

4. *Moonfish Case*

First instance

Also re LJN BD0860, Zwolle District Court, BD0860 07.976403-06, and
LJN BD0857, Zwolle District Court, 07.976404-06,

LJN BD0846, Zwolle District Court, 07.976405-06 Print judgement

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Section: Criminal

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Indication of content: human trafficking human smuggling tax-contribution fraud

Judgement

ZWOLLE - LELYSTAD DISTRICT COURT
Criminal division – Three-judge section

Public Prosecutor's Office no.: 07.976405-06

Judgement: 29 April 2008

Judgement in the case of:

the Public Prosecution Service

and

[Accused]

[date of birth]

[address]

The court hearing took place on 15 April 2008. The Defendant appeared, assisted by Counsel R.P.G. van der Weide, LL.M., of Amsterdam.

The Public Prosecutor, W.V. Gerretschien, LL.M., demanded, during the hearing, the following, with acquittal of count 4 of the indictment:

- that the Defendant be convicted on counts 1, 2, 3 and 5 of the indictment to a custodial sentence for the term of 24 months, of which 8 months to be suspended, with an operational period of two years.

- that the claim of the injured party be awarded, jointly and severally; on non-payment, 140 days imprisonment for non-payment, with the imposition of an order for damages as referred to in Article 36f of the Dutch Code of Criminal Procedure (Wetboek van Strafvordering).

INDICTMENT

The Defendant is charged with the following:

(insertion of the indictment as amended during the hearing on 15 April 2008)

EVIDENCE

Count 1.

The Defendant is charged in count 1 with – stated succinctly – recruiting, transporting, transferring, housing or receiving another person with the purpose of exploitation, and/or that he profited from this exploitation, as defined in Article 273f (1) preamble and sub 1 and 6 of the Dutch Criminal Code (Wetboek van Strafrecht) (CC).

The Court considers the following with respect to the evidence.

Pursuant to the Act of 9 December 2004 (which came into force on 1 January 2005), Article 273a CC was inserted in the Dutch Criminal Code, which article was renumbered as Article 273f CC from 1 September 2006. This article replaces Article 250a CC.

Article 250a CC was intended to make all forms of sexual exploitation a criminal offence. A characteristic of exploitation in this Article is the existence of coercion in the broad sense of the term or misrepresentation, according to the wording of Article 250a(1) (i): to coerce or induce a person to make him or herself available by misuse of the authority arising from an actual state of affairs or by misrepresentation, et cetera.

According to the Explanatory Memorandum (Parliamentary Papers 2003/2004, 29291, no.3) the statutory proposal (concerning Article 273a/273f, among others) arranges the implementation of 8 global legal instruments to suppress human trafficking, among other things, including the UN Protocol on human trafficking of 15 November 2000 on preventive suppression and punishment of trafficking in human beings and the Framework Decision of the Council of the European Union of 19 July 2002 on combating trafficking in human beings.

The definition of human trafficking given in Article 3 of the UN Protocol on human trafficking states – in brief: 'The recruitment, housing or receipt of persons by coercion, misuse of authority or misuse of a vulnerable position with the purpose of exploitation. Exploitation comprises at least forced labour or services'.

In their definition of human trafficking, Article 1 of the Framework Decision and Article 273f CC have both sought to follow the above definition of human trafficking as closely as possible.

According to the Explanatory Memorandum (page 16) the drafters of the above Article 250a(1) (i) have worded the article primarily with regard to exploitation. The description of human trafficking as defined above in the UN Protocol refers primarily to activities with regard to human trafficking. These activities are directed at achieving the aim of exploitation. It concerns a number of activities (such as recruitment, housing, etc.) coupled with means (coercion, abuse of power, etc.) and aimed at exploitation.

In the light of the above, the Court comes to the conclusion that, in judging the facts and

circumstances in the present case with a view to the question whether these fall within the scope of Article 273f CC as criminal offences, it must first be determined whether there have been acts (recruitment, housing or receipt) committed by means of coercion, or of one or more acts, or of the threat of one or more acts, or of misrepresentation or misuse of the authority arising from an actual state of affairs or of abuse of a vulnerable position. In this determination, the Court will restrict itself to the question – in brief – whether there has been abuse of a weaker/vulnerable position since neither the file nor the court hearing has indicated coercion, (the threat of) one or more acts or misrepresentation.

In the opinion of the Court, this would presuppose a certain initiative and pro-active activity on the part of the perpetrator(s) in the light of the above and the formulation of Article 273f CC, whereby intentional misuse would be made of the weaker/vulnerable position of the victims.

Once this can be determined, it must then be judged whether this took place with the object of exploitation.

It may be assumed that the Indians in questions were already in a vulnerable or weaker position, since they were residing illegally in the Netherlands.

