IN THE KINGSTON CROWN COURT

R

v

SAUL SETTE

APPLICATION FOR STAY OF COUNT 1 ON THE INDICTMENT

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1. The defendant Saul Sette (hereafter SS) submits that count 1 on the indictment should be stayed on the ground that it would be unfair for him to be tried because:
   i. There is no evidence that the exhibit RMT/12 amounts to a 'preparation' containing mescaline for the purposes of Misuse of Drugs Act 1971 Schedule 2 Part I para. 5;
   ii. Further and in the alternative, there is legal uncertainty concerning whether dried sections of the Peruvian Torch cactus constitute a 'preparation' containing mescaline. The defendant relied on a communication from a Home Office representative to the effect that the drying of cacti for the purpose of preservation does not amount to preparation for the production of a controlled drug;
   iii. Further, to treat the possession of dried cacti as unlawful under the Misuse of Drugs Act conflicts with the policy of HM Revenue and Customs that its sale attracts liability to pay VAT.

THE LAW

Misuse of Drugs

2. The Misuse of Drugs Act 1971 was the fourth domestic statute enacted pursuant to the United Kingdom's international obligations contained in the Single Convention on Narcotic Drugs 1961. In February 1971 the U.K. was a party to the Convention on Psychotropic Substances. The MDA 1971 follows the categorisation of controlled drugs to be found in the conventions.

3. In Goodchild (1978) 1 W.L.R. 577 the House of Lords considered the following certified point of law of general public importance: *'whether on the true construction of the Misuse of Drugs Act 1971, a person in possession of some leaves and stalk only from the plant or plants of the genus cannabis may thereby be in possession of a cannabinol derivative naturally contained in those leaves, in contravention of section 5(1) of that Act.'*

4. Lord Diplock answered the certified question by stating: p.582: *'I should conclude, therefore, that prima facie a reference in Schedule 2 to a specific drug by its scientific name does not include a reference to any naturally occurring substance of which the specific drug is a constituent but from which it has not yet been separated.'* Further at p. 583: *'the offence of unlawful possession of any controlled drug described in Schedule 2 by its scientific name is not established by proof of possession of naturally occurring material of which the described drug is one of the constituents unseparated from the others.'*

5. In arriving at his decision concerning the construction of the MDA Lord Diplock relied on the principle that *'a man should not be gaoled on an ambiguity.'*

6. Viscount Dilhorne, in a concurring speech, observed that when Parliament intended that plants and parts of plants should come within the scope of the MDA, it made its intention manifest e.g by defining cannabis as meaning the flowering or fruiting tops and by the inclusion of coca leaf and poppy straw[1].

7. In Stevens (1981) Cr.L.R. 568 and Cunliffe (1986) Cr.L.R. 547 the C.A. considered appeals against conviction where the appellants had been convicted of offences in relation to their possession of dried magic mushrooms. By virtue of the decision in Goodchild it was not open to the prosecution to bring charges of simple possession of psilocybin, the proscribed active constituent of the mushrooms. They were, therefore, charged with offences of possession of a preparation containing psilocybin. In Stevens the mushrooms had been dried and reduced to a powder so as to be fit for consumption. In Cunliffe the mushrooms had been dried. In Stevens the C.A. held that, in the absence of

[1] The MDA followed the definitions in the Single Convention on Narcotic Drugs.

any statutory definition, the word 'preparation' had to be given its ordinary and natural meaning. In order for the mushrooms to be prepared they had to cease to be in their natural growing state and in some way altered by the hand of man *'to put them in a condition in which they could be used for human consumption.'*

8. In Cunliffe the C.A. followed Stevens and relied on the following definition of 'preparation' from the Oxford English Dictionary: *'The action of preparing, or condition of being prepared; making or getting ready...A preparatory act or proceeding; Things done to make ready for something...The action or special process of putting something into proper condition for use.'*

9. In Hodder and Matthews (1990) Cr.L.R. 261 the Divisional Court held that mushrooms which had been packaged and frozen did not constitute a 'preparation' because they would have to be defrosted before consumption, but that they did constitute a 'product' for the purpose of the schedule. In his judgment Roch L.J. observed:

> *'In the Goodchild case the cannabinol or cannabinol derivatives were not available until they had been extracted from the resin of the cannabis plant, whereas the hallucinatory drug psilocybin is available to a person who has picked magic mushrooms by his simply eating the fungi that he has picked. It may be that a distinction should be drawn between those instances in which a controlled drug occurs in the natural state in plants or fungi and cannot be used to produce hallucinations without being separated from the substance of which it is a constituent, and those cases in which a controlled drug occurs in a natural plant or fungus and can be used to produce hallucinations without being separated from the plant or fungus.'*

