

SAMMY MALACAT Y MANDAR, PETITIONER, VS. COURT OF APPEALS, AND PEOPLE OF THE PHILIPPINES, RESPONDENTS.

G.R. No. 123595. December 12, 1997

Ponente: DAVIDE, JR., J.

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DAVIDE, JR., J.:

In an Information[1] filed on 30 August 1990, in Criminal Case No. 90-86748 before the Regional Trial Court (RTC) of Manila, Branch 5, petitioner Sammy Malacat y Mandar was charged with violating Section 3 of Presidential Decree No. 1866,[2] as follows:

That on or about August 27, 1990, in the City of Manila, Philippines, the said accused did then and there willfully, unlawfully and knowingly keep, possess and/or acquire a hand grenade, without first securing the necessary license and/or permit therefor from the proper authorities.

At arraignment[3] on 9 October 1990, petitioner, assisted by counsel de oficio, entered a plea of not guilty.

At pre-trial on 11 March 1991, petitioner admitted the existence of Exhibits “A,” “A-1,” and “A-2,”[4] while the prosecution admitted that the police authorities were not armed with a search warrant nor warrant of arrest at the time they arrested petitioner.[5]

At trial on the merits, the prosecution presented the following police officers as its witnesses: Rodolfo Yu, the arresting officer; Josefino G. Serapio, the investigating officer; and Orlando Ramilo, who examined the grenade.

Rodolfo Yu of the Western Police District, Metropolitan Police Force of the Integrated National Police, Police Station No. 3, Quiapo, Manila, testified that on 27 August 1990, at about 6:30 p.m., in response to bomb threats reported seven days earlier, he was on foot patrol with three other police officers (all of them in uniform) along Quezon Boulevard, Quiapo, Manila, near the Mercury Drug store at Plaza Miranda. They chanced upon two groups of Muslim-looking men, with each group, comprised of three to four men, posted at opposite sides of the corner of Quezon Boulevard near the Mercury Drug Store. These men were acting suspiciously with “[t]heir eyes ... moving very fast.”[6]

Yu and his companions positioned themselves at strategic points and observed both groups for about thirty minutes. The police officers then approached one group of men, who then fled in different directions. As the policemen gave chase, Yu caught up with and apprehended petitioner. Upon searching petitioner, Yu found a fragmentation grenade tucked inside petitioner’s “front waist line.”[7] Yu’s companion, police officer Rogelio Malibiran, apprehended Abdul Casan from whom a .38 caliber revolver was recovered. Petitioner and Casan were then brought to Police Station No. 3 where Yu placed an “X” mark at the bottom of the grenade and thereafter gave it to his commander.[8]

On cross-examination, Yu declared that they conducted the foot patrol due to a report that a group of Muslims was going to explode a grenade somewhere in the vicinity of Plaza Miranda. Yu recognized petitioner as the previous Saturday, 25 August 1990, likewise at Plaza Miranda, Yu saw petitioner and 2 others attempt to detonate

a grenade. The attempt was aborted when Yu and other policemen chased petitioner and his companions; however, the former were unable to catch any of the latter. Yu further admitted that petitioner and Casan were merely standing on the corner of Quezon Boulevard when Yu saw them on 27 August 1990. Although they were not creating a commotion, since they were supposedly acting suspiciously, Yu and his companions approached them. Yu did not issue any receipt for the grenade he allegedly recovered from petitioner.[9]

Josefino G. Serapio declared that at about 9:00 a.m. of 28 August 1990, petitioner and a certain Abdul Casan were brought in by Sgt. Saquilla[10] for investigation. Forthwith, Serapio conducted the inquest of the two suspects, informing them of their rights to remain silent and to be assisted by competent and independent counsel. Despite Serapio's advice, petitioner and Casan manifested their willingness to answer questions even without the assistance of a lawyer. Serapio then took petitioner's uncounselled confession (Exh. "E"), there being no PAO lawyer available, wherein petitioner admitted possession of the grenade. Thereafter, Serapio prepared the affidavit of arrest and booking sheet of petitioner and Casan. Later, Serapio turned over the grenade to the Intelligence and Special Action Division (ISAD) of the Explosive Ordnance Disposal Unit for examination.[11]

On cross-examination, Serapio admitted that he took petitioner's confession knowing it was inadmissible in evidence.[12]

Orlando Ramilo, a member of the Bomb Disposal Unit, whose principal duties included, among other things, the examination of explosive devices, testified that on 22 March 1991, he received a request dated 19 March 1991 from Lt. Eduardo Cabrera and PO Diosdado Diotoy for examination of a grenade. Ramilo then affixed an orange tag on the subject grenade detailing his name, the date and time he received the specimen. During the preliminary examination of the grenade, he "[f]ound that [the] major components consisting of [a] high filler and fuse assembly [were] all present," and concluded that the grenade was "[l]ive and capable of exploding." On even date, he issued a certification stating his findings, a copy of which he forwarded to Diotoy on 11 August 1991.[13]

Petitioner was the lone defense witness. He declared that he arrived in Manila on 22 July 1990 and resided at the Muslim Center in Quiapo, Manila. At around 6:30 in the evening of 27 August 1990, he went to Plaza Miranda to catch a breath of fresh air. Shortly after, several policemen arrived and ordered all males to stand aside. The policemen searched petitioner and two other men, but found nothing in their possession. However, he was arrested with two others, brought to and detained at Precinct No. 3, where he was accused of having shot a police officer. The officer showed the gunshot wounds he allegedly sustained and shouted at petitioner "[i]to ang tama mo sa akin." This officer then inserted the muzzle of his gun into petitioner's mouth and said, "[y]ou are the one who shot me." Petitioner denied the charges and explained that he only recently arrived in Manila. However, several other police officers mauled him, hitting him with benches and guns. Petitioner was once again searched, but nothing was found on him. He saw the grenade only in court when it was presented.[14]