Furthermore, the Court takes the following facts and circumstances as its starting point on the basis of the file and the court hearing:

- The persons named in count 1 of the indictment were residing illegally in the Netherlands, and for this reason were not allowed to work, while the Defendant and his two brothers were aware of this.
- They (or their family) had incurred large debts to pay for the journey from India to Europe.
- None of them spoke Dutch and they had no identification papers.
- They all worked in the factory of the Accused and his brothers, where they were employed in the production of tempeh and tofu.
- They generally worked six days a week, often for longer than 8 hours a day, and were paid a wage of €800 a month, with deduction of €100 rent a month, and no pay for overwork.
- The work they carried out can be classified as heavy according to Dutch standards.
- They were housed by the Defendant and his brothers in a house that belonged to one of them; generally there were eight people living there and some of them had to share a bed.
- They were transported to and from their work by the Defendant.
- They had no medical insurance.
- No tax or social insurance contributions were paid for them.

Under these circumstances, it can be established that the Defendant and/or one or more other persons took the initiative and acted purposefully by transporting, housing and receiving the illegal persons (in their living and employment situation), in doing so abusing the vulnerable position in which the illegal persons found themselves, with the ultimate aim of profiting, through their acts, from the recruitment of cheap labour for their factory.

The Court has also taken into consideration that the circumstance that these illegal persons very often offered themselves for work in the Sikh Temple in Amsterdam, so that it was not necessarily a question of active recruitment on the part of the Defendant and/or one or more other persons, does not alter the fact that under the circumstances described above the pro-active and purposeful conduct was such that it constituted abuse of a vulnerable position.

The question which must subsequently be answered is whether the Defendant (in collaboration with one or more others) is guilty of exploitation of the above Indians.

According to Article 273f (2), exploitation comprises at least forced or compulsory labour or services, slavery or practices comparable with slavery or servitude.

The Dutch National Rapporteur on Trafficking in Human Beings formulated a sharply defined criterion in her Fifth Report on Human Trafficking (Fifth Report of the National Rapporteur, The Hague, BNRM, 2007), on the basis of which abuses that constitute exploitation as referred to in Article 273f(2) CC can be distinguished from abuses that do not do so. The criterion established by the Bureau of the Rapporteur for qualifying conduct as exploitation or not is founded on at least one of the following practices:

- coercion, including (the threat of) physical or sexual violence or reporting illegal residence or labour, misuse of authority arising from the actual state of affairs or abuse of a vulnerable position;

- poor working terms and conditions, including unreasonable working hours, being underpaid, dangerous work without the necessary protection, but also the nature of the labour and services;
- multiple dependency, including working to pay off a debt and dependency on the same person for work and such things as housing and identification papers.

The Dutch National Rapporteur on Trafficking in Human Beings has summed up as follows: A situation constitutes exploitation within the meaning of Article 273f(2) CC, if at least one of these problems is a factor and the victim is not free or does not reasonably think there is the freedom to escape from the working situation.

The Court can agree entirely with the above criterion. Not lastly because, for want of Dutch case law, the Rapporteur has reverted to internationally accepted definitions as laid out or as derived from the ECHR (European Convention on Human Rights and Fundamental Freedoms), the Convention on Forced Labour of the ILO (International Labour Organisation), the European Framework Decision and the Palermo Protocol.

In the opinion of the Court, it may certainly be said that there was, in the present case, a socially undesirable situation and disrespectful conduct on the part of the Defendant and his brothers towards the illegal workers by allowing them to work long hours and long weeks, to perform heavy work and for a wage that was not in line with market rates, but that this does not automatically lead to the conclusion of an exploitative situation within the meaning of Article 273f CC.

For this, an excess would have to be established, such that there would be a violation of fundamental human rights. In the opinion of the Court, the above conditions are not sufficient to be able to arrive at this conclusion.

The Court has also taken into consideration the fact that the Indians had certainly incurred debts in connection with their coming to the Netherlands, but that these debts were not owed to the Defendant, so that it was not a matter of working to pay off a debt. Neither did the Defendants or his brothers have the identification documents of the Indians at their disposal. It cannot therefore be said that there was a labour relationship with such excesses, a relationship of multiple dependency or lack of freedom that the Indians had reasonably no other choice than to work for the company of the Defendant and his brothers.

On the basis of the above, the Court does not consider that there are grounds for establishing the purpose of exploitation, so that the charges under count 1 of the indictment cannot be declared proven lawfully and beyond a reasonable doubt. The Defendant must therefore be acquitted of this count.

Count 2

In count 2 of the indictment, the Defendant is charged with aiding and abetting, with others, a number of persons named in the indictment in obtaining residence in the Netherlands, while he knew that the residence of these persons was unlawful.

