

THE PEOPLE OF THE PHILIPPINES, PLAINTIFF AND APPELLANT VS. JOSEPH ELKANISH, DEFENDANT AND APPELLEE.

G .R. No. L-2666. September 26, 1951

Ponente: TUASON, J.

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TUASON, J.:

The defendant was a member of the crew of the S. S. "Washington Mail," of American registry, on which 65 large boxes of blasting caps were found and seized by the authorities while it was anchored inside the breakwater off Manila. The ownership of the explosives being imputed to the accused, two separate informations were filed against him on the same date, one charging illegal importation of the articles under section 2702 of the Revised Administrative Code, and the other, illegal possession of the same articles under Section 1 of Act No. 3023.

Having been arraigned and entered the plea of not guilty on the information for illegal possession, the accused afterward moved to quash the information for illegal importation, on the grounds (1) that blasting caps are not lawful objects of commerce and hence not embraced by section 2702 of the Revised Administrative Code, and (2) that, in any event, prosecution for importation is barred by the prosecution for illegal possession. Without touching the first ground, His Honor, Judge Potenciano Pecson of the Court of First Instance of Manila, dismissed the information on the second.

This appeal, by the City Fiscal, is from that order. Parenthetically, it should be stated that since the appeal was taken, the other case has been tried and the defendant acquitted.

We will follow Judge Pecson's example and confine this decision to a discussion of the question on which the information was dismissed.

There are "hopeless conflicts" in the judicial decisions on the question of former jeopardy; apparent disharmony exists even in decisions of the same court and, it would seem on the surface, in the decisions of this Court. The diversity arose in large measure from the differences¹ in the transactions involved and in the provisions of the statutes, from the application of the general principles on the facts, and from the circumstance that "the tests commonly adopted are by no means infallible." (22 C. J. S278) The nature then of the deed or deeds alleged in the two indictments and their relations to each other and to the statute concerned, must constantly be held in view if one is not to be misled by the adjudicated cases.

Section 9 of Rule 113 of the Rules of Court reads:

"When a defendant shall have been convicted or acquitted, or the case against him dismissed or otherwise terminated without the express consent of the defendant, by a court of competent jurisdiction, upon a valid complaint or information or other formal charge sufficient in form and substance to sustain a conviction, and after the defendant had pleaded to the charge, the conviction or acquittal of the defendant or the dismissal of the case shall be a bar to another prosecution for the offense charged, or for any attempt to commit the same or frustration thereof, or for any offense which necessarily includes or is necessarily included in the offense charged in the former complaint or information."

With reference to the importation and possession of blasting caps, it seems plain beyond argument that the latter is inherent in the former so as to make them juridically identical. There can hardly be importation without possession. When one brings something or causes something to be brought into the country, he necessarily has the possession of it. The possession ensuing from the importation may not be actual, but legal or constructive, but whatever its character, the importer, in our opinion, is a possessor in the juristic sense and he is liable to criminal prosecution. If he parts with the ownership or interest in the article before it reaches Philippine territory, he is neither an importer nor a possessor within the legal meaning of the term, and he is not subject to prosecution for either offense under the Philippine Laws. The owner of the merchandise at the time it enters Philippine waters is its importer and possessor. He who puts merchandise on board a vessel and alienates the title thereto while it is in transit does not incur criminal liability. Possession or ownership of a prohibited article on a foreign vessel on the high seas outside the jurisdiction of the Philippines does not constitute a crime triable by the courts of this country. (*U. S. vs. Look Chaw*, 18 Phil., 573) Of the reported cases, *U. S. vs. Lim Suco*, 11 Phil., 484 and *U. S. vs. Poh Chi*, 20 Phil., 140, bear the closest resemblance to the case at bar.

In *U. S. vs. Lim Suco*, the defendant had been convicted for smoking opium in a pipe. He was afterwards prosecuted for having a pipe in his possession. It was held that "the possession of which he is charged in the second complaint was the same possession which he necessarily had in committing the offense specified in the first, and therefore he could not be again convicted for having the pipe in his possession." The Court said that "when a person has been tried and convicted for a crime which has various incidents included in it, he can not be a second time tried for one of those incidents without being twice put in jeopardy for the same offense." (See also the cases cited.)