The trial court ruled that the warrantless search and seizure of petitioner was akin to a "stop and frisk," where a "warrant and seizure can be effected without necessarily being preceded by an arrest" and "whose object is either to maintain the status quo momentarily while the police officer seeks to obtain more information." [15] Probable cause was not required as it was not certain that a crime had been committed, however, the situation called for an investigation, hence to require probable cause would have been "premature." [16] The RTC emphasized that Yu and his companions were "[c]onfronted with an emergency, in which the delay necessary to obtain a warrant, threatens the destruction of evidence" [17] and the officers "[h]ad to act in haste," as petitioner and his companions were acting suspiciously, considering the time, place and "reported cases of bombing." Further, petitioner's group suddenly ran away in different directions as they saw the arresting officers approach, thus "[i]t is reasonable for an officer to conduct a limited search, the purpose of which is not necessarily to discover evidence of a crime, but to allow the officer to pursue his investigation without fear of violence." [18]

The trial court then ruled that the seizure of the grenade from petitioner was incidental to a lawful arrest, and since petitioner “[l]ater voluntarily admitted such fact to the police investigator for the purpose of bombing the Mercury Drug Store,” concluded that sufficient evidence existed to establish petitioner’s guilt beyond reasonable doubt.

In its decision[19] dated 10 February 1994 but promulgated on 15 February 1994, the trial court thus found petitioner guilty of the crime of illegal possession of explosives under Section 3 of P.D. No. 1866, and sentenced him to suffer:

[T]he penalty of not less than SEVENTEEN (17) YEARS, FOUR (4) MONTHS AND ONE (1) DAY OF RECLUSION TEMPORAL, as minimum, and not more than THIRTY (30) YEARS OF RECLUSION PERPETUA, as maximum.

On 18 February 1994, petitioner filed a notice of appeal[20] indicating that he was appealing to this Court. However, the record of the case was forwarded to the Court of Appeals which docketed it as CA-G.R. CR No. 15988 and issued a notice to file briefs.[21]

In his Appellant’s Brief [22] filed with the Court of Appeals, petitioner asserted that:

1. THE LOWER COURT ERRED IN HOLDING THAT THE SEARCH UPON THE PERSON OF ACCUSED-APPELLANT AND THE SEIZURE OF THE ALLEGED HANDGRENADE FROM HIM “WAS AN APPROPRIATE INCIDENT TO HIS ARREST.”

2. THE LOWER COURT ERRED IN ADMITTING AS EVIDENCE AGAINST ACCUSED-APPELLANT THE HANDGRENADE ALLEGEDLY SEIZED FROM HIM AS IT WAS A PRODUCT OF AN UNREASONABLE AND ILLEGAL SEARCH.

In sum, petitioner argued that the warrantless arrest was invalid due to absence of any of the conditions provided for in Section 5 of Rule 113 of the Rules of Court, citing *People vs. Mengote*. [23] As such, the search was illegal, and the hand grenade seized, inadmissible in evidence.

In its Brief for the Appellee, the Office of the Solicitor General agreed with the trial court and prayed that its decision be affirmed in toto.[24]

In its decision of 24 January 1996,[25] the Court of Appeals affirmed the trial court, noting, first, that petitioner abandoned his original theory before the court a quo that the grenade was “planted” by the police officers; and second, the factual finding of the trial court that the grenade was seized from petitioner’s possession was not raised as an issue. Further, respondent court focused on the admissibility in evidence of Exhibit “D,” the hand grenade seized from petitioner. Meeting the issue squarely, the Court of Appeals ruled that the arrest was lawful on the ground that there was probable cause for the arrest as petitioner was “attempting to commit an offense,” thus:

We are at a loss to understand how a man, who was in possession of a live grenade and in the company of other suspicious character[s] with unlicensed firearm[s] lurking in Plaza Miranda at a time when political tension ha[d] been enkindling a series of terroristic activities, [can] claim that he was not attempting to commit an offense. We need not mention that Plaza Miranda is historically notorious for being a favorite bomb site especially during times of political upheaval. As the mere possession of an unlicensed grenade is by itself an offense, Malacat’s posture is simply too preposterous to inspire belief.

In so doing, the Court of Appeals took into account petitioner’s failure to rebut the testimony of the prosecution witnesses that they received intelligence reports of a bomb threat at Plaza Miranda; the fact that PO Yu chased petitioner two days prior to the latter’s arrest, or on 27 August 1990; and that petitioner and his companions acted suspiciously, the “accumulation” of which was more than sufficient to convince a reasonable man that an offense

was about to be committed. Moreover, the Court of Appeals observed:

The police officers in such a volatile situation would be guilty of gross negligence and dereliction of duty, not to mention of gross incompetence, if they [would] first wait for Malacat to hurl the grenade, and kill several innocent persons while maiming numerous others, before arriving at what would then be an assured but moot conclusion that there was indeed probable cause for an arrest. We are in agreement with the lower court in saying that the probable cause in such a situation should not be the kind of proof necessary to convict, but rather the practical considerations of everyday life on which a reasonable and prudent mind, and not legal technicians, will ordinarily act.

Finally, the Court of Appeals held that the rule laid down in *People v. Mengote*,^[26] which petitioner relied upon, was inapplicable in light of “[c]rucial differences,” to wit:

[In *Mengote*] the police officers never received any intelligence report that someone [at] the corner of a busy street [would] be in possession of a prohibited article. Here the police officers were responding to a [sic] public clamor to put a check on the series of terroristic bombings in the Metropolis, and, after receiving intelligence reports about a bomb threat aimed at the vicinity of the historically notorious Plaza Miranda, they conducted foot patrols for about seven days to observe suspicious movements in the area. Furthermore, in *Mengote*, the police officers [had] no personal knowledge that the person arrested has committed, is actually committing, or is attempting to commit an offense. Here, PO3 Yu [had] personal knowledge of the fact that he chased Malacat in Plaza Miranda two days before he finally succeeded in apprehending him.

