[HIGH COURT OF AUSTRALIA.]

THE KING . . . . . APPELLANT;
COMPLAINANT,

AND

AH LIN . . . . . RESPONDENT.
DEFENDANT,

ON APPEAL FROM THE SUPREME COURT OF QUEENSLAND.

H. C. OF A. 1909.

BRISBANE, *April* 30; *May* 3.

Griffith C.J., O'Connor and Isaacs JJ.

The Aboriginals Protection and Restriction of the Sale of Opium Act 1897 (*Queensland*), (61 *Vict. No.* 17), *secs.* 3, 21, 22—*Having charcoal of opium in one's possession—Substance compounded exclusively for medicinal purposes.*

A. was found in possession of charcoal of opium, which is the residual product of smoked opium, and was charged under sec. 22 of 61 Vict. No. 17, that he, not being a legally qualified medical practitioner or a pharmaceutical chemist, or a wholesale dealer in drugs, unlawfully had in his possession opium contrary to the Act in such case made and provided. A. had obtained the opium under the prescription of a legally qualified medical practitioner for his personal use.

Charcoal of opium is included in the term "opium" for the purpose of the statutory prohibition of the possession of opium.

Held, that having the charcoal of opium in his possession was an offence against the provisions of the Act notwithstanding that it was the residual product of opium prescribed by a legally qualified medical practitioner.

Moroney v. *Quok Yen*, 1908 St. R. Qd., 205, commented on.

Decision of *Chubb* J. reversed.

APPEAL from a decision of *Chubb* J.

The defendant was found guilty by a Police Magistrate of having charcoal of opium in his possession contrary to the Act;

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the magistrate also found that the defendant had become possessed of the opium under the prescription of a legally qualified practitioner for one ounce of opium for personal use, that is to say, for the purpose of alleviating any suffering which would be caused through an abstention from the use of opium. On appeal *Chubb* J. quashed the conviction.

O'Sullivan, A.-G. for Queensland, and *Lukin*, for the appellant.

Chubb J. felt himself bound by the decision of the Full Court of Queensland in *Moroney* v. *Quok Yen* (1), but the cases are not the same. *Opium* is defined in sec. 3 of the Act 61 Vict. No 17, and includes every substance which is or contains the ash of opium or charcoal of opium. The preamble shows the object of the Act is to restrict the sale and distribution of opium among the aboriginal and half-caste inhabitants of the State. Charcoal of opium is of small value, but is often sold to the aboriginals. Thus the possession of charcoal of opium will be seen to be absolutely prohibited, even though medically prescribed. If a doctor prescribes opium exclusively for medicinal purposes, then it is no longer opium within the meaning of the Act; but the opium in this case was not a substance compounded exclusively for medicinal purposes. [The following references were made: *R.* v. *Ah Lin* (2); *Hing* v. *Macarthur* (3); *Sale and Use of Poisons Act* 1891 (55 Vict. No. 31); *Criminal Code Act*, 63 Vict. No. 9, sec. 7.]

Henchman, for the respondent. A substance compounded exclusively for medicinal purposes is not opium within the meaning of the Act, and it was found by the magistrate that when Ah Lin was prescribed the opium to smoke "it would have been very injurious to his health if he had knocked it off altogether." The opium in question was supplied medicinally, and therefore outside the Act.

The appellant even if successful should be made to pay the costs, because there is no question as to the defendant's *bona fides*, and also the complainant did not appear before *Chubb* J. to oppose the quashing of the conviction.

(1) 1908 St. R. Qd., 205. (2) 8 Q.L.J., 1.
(3) 2 Q.J.P., 188.

[GRIFFITH C.J.—No mention of that fact was made when special leave to appeal was asked for. If it had been known, it is quite possible that leave would have been refused or only granted on special terms as to costs.]

Also, though this is a case of great public importance, it is of little moment, comparatively, to the respondent: *Hughes* v. *Steel* (1). The special leave to appeal should therefore be rescinded, or, if the appellant is successful, the fine reduced to a nominal amount. Counsel referred to secs. 4, 7, 9 and 13 of the *Sale and Use of Poisons Act* 1891 (55 Vict. No. 31).

Cur. adv. vult.

May 3.

