INDICTMENT T20060579

IN THE KINGSTON CROWN COURT

REGINA v. SAUL SETTE

JUDGEMENT OF RECORDER WOOD

1. On 12th and 13th March last, I heard an application on behalf of the Defendant Saul Sette that Count 1 of the indictment should be stayed as an abuse of process. I reserved judgement on the application. I was also asked by Mr Blaxland QC, his counsel, that I made a preliminary ruling on whether the substance in the Defendant's possession that is the subject matter of Count 1 could in law amount to a "preparation" within the meaning of the Misuse of Drugs Act 1971.

2. The Defendant faces an indictment containing three counts: Count 1 charges him with possessing 4.69 kilograms of a preparation containing mescaline, a Class A drug, with intent to supply. Count 2 is an offence of keeping a prohibited specimen for sale, namely a quantity of dried plant material- Echinopsis Peruviana. This is San Pedro cactus, colloquially known as Peruvian Torch. Count 3 charges him with offering a prohibited specimen for sale, namely prohibited cuttings of wild-grown specimens of Peruvian Torch.

3. On 11th January 2006 police raided an address in Garratt Lane, London SW18. The Defendant was present. A large number of cacti were seized. A cardboard box (exhibit RMT/12) contained a number of heat-sealed plastic bags within

which were silver foil bags containing dried plant material, namely Peruvian Torch. The plant material contains mescaline at a concentration of 0.8 per cent. Mescaline is a Class A controlled drug in Schedule 2, paragraph 1 of the Misuse of Drugs Act 1971 ("the 1971 Act").

4. The Crown accepts that possession of Peruvian Torch cactus and other plant materials containing controlled drugs are not *per se* illegal: see the speech of Lord Diplock in *DPP v. Goodchild* [1978] 1 WLR 578, HL at 582H and 583G. They assert that exhibit RMT/12 is in fact a "preparation or other product" of mescaline and thereby illegal: see Schedule 2, paragraph 5 of the 1971 Act.

5. It is submitted by the Defendant that the indictment should be stayed as an abuse of process on the ground that the case falls within the second of the two categories of abuse of process as identified in *Beckford* (1996) 1 Cr.App.R. 94, CA, namely that it would be unfair for the Defendant to be tried at all on Count 1. I remind myself that the power to stay proceedings should be used sparingly and only in exceptional cases and also that ignorance of the law is no defence.

6. The Defence submission is based on a lack of legal certainty of the relevant law. The Crown and Defence are agreed as to the relevant principles of law; they disagree as to its application to the facts of this case. The Crown says that the law here is clear and unambiguous. There was an extensive review of the requirement of legal certainty by Lord Bingham in *R. v. Rimmington; R. v. Goldstein* [2006] 1

AC 459, HL at [32]-[36]. In particular, at [33H]: "There are two guiding principles: no one should be punished under a law unless it is sufficiently clear and certain to enable him to know what conduct is forbidden before he does it; and no one should be punished for any act which was not clearly and ascertainably punishable when the act was done."

7. Both the Crown and the Defence have presented arguments as to the meaning of "preparation" and "product" in cases involving the possession of magic mushrooms: *R. v. Stevens* [1981] CrimLR 568, CA; *R. v. Cunliffe* [1986] CrimLR 547, CA; and *Hodder and Matthews v. DPP* [1990] CrimLR 261, DC.

8. The Defence have also referred to three first instance cases: *R. v. Mardle and Evans*, Gloucester Crown Court, 14 December 2004; *R. v. Francis and Francis*, Canterbury Crown Court, 20 April 2005; and *R. v. Harrison and others*. They also involved the possession and intended supply of magic mushrooms and in all three cases the trial judges stayed the proceedings due to lack of legal certainty for reasons similar to those advanced in this case. Those cases are of persuasive authority.

9. Neither party has sought to argue that either Article 7 of the European Convention of Human Rights or the European case law take matters any further. I agree.

10. I have considered the submissions, the skeleton arguments, the authorities cited, the various documentary exhibits referred to (including material from the internet and from the Defendant's website) and the two witnesses called by the Defence at the hearing itself.

