the questionnaires about the health status of individual attendants made available to those attending the meetings, and the health notice distributed, which contains information about contraindications relating to the use of ayahuasca in combination with certain foods or medicines. According to the expert, the religious context ensures that the production of the ayahuasca and its use during religious meetings is strictly regulated. Moreover, consumption is linked to rituals and always takes place in the presence of others who are familiar with the effects.

On the basis of the above, the expert De Wolff concludes that the use of ayahuasca may involve health risks in individual cases, that the information provided by the Santo Daime church is in general correct and adequate and that the limited availability of ayahuasca and the strictly regulated circumstances in which its consumption takes place constitute protection against abuse. In view of this, the final conclusion of the report is that, especially considering the limited size of the Santo Daime church, it is not plausible, on the basis of extant scientific knowledge, that ayahuasca consumption forms a threat to public health. At the hearing De Wolff also stated with respect to the combination of ayahuasca and cannabis that the lack of scientific studies of the combined effect of these substances does not constitute a reason for altering the conclusions, since he took this into account in drawing up his report and there are insufficient indications that the conclusions of the report might not be valid.

In view of the insight provided by De Wolff's report into the composition of ayahuasca and the health risks attached to it, the court takes the view that drinking ayahuasca in the religious context of the Santo Daime church does not involve any appreciable risks to public health. It is true that in individual cases the substance DMT which is present in the Daime may constitute a health risk, but in the opinion of the court the information provided about this and the controlled use within the religious community constitute a sufficient safeguard against unacceptable health risks in those cases in which consumption of the tea is inadvisable.

The safeguards referred to by De Wolff, based on the religious context, are furthermore confirmed in the reports by Kranenborg and Snelders.

In addition, no concrete facts and circumstances have been put forward by the Public Prosecution Service on the basis of which it can be said that there is a realistic threat to public health attached to the ritual use of ayahuasca.

Inasmuch as it has been asserted that the defendant might have been expected to ask for permission on the grounds of Section 6 of the Opium Act, the Court observes that the defendant cannot be reproached with not having done so. Use as a sacrament is not included in the provisions of Section 7 of this Act, so that she cannot be eligible for permission.

In view of the above, the Court is of the opinion that in the defendant's case the statutory prohibition against possessing, supplying and distributing DMT, which is based on the Convention, and as a result of which she cannot receive the most important sacrament of her religion during the worship service, constitutes such a serious infringement of her religious freedom that this infringement cannot be regarded as being necessary in a democratic society.

Furthermore, in this case the interest of the defendant, namely that no infringement should be made of her right to religious freedom as guaranteed by the ECHR, must be weighed against the interest of the State, namely that it must fulfil its duty to prohibit DMT, a duty arising from the Convention on Psychotropic Substances. Considering the weight which must be attached to religious freedom and the circumstance that, as was considered above, there are no appreciable health risks involved in the ritual use of ayahuasca, the Court is of the opinion that in this case the

greater weight should be attached to the protection of religious freedom. The conclusion is that in this case Section 2 of the Opium Act should not apply.

The defendant will be acquitted from all further prosecution since in these circumstances the facts which have been proved do not constitute punishable offences.

6 Decision

The court declares it to be proved that the defendant committed the acts with which she was charged as stated hereinbefore under heading 3.

The court declares that any more or other charges against the defendant than those declared proved hereinbefore have not been proved and acquits the defendant thereof.

The court declares that the charges proved are not punishable and acquits the defendant from all further prosecution in respect thereto.

This judgment was passed by
G.H. Marcus
E.J. Weller and M.F. Wagner
in the presence of A.C. Hofstra
and pronounced at the public hearing of this court on 21 May 2001.

presiding judge,
judges,
court clerk,

[signature]

[signature]

[signature]

[certified to be a true copy
of the original
[initialled]
Court Clerk of the District Court
of Amsterdam]