Unable to accept his conviction, petitioner forthwith filed the instant petition and assigns the following errors:

1. THE RESPONDENT COURT ERRED IN AFFIRMING THE FINDING OF THE TRIAL COURT THAT THE WARRANTLESS ARREST OF PETITIONER WAS VALID AND LEGAL.
2. THE RESPONDENT COURT ERRED IN HOLDING THAT THE RULING IN *PEOPLE VS. MENGOTE* DOES NOT FIND APPLICATION IN THE INSTANT CASE.

In support thereof, petitioner merely restates his arguments below regarding the validity of the warrantless arrest and search, then disagrees with the finding of the Court of Appeals that he was “attempting to commit a crime,” as the evidence for the prosecution merely disclosed that he was “standing at the corner of Plaza Miranda and Quezon Boulevard” with his eyes “moving very fast” and “looking at every person that come (sic) nearer (sic) to them.” Finally, petitioner points out the factual similarities between his case and that of *People v. Mengote* to demonstrate that the Court of Appeals miscomprehended the latter.

In its Comment, the Office of the Solicitor General prays that we affirm the challenged decision.

For being impressed with merit, we resolved to give due course to the petition.

The challenged decision must immediately fall on jurisdictional grounds. To repeat, the penalty imposed by the trial court was:

[N]ot less than SEVENTEEN (17) YEARS, FOUR (4) MONTHS AND ONE (1) DAY OF RECLUSION TEMPORAL, as minimum, and not more than THIRTY (30) YEARS OF RECLUSION PERPETUA, as maximum.

The penalty provided by Section 3 of P.D. No. 1866 upon any person who shall unlawfully possess grenades is reclusion temporal in its maximum period to reclusion perpetua.

For purposes of determining appellate jurisdiction in criminal cases, the maximum of the penalty, and not the minimum, is taken into account. Since the maximum of the penalty is reclusion perpetua, the appeal therefrom

should have been to us, and not the Court of Appeals, pursuant to Section 9(3) of the Judiciary Reorganization Act of 1980 (B.P. Blg. 129),^[27] in relation to Section 17 of the Judiciary Act of 1948,^[28] Section 5(2) of Article VIII of the Constitution^[29] and Section 3(c) of Rule 122 of the Rules of Court.^[30] The term “life imprisonment” as used in Section 9 of B.P. Blg. 129, the Judiciary Act of 1948, and Section 3 of Rule 122 must be deemed to include reclusion perpetua in view of Section 5(2) of Article VIII of the Constitution.

Petitioner’s Notice of Appeal indicated that he was appealing from the trial court’s decision to this Court, yet the trial court transmitted the record to the Court of Appeals and the latter proceeded to resolve the appeal.

We then set aside the decision of the Court of Appeals for having been rendered without jurisdiction, and consider the appeal as having been directly brought to us, with the petition for review as petitioner’s Brief for the Appellant, the comment thereon by the Office of the Solicitor General as the Brief for the Appellee and the memoranda of the parties as their Supplemental Briefs.

Deliberating on the foregoing pleadings, we find ourselves convinced that the prosecution failed to establish petitioner’s guilt with moral certainty.

First, serious doubt surrounds the story of police officer Yu that a grenade was found in and seized from petitioner’s possession. Notably, Yu did not identify, in court, the grenade he allegedly seized. According to him, he turned it over to his commander after putting an “X” mark at its bottom; however, the commander was not presented to corroborate this claim. On the other hand, the grenade presented in court and identified by police officer Ramilo referred to what the latter received from Lt. Eduardo Cabrera and police officer Diotoy not immediately after petitioner’s arrest, but nearly seven (7) months later, or on 19 March 1991; further, there was no evidence whatsoever that what Ramilo received was the very same grenade seized from petitioner. In his testimony, Yu never declared that the grenade passed on to Ramilo was the grenade the former confiscated from petitioner. Yu did not, and was not made to, identify the grenade examined by Ramilo, and the latter did not claim that the grenade he examined was that seized from petitioner. Plainly, the law enforcement authorities failed to safeguard and preserve the chain of evidence so crucial in cases such as these.

Second, if indeed petitioner had a grenade with him, and that two days earlier he was with a group about to detonate an explosive at Plaza Miranda, and Yu and his fellow officers chased, but failed to arrest them, then considering that Yu and his three fellow officers were in uniform and therefore easily cognizable as police officers, it was then unnatural and against common experience that petitioner simply stood there in proximity to the police officers. Note that Yu observed petitioner for thirty minutes and must have been close enough to petitioner in order to discern petitioner’s eyes “moving very fast.”

Finally, even assuming that petitioner admitted possession of the grenade during his custodial investigation by police officer Serapio, such admission was inadmissible in evidence for it was taken in palpable violation of Section 12(1) and (3) of Article III of the Constitution, which provide as follows:

SEC. 12 (1). Any person under investigation for the commission of an offense shall have the right to be informed of his right to remain silent and to have competent and independent counsel preferably of his own choice. If the person cannot afford the services of counsel, he must be provided with one. These rights cannot be waived except in writing and in the presence of counsel.

(3) Any confession or admission obtained in violation of this or Section 17 hereof shall be inadmissible in evidence against him.

Serapio conducted the custodial investigation on petitioner the day following his arrest. No lawyer was present and Serapio could not have requested a lawyer to assist petitioner as no PAO lawyer was then available. Thus,

even if petitioner consented to the investigation and waived his rights to remain silent and to counsel, the waiver was invalid as it was not in writing, neither was it executed in the presence of counsel.

