

THE UNITED STATES, PLAINTIFF AND APPELLEE, VS. LOOK CHAW (ALIAS LUK CHIU), DEFENDANT AND APPELLANT.

G.R. No. 5889. July 12, 1911

Ponente: ARELLANO, C.J.

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ARELLANO, C.J.:

This case is a separate part of Case No. 5887 and bears No. 5889 on the general docket of this court, and No. 377 on the docket of the Court of First Instance of Cebu.

The complaint in this case states:

"That, on or about the 18th of August, 1909, within the boundaries of the municipality of Cebu of this province and judicial district, the said Look Chaw (alias Luk Chiu) did, without having obtained authorization from the Collector of Internal Revenue and without being authorized in any manner by law, engage in the business of selling opium, and trade and traffic in the same."

C. J. Milliron, an internal-revenue agent, testified that Vicente Base took to the governor of Cebu a can of opium containing 200 grammes of the said drug, in order to show him that the accused had sold opium to Base, and the governor called the witness in order that he might take part in this case. After the accused was arrested, he confessed before the witness and the provincial fiscal that he had sold to Vicente Base thirty cans of opium on the 15th of August, 1909, but that he had not received the price thereof, and that the money which was found in a box of his on board the British steamship Erroll, P1,500 in amount, was obtained in Manila and was seized by the captain of the vessel. According to the accused, he had purchased in Hongkong 137 cans of opium for the purpose of introducing it as contraband into Mexico, the destination of the vessel, but that as the latter changed its route touching first at Manila, the opium arrived at Cebu.

Vicente Base testified that he had negotiated with the accused with respect to the sale of the three sacks of opium which were seized while in the latter's possession and were the subject matter of the previous cause; that these three sacks were not taken ashore, because the accused would not permit this to be done without previous delivery of the whole price of P1,000, of which witness had only paid P533; that he therefore only took one can from one of the said sacks.

The Court of First Instance of Cebu sentenced the accused to one year's imprisonment and the payment of a fine of P2,000, with additional subsidiary imprisonment in case of insolvency, not to exceed one-third of the principal penalty, and to the payment of the costs of the trial. It was ordered in the judgment that the exhibits connected with the case should be confiscated, and that, in case of an appeal, and even after the sentence had been served, the defendant should not be released from custody, but delivered to the customs authorities for the purpose of the enforcement of the existing immigration laws.

The defendant appealed and has alleged before this court that he can not be punished in accordance with section 15 of Act No. 1761, under which the complaint was drawn. This said section 15 reads thus:

" (a) No person shall import, cook, or prepare opium, or engage in the business of purchasing or selling opium or of dealing or trafficking therein, unless he shall first have secured from the Collector of Internal Revenue a license to transact such business and shall have paid the license tax prescribed by this Act. * * *"

To make an isolated sale, says the appellant, is not to engage in the business of selling. To negotiate the sale of opium does not mean clandestinely to sell opium once.

In our opinion, the act defined in section 15 is distinct from that penalized in section 5; the act referred to in the latter is any act of sale, while that concerned in the former relates to the business of selling, in an habitual, professional manner, as one of an undertaking or occupation, without license.

"SEC. 5. (a) It shall be unlawful to sell, transfer, give, or deliver opium to any person except to a duly licensed and practicing physician, pharmacist, or second-class pharmacist, or a duly licensed dispensator of opium, or duly registered confirmed user of opium in a licensed opium dispensary for consumption therein only, and in accordance with the provisions of this Act: * * *

" (b) Any person violating the provisions of the preceding subsection shall be punished by a fine not exceeding one thousand pesos, or by imprisonment for a period not exceeding one year, or by both such fine and imprisonment, in the discretion of the court: * * *"

The crime concerned in this case, according to this section 5, is comprised within the language of the complaint which charges the act of selling opium without the authorization of the Collector of Internal Revenue.

The other ground of the appeal is that the confessions of the accused were taken into account for the purpose of his conviction. The trial court pronounced its sentence after considering that "sufficient proof has been furnished by the evidence/" and the evidence did not consist solely in the confession that the accused, on the day and at the place mentioned in the complaint, contracted with Vicente Base for the sale of the opium, the subject matter of the present prosecution; and as this finding does not appear to be erroneous nor contrary to the conclusions reached from the evidence, it is accepted by this court in order that thereby the judgment appealed from may be duly affirmed, as we do affirm the same.

This disposes of the appeal; but, in the opinion of this court, the defense of double jeopardy alleged by the accused in first instance, with exception to the order disallowing it, can not but be taken into consideration, although in the instance, on the appeal, that defense was not reproduced with the allegation that its disallowance was an error committed by the lower court in its judgment. This point appears to involve a question of jurisdiction.

