

## **PEOPLE OF THE PHILIPPINES, PLAINTIFF-APPELLEE, VS. QUE MING KHA ALIAS ALFONSO GO AND KIM QUE YU ALIAS ALFONSO QUE, ACCUSED-APPELLANTS.**

*G.R. No. 133265. May 29, 2002*

Ponente: PUNO, J.

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### **PUNO, J.:**

On May 16, 1997, around 5:00 in the afternoon, members of the Central Police District, Batasan Station No. 6 intercepted a van carrying nine (9) sacks of methamphetamine hydrochloride or shabu near Commonwealth Avenue in Quezon City. The police arrested the driver of the van, Que Ming Kha alias Alfonso Go (Go), and his companion, Kim Que Yu alias Alfonso Que (Que).

Go and Que were charged before the Regional Trial Court of Quezon City with violation of Sec. 15, Article III in relation to Sec. 2(e), (f), (m), Article I of R.A. 6425 as amended by P.D. 1683, otherwise known as the Dangerous Drugs Act, in an information that reads as follows:

“That on or about the 16[th] day of May, 1997 in Quezon City, Philippines, the said accused conspiring together, confederating with other persons whose true names, identities and whereabouts have not as yet been ascertained and mutually helping one another, not having been authorized by law to sell, dispense, deliver, transport or distribute any regulated drug, did then and there wilfully, unlawfully, feloniously and knowingly transport or distribute 253.8609 kilograms of white crystalline substance known as "SHABU" containing methamphetamine hydrochloride, which is a regulated drug.

CONTRARY TO LAW.”[1]

Go and Que were found guilty of the charge and were given the death sentence. The dispositive portion of the decision states:

“ACCORDINGLY, judgment is hereby rendered finding the accused Que Ming Kha (a.k.a. Alfonso Go or Que Beng Kha) and Kim Que Yu (a.k.a. Alfonso Que) GUILTY as principals beyond reasonable doubt of transporting in large scale 253.8609 kilos of methamphetamine hydrochloride, a.k.a. shabu, in violation of the Dangerous Drugs Act, as amended, (R.A. 6425), and they are hereby sentenced to DEATH.

In case their sentences on appeal are commuted, it is advised that they be ordered deported after service of sentence as they are both in the Philippines illegally.

Inasmuch as the bulk of the shabu involved in this case has already been destroyed at the San Lazaro Crematorium in Manila on July 21, 1997 in the presence of the Secretary of Justice Teofisto Guingona, the Director of the Dangerous Drugs Board, Manuel Supnet, the Vice-Mayor of Quezon City Herbert Bautista, prosecutor Luis Maceren, defense counsel Godwin Valdez, a representative of the NBI, the PNP Chemists and other officials, the remaining shabu retained for purposes of evidence and other related paraphernalia of contraband are ordered confiscated in favor of the Government and destroyed pursuant to law upon finality of this decision.

The Khia Pride (sic) van, color blue with Plate No. UPN 595 is ordered forfeited in favor of the State. For this purpose, the Philippine National Police officer in custody of said van is hereby ordered to transfer and surrender said vehicle to the Clerk of Court Mercedes Gatmaitan of the Regional Trial Court of Quezon City to be used for official purposes.

Let a copy of this decision be furnished the Chairman of the Bureau of Immigration.”[2]

The case is now before us on automatic review.