Even granting *ex gratia* that petitioner was in possession of a grenade, the arrest and search of petitioner were invalid, as will be discussed below.

The general rule as regards arrests, searches and seizures is that a warrant is needed in order to validly effect the same.[31] The Constitutional prohibition against unreasonable arrests, searches and seizures refers to those effected without a validly issued warrant,[32] subject to certain exceptions. As regards valid warrantless arrests, these are found in Section 5, Rule 113 of the Rules of Court, which reads, in part:

Sec. 5. -- Arrest, without warrant; when lawful -- A peace officer or a private person may, without a warrant, arrest a person:

- (a) When, in his presence, the person to be arrested has committed, is actually committing, or is attempting to commit an offense;
- (b) When an offense has in fact just been committed, and he has personal knowledge of facts indicating that the person to be arrested has committed it; and
- (c) When the person to be arrested is a prisoner who has escaped ***

A warrantless arrest under the circumstances contemplated under Section 5(a) has been denominated as one "in flagrante delicto," while that under Section 5(b) has been described as a "hot pursuit" arrest.

Turning to valid warrantless searches, they are limited to the following: (1) customs searches; (2) search of moving vehicles; (3) seizure of evidence in plain view; (4) consent searches;[33] (5) a search incidental to a lawful arrest;[34] and (6) a "stop and frisk." [35]

In the instant petition, the trial court validated the warrantless search as a "stop and frisk" with "the seizure of the grenade from the accused [as] an appropriate incident to his arrest," hence necessitating a brief discussion on the nature of these exceptions to the warrant requirement.

At the outset, we note that the trial court confused the concepts of a "stop-and-frisk" and of a search incidental to a lawful arrest. These two types of warrantless searches differ in terms of the requisite quantum of proof before they may be validly effected and in their allowable scope.

In a search incidental to a lawful arrest, as the precedent arrest determines the validity of the incidental search, the legality of the arrest is questioned in a large majority of these cases, e.g., whether an arrest was merely used as a pretext for conducting a search.[36] In this instance, the law requires that there first be a lawful arrest before a search can be made -- the process cannot be reversed.[37] At bottom, assuming a valid arrest, the arresting officer may search the person of the arrestee and the area within which the latter may reach for a weapon or for evidence to destroy, and seize any money or property found which was used in the commission of the crime, or the fruit of the crime, or that which may be used as evidence, or which might furnish the arrestee with the means of escaping or committing violence.[38]

Here, there could have been no valid in flagrante delicto or hot pursuit arrest preceding the search in light of the lack of personal knowledge on the part of Yu, the arresting officer, or an overt physical act, on the part of petitioner, indicating that a crime had just been committed, was being committed or was going to be committed.

Having thus shown the invalidity of the warrantless arrest in this case, plainly, the search conducted on petitioner could not have been one incidental to a lawful arrest.

We now proceed to the justification for and allowable scope of a "stop-and-frisk" as a "limited protective search of outer clothing for weapons," as laid down in Terry, thus:

We merely hold today that where a police officer observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot and that the persons with whom he is dealing may be armed and presently dangerous, where in the course of investigating this behavior he identifies himself as a policeman and makes reasonable inquiries, and where nothing in the initial stages of the encounter serves to dispel his reasonable fear for his own or others' safety, he is entitled for the protection of himself and others in the area to conduct a carefully limited search of the outer clothing of such persons in an attempt to discover weapons which might be used to assault him. Such a search is a reasonable search under the Fourth Amendment ***[39]

Other notable points of Terry are that while probable cause is not required to conduct a "stop and frisk,"[40] it nevertheless holds that mere suspicion or a hunch will not validate a "stop and frisk." A genuine reason must exist, in light of the police officer's experience and surrounding conditions, to warrant the belief that the person detained has weapons concealed about him.[41] Finally, a "stop-and-frisk" serves a two-fold interest: (1) the general interest of effective crime prevention and detection, which underlies the recognition that a police officer may, under appropriate circumstances and in an appropriate manner, approach a person for purposes of investigating possible criminal behavior even without probable cause; and (2) the more pressing interest of safety and self-preservation which permit the police officer to take steps to assure himself that the person with whom he deals is not armed with a deadly weapon that could unexpectedly and fatally be used against the police officer.

Here, here are at least three (3) reasons why the "stop-and-frisk" was invalid:

First, we harbor grave doubts as to Yu's claim that petitioner was a member of the group which attempted to bomb Plaza Miranda two days earlier. This claim is neither supported by any police report or record nor corroborated by any other police officer who allegedly chased that group. Aside from impairing Yu's credibility as a witness, this likewise diminishes the probability that a genuine reason existed so as to arrest and search petitioner. If only to further tarnish the credibility of Yu's testimony, contrary to his claim that petitioner and his companions had to be chased before being apprehended, the affidavit of arrest (Exh. "A") expressly declares otherwise, i.e., upon arrival of five (5) other police officers, petitioner and his companions were "immediately collared."

Second, there was nothing in petitioner's behavior or conduct which could have reasonably elicited even mere suspicion other than that his eyes were "moving very fast" – an observation which leaves us incredulous since Yu and his teammates were nowhere near petitioner and it was already 6:30 p.m., thus presumably dusk. Petitioner and his companions were merely standing at the corner and were not creating any commotion or trouble, as Yu explicitly declared on cross-examination:

Q And what were they doing?

A They were merely standing.

Q You are sure of that?

A Yes, sir.

Q And when you saw them standing, there were nothing or they did not create any commotion?

A None, sir.

Q Neither did you see them create commotion?