Before separating the two causes, as related at the beginning of this decision, there was but one single complaint and there would have been only one trial for the possession of opium and for the sale of opium. But the defendant's counsel set up a demurrer, arguing that the complaint was defective inasmuch as it charged two distinct crimes, for according to the defense, it was alleged to be one crime to possess opium and another different crime to sell opium; and the court deferred to this pretension and ordered the filing of two complaints, one for the possession of opium and another for the sale of opium; that for the possession of opium was the one first tried by the lower court.

In answering the second complaint for the sale of opium, the defendant alleged that he had already been in jeopardy.

"The defendant was convicted yesterday," said his attorney, "for the violation of law committed, of possessing opium, and has already been sentenced by this court to five years' imprisonment and in addition to pay a fine of ten thousand pesos. According to the principles of penal law, when a crime has been committed which is necessary in order to commit another, the delinquent, of course, can not be punished for the two crimes, but

must suffer for the crime for which the greater penalty was provided."

The court rejected this allegation: first, because the prosecution of two crimes instead of one was brought about by the defense itself; and second, because, in the opinion of the trial judge, if the defendant had first been convicted for selling opium, he certainly would have been in jeopardy in the cause prosecuted for possessing opium, for the reason that really one can not sell opium without possessing it, while, if the terms are inverted, the same result does not follow, because one may possess opium without selling it, and consequently in the present cause the allegation of double jeopardy is inadmissible.

True it is, we assert, that it is one crime to possess opium, punished by section 31 of the Act, and another, to sell opium, penalized by section 5 of the same Act before cited.

And it is also true that when one single act constitutes two or more crimes, or when one of them is a necessary means for the commission of the other, only the penalty corresponding to the more serious crime shall be imposed, in its maximum degree, and thus, he who smokes opium in a pipe, by one single act lays himself liable to three penalties of the law, one of them, merely for the fact of possessing opium, another, for the mere possession of a pipe in which opium is smoked, and the other, for the act of smoking opium; but the penalties corresponding to these three crimes ought not to be imposed upon the defendant in this case, and only the penalty for the most serious of these crimes.

But the illegal possession of 137 cans of opium and the illegal sale of 30 cans of opium, which are the two acts confessed by the accused, are not one act which constitutes two crimes, nor a crime which is a necessary means for the commission of another. They are two isolated acts, punishable, each of them, in themselves. Only in the event where all the amount of the opium possessed and seized be in its totality the same as that which was possessed with the sole purpose of being delivered as the matter or subject of a sale previously agreed upon, could it be said, in the opinion of this court, that the possession of the opium was a necessary means to effect the delivery by reason of the sale, and that the sale agreed upon was the sole reason for the possession of the opium seized. The possession of the quantity contained in the pipe can not be considered as a different crime from that of smoking opium in a pipe, nor the possession of the pipe, as a crime different from that of smoking opium in a pipe. But if the person surprised in smoking opium in a pipe was also surprised in the possession of the thirty cans sold by the accused, it could not properly be inferred that the possession of these thirty cans, which in itself is a crime, was a necessary means for the commission of the other crime of smoking opium in a pipe, and that the person in whose possession the thirty cans were seized, possessed the same solely and exclusively for the purpose of smoking opium in a pipe. It might very well have been that he had acquired the drug for the purpose of inhaling, injecting, chewing, swallowing, or other uses, and that only by chance did it occur to him to try to smoke it in a pipe, on the very occasion when he was surprised, this being the evident fact of the commission of the crime which can not, in its essence, include the existence of thirty cans, not then contained in the pipe, each can certainly being susceptible of other various uses, every one of which might by its nature constitute a different crime.

We consider this doctrine equally applicable to crimes which are evils by their very nature, as well as to those which are merely *malum quia prohibitum*; because it not only aims at a more or less strict application of a penal precept which, undoubtedly, in the practice of this court, usually tends toward the lesser severity and, occasionally, the greatest benignity when the second class, or conventional crimes, are concerned, but also because that doctrine is the logical result of the process of the intelligence in the derivation of consequences from the principles constitutive of the nature of things.

Thus it is that we find the institution of this cause, and its separation from the previous one, to be founded on law

and juridical principles, and the judgment appealed from, to be in accordance with right and equity, except with regard to the amount of the penalty, which we reduce, in harmony with the provisions of section 5 aforementioned, to six months' imprisonment and a fine of P1,000 Philippine currency.

Therefore, with the understanding that the imprisonment and the fine imposed shall be, respectively, six months and P1,000 Philippine currency, we affirm, as to all the rest, the judgment appealed from, with the costs of this instance against the appellant. So ordered.

Torres, Mapa, and Johnson, JJ., concur.

Carson, J., concurs in the result.

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