From the prosecution evidence, it appears that on May 16, 1997, Chief Inspector Gilbert Dela Fuente, Head of the Intelligence and Investigation Division, Station 6, Central Police District, received a phone call from an informant that a blue Kia Pregio van with plate number UPN 595 which was being used in the transport of shabu has been seen within the vicinity of Barangay Holy Spirit, Quezon City. Dela Fuente immediately dispatched the three teams to monitor the van. Team 3, composed of team leader Police Inspector Raul Espejon and team members PO3 Justo Curameng, SPO1 Joselito Velasquez and PO3 Jovencio Villacorte, positioned themselves at Don Antonio Avenue, Barangay Holy Spirit. Around 5:00 o'clock in the afternoon, the team spotted the blue Kia van on the opposite side of the street going toward the direction of Commonwealth Avenue. Before reaching Commonwealth Avenue, in front of Andok's Litson Manok, the van hit a seven-year old boy. The van sped away, leaving its young victim behind. A concerned motorist picked up the boy and rushed him to the hospital. Espejon, in the meantime, reported to Dela Fuente that they have spotted the blue Kia van. They followed the van after it sped away and intercepted it at Commonwealth Avenue corner Zuzuarregui Street. The members of the team alighted from their vehicle and approached the van. They introduced themselves as police officers to the driver and passenger of the van. The police noted that Go was on the driver's seat while Que sat on the passenger's seat. Espejon informed Go that he just committed the crime of reckless imprudence and asked for his driver's license. The police peered through the window of the van and noticed several sacks placed on the floor at the back of the van. The sacks have Chinese markings and had a logo which looked like the head of a pig. One of the sacks was open and they noticed that it contained several plastic bags containing white crystalline substance. The police also asked for the identification of Go's companion. The latter handed his driver's license which revealed his name as Kim Que Yu. The police handcuffed Go and Que, confiscated their driver's license and their cellular phones found at the front seat of the van, and brought them to Police Station No. 6 for investigation. PO3 Curameng drove the van to the police station. They passed by the Kabayan Center to check on the condition of the boy who was hit by the van. Upon reaching Police Station No. 6, the monitoring team turned over the suspects and the seized articles to the desk officer. Dela Fuente informed Superintendent Hercules Cataluna, Chief of the Central Police District, about the incident. The police inspected the contents of the van in the presence of Superintendent Cataluna and several officials of Barangay Holy Spirit. They counted nine sacks, eight of which were sealed and one open, revealing several plastic bags which contained white crystalline substance suspected to be shabu.[3] The arresting officers thereafter forwarded the seized substance to the PNP Crime Laboratory for examination. Each of the nine sacks contained 253 plastic bags which contained around one kilo of the white crystalline substance.[4] Upon examination, the substance was found positive for methamphetamine hydrochloride or shabu.[5]

Both Go and Que claim ignorance about the presence of shabu at the back of the van.

Go stated that two months prior to his apprehension, he came to Manila from Cebu and was employed as driver by a certain Ah Chai. On May 16, 1997, Ah Chai instructed him to meet with him at Ever Gotesco in Commonwealth Avenue. Go took a taxicab from Ah Chai's residence in Pasig to their meeting place. After waiting for some time, Go saw Ah Chai arrive, driving the blue Kia van. Go took over the wheel but relied on Ah Chai for the direction. Suddenly, a boy crossed the street, prompting Go to swerve to the left. But the van still hit the boy. Ah Chai lost no time in picking up the boy to bring him to the hospital. He hailed a tricycle and

instructed the driver to bring them to the nearest hospital. Before he left, Ah Chai instructed Go to watch over the van and assured him that he would return shortly. Curious onlookers, meanwhile, gathered around the scene of the accident. Then, a car pulled over and a man in civilian clothes approached him. The man introduced himself as a police officer. He asked Go several questions, but since he was having difficulty with the language, he remained silent. The man slapped him several times because of his refusal to answer. While he was being interrogated by the police officer, he saw a taxicab stop in front of them and his friend from China, Alfonso Que, alighted from the cab. Que asked him what happened and offered to help him. Go related to him in Chinese the events that transpired before he arrived. Que talked with the police officer in Go's behalf. Que told Go that the police officer invited them to the police station for interview. Go agreed after being assured that nothing bad would happen to them. Go rode with the police officer while Que drove the van to the police station. When they reached the police station, Go was made to stay in a small room and his hands were handcuffed. Que, meanwhile, continued to talk with the police officers outside. Later, Que entered the room. His hands were also handcuffed. He was fuming mad. Que asked him about the contents of the van. But Go denied any knowledge about the cargo. After they were interrogated by the police officers, they were brought to the Criminal Investigation Division of the Central Police District where they were detained. Go denied any involvement in the commission of the offense. He also said that he did not own any of the cellular phones confiscated inside the van.[6]

