

PEOPLE OF THE PHILIPPINES, PLAINTIFF-APPELLEE, VS. BERLY FABRO Y AZUCENA, ACCUSED-APPELLANT.

G.R. No. 114261. February 10, 2000

Ponente: KAPUNAN, J.

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KAPUNAN, J.:

Appellant Berly Fabro y Azucena, together with her common-law husband Donald Pilay y Calag and Irene Martin, was charged with the crime of "violation of Section 21 (b) Art. IV, in relation to Section 4, Art. II of Republic Act No. 6425, as amended," under Criminal Case No. 11231-R of the Regional Trial Court of Baguio City, in an information that reads:

That on or about the 7th day of April 1993, in the City of Baguio, Philippines, and within the jurisdiction of this Honorable Court, the above-named accused, conspiring, confederating and mutually aiding one another, did then and there willfully, unlawfully and feloniously sell and/or deliver to PO2 ELLONITO APDUHAN, who acted as poseur-buyer, one (1) kilo of dried marijuana leaves, a prohibited drug without any authority of law, in violation of the aforementioned provision of law.

CONTRARY TO LAW.[1]

Upon arraignment, appellant and Donald Pilay pleaded not guilty to the crime charged.[2] A co-accused, Irene Martin, remains at large.

The prosecution's case against herein appellant is as follows:

At around 5:00 o'clock in the afternoon of April 7, 1993 in Camp Henry Allen, Baguio City, two "concerned individuals," later identified as Gloria and Emma Borce,[3] reported to Chief Inspector Allyn Evasco of the 14th Narcotics Regional Field Office, that a couple living together as husband and wife in Quirino Hill, Baguio City, was engaged in selling marijuana. They added that sales usually took place between 5:00 and 6:00 p.m.[4]

Acting on that report, Chief Inspector Evasco organized two teams to conduct a buy-bust operation. The first team was composed of SPO1 Modesto Carrera, SPO3 Delfin Salaria, SPO1 Galutan and one civilian agent while the second team had Senior Inspector Franklin Mabanag and three (3) members of the 191st Mobile Force Company.[5] Mabanag was to be the overall team leader with Batag as his assistant.[6] SPO2 Ellonito Apduhan was designated poseur-buyer in the operation. After briefing the group, Chief Inspector Evasco gave P600.00 as purchase money to Apduhan. The amount consisted of six P100-bills with their serial numbers duly listed down.[7]

With the civilian informers in tow, the group proceeded to Quirino Hill on board three vehicles. They arrived at around 5:45 p.m.[8] All of them disembarked from the vehicles except for Mabanag who stayed in his car. Apduhan, Gloria and Emma took a stairway down to the house of Pilay and appellant below street level. Batag stationed himself on the top portion of the stairway about twenty (20) meters from Pilay's house.[9] Carrera positioned himself at the upper portion of the road about thirty (30) meters away from the same house.[10] The

back-up team deployed within the immediate vicinity in such a way that they could clearly see the transaction between the suspected pushers and the poseur-buyer.

As Apduhan, Gloria and Emma drew near Pilay's residence, appellant met them. Her common-law husband who appeared drunk was inside the house by the main door.[11] Gloria and Emma introduced Apduhan to appellant as a stranger in the place who wanted to buy marijuana. Appellant told them that a kilo would cost them P700.00 but she agreed to Apduhan's price of P600.00.[12] After Apduhan had ordered a kilo of the contraband, appellant told them to wait a while.[13] Appellant then went to a house just behind her own.[14]

After a few minutes, she returned in the company of another woman who was later identified as Irene Martin. Appellant was holding something that looked like a brick wrapped in newspaper and placed inside a transparent plastic bag.[15] Appellant handed the stuff to Apduhan. Her companion, Irene Martin, demanded payment therefor. Apduhan gave her the P600.00. Apduhan removed the wrapper of the merchandise. After ascertaining that it was a brick of marijuana, he made the pre-arranged signal of lighting his cigarette.[16] Immediately, the back-up team rushed towards their direction. However, before the team could reach them, Irene Martin ran away. Apduhan held appellant so that she could not escape.[17] Donald Pilay was also arrested. The buy-bust team in pursuit of Irene Martin ended up in her house with barangay councilman Dominic Dicoy. Since her house was locked, the team forcibly opened it. Inside, they found Irene's husband, Eusebio Martin. The team obtained his consent to search the house.[18] The search proved futile - neither Irene nor marijuana was found there.[19] Thereafter, the team brought the suspects and the confiscated marijuana to their office at Camp Allen.