In the opinion of the Court, it is shown sufficiently by the evidence presented, namely: The statements of the persons named in count 2 of the indictment, the statements made by the Defendant before investigating officers and the statements of the two brothers of the Defendant, made before investigating officers, that the Defendant committed the offences he is charged with in the indictment.

Count 3

The Defendant is charged with giving, together with others, instructions or exercising effective control over the committing of punishable acts by a legal entity [name of company], as defined in Article 69 of the Dutch General Tax Act (Algemene wet inzake rijksbelastingen).

The available documents have made it clear to the Court that the Defendant, together with his brother [Co-accused], is registered as director of said legal entity. The Defendant, unlike his brother [Co-accused], was involved in the general and financial running of the legal entity. He signed the forms referred to in the indictment himself, as he said in his statements in the presence of investigating officers. The fact that the brother of the Defendant, [Co-accused], was in charge of the company and also arranged financial matters with the accountant [Name] does not alter the fact, in the opinion of the Court, that the Defendant played an important part in committing the acts he is charged with in the indictment. By unquestioningly accepting the information from his brother concerning the financial course of affairs, he has at least knowingly and wilfully accepted the probable likelihood that his conduct would constitute the criminal offences set out in the indictment.

This count also can therefore be declared proven.

Count 4

With the Public Prosecutor and the Defence, the Court is also of the opinion that the charges under count 4 cannot be proven lawfully and beyond a reasonable doubt. The Defendant is therefore acquitted of this count.

Count 5

The Defendant should also be acquitted of this count, being a member of a criminal organisation. The Court found that, although the documents in the file and the hearing in Court show that the Defendant and Co-accused were guilty of committing criminal offences together and in association, it has not been established that there was a structural and long term form of collaboration with fixed role allocation and strong hierarchical structure with the purpose of committing criminal offences.

PUNISHABILITY

The proven facts constitute:

Count 2:

Aiding and abetting another person, from profit motives, in obtaining residence in the Netherlands, while he knows that this residence is unlawful and while this act was committed in association by several persons, on several occasions, punishable in every case under Article 197a of the Dutch Criminal Code.

Count 3:

Wilfully submitting a tax return required by the Dutch tax law incompletely and incorrectly, which resulted in too little tax being levied, committed by a legal entity, while he exercised effective control over the wrongful conduct, committed on several occasions.

The Defendant is therefore subject to punishment since no facts and circumstances have been established that would exclude or rule out this punishability.

IMPOSITION OF PUNISHMENT OR ORDER

In the light of the character and gravity of the acts that have been declared proven and subject to punishment, of the circumstances whereby the Defendant has committed these and the personality of the Defendant, as has been evidenced by various matters during the court hearing, the Court deems that the following judgement is appropriate.

The Court deems in this case that a partly unsuspended custodial sentence is necessary because a less stringent settlement of the case would represent a failure to recognise the character and gravity of the acts that have been declared proven and subject to punishment, also in the light of the past record of the Defendant. The Court deems that no other special circumstances are present that would lead to a different judgement.

With regard to the punishment to be meted out, the Court has considered the following. Together and with others, the Defendant has made it possible for persons staying illegally in the Netherlands to stay in the Netherlands, which is in itself a serious offence that can cause damage to Dutch society and which also results in socially undesirable general and employment situations for the illegal persons involved, as set out in count 1. The Court holds it strongly against the Defendant that he and his co-perpetrators have caused these illegal residents to be in such an undesirable situation and have made them work under such poor working conditions: long working hours, six-day working weeks, having to share just one place to sleep, a wage of not more than €800 a month, no payment for overtime and no health insurance.

This is totally unacceptable according to Dutch standards.

In addition, the Defendant has enriched himself considerably through tax fraud.

The Court has also taken into consideration the fact that the Defendant is acquitted of three of the five charges in the indictment.

In its judgement, the Court has also taken into account the extract from the judicial records dated 18 March 2008, concerning the Defendant.

The imposition of the sentence or order has been based, apart from the statutory provisions already referred to, on Articles 10, 14a, 14b, 14c, 27, 47, 51, 57 and 91 of the Dutch Criminal Code.

Injured party

Since the Defendant is acquitted of count 1 of the indictment, the injured party's claim is not allowable.

RULING

Counts 1, 4 and 5 of the indictment have not been proven and the Defendant is acquitted of the charges in these counts.

As indicated above, counts 2 and 3 of the indictment are declared proven and these constitute criminal offences, as stated above. The Defendant is therefore liable to punishment on these counts.

The Court sentences the Defendant to a custodial sentence for the term of ten months.

The time that the Defendant has spent on remand and in pre-trial detention before the execution of this judgement will be deducted from the execution of the imposed custodial sentence.

A part of the custodial sentence, a term of four months, will not be executed, unless the Court orders this at a later date on the basis of the fact that the Defendant is guilty of a criminal offence before the end of the operational period of two years.

Declares that the claim of the injured party is not allowed.