Que, on the other hand, testified that he runs his own business together with his cousin, Lorenzo Que. They buy and sell corn, soya beans and other hog feeds. On May 16, 1997, after taking an early lunch, he went to see his cousin at 12th Avenue, Caloocan City. From Caloocan, he took a jeepney to Novaliches to see a certain Mr. Chua of Liberty Farm to offer him some of their products. But since Mr. Chua was not at his office at the time, Que proceeded to Uniwide in Novaliches. From there, he took a taxicab going to Fairview. He wanted to visit his friend, Henry Co, and offer him a business proposal. He instructed the taxi driver to take a short cut at Sauyo Road. Que, however, did not reach his destination. While they were traversing Don Antonio Avenue, Que saw his friend from China, Alfonso Go who seemed to be in trouble. He noticed a small crowd gathered around him and a man was talking to him. He got off the taxicab and approached Go. He asked him what happened. Go told Que that the van he was driving had sideswiped a boy and his employer brought the boy to the hospital, but the latter has not returned. Go told him that the name of his employer was Ah Chai. The policeman invited them to go to the police station. The police officer requested Que to drive the van because he wanted Go to ride with him in the car. Upon reaching the police station, he handed the key to a police officer. The policeman told him to stay in the office while Go was locked inside a small cell. They were told to wait for a while until Go's employer comes back from the hospital. After waiting for quite some time, a police personnel came in and reported that they found sacks of shabu inside the van. The police handcuffed Que. He protested. He denied any knowledge about the contents of the van. But he was nonetheless placed inside the cell with Go.[7] The police later brought Que and Go to the Batasan Police Detachment. Que testified that he did not see Espejon at the scene of the accident. He only saw him at the Batasan Police Detachment when he interrogated Go. He belied the testimony of the police officers who testified before the court. Que stated that from Batasan Police Station No. 6, they were transferred to Criminal Investigation Division of the Central Police District where they were detained.[8]

To corroborate Que's testimony, the defense also presented other witnesses who were allegedly at the scene of the accident at the time of the apprehension of Go and Que.

Pedro Loreto, a tricycle driver, testified that on May 16, 1997, around 5:00 o'clock in the afternoon, he took a passenger to Don Antonio Avenue in Quezon City. When they got to Don Antonio, he saw a crowd gathered in front of Andok's Litson Manok. After his passenger got off the tricycle, he tried to see what the commotion was all about. He saw a blue Kia van parked in front of his tricycle. Then he saw a Chinese man carrying a young boy. The Chinese and the boy boarded his tricycle and the former instructed him to bring them to the hospital. He

brought them to Malvar Hospital along Commonwealth Avenue. The Chinese paid him P100.00 and then alighted from the tricycle together with the boy. Loreto went back to ply his route. When asked to identify the person who brought the boy to the hospital, he said that the man was not in the courtroom. He, however, identified Alfonso Go as the driver of the van.[9]

Fermin Dagumang testified that on May 16, 1997, around 5:00 o'clock in the afternoon, he took a tricycle to Commonwealth Avenue. When he alighted in front of Andok's Litson Manok at Don Antonio, he saw a blue van parked nearby. The driver of the van was short and stocky and Chinese-looking. Then he noticed a crowd gathered in front of the store. He went closer and he saw a child lying on the road. A tall skinny person who looked Chinese took him into his arms. The man, at that time, was looking for a vehicle to bring the child to the hospital. Dagumang then left the scene. Dagumang said that the man who carried the boy was not in the courtroom.[10]

Elmar Cawiling, the seven-year old boy who was hit by the van, also took the witness stand. He stated that on May 16, 1997, after the van hit him, a small, Chinese-looking man immediately picked him up and brought him to the hospital. When asked if it was Alfonso Go who brought him to the hospital, he replied in the negative.[11]

Go raised the following assignment of errors in his Brief:

"1.

The lower court [sic] was so full of bias and prejudice against appellant that he was incapable of rendering a fair, just and correct judgment in the case.

2.

The lower court erred in giving credence to the testimonies of the policemen who testified for the prosecution that they were tailing the Kia Pregio van when it hit the 7-year old ambulant vendor, Elmar Cawiling; that after hitting the boy, the van sped away; that the policemen chased the van until they overtook it at the corner of Zuzuarregui Avenue; and that when they overtook the van they found appellant Que Ming Kha and his co-accused Kim Que Yu inside the van.

3.

The lower court erred in not holding that the shabu was the product of illegal search and seizure, hence not admissible in evidence for any purpose in any proceeding.

4.

The lower court erred in holding that appellant Que Ming Kha 'distributed' or 'transported' shabu within the meaning of Section 15, Article III of Republic Act No. 6425." [12]

Que, on the other hand, cited the following errors:

"1.

Appellant was denied the right to an impartial and unbiased court.

2.

Testimony of the prosecution witnesses is plainly self-serving, concocted and full of discrepancies.

3.