A None, sir.[42]

Third, there was at all no ground, probable or otherwise, to believe that petitioner was armed with a deadly

weapon. None was visible to Yu, for as he admitted, the alleged grenade was “discovered” “inside the front waistline” of petitioner, and from all indications as to the distance between Yu and petitioner, any telltale bulge, assuming that petitioner was indeed hiding a grenade, could not have been visible to Yu. In fact, as noted by the trial court:

When the policemen approached the accused and his companions, they were not yet aware that a handgrenade was tucked inside his waistline. They did not see any bulging object in [sic] his person.[43]

What is unequivocal then in this case are blatant violations of petitioner’s rights solemnly guaranteed in Sections 2 and 12(1) of Article III of the Constitution.

WHEREFORE, the challenged decision of the Seventeenth Division of the Court of Appeals in CA-G.R. CR No. 15988 is SET ASIDE for lack of jurisdiction on the part of said Court and, on ground of reasonable doubt, the decision of 10 February 1994 of Branch 5 of the Regional Trial Court of Manila is REVERSED and petitioner SAMMY MALACAT y MANDAR is hereby ACQUITTED and ORDERED immediately released from detention, unless his further detention is justified for any other lawful cause.

Costs de oficio.

SO ORDERED.

Narvasa, C.J., Regalado, Romero, Bellosillo, Melo, Puno, Vitug, Kapunan, Mendoza, Francisco, and Martinez, JJ., concur.

Panganiban, J., please see separate opinion.

[1] Original Record (OR), 1.

[2] Entitled Codifying the Laws on Illegal/Unlawful Possession, Manufacture, Dealing in, Acquisition or Disposition, of Firearms, Ammunition or Explosives or Instruments used in the Manufacture of Firearms, Ammunition or Explosives; and Imposing Stiffer Penalties for Certain Violations thereof and for Relevant Purposes.

[3] OR, 9.

[4] The affidavit of arrest, booking sheet and letter-referral to the prosecutor, respectively.

[5] OR, 21.

[6] Transcript of Stenographic Notes (TSN), 14 April 1993, 12.

[7] TSN, 14 April 1993, 13.

[8] TSN, 14 April 1993, 14.

[9] Id., 15-21.

[10] Spelled as Suquila in the Affidavit of Arrest; Exhibit A; Rollo, CA-G.R. CR No. 15988 [CA Rollo] 7.

[11] TSN 14 April 1993, 3-9.

[12] TSN, 14 April 1993, 9.

[13] TSN, 27 October 1992, 2-5.

[14] TSN, 11 June 1993, 2-5.

[15] Citing *Posadas v. Court of Appeals*, 188 SCRA 288 [1990].

[16] Citing 1 Joaquin G. Bernas, *THE CONSTITUTION OF THE REPUBLIC OF THE PHILIPPINES, A COMMENTARY*, 124 (1987 ed.) [hereinafter 1 Bernas].

[17] Citing *Schmerber v. California*, 384 U.S. 757; 86 S. CT. 1826; 16 L. Ed. 2d. 908 (1966).

[18] Citing Isagani A. Cruz, *CONSTITUTIONAL LAW* 141 (1987 ed.).

[19] OR, 196-200; Annex “A” [should be “E”] of Petition, Rollo, 91-95. Per Judge Cesar Mindaro.

[20] OR, 208.

[21] CA Rollo, 37.

[22] *Id.*, 49 et seq.

[23] 210 SCRA 174 [1992].

[24] *Id.*, 84-100.

[25] Annex “A” of the Petition, Rollo, 34-41. Per Garcia, C., J., ponente, with Labitoria, E., and Aliño-Hormachuelos, P., JJ., concurring.

[26] *Supra* note 23.

[27] Said Section provides:

SEC. 9. Jurisdiction. -- The Court of Appeals shall exercise:

x x x

(3) Exclusive appellate jurisdiction over all final judgments, decisions, resolutions, orders, or awards of Regional Trial Courts and quasi-judicial agencies, instrumentalities, boards, or commission, except those falling within the appellate jurisdiction of the Supreme Court in accordance with the Constitution, the provisions of this Act, and of subparagraph (1) of the third paragraph and subparagraph (4) of the fourth paragraph of Section 17 of the Judiciary Act of 1948.

[28] The Section pertinently reads:

SEC. 17. Jurisdiction of the Supreme Court. – x x x

The Supreme Court shall have exclusive jurisdiction to review, revise, reverse, modify or affirm on appeal, as the law or rules of court may provide, final judgments and decrees of inferior courts as herein provided, in –

(1) All criminal cases involving offenses for which the penalty imposed is death or life imprisonment; and those involving other offenses which, although not so punished, arose out of the same occurrence or which may have been committed by the accused on the same occasion, as that giving rise to the mere serious offense, regardless of whether the accused are charged as principals, accomplices or accessories, or whether they have been tried jointly or separately;

x x x

[29] The Section relevantly reads:

SEC. 5. The Supreme Court shall have the following powers:

x x x

(2) Review, revise, reverse, modify, or affirm on appeal or certiorari as the law or the Rules of Court may provide, final judgments and orders of the lower courts in:

x x x

(d) All criminal cases in which the penalty imposed is reclusion perpetua or higher....

[30] The Section provides:

SEC. 3. How appeal taken. –

x x x

The appeal to the Supreme Court in cases where the penalty imposed is life imprisonment, or where a lesser penalty is imposed but involving offenses committed on the same occasion or arising out of the same occurrence that give rise to the more serious offense for which the penalty of death or life imprisonment is imposed. ...

[31] Art. III, Section 2, Constitution.

[32] See 1 Bernas 86 (1987).

[33] Mustang Lumber Inc. v. Court of Appeals, 257 SCRA 430, 450 [1996].

[34] Moreno v. Ago Chi, 12 Phil. 439 [1909]; Rule 126, Section 12, Rules of Court.

[35] Terry v. Ohio, 392 U.S. 1, 88 S. Ct. 1868, 20 L.Ed.2d 889 [1968].

