

## THE UNITED STATES, PLAINTIFF AND APPELLEE, VS. MARCELO JOSE ET AL., DEFENDANTS AND APPELLANTS.

*G.R. No. 11737. August 26, 1916*

Ponente: MORELAND, J.

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### MORELAND, J.:

The information in this case reads as follows:

"That on or about the 16th day of May, 1915, in the naval reservation of Olongapo, in the municipality of Subic, Province of Zambales, Philippine Islands, and within the jurisdiction of this court, the said accused Marcelo Jose, Bonifacio Leyva, Rafael de la Rosa, and Tan Bo, voluntarily, illegally, and criminally, and without authority so to do, imported into the Philippine Islands 15 kilos of opium."

The charge was dismissed as to Bonifacio Leyva who was used as a witness for the Government; while the accused Rafael de la Rosa pleaded guilty and was duly sentenced. Marcelo Jose and Tan Bo pleaded not guilty and were duly tried, convicted, and sentenced. They both appealed.

Briefs have been filed in this court by counsel for appellants covering every possible aspect of the case and raising every point which by any possibility might serve them in their defense. We do not find it necessary to discuss all the points raised, although many of them are very important, for the reason that we find ourselves in entire agreement with counsel with regard to one question the resolution of which must be followed by a judgment of acquittal.

It appears in this case that, in obedience to the instructions of Captain Hawkins, head of the customs secret service, who had received information that the steamship Abarenda sailing from Shanghai bound to Olongapo carried opium consigned to one Marcelo Jose residing in Olongapo, three secret service agents, Scott, Samson, and Balmes, went to Olongapo for the purpose of seizing the drug as soon as it should be discharged and delivered to Marcelo Jose. They arrived at Olongapo on the 14th of May, 1915, and there awaited the arrival of the Abarenda which anchored in Subic Bay on the 15th. They kept a constant watch on the ship, carefully noting the persons and craft which left it for the shore. Their watch was especially vigilant during the night. About 10 o'clock of the night of the 16th of May, while Samson and Balmes were hidden near a lumber store located at 218 Draper Street, owned by Marcelo Jose and operated with the assistance of his superintendent, Tan Bo, they observed a banca coming toward the shore from the steamship Abarenda with the evident intention of landing near the lumber store referred to. It showed no lights and was driven by two men. The banca landed on the sand and one of its occupants disembarked, carrying with him a bundle of considerable size, and immediately started toward the lumber establishment of Marcelo Jose. They followed him; and, while Balmes remained in a place close to the store from which he was able to see the person who remained in the banca and still be always within reach of his companion's voice, Samson followed the person carrying the bundle and saw him disappear in Jose's store. He followed him inside and there saw the accused, Tan Bo, in the act of opening the bundle which had been delivered to him by the person who carried it from the banca. The latter had disappeared before Samson's entry, going out of another door of the store without the latter being able to detain him. Thereupon he called Balmes and

they observed Tan Bo while he opened the bundle. They saw that it was a sack containing a number of cans of opium; and, believing that more opium might be hidden on the premises, they began a search of the store. While thus engaged they heard the sound of footsteps in the back part of the building and, on investigating, were confronted with the accused, Rafael de la Rosa. Samson immediately arrested him and, on searching him, found in his pockets and about his clothes ten cans of opium. They also arrested Tan Bo; and, on asking him who the owner of the opium was, he stated that it belonged to Marcelo Jose and, at his request, accompanied Samson to another store of Jose at No. 200 Harris Street. The officer, accompanied by Jose and de la Rosa, then returned to the lumber store where Jose, noting that the two secret service men were Filipinos, took Samson apart and offered him P800 if he would return the opium and say nothing about it. He accompanied this request by delivering to Samson P400. Samson took the money and turned it over to his companion' Balmes for safekeeping and ordered him to call a policeman. He also told Jose that he was to consider himself under a second arrest for attempting to bribe a public official. Shortly afterwards Scott arrived in company with a local policeman and Marcelo Jose, Tan Bo, De la Rosa, and two other Chinamen and a woman who was found sleeping in the store were taken to jail.

An examination of the record discloses that the prosecution has failed to prove that the boat from which the opium in question was taken arrived at the port of Olongapo from a foreign country with the opium on board. The only evidence on that subject in the record is that given by C. C. Riner. He testified that he was a lieutenant of marines of the United States Navy, and intelligence officer of the Naval Reservation at Olongapo. His testimony, as it appears in the record, is as follows:

"Q. As intelligence officer of Olongapo, do you know what day the Government steamship Abarenda arrived there and for what length of time it remained and from whence it came?

"Mr. DELGADO. I object on the ground that it does not appear that it was his duty as intelligence officer to be there and keep watch.

"Court. The question is allowed, striking out only the first words 'as intelligence officer.'

"Mr. DELGADO. Exception.