Discovery of the drugs was accidental and not the result of monitoring or surveillance by the police.

4.

Testimony of actual eyewitnesses was disregarded while that of police officers who were latecomers to the scene was credited.

5.

Eleven reasons given by the trial court as grounds for its decision are products of bias and prejudice.

6.

Owner of shabu is Ah Chai, a person entirely different from appellant Alfonso Que.

7.

Fact of warrantless search sustains defense apart from violating constitutional rights of Que.

8.

Presumption of innocence must prevail because an honest analysis of the evidence clearly shows innocence or, at the very least, reasonable doubts.”[13]

We reverse the decision of the trial court in so far as it found accused-appellant Que guilty of the charge.

In *People v. Pagaura*[14] we made the cautionary warning that “the court must be extra vigilant in trying drug cases lest an innocent person is made to suffer the unusually heavy penalties for drug offenses x x x. In our criminal justice system the overriding consideration is not whether the court doubts the innocence of the accused but whether it entertains a reasonable doubt as to his guilt. x x x” In the case at bar, no less than the Solicitor General himself entertains doubt on the guilt of Que and recommends his acquittal. When the prosecution itself says it failed to prove Que’s guilt, the Court should listen and listen hard, lest it locks up a person who has done no wrong.

We fully agree with the Solicitor General that “persistent doubt exists on the full veracity of the prosecution’s theory as regards his (Que’s) participation in the crime.”[15] Eye contact with the evidence of the prosecution against Que will establish that it is incredible as it goes against the grain of our natural experience and expectation. Right from the start, the prosecution story cannot but raise the quizzical eyebrow. According to the story, five (5) days before the apprehension of the accused, the policemen had already gathered detailed data

about the Kia Pregio van that would be used in moving a big quantity of shabu in Quezon City. They knew exactly its model, plate number, color, etc. Despite the wide time lead, the prosecution does not explain its failure to flush out the true owner of the van who could well be the drug lord in the case at bar. Certainly, it was not too difficult to discover his identity from the van's registration papers with the LTO and thereafter monitor the vehicle's movement. Instead, the policemen meandered around the city, hoping they would encounter the van by chance. We cannot be made to believe that our policemen catch drug syndicates by using the calculus of chance.

Equally unexplainable in the prosecution story is the reaction of the policemen when they spotted the van transporting the shabu which they have been hunting for five (5) days. They knew it was carrying shabu of big quantity. They ought to suspect that its passengers pose a clear danger to their lives. Yet, nothing in the records shows that PO1 Raul Espejon and PO3 Jesus Curameng called for reinforcement when they first saw the van. They just serenely tailed the van until it bumped an ice cream-on-sticks vendor. Again, such an act of throwing caution to the wind strains the seams of credibility of the policemen-witnesses.

More astonishing is the hit and run story peddled by the prosecution. Don Antonio Avenue, the place where the van swiped Elmar Cawiling, a 7-year old ambulant vendor, is just a few yards away from the main Commonwealth road. The street intersects a main road and is a bustling place especially at 5:00 p.m. or after office hours. On both sides of the street can be found commercial establishments like banks, pharmacies and eating places while the giant Ever Gotesco mall stands across Commonwealth Avenue. To compound the traffic jam in the area, numerous tricycles that ply the nearby subdivisions parks operate in the corner of Commonwealth Avenue and Don Antonio Avenue. Given the usual traffic mess in the area, it is inconceivable that the van could speed away after swiping the vendor Cawiling. Indeed, there is no credible evidence that there were no vehicles in front of the van that could have impeded its movement. The defense version that the van stopped after hitting Cawiling and that it did not move as people surrounded it is more worthy of credence as it accords with the traffic situation in the venue of the accident.

Similarly, the prosecution story on how the accused were arrested and the van brought to the police station defies reason. To repeat, the policemen declared that they have been on the alert for the van carrying shabu for about five days. When by chance they spotted the van, they followed it until it sped away after sideswiping Cawiling. They gave the van a hot pursuit and overtook it after a one kilometer chase. Again, the expectation is that confronted with a dangerous drug syndicate, the apprehending officers, with ready guns, would order the driver and passenger of the van to go down with upraised hands, search them for weapons, handcuff them and then inspect the van for the suspected shabu. The evidence, however, does not show that policemen Espejon and Curameng followed this standard police procedure for their own safety.