[36] See Rex D. Davis, Federal Searches and Seizures 96-98, 120 [1964].

[37] People v. Malmstedt, 198 SCRA 401, 422 [1991] per Narvasa, C.J., concurring and dissenting.

[38] 1 Bernas 105.

[39] Terry, at 911. In fact, the Court noted that the "sole justification" for a stop-and-frisk was the "protection of the police officer and others nearby;" while the scope of the search conducted in the case was limited to patting down the outer clothing of petitioner and his companions, the police officer did not place his hands in their pockets nor under the outer surface of their garments until he had felt weapons, and then he merely reached for and removed the guns. This did not constitute a general exploratory search, Id.

See MICHELE G. HERMAN, SEARCH AND SEIZURE CHECKLIST 202 [1994] (hereinafter Hermann): "Nothing in Terry can be understood to allow a generalized cursory search for weapons or, indeed, any search whatever for anything but weapons," quoting from Ybarra v. Illinois, 444 U.S. 85, 93-94 [1979].

[40] We have held that probable cause means a fair probability that contraband or evidence of a crime will be found, *** and the level of suspicion required for a Terry stop is obviously less demanding than that for probable cause, in Hermann, at 187, quoting from United States v. Sokolow, 490 U.S. 1, 7 [1989].

Thus, it may be said that a brief on-the-street seizure does not require as much evidence of probable cause as one which involves taking the individual to the station, as the former is relatively short, less conspicuous, less humiliating, in 3 Wayne R. LaFave, Search and Seizure: A Treatise on the Fourth Amendment §9.1(d), at 342 [2nd ed. 1987] (underscoring supplied).

It is necessary to determine if "stop and frisk" may be distinguished from arrest and search, knowing that the justification of stopping and frisking is less than the probable cause to arrest and search, in 1 Joseph A. Varon, *Searches, Seizures and Immunities* 81 [2nd ed. 1974] (hereinafter 1 Varon) (underscoring supplied).

[41] See 1 Varon, at 84.

[42] TSN, 14 April 1993, 19-20.

[43] RTC Decision, 2; CA Rollo, 28.

SEPARATE OPINION

PANGANIBAN, J.:

I agree with the persuasive ponencia of Mr. Justice Hilario G. Davide, Jr., that:

1. the search conducted on petitioner (a) was not incidental to a lawful arrest and (b) did not constitute a valid stop-and-frisk; thus, the grenade found in his person cannot be admitted as evidence against him; and
2. the Court of Appeals had no jurisdiction to entertain the appeal from the trial court's decision.

I wish, however, to correlate the present case with four relevant decisions I authored for the Court: *Manalili vs. Court of Appeals*,^[1] *People vs. Encinada*,^[2] *People vs. Lacerna*^[3] and *People vs. Cuizon*,^[4] all of which were promulgated without any dissenting view. This correlation may be of benefit to the bench, the bar and, particularly, to law enforcement officers. Let me first present a background on each.

Manalili Involved a

Valid Stop-and-Frisk

In *Manalili*, anti-narcotics policemen conducted a surveillance in response to information that drug addicts were roaming the area fronting the city cemetery of Kalookan, and chance upon *Manalili* who was observed to have reddish eyes and to be walking in a wobbly manner. Because his appearance was characteristic of a person "high on drugs," the lawmen approached him, introduced themselves and inquired as to what was in his hands. At first, *Manalili* resisted but the police prevailed and he showed them his wallet. The anti-narcotics men found inside what they suspected to be crushed marijuana residue. They took *Manalili* to their station for further investigation. A chromatographic test of the wallet contents positively affirmed the lawmen's suspicions. *Manalili* was thus charged, tried and convicted of illegal possession of the prohibited substance. He subsequently challenged before us the legality of his search and arrest, and the admission of the marijuana as evidence. He contended that the latter two were products of the illegal search.

Rejecting his appeal, this Court held that the search was akin to a stop-and-frisk. The police had sufficient reason to stop *Manalili*, who "had red eyes and was wobbling like a drunk x x x [in] a popular hangout of drug addicts," in order to investigate if he was actually "high" on drugs. The situation verily called for a stop-and-frisk.

Lawmen Had Sufficient Opportunity

to Secure Warrant in Encinada

In *Encinada*, a police officer received late in the afternoon a tip from an informant that the following morning, appellant would be arriving at the Surigao port bringing marijuana. Without securing a search warrant allegedly because courts were already closed for the day, the lawmen proceeded early next morning to the city wharf. About 8:30 a.m., they saw the suspect, carrying two plastic baby chairs, disembark and thereafter board a tricycle. The

police followed immediately and ordered the driver to stop. After introducing themselves, the policemen asked Encinada to alight and to hand over his luggage for inspection. found between the baby chairs was a bulky package which was later found to contain marijuana. On these particulars, he was charged, tried and convicted by the trial court for violation of Sec. 4, Art. II of RA 6425, holding that Encinada was caught in flagrante delicto. Hence, the warrantless search following his arrest was valid, and the marijuana seized was admissible in evidence.