Article 7 and legal certainty

10. In Rimmington; Goldstein (2006) 1 A.C. 459 Lord Bingham reviewed the principles concerning the requirement for legal certainty both under the common law and under Article 7 of the ECHR. At para. 33, having cited an extensive passage from the judgment of the C.A. in Misra (2005) 1 Cr.App.R. 21, he stated: *'There are two guiding principles: noone should be punished*

under a law unless it is sufficiently clear and certain to him to enable him to know what conduct is forbidden before he does it; and noone should be punished for any act which was not clearly and ascertainably punishable when the act was done.'

11. If a criminal charge is founded on facts in circumstances where it is unclear if an offence has been committed in breach of the principle of legal certainty, then the indictment should be stayed because the case falls within the second of the two categories of abuse of process identified in Beckford (1996) 1 Cr.App.R. 94, that it would unfair for the defendant to be tried.

12. In three first instance decisions judges of the Crown Court have stayed proceedings against defendants charged with possession of magic mushrooms with intent to supply prior to the enactment of S.21 Drugs Act 2005, which added fungus of any kind containing psilocin or an ester of psilocin as a class A drug to part 1 of schedule 2 to the MDA. In each case the defendants were openly selling from shop premises magic mushrooms, which were packaged for sale and kept in fridges or cool bags. In each case the defendants had made inquiries of the authorities concerning the legality of the sales and there was evidence to the effect that customs treated the sale of the mushrooms as liable to attract VAT.

13. In Mardle and Evans Gloucester C.C. 14/12/04 the recorder stayed the *indictment principally on the ground that the Home Office guidance in respect* of what was allowed was *'a fudge'* and *'everyone is entitled to know what is and what is not a criminal offence'*. The recorder adopted Lord Diplock's expression in Goodchild that *'a man should not be jailed upon an ambiguity.'*

14. In Francis and Francis Canterbury C.C. 20/4/05 the judge placed reliance on the inconsistency between the treatment by customs of the sale of mushrooms as attracting VAT and thus a lawful activity and the prosecution based on the same conduct: *'I accept and agree with the submission that there is something fundamentally unfair in the state on the one hand charging revenue on the importation of these mushrooms and on the other hand prosecuting people for selling them.'* Further she held: *'What is ultimately fatal to this prosecution is*

that there was no clear exposition that unprepared mushrooms of this type were illegal.'

15. In Harrison, Ibrar and Page Birmingham C.C. 4/05/05 the judge based his decision on the uncertainty principle having found as a fact: *'I am abundantly satisfied that at the time material to this case the question of whether a person who packaged and/or chilled magic mushrooms for the purpose of supply thereby infringed the law by bringing his activities within para 5 of schedule 2 was unclear. The law lacked precision and accessibility.'*

The VAT regime

16. In Einberger v Hauptzollamt Freiburg ECJ 28/02/1984 and Vereniging Happy Family Rustenburgerstraat v Inspecteur der Omzetsbelasting ECJ 5/07/1988 the European Court of Justice held that no liability to turnover tax arises upon the unlawful supply of narcotic drugs. In the Happy Family case this principle was applied and extended to the supply of hemp in a coffee shop in Amsterdam, where the prosecuting authorities adopted a policy of not prosecuting small-scale hemp dealers.

SUBMISSIONS

Is Exhibit RMT/12 a 'preparation'?

17. SS submits:
    i. That the definition of 'preparation' adopted in the cases of Stevens and Cunliffe was per incuriam and should not be followed in the context of the facts of this case;
    ii. In any event, there is no evidence that RMT/12 is a 'preparation' applying the Stevens definition.

18. In Stevens and Cunliffe the C.A. decided that, because the word 'preparation' had not been defined in the MDA, then the court should define it as an ordinary English word. It appears that in neither case was the CA's attention directed to the definition of 'preparation' as it appears in the international instruments, which gave rise to the U.K.s domestic legislation. In Article 1 of the Single Convention on Narcotic Drugs 'preparation' is defined as *'a mixture, solid or liquid, containing a drug'*. In Article 1 (f) of the Convention on Psychotropic Substances 'preparation' is defined 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.'

19. Had these definitions been applied to the facts in Stevens and Cunliffe it is doubtful that the court would have ruled as it did in each case.