To be sure, it is critical to ascertain whether the van sped away or whether it remained stationary after hitting the vendor Cawiling. The pieces of evidence on this issue are hopelessly at odds. The testimonies of policemen Espejon and Curameng tend to establish that the van with Go and Que inside sped away and they intercepted it after a kilometer long chase. In contrast, Que declared that he was just passing by Don Antonio Avenue on board a taxi when he saw his friend Go in the middle of the street after the accident. He alighted to find out Go's problem. At that time, the van was already parked by the streetside. As Go was unfamiliar with Tagalog, Que interpreted to him the questions of the policeman. Later, Go and the van were brought to the police station for investigation. He agreed to accompany Go who had communication problems. In the station, the van was found to be carrying shabu. He was arrested together with Go. Only disinterested witnesses could clear the fog of evidence on this important factual issue. None of the disinterested witnesses, namely, Cawiling, the boy vendor, Loreto, the tricycle driver who brought Cawiling to the hospital, and Dagumang, the passenger of Loreto, corroborated the prosecution story that the van carrying Go and Que sped away after sideswiping Cawiling. Consequently, the trial

court erroneously calibrated the evidence against Que and in favor of the prosecution.

We fully concur with the following analysis of the defense evidence made by the Solicitor General, viz:

“Elmar Cawiling, the ambulant vendor sideswiped by the van, testified that it was not accused-appellant Kim Que Yu who picked him up but another ‘Chinese looking man.’ Pedro Loreto, driver of the tricycle who brought Elmar Cawiling to the hospital, corroborated the testimony of the latter. Pedro Loreto further testified that there were no police officers at the scene when the accident happened, until the time he brought the boy to the hospital along with a ‘Chinese looking man.’ He also identified appellant Que Ming Kha as the other person inside the van who was seated at the driver’s seat. Loreto was later asked if the other Chinese man, who brought the boy to the hospital, was in the courtroom to which he politely said ‘no.’ The defense claims that appellant Kim Que Yu arrived at the scene only after the tricycle carrying the boy to the hospital had left.

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x x x the records will show that the defense testimonies sufficiently establish that the other man in the van, aside from the driver, is not Kim Que Yu alias Alfonso Que, but a certain Ah Chai whom the driver, Appellant Que Ming Kha, identified as Chiang Lai On. Further, verification from the records of Malvar Medical Foundation, to where the boy, Elmar Cawiling was brought, reveals that it was Chiang Lai On who brought the boy there as shown by his driver’s license No. 96-215658. Thus, Kim Que Yu alias Alfonso Que could not have been the owner of the illegal contraband as there were only two Chinese looking men seen inside the van when the accident happened. Appellee cannot see its way clear to concur with the conviction of Kim Que Yu which might result in the forfeiture of his life, when persistent doubt exists on the full veracity of the prosecution’s theory as regards his participation in the crime. Que had nothing to do with the loading and transport of the shabu. Not one reliable eyewitness pointed to him as having been with Go inside the van when it hit Elmar Cawiling. Not one witness saw him get off the van when the accident happened. Not one credible eyewitness testified that Kim Que Yu was seen at the vicinity of the bumping of the child at the time of the accident until shortly before the police arrived.

On the contrary, the undisputed civilian eyewitnesses confirmed Kim Que Yu’s story that he just chanced upon the accident and that he got off the taxicab where he was riding when he saw his fellow Fookienese in some kind of trouble with a crowd of curious onlookers milling around the accident scene. The testimony of disinterested eyewitnesses shows that when Que arrived, the injured child had already been brought to the hospital. Que did not see him. The police who arrived even later than Que did not see the accident victim. Much less did they see the accident itself. As will be shown later, the testimonies of the policemen who were the only prosecution witnesses on the accident are shot through and through with discrepancies and obvious fabrication.

The eyewitnesses who corroborated the testimony of Que were Elmar Cawiling, the boy victim of the accident; Pedro Loreto, the tricycle driver who drove Cawiling to the hospital; and Fermin Dagumang, the passenger of the tricycle who got off to give way to the accident victim.