The police prepared the booking sheet and arrest reports as regards Donald Pilay and appellant.[20] SPO1 Carrera, SPO2 Apduhan and SPO3 Batag executed a joint affidavit of arrest.[21] The police requested the PNP Crime Laboratory Service to examine the confiscated item. To identify it, Apduhan, Batag and Carrera affixed their signatures thereon.[22] Forensic Chemist Lalaine Ong Rodrigo confirmed that the seized item weighing one (1) kilo was indeed positive for marijuana.[23] However, since she could not go to Baguio City to testify, another forensic chemist, Alma Margarita Villaseñor conducted another test on 995.5 grams of specimen and found it to be positive for marijuana.[24]

The defense presented a different version of the incident leading to the arrest of appellant and her common-law husband. Appellant denied having sold marijuana to Apduhan, claiming that Gloria and Emma were the ones carrying the pack of marijuana when the team approached her. According to appellant, at around 6:00 p.m. of April 7, 1993, she was busy cooking in her house at Middle Quirino Hill, Baguio City. Her "husband" Donald was then drinking liquor with their neighbors Eusebio Martin, George Matias and others.[25]

While cooking, appellant noticed Gloria and Emma Borce pass by. They went straight to the house of her neighbor Irene Martin which was just behind her own house.[26] After a while, Irene summoned appellant to her house where she was introduced to Gloria and Emma. The two asked appellant if she could do home service for them as appellant was a beautician. They added that they needed a favor from appellant. However, they were not able to tell appellant what favor it was because appellant excused herself to go back home and resume cooking. Moments later, Gloria and Emma followed appellant to her house. They reiterated their need for appellant's services as a beautician provided that she would do them a favor. Appellant replied that she could not attend to them. Hearing this, the two women left her. Appellant noticed that Gloria and Emma carried a regular-sized black shoulder bag.[27]

Gloria and Emma returned three minutes later. Gloria was no longer carrying the shoulder bag. Instead, she was holding something wrapped in a newspaper.[28] Appellant overheard Emma telling Gloria to hold the marijuana.[29] Armed men also accompanied the two women. Despite her objections, appellant was immediately

handcuffed by one of the armed men.[30] A commotion ensued in the midst of which Gloria and Emma disappeared. Appellant was led to a waiting vehicle and was brought to the investigating division of the 14th NARCOM unit in Camp Allen, Baguio City.

Appellants' co-accused, Donald Pilay recounted that on April 7, 1993, he and one Pelayos were at the house of Dr. Pilando to get their wages as the latter's workers. Subsequently, they engaged in a drinking spree somewhere in Hilltop near the vegetable section. In the afternoon of the same day, they transferred to Doro's place. They resumed their drinking session at the house of Eusebio Martin in Quirino Hill. On his way home, someone poked a gun at him and placed him in the trunk of a vehicle. He was brought to Camp Allen where he saw his wife, appellant herein, with barangay councilman Dicoy.[31]

Dominic Dicoy, the other witness for appellant, testified on how Donald Pilay wrestled with four NARCOM agents on April 7, 1993 prior to his arrest. He corroborated the testimonies of the arresting officers regarding the search conducted on the residence of Irene Martin.

On January 4, 1994, the trial court rendered the Decision disposing of Criminal Case No. 11231-R as follows:

WHEREFORE, the Court Finds the accused Berly Fabro guilty beyond reasonable doubt of the offense of Violation of Section 4 Article II of Republic Act No. 6425 as amended (Sale and/or Delivery of Marijuana) as charged in the body of the Information, not its caption, and hereby sentences her to Life Imprisonment and to pay a Fine of Twenty Thousand Pesos (P20,000.00) without subsidiary imprisonment in case of Insolvency and to pay the costs.

The marijuana confiscated from accused Berly Fabro (Exh. H) being the subject of the offense is hereby ordered confiscated and forfeited in favor of the State and referred to the Dangerous Drugs Board for immediate destruction.