GRIFFITH C.J. The respondent, a Chinese, was charged with a breach of the provisions of the *Aborigines Protection and Restriction of the Sale of Opium Act* 1897, the charge being that he, not being a legally qualified medical practitioner or a pharmaceutical chemist or a wholesale dealer in drugs, unlawfully had in his possession opium contrary to the Act. On the hearing of the complaint it was proved that the defendant had in his possession in a tin, and also in a box, what is called charcoal opium, or charcoal of opium, which are terms used to denote the residual product left in an opium pipe after the opium has been smoked. The magistrate convicted the defendant, but *Chubb* J. quashed the conviction, considering himself bound by the case of *Moroney* v. *Quok Yen* (2), decided by the Full Court last year. The question for determination depends entirely upon the words of the Statute. Sect. 21 provides that:—"It shall not be lawful for any person, not being a legally qualified medical practitioner, or a pharmaceutical chemist, or a wholesale dealer in drugs, to sell, or in any manner dispose of, deliver, or supply, opium to any other person, or to have or keep in his possession any opium for any purpose whatever." The relevant words are:—"It shall not be lawful for any person" (except those specified) "to have or keep in his possession any opium for any purpose whatever." The interpretation clause defines opium thus (sec. 3):—"Opium, whether in the form of gum or liquid, and every substance, whether solid or

(1) 5 C.L.R., 755.

(2) 1908 St. R. Qd., 205.

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liquid, which contains opium, not being a substance compounded exclusively for medicinal purposes, and every substance which is or contains the ash of opium, or charcoal of opium." Now the thing found in defendant's possession was charcoal of opium, and it is, by the plain words of sec. 21, made unlawful for any person, not being a person of one of the three classes mentioned, to have in his possession charcoal of opium for any purpose whatever. The defendant was, therefore, clearly within the prohibition of the Act. In the case of *Moroney* v. *Quock Yen* (1), the defendant, who was found with liquid opium in his possession, had obtained it under a medical prescription, and the Court held that the case was not within the Act, the ground of the decision being that the possession of opium by a patient to whom it had been prescribed by a medical practitioner was not forbidden. That case, however, even if rightly decided, does not govern the present, because it cannot be suggested that the charcoal opium found in defendant's possession was prescribed by a medical practitioner. It was, no doubt, found by the magistrate that a medical practitioner had prescribed opium to be smoked by the defendant, and it is contended that as the smoking of the opium must have led to the production of charcoal opium, and as the possession of the opium for the purpose of smoking was lawful, the coming into possession of the residual product was not unlawful. That may be so, but it does not follow that keeping possession of the residual product would be lawful. Even, therefore, if *Quok Yen's Case* (1) is good law, the keeping of the charcoal opium in defendant's possession was unprotected by the Statute. In that case, the learned Judges seem to have regarded the words "compounded," &c., in the definition of opium as having substantially the same meaning as "prescribed by a medical practitioner." But the words are "compounded exclusively for medicinal purposes," not "prescribed by a medical practitioner." The prescribing by a medical practitioner of a thing the possession of which is unlawful will not make the possession of it lawful. So far as that case may be taken to authorize the possession by anyone of anything within the definition of opium, *i.e.*, so far as it purports to authorize the possession of any sub-

(1) 1908 St. R. Qd., 205.

stance containing opium, which cannot be described as "a substance compounded exclusively for medical purposes," it cannot, in my opinion, be supported. Whether it is possible for gum opium or liquid opium, under any circumstances or in any form of mixture, to come within those terms is a question of fact upon which I offer no opinion. But so far as the case of *Moroney* v. *Quock Yen* (1) is to be taken as authorizing the possession of anything containing opium which is not compounded exclusively for medicinal purposes, it must be taken to be overruled.

For these reasons the appeal must be allowed. The appeal was by special leave, and the appellant has undertaken to submit to any order that the Court may make as to costs. The matter determined being of great public importance, it would be hard to make the respondent bear the whole burden of the costs. Under these circumstances, it will be in accordance with the practice of this Court, and of the Judicial Committee, to order the appellant to pay the costs. During the argument we were informed of the fact, not mentioned when leave to appeal was obtained, that the present appellant did not appear to support the conviction before *Chubb* J. I think it is very probable that if that fact had been brought to the notice of the Court leave would not have been granted. Under these circumstances, the respondent having obtained the decision of the Supreme Court in his favour without opposition or argument, I think that, as an alternative to rescinding the leave to appeal, we have power to put the appellant upon terms to consent to the reduction of the penalty to a nominal amount. The Attorney-General, who appeared for him, and who speaks for the Crown, consents to a reduction of the penalty. I think that the proper order to make will be that, the Attorney-General for the Crown consenting to the reduction of the penalty to 1s., the appeal be allowed, the conviction restored, and that the appellant pay the costs of the appeal.

O'CONNOR J. I am of the same opinion.

ISAACS J. I concur.

(1) 1908 St. R. Qd., 205.