It is beyond dispute that they were at the scene of the accident. There is no reason to doubt the truth of their testimony, especially when it bears the hallmarks of being spontaneous, straightforward, categorical and remains consistent.”[16]

The judgment of the trial court convicting Que despite the paucity of the prosecution evidence can only be attributed to the racial bias of the trial judge against Chinese. The trial judge unblushingly revealed this racial prejudice in his decision itself when he wrote:[17]

“The Chinese in this country ever since the Spanish regime are known to buy people. By default and other reasons, they are lording it over our land economically despite Dr. Jose P. Rizal, Andres Bonifacio, and others. They are known to be cheapskates or kuripot, but, not when they want to attain certain things. Since the large

contraband involved here belongs clearly to a criminal syndicate, such syndicate of Chinese ruffians would have spared no amount to pollute our justice system as indeed the illegal entry and stay of Alfonso Go and Alfonso Que have shown, together with their contemptuous disregard of our penal laws on falsification and use of aliases and our tax laws by their non-payment of any tax since 1987.”

Even the Solicitor General denounced the relentless prejudice of the trial judge, viz:[18]

“The judge from the very start attempted to conduct trial even if there was no preliminary investigation (May 23, 1997 hearing). In his own words ‘an exculpatory existence has to be proved in court (May 27, 1997 hearing).’ Only after being reminded of the requirements of due process did he postpone arraignment so that the preliminary investigation could be conducted.

During arraignment, the judge ignored the unfamiliarity of appellant Que Ming Kha with English or Tagalog.

Contrary to the familiarity with Tagalog and Visayan, respectively, to enable the understanding of the highly technical terms in an arraignment (July 15, 1997 hearing).

Up to the end of trial, this prejudice against one he wrongly believed was an undocumented alien namely Kim Que Yu colored the court’s judgment.

The manner and attitude of the judge in the aforesaid proceedings bespeaks of his partiality. His prejudgment or hasty conclusions does (sic) not speak well relative to the utmost circumspection he should exercise in the discharge of his duties to preclude suspicion on his impartiality (*Jarquete vs. Boncuaras*, 60 SCRA 217; *Yanuario vs. Paraguay*, 71 SCRA 11).

The unfortunate bias of the judge against the Chinese is expressed in the decision. The judge presumed an accused as guilty because he is Chinese. The accused is prejudged guilty because of his nationality and his status as an illegal overstaying alien.”

More need not be said.

Every accused in a criminal case is presumed innocent until proven otherwise. It is the prosecution that has the burden of proving his guilt and it is required that his guilt be proved beyond reasonable doubt. This Court has ruled time and again that it is only when the mind is satisfied that the crime has been committed by the person on trial that the judgment should be for conviction.[19] If the inculpatory facts and circumstances are capable of two or more explanations, one of which is consistent with the innocence of the accused of the crime charged and the other consistent with their guilt, then the evidence does not fulfill the test of moral certainty and is not sufficient to support a conviction.[20] The all too clear reason for the age-old ruling is the failure of the prosecution to discharge its duty to overcome the presumption of innocence. Such is the case at bar with respect to Que. His conviction cannot be rooted on the presumption of regularity in the performance of duty accorded to the police officers who made the apprehension. This presumption cannot be used against Que when the Solicitor General himself concedes that their testimonies are “obvious fabrications.” Appellant Que cannot rot in jail on a sentence of reclusion perpetua on the basis of these “obvious fabrications.”

We now come to the appeal of accused-appellant Go. It has been established that Go was driving the van that carried the contraband at the time of its discovery. He was therefore caught in the act of transporting a regulated drug without authority which is punishable under the Dangerous Drugs Act. Section 15, Article III of the Dangerous Drugs Act penalizes “any person who, unless authorized by law, shall sell, dispense, deliver, transport or distribute any regulated drug.”

To exonerate himself, Go claimed that he was not aware of the existence of the contraband at the back of the van. We are not persuaded. The crime under consideration is *malum prohibitum*. In such case, the lack of criminal

intent and good faith do not exempt the accused from criminal liability. Thus, Go's contention that he did not know that there were illegal drugs inside the van cannot constitute a valid defense. Mere possession and/or delivery of a regulated drug without legal authority is punishable under the Dangerous Drugs Act.[21]

Go further argued that the search made on the van was illegal and therefore the shabu discovered from that search is inadmissible as evidence. We do not agree.

