

THE UNITED STATES, PLAINTIFF AND APPELLEE, VS. ONG SHIU (ALIAS ONG SIO CO), DEFENDANT AND APPELLANT.

G.R. No. 9784. October 21, 1914

Ponente: JOHNSON, J.

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JOHNSON, J.:

On the 26th day of February, 1914, the assistant prosecuting attorney of the city of Manila presented a complaint against the defendant charging him with a violation of section 31 of Act No. 1761, amended by section 3 of Act No. 1910.

The complaint alleged: "That on or about the 24th day of February, 1914, in the city of Manila, P. I., the said Ong Shiu, alias Ong Sio Co, did then and there, willfully, unlawfully, and feloniously have in his possession and under his control 8 grams of opium and 4 grams of opium ash. That the said accused is not a citizen of the United States or a citizen of the Philippine Islands and has heretofore been convicted of two former offenses under this law. Contrary to law."

Upon said complaint the defendant was arrested, arraigned, tried, found guilty, and sentenced by the Honorable Richard Campbell, judge, to be imprisoned for a period of six months. The lower court, after hearing the evidence, found:

"On the morning of the day of the crime, the accused was discovered in his room with another Chinaman. The policemen noticed a strong smell of opium coming from where the accused was. They therefore forced the door and entered the said room. Just at that moment the accused threw away an opium pipe through a hole in the floor, and when the pipe was picked up by the policemen it was still quite hot. Besides, other devices used in smoking opium were found in the room, and, in the hands of the accused, 8 grams of opium and 4 grams of opium ashes."

The only defense presented by the defendant was in the nature of a general denial of all of the facts stated by the witnesses for the prosecution.

During the trial of the cause the prosecution presented Exhibit B. (Record, page 6.) Said exhibit is a certificate presented by the police department of the city of Manila. It certifies that the defendant had been condemned for a violation of the Opium Law in two different causes, by the Court of First Instance of the city of Manila. The first was cause No. 7779, for a period of three months' imprisonment and the second was cause No. 9253, for a period of four months' imprisonment. Said certificate was presented and admitted in evidence without objection in the lower court. From the sentence of the lower court the defendant appealed to this court.

The only objection presented by the appellant in this court relates to the penalty¹ of six months' imprisonment imposed by the lower court, based upon the fact that the defendant had been convicted before for the same offense. The appellant argues that Exhibit B should not have been admitted in the lower court. He insists that it is not sufficient proof of the fact that he had been theretofore convicted of a similar offense. It will be remembered that the defendant, even though he was represented by an attorney at law in the trial of the cause, made no

objection to the admissibility of said Exhibit B. His objection to the admissibility of said exhibit is presented for the first time in this court. We do not understand why the prosecuting attorney did not present the records of the Court of First Instance, for the purpose of showing that the defendant had been theretofore convicted of similar offenses. The records certainly would have been the best proof of such former conviction. The certificate was not the best proof. There seems to be no justification for the presentation of proof of a secondary character, when the case was being tried in the same court where the defendant had been theretofore twice convicted and where the original records were. Under an objection upon the ground that the said certificate (Exhibit B) was not the best proof, it should have been rejected. Once admitted, however, without objection, even though not the best evidence, and even though not admissible under an objection, we are not inclined now to reject it. If the defendant had opportunely presented an objection to the admissibility of said certificate, no doubt the prosecution would have presented the best proof upon the questions to which said certificate relates. If the defendant did not believe that the proof was sufficient, he should have presented his objection at the time the same was presented, and thereby have given the prosecuting attorney an opportunity, if he desired to prove the fact, to present other and different proof. Evidently the defendant did not object to the admissibility of said certificate, because he was willing to admit the facts contained therein. The complaint alleged that the defendant had been convicted twice before of a violation of the same law (the Opium Law). That allegation was evidently made for the purpose of increasing the penalty in the present case. The burden was upon the the prosecution to prove said allegation. The prosecuting attorney evidently believed that he had made out a prima facie case by the presentation of said certificate. Had the defendant objected to its admissibility, the prosecuting attorney would have presented the record of the court in support of his allegation. The defendant made no objection to the admissibility of the proof offered, neither did he attempt to refute the prima facie case made by the prosecuting attorney. Objections which are relied upon for the purpose of reversing or modifying the decisions of the trial court, should be made first in that court.

In view of all of the facts in the present case and the failure of the defendant to object to the admissibility of said Exhibit B, while we admit that said exhibit is not the best proof of the facts which the prosecuting attorney was attempting to prove, yet, nevertheless, we are not inclined to reverse or modify the sentence of the lower court. Therefore the sentence of the lower court is hereby affirmed, with costs.

Arellano, C. J., Torres, Carson, and Araullo, JJ., concur.

CONCURRING

MORELAND, J.

I do not believe that the certificate of the chief of police that the accused had been before convicted of a crime was admissible in evidence to prove former conviction, nor do I believe that such evidence should be considered even though admitted. It is not only not the best evidence but is hearsay ; and a person should neither be put in jail nor have his punishment increased by that kind of evidence.

Therefore, while I agree to the conviction, I do not agree to the increase in punishment induced by the finding that there was a former conviction, said finding being based wholly on the certificate of the chief of police referred to.

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