The accused Berly Fabro being a detention prisoner is entitled to be credited in the service of her sentence 4/5 of her preventive imprisonment in accordance with Article 29 of the Revised Penal Code.

For failure of the prosecution to prove his guilt beyond reasonable doubt, the accused Donald Pilay is Acquitted of the offense charged in the Information with costs de oficio.

Let an alias warrant of arrest be issued against co-accused Irene Martin to be implemented by any law enforcing agency in the country so that upon her arrest she shall have a separate arraignment and trial of her own.

SO ORDERED.[32]

In this appeal, appellant assails her conviction on the ground that her guilt has not been proven beyond reasonable doubt. She contends that the following circumstances create a doubt as to her culpability for the crime charged: (1) Contrary to the allegation of the prosecution, the amount of the confiscated marijuana "weighed only 99.5 grams and not one (1) kilo;" (2) The marked money allegedly used in the buy-bust operation was not recovered and presented during the trial; and (3) Based on the testimony of the NBI, the real possessor of the confiscated properties was her co-accused Irene Martin.

The grounds relied on by the appellant are clearly without merit.

Appellant posits that the amount of marijuana confiscated weighed only 99.5 grams.

Appellant relies on the testimony of Forensic Chemist Alma Margarita Villaseñor where she referred to the confiscated marijuana as weighing 99.5 grams:[33]

q Could you remember madame witness if your predecessor Sr. Inspector Lalaine Ong conducted her own

examination of this item?

a

It states on the chemical report that she conducted the examination?

q

And how many grams of this item did she use of the examination (sic)?

a

I did not see the representative sample.

q

But when you received the item, how much did it weight?

a

99.5.

q

So it must be lesser now?

a

Yes, sir.[34]

However, it should be noted that in her written report Villaseñor indicated that the specimen had a "total of 999.5 grams of dried suspected marijuana fruiting tops." [35]

As between a writing or document made contemporaneously with a transaction in which are evidenced facts pertinent to an issue, when admitted as proof of these facts, is ordinarily regarded as more reliable proof and of greater probative value than oral testimony of a witness as to such facts based upon memory and recollection. The reason behind this is obvious, human memory is fallible and its force diminishes with the lapse of time.[36] Hence, as between Villaseñor's testimony and her written report, the latter is considered as the more accurate account as to the amount of marijuana examined.

Moreover, the initial Chemistry Report conducted by Forensic Chemist Lalaine Ong Rodrigo on April 8, 1993, a day after its confiscation, recorded that the specimen submitted for laboratory examination was "one (1) kilo of suspected dried fruiting tops." [37]

This Court is convinced that despite Villaseñor's testimony that the marijuana weighed 99.5 grams, there is overwhelming documentary and testimonial evidence, as correctly appreciated by the trial court, pointing to the fact that the contraband weighed one (1) kilo when it was seized.

The prosecution's failure to present the marked money used in buying marijuana from appellant did not cause a dent on the prosecution's case. Such failure was on account of Irene Martin's flight after taking the money used in the sale. It must be stressed, however, that failure to present the marked money is of no great consequence. The Dangerous Drugs Law punishes the mere act of delivery of prohibited drugs after the offer to buy by the entrapping officer has been accepted by the prohibited drug seller.[38] Rather, of importance are the facts that the prohibited drug given or delivered by the accused was presented before the court and that the accused was clearly identified as the offender by the prosecution eyewitness.[39] Stated differently, the buy-bust money is not

indispensable to the conviction of an accused provided that the prosecution has adequately proven the sale of the dangerous drug.[40]

Appellant's contention that Irene Martin was the real culprit being the source of the contraband does not in any way absolve her of the crime of selling marijuana. While it is true that it was Irene Martin who took the money, appellant was the one who negotiated with the poseur-buyers; fetched her co-accused; carried and handed over the marijuana to Apduhan. The acts of Martin and appellant clearly show a unity of purpose in the consummation of the sale of marijuana. In other words, between Martin and appellant, conspiracy in the commission of the crime was indubitably proven by the prosecution.