Reversing the trial court, this Court stressed the following: Encinada was not committing a crime in the presence of the police; the latter did not have personal knowledge of facts indicating that he just committed an offense; and raw intelligence information was not a sufficient ground for a warrantless arrest.[5] Furthermore, "[t]he prosecution's evidence did not show any suspicious behavior when the appellant disembarked from the ship or while he rode the motorela. No act or fact demonstrating a felonious enterprise could be ascribed to appellant under such bare circumstances." [6] Having known the identity of their suspect the previous day, the law enforcers could have secured a warrant of arrest even within such limited period (per Administrative Circular No. 13 and Circular No. 19, s. 1987). In emphasizing the importance of according respect to every person's constitutional rights against illegal arrests and searches, the Court exhorted:

"Lawmen cannot be allowed to violate every law they are expected to enforce. [The policeman's] receipt of the intelligence information regarding the culprit's identity, the particular crime he allegedly committed and his exact whereabouts underscored the need to secure a warrant for his arrest. But he failed to do so. Such failure or neglect cannot excuse him from violating a constitutional right of the appellant." [7]

"x x x That the search disclosed a prohibited substance in appellant's possession and thus confirmed the police officers' initial information and suspicion, did not cure its patent illegality. An illegal search cannot be undertaken and then an arrest effected on the strength of the evidence yielded by the search." [8]

Consent Validated an Otherwise

Illegal Search in Lacerna

In Lacerna meanwhile, a police officer observed that the occupants of a taxicab bowed their heads and slouched when they passed through the checkpoint he was manning, making him suspect that something was amiss. He signaled the driver to stop, then asked permission to search the vehicle. The occupants consented. Found inside a plastic bag were several blocks wrapped in newspaper, which were later discovered to contain marijuana. Lacerna questioned his warrantless arrest and seizure, claiming that they were violative of his constitutional rights.

The Court, despite declaring that the prior attendant circumstances did not justify a warrantless search and seizure, ruled that the search was valid, not because Lacerna was caught in flagrante delicto, but because he freely consented to the search. Although appellant and his companion were stopped by the police on mere suspicion -- without probable cause -- that they were engaged in a felonious enterprise, the Court stressed that their permission for the search was expressly sought and obtained by the law enforcers. This consent validated the search, waiver being a generally recognized exception to the rule against warrantless search.[9] The marijuana, therefore, was admissible in evidence. "There was no poisonous tree to speak of."

Mere Suspicion of Criminal Activity

Did Not Justify Search of Cuizon

Lastly, in Cuizon, the NBI, after conducting a surveillance on Cuizon for about a month, received in the morning a tip from an informant that Cuizon and his wife were arriving at NAIA that same day, bringing a large quantity of shabu. A team was immediately organized and sent to the airport to intercept the suspect. Shortly after noon, the Cuizon spouses arrived. While at the airport arrival area, Cuizon handed four travelling bags to Pua and Lee

who thereafter boarded a taxicab, while the Cuizon took a different vehicle. The NBI team members posted at the NAIA parking area, however, failed to intercept the suspects. The team merely trailed the taxicab which proceeded to the Manila Peninsula Hotel in Makati. After identifying themselves to the suspects in their hotel room, the team asked permission to search their bags in the presence of the hotel's chief security officer. Pua and Lee consented in writing. Found inside three of the four bags similar to those handed to them by Cuizon at the airport were plastic packages of white crystalline substances which, upon later examination, were confirmed to be shabu. Taking with them the two accused (who, however, did not implicate Cuizon), the NBI team proceeded to the Cuizon residence where they found a bag allegedly containing the same substance. The three were charged and convicted of illegal transport of the regulated drug. On appeal, only Cuizon challenged the validity of his warrantless arrest, search and seizure.

Reiterating the doctrine that "where a person is searched without a warrant, and under circumstances other than those justifying a warrantless arrest x x x, upon a mere suspicion that he has embarked on some criminal activity, and/or for the purpose of discovering if indeed a crime has been committed by him, then the search made of such person as well as his arrest [is] deemed illegal," [10] this Court declared unlawful the arrest of Cuizon as well as the incidental search and seizure. The warrantless arrest and search were not justified by the rules on "in flagrante delicto" or "hot pursuit" for, at the time of his arrest, Cuizon was inside his home resting with his wife and child. No offense had just been committed or was actually being committed or attempted by him in the presence of the lawmen, nor did the latter have personal knowledge of facts indicating that Cuizon authored an offense that had just in fact been committed. Consequently, any evidence obtained during the illegal search, "even if tending to confirm or actually confirming the initial suspicion, is absolutely inadmissible for any purpose and in any proceeding, the same being 'the fruit of the poisonous tree.'" [11]

The same would have been true as regards Pua and Lee. But Pua effectively waived his right against the warrantless search when he agreed in writing for the NBI team to search his luggage. Besides, he failed to challenge the validity of his arrest and search and the admission of the evidence obtained thereby. However, the case against Lee, who could not speak English or Filipino, was remanded for a retrial, because he was effectively denied his right to counsel; for although he was provided with one, he could not understand and communicate with him concerning his defense.

After reviewing previous decisions on valid warrantless arrests and searches, the Court underscored in sum that there was need for facts providing probable cause, such as the "distinct odor of marijuana, reports about drug transporting or positive identification by informers, suspicious behavior, attempt to flee, [or] failure to produce identification papers" to justify warrantless arrests and searches. Likewise, urgency must attend such arrests and searches, as where motor vehicles are used and there is great probability that the suspect would get away before a warrant can be procured. Most important is that the law enforcers must act immediately on the information received, suspicions raised or probable cause established, and should effect the arrests and searches without any delay. [12]

Instant Case Correlated

with Four cited

Now to the correlation with the case at bar.

(1) As in Manalili, lawmen were on surveillance in response to information that a criminal activity could be in the offing at a specified place. The stark difference, however, is that in Manalili, the reported activity involved drug use and the lawmen belonged to the anti-narcotics group, while in the instant case, the police on patrol were ordinary law enforcers on the lookout for possible bombers. In the former, the law enforcers concerned may be

presumed to possess special knowledge and skill to detect the physical features exhibited by a current drug user. Thus, when these specially trained enforcers saw Manalili with reddish eyes and walking in a wobbly manner characteristic of a person "high" on drugs per their experience, and in a known hangout of drug users, there was sufficient genuine reason to stop and frisk the suspect. It is well to emphasize that under different circumstances, such as where the policemen are not specially trained, and in common places where people ordinarily converge, the same features displayed by a person will not normally justify a warrantless arrest or search on him.

