

**THE UNITED STATES, PLAINTIFF AND APPELLEE, VS. CHAN TOCO,
DEFENDANT AND APPELLANT,***G.R. No. 3851. December 17, 1908*

Ponente: CARSON, J.

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The accused in this case was charged with an infraction of section 4 of Act No. 1461 of the Philippine Commission, in that on the 23d day of October, 1906, he smoked opium in the store of a Chinaman named Liangco, in the municipality of Santo Niño, in the Province of Samar, without being duly registered, and without having secured a certificate to that effect, as provided in section 4 of the Act. The evidence of record fully sustains the findings of the trial court, and establishes the guilt of the accused beyond a reasonable doubt, and we find no error in the proceedings prejudicial to the rights of the appellant.

Counsel for the accused demurred to the information on the ground that it failed to allege that the use of opium had not been prescribed as a medicine by a duly licensed and practicing physician; and in support of his contention that the demurrer filed in the court below was improperly overruled, counsel for the appellant insists that the statutory offense denned in section 4 of Act No. 1461, of which the appellant was convicted, was not sufficiently alleged in the information, and a formidable array of authorities have been cited holding that, where the enacting clause in a statute describes an offense with certain exceptions, the exceptions should be negative in the indictment, complaint, or information.

Section 4 of Act No. 1461 is as follows :

"(a) Except when prescribed as a medicine by a duly licensed and practicing physician, it shall be unlawful for any person to smoke, chew, swallow, inject, or otherwise consume or use opium in any of its forms unless such person has been duly registered as provided in section two hereof and has secured the certificate therein prescribed. Except when prescribed as a medicine by a duly licensed and practicing physician, no registered confirmed user of opium shall smoke, chew, swallow, inject, or otherwise use or consume opium except in his own residence.

"(b) Any person violating the provisions of this section shall be punished by a fine not exceeding two hundred pesos, or by imprisonment for a period not exceeding six months, or by both such fine and imprisonment, in the discretion of the court."

Bishop, in his work on Criminal Procedure (Vol. I, paragraphs 631-645), discusses the question of negating exceptions at length. He says that the older writers, with whom we may now class Chitty, present the distinctions without the nicer shades discoverable in the later decisions, Chitty being of the opinion that, where this excusing matter stands in clauses separate from the main provision, "it is not necessary to state in the indictment that the defendant does not come within the exceptions, or to negative the provisos it contains. Nor is it even necessary to allege that he is not within the benefit of its provisos, though the purview should expressly notice them, as by saying that none shall do the act prohibited, except in the cases thereafter excepted. For all these are matters of

defense, which the prosecutor need not anticipate, but which are more properly to come from the prisoner." But Bishop insists that the correct doctrine is that "if exceptions are in the enacting clause, it will be necessary to negative them, in order that the description of the crime may in all respects correspond with the statute," and amplifies this rule by laying down the following propositions;

"First. The negative of all exceptions in the enacting clause should be averred, unless such in form and substance that an affirmative offense will appear without.

"Second. A negative descriptive of the offense must be alleged.

"Third. However mutually located are the provisions of a statute, an indictment thereon, as on the common law, must aver all negatives necessary to show affirmatively an offense.

"Fourth. As on the common law, so on a statute, the indictment need not negative matter of defense.

"Fifth. In general, and subject to exceptions growing out of doctrines already stated, an exception or proviso which is not in the enacting clause, whether in the same section with it or not, need not be negated.

"Sixth. Where there is in the enacting clause a reference to an exception or proviso more fully stated in a separate clause or statute, the indictment is required to negative it or not, according as the form of the expression and the nature of the matter render the latter an element in the prima facie offense or in the defense.

"Seventh. A negative not required by law may be rejected as surplusage.

"Eighth. A negative averment need not be so minute, or so nearly in the statutory words, as must an affirmative one; but any negation in general terms, covering the entire substance of the matter, will suffice."

It must be admitted that, with varying modifications, the doctrine as to negating exceptions, thus laid down by Bishop, appears to be the accepted doctrine as expressed in the opinion of most of the courts of last resort of the various States of the United States, but the Supreme Court of the United States in the case of *U. S. vs. Cook* (84 U. S. Rep., 108, 173), modifies this doctrine in the following terms:

"Where a statute defining an offense contains an exception in the enacting clause of the statute which is so incorporated with the language defining the offense that the ingredients of the offense can not be accurately and clearly described if the exception is omitted, the rules of good pleading require that an indictment founded upon the statute must allege enough to show that the accused is not within the exception; but if the language of the section defining the offense is so entirely separable from the exception that the ingredients constituting the offense may be accurately and clearly defined without any reference to the exception, the pleader may safely omit any such reference, as the matter contained in the exception is matter of defense and must be shown by the accused.

"Offenses created by statute, as well as offenses at common law, must be accurately and clearly described if an indictment, and if they can not be, in any case, without an allegation that the accused is not within an exception contained in the statute denning the offense, it is clear that no indictment founded upon the statute can be a good one which does not contain such an allegation, as it is universally true that no indictment is sufficient if it does not accurately and clearly allege all the ingredients of which the offense is composed.

"With rare exceptions, offenses consist of more than one ingredient, and in some cases of many, and the rule is universal that every ingredient of which the offense is composed must be accurately and clearly alleged in the indictment, or the indictment will be bad, and may be quashed on motion, or the judgment may be arrested, or be reversed on error.

"Text writers and courts of justice have sometimes said that if the exception is in the enacting clause the party pleading must show that the accused is not within the exception, but where the exception is in a subsequent

section or statute, that. the matter contained in the exception is matter of defense and must be shown by the accused. Undoubtedly that rule will frequently hold good, and in many cases prove to be a safe guide in pleading, but it is clear that it is not a universal criterion, as the words of the statute denning the offense may be so entirely separable from the exception that all the ingredients constituting the offense may be accurately and clearly alleged without any reference to the exception.