The Constitution proscribes search and seizure without a judicial warrant and any evidence obtained without such warrant is inadmissible for any purpose in any proceeding. The rule is, however, not absolute. Search and seizure may be made without a warrant and the evidence obtained therefrom may be admissible in the following instances: (1) search incident to a lawful arrest; (2) search of a moving motor vehicle; (3) search in violation of customs laws; (4) seizure of evidence in plain view; (5) when the accused himself waives his right against unreasonable searches and seizures.[22] The search made in the case at bar falls under the fourth exception. We held in *People vs. Doria*: [23]

“Objects falling in plain view of an officer who has a right to be in a position to have that view are subject to seizure even without a search warrant and may be introduced in evidence. The 'plain view' doctrine applies when the following requisites concur: (a) the law enforcement officer in search of the evidence has a prior justification for an intrusion or is in a position from which he can view a particular area; (b) the discovery of evidence in plain view is inadvertent; (c) it is immediately apparent to the officer that the item he observes may be evidence of a crime, contraband or otherwise subject to seizure. The law enforcement officer must lawfully make an initial intrusion or properly be in a position from which he can particularly view the area. In the course of such lawful intrusion, he came inadvertently across a piece of evidence incriminating the accused. The object must be open to eye and hand and its discovery inadvertent.”

The facts show that while the van was traversing Don Antonio Avenue in Quezon City, it accidentally hit a seven-year old ambulant vendor. The van stopped and the owner got off to bring the boy to the hospital. A police officer who witnessed the accident approached the van to apprehend the driver for reckless imprudence. As he stood near the van, he saw through the lightly tinted window of the van several sacks placed at the back of the van. One of the sacks was open, revealing several plastic bags containing white crystalline substance which the police suspected to be shabu. Clearly, the prohibited substance was within the plain view of the police officer who was in a position to be near the van at the time. The substance is therefore not a product of an illegal search and not inadmissible as evidence.

We now discuss the penalty that should be imposed on the guilty appellant. Section 15, Article III of the Dangerous Drugs Act imposes the penalty of reclusion perpetua to death and a fine ranging from five hundred thousand pesos (P500,000.00) to ten million pesos (P10,000,00.00) for the offense. The law thus prescribes a penalty composed of two indivisible penalties. Under Article 63 of the Revised Penal Code, in such case, when there are neither mitigating nor aggravating circumstances, the lesser penalty shall be applied. There being no mitigating nor aggravating circumstance in this case, the lesser penalty of reclusion perpetua should be imposed on Go.[24]

IN VIEW WHEREOF, the Court finds accused-appellant Que Ming Kha alias Alfonso Go GUILTY as charged. He is sentenced to suffer the penalty of RECLUSION PERPETUA. Accused-appellant Kim Que Yu alias Alfonso Que is ACQUITTED. The Director of the Bureau of Corrections is directed to order his immediate release and to report to this Court his compliance with this order within five (5) days from notice hereof. The remaining shabu retained for purposes of evidence and other related paraphernalia are ordered confiscated in favor of the government and destroyed in accordance with law.

**SO ORDERED.**

Bellosillo, Melo, Vitug, Kapunan, Mendoza, Panganiban, Quisumbing, Ynares-Santiago, De Leon, Jr., Sandoval-Gutierrez, Carpio, Austria-Martinez, and Corona, JJ., concur.

Davide, Jr., C.J., concurs as to the conviction but dissents as to the acquittal. Both accused are equally guilty.

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[1] Rollo, p. 7.

[2] Rollo, p. 38.

[3] TSN, August 29, 1997; TSN, September 12, 1997; TSN, September 19, 1997.

[4] TSN, September 26, 1997.

[5] TSN, July 4, 1997; Exhibits "C," "D" and "G."

[6] TSN, February 6, 1998.

[7] TSN, February 25, 1998.

[8] TSN, March 4, 1998.

[9] TSN, November 10, 1997.

[10] TSN, November 10, 1997.

[11] TSN, March 18, 1998.

[12] Rollo, pp. 221-222.

[13] Rollo, pp. 95-96.

**[14] 267 SCRA 17 (1997).**

[15] Appellee's Brief, pp. 22-23.

[16] Appellee's Brief, pp. 16-24.

[17] Rollo, p. 230.

[18] See Office of the Solicitor General's Brief, pp. 20-21.

[19] People vs. Vidal, 308 SCRA 1 (1999).

[20] People vs. Parayno, 24 SCRA 3 (1968).

[21] People vs. Sy Bing Yok, 309 SCRA 28 (1999).

[22] People vs. Doria, 301 SCRA 668 (1999).

[23] Supra.

[24] People vs. Montilla, 285 SCRA 703 (1998).

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