

THE UNITED STATES, PLAINTIFF AND APPELLEE, VS. LIM SUCO, DEFENDANT AND APPELLANT.

G.R. No. 4793. October 22, 1908

Ponente: WILLARD, J.

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WILLARD, J.:

A complaint was filed against the defendant in the Court of First Instance of the Province of Leyte charging him with a violation of section 7 of Act No. 1761, relating to opium. He contended that he had been formerly convicted of the same offense, relying upon a prosecution against him under section 4 of the same law. The court below held that the two offenses were distinct and separate, convicted him of a violation of section 7, and sentenced him to imprisonment for two months and to pay a fine of P500. From this judgment he has appealed.

Sections 4 and 7 of Act No. 1761 are as follows:

"SEC. 4. (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 unless such person has been duly registered as provided in section two hereof and has secured the certificate therein provided. 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 a duly licensed opium dispensary hereinafter provided for.

"(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: Provided, That in case of the commission of a second offense under the provisions of this section the person so convicted, if other than a citizen of the United States or a citizen of the Philippine Islands, may by order of the court be deported.

"SEC. 7. (a) Except upon the prescription of a duly licensed and practicing physician or upon lawful permit of the Collector of Internal Revenue it shall be unlawful for any person not a duly licensed and "practicing physician, pharmacist, second-class pharmacist, licensed dispensator of .opium, or a duly registered user of opium, when using the same in a licensed opium dispensary only and in such quantities as may be stated in his certificate, to have in his possession opium, or any pipes, hypodermic syringes, or other apparatus or paraphernalia to be used for smoking, injecting, or using opium in any manner.

"(b) Any person violating the provisions of this section shall be punished by a fine not exceeding five hundred pesos or by imprisonment for a period not exceeding one year, or by both such fine and imprisonment, in the discretion of the court: Provided, That all opium, pipes, and other opium apparatus and paraphernalia found in the possession of any person not authorized to have same shall be seized and forfeited to the Government."

It is true that these articles describe two offenses, but the question in this case is, whether the defendant, having been convicted of a violation of section 4, can under the facts in this case be convicted of a violation of section 7. It becomes important to determine exactly what the facts are upon which the second conviction rests.

As we understand the case, the defendant was convicted in the first offense for smoking opium in a pipe. He necessarily had in his possession a pipe for that purpose. The second complaint is for having in his possession this same pipe, and it is the same possession which he necessarily had when he was smoking the pipe. We do not understand that there was anything to show that he had the pipe in his possession at a different time or that he was the owner of the pipe. The possession with which he is charged in the second complaint is the same possession which he necessarily had in committing the offense described in the first complaint. That this is the true condition of the case, we think appears from all the proceedings therein. For example, the court in its decision said:

"The question presented by this record is, whether the defendant, having been convicted of the offense of smoking opium, can be again tried upon a complaint charging him with the possession of the identical apparatus or utensils used by him to commit the other offense?"

The Attorney-General says in his brief:

"The defendant admitted all the facts stated in the complaint, and the fiscal admitted also that the pipe and lamp were the same which the defendant had used and which were presented as proof in the other case."

The appellant in his brief says:

"At midnight of the 19th of February, 1908, the municipal treasurer of Palo, Province of Leyte, P. I., entered the dwelling house of the accused and caught him smoking opium in an apparatus used for this purpose. The accused was arrested at once and the apparatus together with a small quantity of opium was confiscated. Two informations were filed against him, one for violating section 4 of Act No. 1761, which prohibits and punishes the smoking of opium, and the other for having in his possession the apparatus or paraphernalia used for smoking opium, penalized by section 7 of said Act.

"It being certain that the possession which the defendant had of the pipe and which is the basis of the claim that he violated section 7 of the law, was the same possession which he necessarily had of the pipe when he was convicted of a violation of section 4, we agree with the attorney for the appellant that the second judgment can not be sustained. He says:

"The Existence of the one crime (the possession) is necessary for the existence of the other, inasmuch as in order to smoke opium it is essential first to possess some quantity of the drug and the apparatus used therefor. As the defendant was already convicted and sentenced for smoking opium, and the judgment executed, it is improper to prosecute him again for having in his possession the apparatus for smoking opium, because such possession was necessarily involved in the first, of which it is the foundation, and was therefore included in the first conviction."

In the case *In re Nielsen* (131 U. S., 176, 188) the court said:

"It seems to us very clear that where, as in this case, 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."

In the case of *People vs. Cox* (107 Mich., 435, 438) the court said :

"The lesser offense is necessarily included in the greater, and 'as the Government can not begin with the highest, and then go down step by step; bringing the man into jeopardy for every dereliction included therein, neither can it begin with the lowest and ascend to the highest with precisely the same result.'"

In the case of *The People vs. Defoor* (100 Cal., 150, 154) it appeared that the complaining witness, Jones, was seated in Raggio's store, the defendant came in and after addressing some abusive language to Jones, struck him upon the head with a whisky glass; that Jones got up, whereupon the two men seized each other, and in the

struggle that followed fell upon the floor, each striking the other as opportunity offered; that during the struggle, Jones was bitten upon the thumb by the defendant, and that the thumb was later amputated, Afterwards, two informations were filed against the defendant, the first charging him with an assault upon Jones with a glass tumbler with intent to kill and murder Jones, and the second for mayhem. He was tried upon the first complaint and convicted of an assault. He was afterwards brought to trial upon the second complaint, for mayhem, and he pleaded a former conviction, which plea the court sustained, saying:

"Nor does it make any difference that the conviction was for the higher offense of mayhem, since that offense could not be proved without proving the assault for which he had already been convicted. The doctrine of merger, to which great importance is given in many of the cases, can not aid the respondent. If the information for mayhem had been the only one filed, the conviction would have merged the lower included offense of an assault, but the conviction of mayhem could not merge a prior conviction and judgment for the same assault."

(See also, *Grafton vs. The United States*, 206 U. S., 333.)

Whether, if the defendant had been acquitted of the first charge, he could have been tried upon the second complaint, is a question which we do not decide.

In the case of *The United States vs. Capurro* (7 Phil. Rep., 24) it was held that an acquittal of the crime of robbery would not prevent a prosecution for assaulting a public official, the same transaction being involved in both cases. An examination of the record in that case, and particularly of the decision of the court upon the first trial for robbery, will show that there is no inconsistency between that decision and the present one.

The judgment of the court below is reversed, and the defendant acquitted of the complaint, with the costs of both instances de officio.

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

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