In *U. S. vs. Poh Chi*, the Court held that it was not the intention of the legislature to have separate complaints filed against a person found in the illegal possession of opium and a pipe for smoking the same—one for illegal possession of the opium and another for the possession of the pipe.

When the above cases were decided, the law in force on the subject was General Orders No. 58, Sections 19-30. If there is any difference between that law and Section 9 of Rule 113 of the Rules of Court, it is that the latter is more liberal, whereas by General Orders No. 58 there was jeopardy when the offense charged in the second information or indictment is necessarily included in the first complaint or information, the Rules of Court operates both ways, barring a second indictment, which charges an offense which "necessarily includes or is necessarily included in the offense charged in the former complaint or information."

Penal statutes, substantive and remedial or procedural, are, by the consecrated rule, construed strictly, or liberally in favor of accused. The fact that the protection against being twice put in jeopardy for the same offense is not only a legislative creation but secured by the Constitution, impresses with a command such construction as would bring the statute into harmony with the spirit of the fundamental law. As this Court, through Mr. Justice Moreland, has said in *U. S. vs. Gustilo*, 19 Phil., 208.—

"We are confident that that portion of the Philippine Bill embodying the principle that no person shall be twice put in jeopardy of punishment of the same offense should, in accordance with its letter and spirit, be made to cover as nearly as possible every result which flows from a single criminal act impelled by a single criminal intent. The fact should not be lost sight of that it is the injury to the public which a criminal action seeks to redress, and by such redress to prevent its repetition, and not the injury to individuals. In so far as a single criminal act, impelled by a single criminal intent, in other words, one volition, is divided into separate crimes and punished accordingly, just so far are the spirit of the Philippine Bill and the provisions of article 89 of the Penal Code violated."

This doctrine was reiterated in *U. S. vs. Poh Chi*, *supra*.

In our case, there is no denying that importation and possession represent only one criminal intent, one volition; the design was to sell or dispose of the blasting caps for profit, the importation and possession being no more than means to accomplish that purpose, the media between the accused and the ultimate objective. Importation and possession, at least in this particular case, played the same auxiliary role with reference to the object pursued. That, it should be borne in mind, does not go exactly for smoking opium and possession of a pipe, the latter of which was considered merged in smoking in the cases above cited. For smoking is an end in itself; and while pipe is indispensable and therefore a means for smoking, possession of pipe may have a purpose for its owner other than selling it or smoking with it himself. He can allow others to use it for compensation or keep it as part of an equipment for running an opium den. In other words, possession of an opium pipe may envisage broader objectives than possession and importation of blasting caps.

The appealed order is affirmed without costs.

Bengzon, Padilla, Reyes, and Jugo JJ., concur.

Paras, C. J., concurs in the result.

DISSENTING

FERIA, J.,:

I dissent from the decision of the majority.

The ownership of the 65 large boxes of blasting caps found and seized by the authorities on board the S.S. "Washington Mail", of American registry, while it was anchored inside the breakwaters of Manila, was imputed to the accused who was a member of the crew of said steamship. The accused was charged in one case with the offense of illegal possession of the said blasting caps under section 1 of Act No. 3023, and in the other with illegal importation of the same article under Section 2702 of the Administrative Code.

The defendant pleaded not guilty on the information for illegal possession of blasting caps, and filed a motion to quash the information for illegal importation thereof on the ground (1) that the facts charged in the information do not constitute an offense, and (2) "assuming that they constitute the crime charged, it is a second jeopardy for the same offense" of illegal possession of the same article charged in the other case pending before the same court. The Court of First Instance of Manila dismissed the information on the ground that "it appearing that the accused is charged in Criminal Case No. 8080 of illegal possession of explosives, arising out of the same act, * * * the second ground is well taken." The City Fiscal appealed from the order dismissing the information.

We are of the opinion and so hold that the lower court erred in dismissing the information for illegal importation against the defendant.