A final note. The information denotes the crime as a "VIOLATION OF SECTION 21 (b) ART. IV IN RELATION TO SECTION 4/ARTICLE II OF REPUBLIC ACT 6425 AS AMENDED".[41] This is an erroneous designation of the crime committed. Section 21 of R.A. 6425 reads:

Sec. 21. Attempt and Conspiracy. The same penalty prescribed by this Act for the commission of the offense shall be imposed in case of any xxx conspiracy to commit the same in the following cases:

xxx

b) Sale, administration, delivery, distribution and transportation of dangerous drugs.

It is clear that Section 21 (b) of R.A. 6425 punishes the mere conspiracy to commit the offense of selling, delivering, distributing and transporting of dangerous drugs. Conspiracy herein refers to the mere agreement to commit the said acts and not the actual execution thereof. While the rule is that a mere conspiracy to commit a crime without doing any overt act is not punishable, the exception is when such is specifically penalized by law, as in the case of Section 21 of Republic Act 6425. Conspiracy as crime should be distinguished from conspiracy as a manner of incurring criminal liability the latter being applicable to the case at bar.

In any event, such error in the information is not fatal. The body of the information states that the crime for which the petitioner is charged is as follows:

"the above-named accused, conspiring, confederating and mutually aiding one another, did there willfully, unlawfully and feloniously sell and/or deliver to PO2 Elonito Apduhan, who acted as poseur buyer, one (1) kilo of dried marijuana leaves..."

It has been our consistent ruling that what is controlling are the actual recital of facts in the body of the information and not the caption or preamble of the crime.[42]

Having considered the assignments of error and finding no basis which, from any aspect of the case, would justify us in interfering with the findings of the trial court, it results that the appealed decision must be **AFFIRMED** in toto.

SO ORDERED.

Davide, Jr., C.J., (Chairman), Puno, Pardo, and Ynares-Santiago, JJ., concur.

[1] Rollo, p. 10.

[2] Records, p. 10.

[3] TSN, July 13, 1993, p. 4; pp. 25-26.

- [4] TSN, June 29, 1993, pp. 23-24.
- [5] Id., at 8.
- [6] TSN, June 30, 1993, p. 7; TSN, July 13, 1993, pp. 4-7.
- [7] Exhibit "A."
- [8] TSN, June 30, 1993, p. 18.
- [9] TSN, July 13, 1993, p. 9.
- [10] TSN, June 30, 1993, p. 45.
- [11] TSN, June 29, 1993, p. 14; TSN, June 30, 1993, pp. 30 & 42.
- [12] TSN, June 30, 1993, pp. 12-13.
- [13] TSN, June 29, 1993, p. 13; TSN, June 30, 1993, pp. 10-11.
- [14] TSN, June 29, 1993, *ibid.*.
- [15] Id., at 18-19.
- [16] Id., at 14.
- [17] TSN, June 30, 1993, p. 30.
- [18] Exhibit "F."
- [19] TSN, June 30, 1993, pp. 32, 53.
- [20] Exhibits "C" & "D."
- [21] Exhibit "B."
- [22] TSN, June 30, 1993, p. 19; TSN, August 13, 1993, pp. 23-17.
- [23] TSN, August 13, 1993, p. 21; Exh. 1.
- [24] Exhibit "G."
- [25] TSN, September 29, 1993, pp. 3-4.
- [26] Id., at 5.
- [27] Id., at 18.
- [28] Id., at 23.
- [29] Id., at 6-7.
- [30] Id., at 8.
- [31] TSN, October 7, 1993, pp. 3-12.
- [32] Rollo, p. 80.
- [33] Id., at 8, 10 & 20.
- [34] TSN, August 13, 1993, p. 20.

[35] Exhibit "G."

[36] Vicente J. Francisco, *The Revised Rules of Court*, Volume VII, 1997 Ed. P. 538 (citing 20 Am. Jur. 1029).

[37] Exhibit "I"

[38] *People v. Lucero*, 229 SCRA 1 (1994); *People v. Fabian*, 204 SCRA 730 (1991).

[39] *People v. Ganguso*, 250 SCRA 268 (1995); *People v. Noble*, 211 SCRA 675 (1992).

[40] *People v. Pascual*, 208 SCRA 393 (1992).

[41] *Rollo*, p. 10.

[42] *Buhat vs. Court of Appeals*, 265 SCRA 701, 716 (1996).

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