20. Further, the court in Cunliffe applied a definition from the O.E.D. which was not appropriate in the context of a drug. The OE.D. contains ten separate definitions of 'preparation'. No. 2, inter alia, states: '*...composition, manufacture (of a chemical, medicinal or other substance)*'. No. 6 states: '*A substance specially prepared, or made up for its appropriate use or application, e.g. as food or medicine, or in the arts or sciences.*' Applying these more apposite definitions, the simple act of drying cannot, without more, amount to a 'preparation'.

21. If, contrary to the above submission, the court decides that it is bound by the decision in Stevens, there is no evidence that RMT/12 was in a state in which it could be consumed, which is a necessary element of the Stevens definition as illustrated in Hodder and Matthews. The forensic scientist Clare Nixon describes the contents of RMT/12 as '*dried plant material*'. It was found at SS's address in sealed foil packages inside the delivery box from the supplier in Peru. The pros have served a statement re. the properties of mescaline from Paul Skett, a Reader in Pharmacology. At p.44 he states in general terms, without reference to the exhibit in this case: '*The raw plant material can be chewed or the purified extract taken orally as a liquid or in powder form, taken by injection or by "snorting"*.' It follows that the prosecution have served no evidence that the content of RMT/12 could be consumed as it is without some further preparation.

22. As Roch L.J. observed in Hodder, a distinction may need to be drawn between those naturally growing substances such as mushrooms, which can be consumed without preparation, and those which require some process of extraction. The Peruvian Torch cactus clearly falls into the latter category. In the circumstances the court should apply the law as formulated by Lord Diplock in Goodchild to the effect that the dried plants comprise naturally occurring material of which the controlled drug is one of the constituent

elements unseparated from the others. Taking this definition as the starting point, the cactus plant material would only become a 'preparation' once the constituent element, mescaline, had been separated in a way which made it consumable. There is no evidence that RMT/12 was in a consumable state and, therefore, no grounds on which to found a prosecution.

Legal certainty

23. SS had communicated with Richard Mullins of the Home Office Drug Legislation and Enforcement Unit. After arrest he produced this letter to the police. It contains the following statement: *'In itself drying in order to preserve for purely botanical/horticultural/herbarium purposes – "mere preservation" – does not in law amount to preparation for the production or a controlled drug. But I would expect any move on anyone's part beyond "mere preservation" to prepare the cactus/plant/fungus/ whatever for the unauthorised production of any controlled drug '*

24. This amounts to clear advice that the mere act of drying mescaline containing cacti does not in law constitute a preparation for the purposes of the criminal law. What is required is some act beyond mere preservation i.e. beyond drying the cacti. The fact that the person in possession of the cactus intends to sell it to someone whom he knows will extract mescaline for the purpose of consumption does not render him liable for the final product. His intention is irrelevant. The only question is whether the substance in his possession is a preparation containing mescaline. SS was entitled to rely on the advice of Mr. Mullins that it was not.

25. At the very least the letter from Richard Mullins demonstrates that the law in relation to dried cactus is in a state of uncertainty, such that it was impossible for SS, in common with other retailers, to ascertain whether what he was doing was proscribed by the criminal law. This point was graphically made D.S. Mark Taylor, the officer in the case, who was reported in the Streatham Guardian of 19/01/06 saying of the instant case: *' We might be setting a legal precedent here we are in new territory. '* It is inconsistent with the principle of legal certainty to bring criminal charges with a view to creating new law. Defendants should not be treated like guinea pigs.

Inconsistency with the approach of customs

26. SS will rely on the statement of Christopher Bovey, who runs an internet business trading in cacti and other products, including samples of dried Peruvian Torch cacti. He is registered for VAT and collects VAT on all sales. SS himself is not registered for VAT because his trade has not been of sufficient volume to require registration.

27. The inference from this is that HM Revenue and Customs do not consider the trade in mescaline containing cactus, or the dried parts thereof, to be illegal. If they did so consider then they had a duty not to collect VAT on their sale in accordance with the ECJ authorities to this effect.

28. It is submitted that the approach of HHJ Williams at Canterbury CC in the case of Francis should be followed to the effect that it is fundamentally unfair for the state on the one hand to charge revenue on a substance and on the other hand to bring a criminal prosecution in respect of the same substance. This is a principle of general application going to the question of public policy. The fact that SS does not himself pay VAT is irrelevant.

Conclusion

29. In the circumstances count 1 on the indictment should be stayed as an abuse of the process of the court.

Henry Blaxland Q.C.

Ben Cooper.

7th March 2007.