The case before us presents such a situation. The policemen merely observed that Malacat's eyes were moving very fast. They did not notice any bulges or packets about the bodies of these men indicating that they might be hiding explosive paraphernalia. From their outward look, nothing suggested that they were at the time armed and dangerous. Hence, there was no justification for a stop-and-frisk.

(2) In relation to the cases of Encinada and Cuizon, at the time of the arrests of the suspects, none of the actions of Accused Encinada and Cuizon were beyond normal as to suggest that they were then engaged in felonious activities. The simple handing over of the baggage by Cuizon to Pua and Lee was far from being indicative of any illegal activity. Such act by itself does not, by any stretch of imagination, even appear to be suspicious. Granting that indeed an offense was committed by Cuizon at the airport, his subsequent arrest cannot even be justified under the rule on "hot pursuit." He did not attempt to flee, but was actually able to leave the premises and reach his house unhampered by the police. There was considerable interruption between the supposed commission of the crime and his subsequent arrest in his house where he was already resting.

Moreover, Encinada and Cuizon had been previously identified and subjected to surveillance. Police informants themselves, presumably reliable, tipped off their alleged criminal activity. Specifically with respect to Encinada, there was sufficient time to priorly obtain a warrant for his arrest. It must be stressed that raw unverified intelligence information alone is not sufficient to justify a warrantless arrest or search. That is why it is important to bring one's evidence before a judge who shall independently determine if probable cause exists for the issuance of the warrant. It is not for the police to make such determination.

As regards Cuizon, it was, worse, the ineptness of the NBI team dispatched to intercept him which foiled his arrest and search. In the present case, if it were true that the arresting officer saw Malacat two days earlier attempting to detonate a grenade in the same vicinity, again it was the policemen's ineptitude that frustrated his valid arrest there and then and, further, their inability to effectively investigate and identify the culprit -- so as to have obtained a lawful arrest warrant -- that hindered his valid seizure thereafter.

(3) In Lacerna, true, the occupants of the taxicab bowed their heads and slouched when they passed through the police checkpoint. Although such acts could raise suspicions, they did not provide sufficient reason for the police to stop and investigate them for possible criminal operation; much less, to conduct an extensive search of their belongings. A checkpoint search is limited to a roving view within the vehicle. A further search may be validly effected only if something probably illegal is within his "plain view." In Lacerna, if not for the passengers' free and express consent, the search would have been undoubtedly declared illegal. Similarly, the fast-moving eyes of Malacat, although connoting unusual behavior, was not indicative that he was armed and dangerous as to justify a search on his person.

Mengote Supports

Present Ponencia

Bolstering the invalidity of the arrest and search of Malacat is *People vs. Mengote*,^[13] Another classic on the right against unreasonable searches and seizures. Upon receiving a telephone call shortly before noon from an

informer that there were suspicious-looking persons at a certain street corner in Tondo, Manila, the Western Police District dispatched a surveillance team to said place. There they saw two men "looking from side to side" with one "holding his abdomen." The police approached them and identified themselves, whereupon the two tried to flee but failed as other lawmen surrounded them. The suspects were searched, and recovered from Mengote was a fully loaded pistol; from his companion, a fan knife.

The Court ruled that the situation was not one calling for a lawful warrantless search and arrest. As the Court, through Mr. Justice Isagani A. Cruz, succinctly put it: "What offense could possibly have been suggested by a person 'looking from side to side' and 'holding his abdomen' and in a place not exactly forsaken?"

"x x x [T]here could have been a number of reasons, all of them innocent, why his eyes were darting from side to side and he was holding his abdomen. If they excited suspicion in the minds of the arresting officers, as the prosecution suggests, it has nevertheless not been shown what their suspicion was all about. In fact, the policemen themselves testified that they were dispatched to that place only because of the telephone call from the informer that there were 'suspicious-looking' persons in that vicinity who were about to commit a robbery at North Bay Boulevard. The caller did not explain why he thought the men looked suspicious nor did he elaborate on the impending crime." [14]

In closing, the Court lamented and thus warned:

"It would be a sad day, indeed, if any person could be summarily arrested and searched just because he is holding his abdomen, even if it be possibly because of a stomach-ache, or if a peace officer could clamp handcuffs on any person with a shifty look on suspicion that he may have committed a criminal act or is actually committing or attempting it. This simply cannot be done in a free society. This is not a police state where order is exalted over liberty or, worse, personal malice on the part of the arresting officer may be justified in the name of security." [15]

Under our rule in Mengote, petitioner's dubious act of moving his eyes swiftly from side to side can in no way justify a stop-and-frisk. To convict a person on the basis only of his queer behavior and to sentence him to practically a lifetime in prison would simply be unfathomable. Nothing can be more wrong, unjust and inhuman. WHEREFORE, I vote to SET ASIDE the assailed decision and to ACQUIT Petitioner Sammy Malacat y Mandar.

[1] G.R. No. 113447, October 9, 1997.

[2] G.R. No. 116720, October 2, 1997.

[3] G.R. No. 109250, September 5, 1957.

[4] 256 SCRA 325, April 18, 1996.

[5] *People vs. Encinada*, supra, pp. 17-18.

[6] *Ibid.*, pp. 18-19.

[7] *Ibid.*, pp. 21-22.

[8] *Ibid.*, p. 24.

[9] Citing *People vs. Fernandez*, 239 SCRA 174, December 13, 1994, *Aniag, Jr., vs. Comelec*, 237 SCRA 424, October 7, 1994, and other cases.

[10] *People vs. Cuizon*, supra, p. 339.

[11] *Ibid.*

[12] Ibid., pp. 346-347.

[13] 210 SCRA 174, June 22, 1992.

[14] Ibid., p. 179.

[15] Ibid., pp. 181-182.

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