Section 2, Rule 113 of the Rules of Court provides as ground for a motion to quash "that the defendant has been previously convicted or in jeopardy of being convicted, or acquitted of the offense charged." But this is essentially different from the erroneous legal conclusion that "it is a second jeopardy for the same offense" alleged as a ground in the motion to quash, for according to the facts required to be alleged in said motion by section 5 of Rule 113, said second jeopardy consists in the prosecution of the defendant for the same offense with which he is being charged in another action still pending in the court. Different, because in order that a defendant may successfully allege former jeopardy, it is necessary that he had previously been (1) convicted or (2) acquitted, or (3) in jeopardy of being convicted of the offense charged, that is, that the former case against him for the same offense "has been dismissed or otherwise terminated without his express consent by a court of competent jurisdiction,

upon a valid complaint or information, and after the defendant has pleaded to the charge." (See 2 (8) and section 9, Rule 113, of the Rules of Court.)

Section 9 of Rule 113 of the Rules of Court was taken from the provisions of General Orders No. 58 on jeopardy, and from the doctrines laid down in the decisions of this court as well as those of the courts of last resort in the United States, which did not legislate but only construed and applied the said principle. There is no substantial difference between the provisions of General Orders No. 58 on jeopardy and those of section 9 of Rule 113, in so far as the identity of offenses charged in the actual and previous prosecution. Section 9 of Rule 113 can not be more or less liberal, for the defense of jeopardy is a substantive right, which this Supreme Court cannot change or modify in the exercise of the power conferred upon it by the Philippine Constitution to promulgate "rules concerning pleading, practice and procedure in all courts" which "shall not diminish, increase, or modify substantial rights." There is no substantial difference, because, although according to the former there is identity of offenses when the offense charged in the second complaint or information is necessarily included in the previous complaint or information, and section 9, Rule 113 of the Rules of Court provides that there is identity when the offense presently charged necessarily includes the offense charged in the former complaint or information, the defense of jeopardy is not enlarged thereby. The said provisions of section 9 of Rule 113 were adopted only for as a better test for determining the identity of offenses. Because when the offense charged in the second or subsequent complaint or information necessarily includes the one charged in the former, the defendant will be in danger of being convicted, not only of the offense charged, but of the offense necessarily included therein and charged in the former information.

The pendency of two criminal prosecutions against a person charged with one and the same offense cannot be considered as the same as, or equivalent to, the ground that "the defendant has been previously convicted or in jeopardy of being convicted, or acquitted of the offense charged," for the simple reason that he has not yet, at that stage of the proceeding, been previously convicted or acquitted of the offense charged, or the case against him dismissed without the express consent of the defendant in one of the two prosecutions'. In order that a defendant may invoke former conviction or acquittal or former jeopardy, it is necessary that he had previously "been convicted or acquitted or the case against him dismissed or otherwise terminated without the express consent of the defendant by a court of competent jurisdiction, upon a valid complaint or information or other formal charge sufficient in form and substance to sustain a conviction, and after the defendant has pleaded to the charge." Only after one of the criminal actions or prosecutions has been decided by judgment of conviction or acquitted, or dismissed or otherwise terminated without the express consent of the defendant under the terms and condition above set forth, may the defendant successfully set up former jeopardy as a ground for dismissal of or defense against the other prosecution or criminal action.

Besides, according to the decisions of this Court hereinafter quoted the offense of illegal possession of opium, and of blasting caps for that matter, is not committed until after the opium has been landed from a vessel upon the Philippine soil, and then and only then would the Philippine court have jurisdiction over the offense. Therefore the pendency of the case for illegal possession did not and could not have placed the defendant in jeopardy of being convicted of that offense, because as the blasting caps were seized on board the S. S. "Washington Mail" while it was anchored inside the breakwaters of Manila, the information for illegal possession was not and could not be valid and sufficient, and the Court of First Instance of Manila did not have jurisdiction over the said offense.