"Cases have also arisen, and others may readily be supposed, where the exception, though in a subsequent clause or section, or even in a subsequent statute, is nevertheless clothed in such language, and is so incorporated as an amendment with the words antecedently employed to define the offense, that it would be impossible to frame the actual statutory charge in the form of an indictment with accuracy, and the required certainty, without an allegation showing that the accused was not within the exception contained in the subsequent cause, section, or statute. Obviously such an exception must be pleaded, as otherwise the indictment would not present the actual statutory accusation, and would also be defective for the want of clearness and certainty.

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"Commentators and judges have sometimes been led into error by supposing that the words 'enacting clause,' as frequently employed, mean the section of the statute defining the offense, as contra distinguished from a subsequent section in the same statute, which is a misapprehension of the term, as the only real question in the case is whether the exception is so incorporated with the substance of the clause defining the offense as to constitute a material part of the description of the acts, omission, or other ingredients which constitute the offense. Such an offense must be accurately and clearly described, and if the exception is so incorporated with the clause describing the offense that it becomes in fact a part of the description, then it can not be omitted in the pleading, but if it is not so incorporated with the clause denning the offense as to become a material part of the definition of the offense, then it is matter of defense and must be shown by the other party, though it be in the same section or even in the succeeding sentence."

And in the case of *Nelson vs. U. S.* (30 Fed. Rep., 112), the court, after discussing the material modification in the above-cited decision of the Supreme Court of the United States of the rule as laid down by Bishop and other law writers, says:

"But in my judgment they (referring to the fact that certain cases decide that exceptions such as that mentioned in the indictment in that case should be negatived) are more distinguished for verbal dialectics than good sense, and are better calculated to puzzle and pervert than to promote the administration of justice. As a rule, an exception in a statute by which certain particulars are withdrawn from or accepted out of the operation of the enacting clause thereof defining a crime concerning a class or species, constitutes no part of the definition of such crime, whether placed close to or remote from such enacting clause. And, whenever a person accused of the commission of such a crime claims to be within such exception, it is more logical and convenient that he should aver and prove the fact than that the prosecutor should anticipate such defense, and deny it."

The question raised in the case of *Nelson vs. U. S.* was almost identical with the question submitted in the case at bar. An Act of Congress prohibited and penalized the sale of intoxicating liquor in the territory of Alaska, except for mechanical, medicinal, or scientific purposes, and the indictment failing to negative this exception, counsel for defendant urged that it was fatally defective. The court held, however, that the purpose of the statute was to prohibit generally the sale of intoxicating liquors throughout the territory, and that the exception as to the sale of liquor for mechanical, medicinal, or scientific purposes merely withdrew such sales from the operation of the enacting clause of the statute, and that it mattered not that the exception appeared to be grammatically a provision of the enacting clause, and that under the technical rule laid down by the law writers it should be negatived, practically it was more logical and convenient that the accused should aver and prove the fact that the sale made by him fell within the exception, than that the prosecutor should anticipate such defense and deny it.

So in the case at bar, the evident intent and purpose of the statute is to prohibit and to penalize generally the smoking of opium in these Islands. But the legislator desired to withdraw from the operation of the statute a limited class of smokers, to wit, those who smoked under the advice and by prescription of a licensed and practicing physician, and we do not think that it makes the slightest practical difference, whether the excepting proviso as to such persons is found in the enacting clause of the statute in a separate provision thereof or in a separate Act. Hence where one is charged with a violation of the general provisions of the Opium Law, it is "more logical as well as more practical and convenient," if he did in fact smoke opium under the advice of a physician, that he should set up this fact by way of defense, than that the prosecution should be called upon to prove that every smoker, charged with a violation of the law, does so without such advice or prescription. Indeed, when it is considered that under the law any person may, in case of need and at any time, procure the advice of a physician to use opium or some of its derivatives, and that in the nature of things no public record of prescriptions of this kind is or can be required to be kept, it is manifest that it would be wholly impracticable and absurd to impose on the prosecution the burden of alleging and proving the fact that one using opium does so without the advice of a physician. To prove beyond a reasonable doubt, in a particular case, that one using opium does so without the advice or prescription of a physician would be in most cases a practical impossibility without the aid of the defendant himself, while a defendant charged with the illegal use of opium should find little difficulty in establishing the fact that he used it under the advice and on the prescription of a physician, if in fact he did so.

We conclude, therefore, that the demurrer was properly overruled by the trial court, both from the necessity of the case and under the doctrine laid down in the case of *Nelson vs. U. S.*, which we accept and approve, that, "as a rule, an exception in a statute by which certain particulars are withdrawn from or excepted out of the enacting clause thereof defining a crime concerning a class or species, constitutes no part of the definition of such crime, whether placed close to or remote from such enacting clause."

It is worthy of consideration in this connection that in Act No. 1761, which repeals Act No. 1461, reenacting most of its provisions with certain amendments and additions, it is expressly provided that the possession of opium, opium pipes, and other instruments for its use, shall be deemed prima facie evidence that the person in possession thereof has used one of the prohibited drugs without the prescription of a duly licensed and practicing physician, unless such prescription is produced by such person.

It is not necessary to discuss the remaining alleged errors in procedure assigned by counsel for appellant, because it does not appear that objection based on these alleged errors was made to the proceedings in the lower court, and we have frequently held in similar cases that accused persons can not be heard to raise such objections for the first time in this court.

The judgment and sentence of the trial court should be and is hereby affirmed, with the costs of this instance against the appellant. So ordered.

Arellano, C. J., Torres, Mapa, Willard, and Tracey, JJ. concur.

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