11. In particular the Defence rely on letters (exhibit SS/2 at *xp.427*) to the Defendant from Richard Mullins who worked for the Home Office Drug Legislation and Enforcement Unit, and from Chris Edwards at the Direct Communications Unit of the Home Office regarding dried mescaline-containing cacti: see paragraph 7 of the Defence Advice on Representation. In SS/2, in the penultimate paragraph, Mr Mullins states: "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 of 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 they contain to be considered unlawful under the Misuse of Drugs Act 1971." I have also read a copy of an e-mail of 25 November 2005 sent by Mr Edwards to a Darryl Bickler, with whom the Defendant was in correspondence in early January 2006, in which Mr Edwards states: "Your e-mail has been passed to the Drug Legislation and Enforcement Unit and I have been asked to reply. Your comments about uncertainty over the legitimacy of a "preparation" and lack of legal precedent in the courts which strictly defines the said term are correct and as such there does appear to be some confusion over what traders are legally entitled

to do." Having set out the relevant paragraphs of the 1971 Act, he continues: "Our reading of this is that plant products such as the ones you refer to i.e. Peyote, San Pedro are, even though they contain substances which are active ingredients of Class A drugs, are not illegal **in their natural state**. There is a grey area over whether these plants become a preparation once they are dried. I am aware that pot-pourri cactus plants are quite popular and have previously had enquiries about whether it is lawful to sell such items. You are right in saying that most traders specify that such items are not for human consumption and I believe this is probably the reason for the status quo as the onus is then passed onto the customer as to what he or she then does with the purchase."

12. The effect of the letters, according to the Defence, is that they say that what has been done to the cacti in RMT/12 is "preservation" rather then "preparation". The Defence also rely on the fact that Her Majesty's Revenue and Customs levy VAT on other sellers of Peruvian Torch cacti- although not in fact on the Defendant because he was unregistered. They also rely on the evidence of Michael Jay and Christopher Bovey, given as part of the abuse of process application. I shall return to their evidence in paragraphs 14 and 15 below.

13. The Crown asserts that there is no ambiguity or uncertainty in the law- RMT/12 is clearly both a "preparation" and a "product" within the meaning of the words in the 1971 Act- that much is clear from the cases of *Stevens*, *Cunliffe* and *Hodder and Matthews*. Nor is there any ambiguity in the Mullins' letter. The payment of

VAT on sales is irrelevant to legality and gives no legal respectability to the Defendant's actions, in the absence of any specific inspection and approval by Customs with knowledge of the conduct.

14. Michael Jay gave evidence before me. He is an author, specialising in drugs. He gave evidence about the San Pedro cactus. In his view, the drying of the material – that resulted in RMT/12- was "preservation" not "preparation". He had not seen anything like RMT/12 before. Dried cactus is used in gardening centres. He said that the drying had taken it *back* a stage because RMT/12 is less easy to digest than the cactus material itself. One would need to re-hydrate the material, boil it for a day and repeatedly filter it. To extract the mescaline would require a succession of chemical solvents- "serious laboratory chemistry" in his words. He described the traditional Peruvian way of consuming the cactus and accepted that one could grind the shavings into a powder.

15. Christopher Bovey gave evidence. He runs an internet based company selling herbs and plants, including dried cacti imported from Peru in the form found in RMT/12. He sells bags of dried shavings of Peruvian Torch very similar to RMT/12, although with less in them. He had received a letter from Richard Mullins that was almost word for word SS/2. He pays VAT on Peruvian torch cacti. Most "headshops", as they are called, sell Peruvian Torch. He took the last sentence of SS/2 to mean boiling.

16. I find the Mullins' letter lacks clarity. On the one hand it could be read as warning the Defendant as to the illegality of his activity; on the other hand it could be construed as equating drying with preservation and, as Mr Blaxland submits, preservation is not preparation depending upon the supplier's intention. The last sentence can be read as giving comfort to the person who possesses no more than what is in RMT/12.the dried material in this case. It seems to me that there is a degree of uncertainty in the law which is not sufficiently clarified by the case law upon which the Crown relies.

17. Mr Jay alluded to section 21 of the Drugs Act 2005, which closed the magic mushroom "loophole" by including "Fungus (of any kind) which contains psilocin..." It appears that the legislators were aware of the fact that cacti are not legally controlled under the 1971 Act and have chosen not to include them in the same way.

18. In all the circumstances it is my view that the law is not sufficiently clear or certain. That, coupled with Her Majesty's Revenue and Customs' treatment of Peruvian cacti, just persuades me that it would be an abuse of the process for the Crown to be allowed to proceed on Count 1. Given my ruling I do not think it necessary at this stage to give any definitive ruling on whether there would be, at

the close of the Crown's case, sufficient evidence of "preparation" or "product" to go to the jury.

20th March 2007 Recorder N. Wood