"A. Yes, sir; the Abarenda arrived at Olongapo the 15th day of May, 1915, from Shanghai, China, and departed for Cavite the 5th of June 1915.

"Q. Who is the commander of the Olongapo Naval Reserve?—A. Captain Benjamin Tappan of the United States Navy.

"The PROSECUTING ATTORNEY. I desire to offer as a part of the evidence of the prosecution a telegram which I have received from Commander Tappan regarding the date of the arrival of the steamship Abarenda and from whence it came and when it sailed.

"Mr. DELGADO. We object to this evidence because it is not the best proof.

"Court. The objection is sustained.

"FISCAL. Exception.

"Q. How do you come to know that the steamship Abarenda came from Shanghai to Olongapo this year?—A. Being one of the officials of the marine infantry I am also an official of the naval marine; the commander is my superior and he informed me officially that the Abarenda would arrived on such a day.

"Mr. DELGADO. We move to strike out the declaration of the witness on the ground that it is hearsay.

"Court. Motion denied.

"Mr. DELGADO. Exception.

"A. Moreover, I knew personally that the Abarenda arrived and I was on board of the vessel several times before she sailed from Olongapo and the commander informed me also that it sailed from Shanghai and Captain John also informed me of the same thing.

"Mr. DELGADO. I make the same motion to strike out on the ground that the evidence is hearsay.

"COURT. That information with regard to the port of departure of the steamship Abarenda which you received from your commander was given to you in your official capacity?—A. Yes, sir.

"Court. The objection is overruled.

"Mr. Delgado. Exception."

This is all the evidence there is in the record tending to show that the Abarenda came from a foreign port. The witness Lieutenant Riner, as appears, had no personal knowledge of the fact that the Abarenda sailed from Shanghai destined for Olongapo carrying the opium in question. He frankly says that all he knew about the port of departure of the steamship and of the time it arrived at Olongapo came, in the first place, from a statement made to him by the commander of the naval reserve and, in the second place, from the same sort of statement by the captain of the steamship itself. Such evidence is hearsay and is not competent to prove a material fact in a criminal case. The introduction of the evidence was opposed by counsel for the defense on the ground that it was hearsay and incompetent and an exception was taken to the order overruling the objection. Although the evidence is in the record it was admitted improperly and can serve no purpose in this case. (Sec. 276, Cod. Civ. Proc.)

There can be no question that, unless a ship on which opium is alleged to have been illegally imported comes from a foreign country, there is no importation. If the ship came to Olongapo from Zamboanga, for example, the charge that opium was illegally imported on her into the port of Olongapo, i. e., into the Philippine Islands, could not be sustained no matter how much opium she had on board or how much was discharged. In order to establish the crime of importation as defined by the Opium Law, it must be shown that the vessel from which the opium is landed or on which it arrived in Philippine waters came from a foreign port. Section 4 of Act No. 2381 provides that:

"Any person who shall unlawfully import or bring any prohibited drug into the Philippine Islands, or assist in so doing, shall be punished \* \* \*."

It is clear that a breach of this provision involves the bringing of opium into the Philippine Islands from a foreign country. Indeed, it is a prime essential of the crime defined by that section. Without it, no crime under that section can be established.

This failure of proof makes it unnecessary to discuss the other questions raised.

Counsel for neither of the parties to this action have discussed the question whether, in case the charge of illegal importation fails, the accused may still be convicted, under the information, of the crime of illegal possession of opium. We, therefore, have not had the aid of discussion of this proposition; but, believing that it is a question which might fairly be raised in the event of an acquittal on the charge of illegal importation, we have taken it up and decided it. Section 29 of the Code of Criminal Procedure provides that:

"The court may find the defendant guilty of any offense, or of any frustrated or attempted offense, the commission of which is necessarily included in the charge in the complaint or information."

As will be seen from this provision, to convict of an offense included in the charge in the information it is not sufficient that the crime may be included, but it must necessarily be included. While, in the case before us, the possession of the opium by the appellants was proved beyond question and they might have been convicted of that offense if they have been charged therewith, nevertheless, such possession was not an essential element of the crime of illegal importation and was not necessarily included therein. The importation was complete, to say the least, when the ship carrying it anchored in Subic Bay. It was not necessary that the opium be discharged or that it be taken from the ship. It was sufficient that the opium was brought into the waters of the Philippine Islands on a boat destined for a Philippine port and which subsequently anchored in a port of the Philippine Islands with intent to discharge its cargo. That being the case it is clear that possession, either actual or constructive, is not a necessary element of the crime of illegal importation nor is it necessarily included therein. Therefore, in acquitting the appellants of the charge of illegal importation, we cannot legally convict them of the crime of illegal possession.

The judgment of conviction is reversed and the accused acquitted, costs de officio. So ordered.

Torres and Araullo, JJ., concur.

Trent, J., concurs in the result.

Johnson, J., dissents.

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