Furthermore and principally, because the illegal importation of blasting caps in the present case is obviously an offense different from illegal possession of the same article, and one of them does not necessarily include or is not necessarily included in the other, even assuming for argument's sake that the blasting caps were landed by the

defendant upon Philippine soil. Because, the illegal importation is complete or consummated the moment the article imported is brought or enters the territorial waters of the country, "before entry of the custom house;" while illegal possession of the same article is not committed until after it has been landed from the vessel upon the Philippine soil, according to uniform rulings of this Court in cases of illegal importation and illegal possession of opium, which are applicable by analogy to importation and illegal possession of blasting caps in the present case.

In the case of *U. S. vs. Look Chaw*, 18 Phil., 573, quoted with approval in *U. S. vs. Ah Sing*, 36 Phil., 978, 980, and in *People vs. WongCheng*, 46 Phil., 729, 732, we held that the mere possession of opium aboard a foreign vessel in transit or in any other ports is not considered as a public offense triable by our own courts, but it would only constitute illegal possession of opium in violation of the Opium law when it is landed from a vessel upon Philippine soil, thus committing an open violation of the laws of the land; and only then would the court of the Philippines established in the said place have competent jurisdiction over the offense in the absence of an agreement under an international treaty. In said case of *U. S. vs. Look Chaw* this Court held:

"Although the mere possession of an article of prohibited use in the Philippine Islands, aboard a foreign vessel in transit, in any local port, does not, as a general rule, constitute a crime triable by the courts of the Islands, such vessel being considered as an extension of its own nationality, the same rule does not apply when the article, the use of which is prohibited in the Islands, is landed from the vessel upon Philippine soil; in such a case an open violation of the laws of the land is committed with respect to which, as it is a violation of the penal law in force at the place of the commission of the crime, no court other than that established in the said place has jurisdiction of the offense, in the absence of an agreement under an international treaty."

As the blasting caps were found on board the S. S. "Washington Mail" of American registry in transit and seized by the Philippine authorities while the steamship was anchored inside the breakwater of Manila, no offense of illegal possession of said article was committed in violation of section 1 of Act No. 3028, and besides no court of the Philippines has jurisdiction to try it.

But the illegal importation of blasting caps was consummated or completed the moment the S. S. Washington Mail entered the Philippine waters or the article brought into the jurisdictional waters of the country with the intent to import it. In the case of *United States vs. Chu Loy and Lee Kam*, 37 Phil., 510, 512, this Supreme Court held:

"The rule, that the importation of merchandise for the purpose of the revenue department of the Government as well as for the other purposes is complete the moment the vessel enters the waters of the country, is so well established that the citation of authorities to support it seems almost unnecessary. (*U. S. vs. Look Chaw*, 18 Phil. Rep., 573; *The Mary*, 16 Fed. Cases, 932; *U. S. vs. Lyraan*, 26 Fed. Cases, 1024; *Perots vs. U. S.*, 19 Fed. Cases, 258; *U. S. vs. Jose*, 34 Phil., Eep. 840; *U. S. vs. Ah Sing*, 36 Phil. Rep., 978.)

"However well that rule may be established by eminent authorities, it is necessary limited in its scope of operation by another rule that is equally well established, and that is that the bringing of merchandise into the jurisdictional waters of the country must be with the intent to import it. * * *"

In *United States vs. Ah Sing*, 36 Phil., 978, 981, we held the following:

"* * * The Federal Courts of the United States have held that the mere act of going into a port, without breaking bulk, is *prima facie* evidence of importation. (*The Mary* [U. S.], 16 Fed. Cas., 932, 933.) And again, the importation is not the making entry of goods at the custom house, but merely the bringing them into port; and the importation is complete before entry of the Custom House. (*U. S. vs. Lyman* [U. S.], 26 Fed. Cas., 1024, 1028; *Perots vs. U. S.*, 19 Fed. Cas., 25S.) As applied to the Opium Law, was expressly held that any person unlawfully imports or brings any prohibited drug into the Philippine Islands, when the prohibited drug is found under this person's control on a vessel which has come direct from a foreign country and is within the

jurisdictional limits of the Philippine Islands. In such case, a person is guilty of illegal importation of the drug unless contrary circumstances exist or the defense proves otherwise. * * *

Wherefore we are of the opinion that the order appealed from should be reversed and the case is remanded to the lower court for further proceedings.

Pablo, J., concurs.

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