THE PEOPLE OF THE PHILIPPINES, APPELLEE, VS. GERARDO ORTEZA, APPELLANT.

G.R. NO. 173051 (FORMERLY G.R. NO. 161678). July 31, 2007

Ponente: TINGA, J.

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TINGA, J.:

Gerardo Orteza was charged before the Regional Trial Court of Tarlac City, Branch 64, with illegal sale of shabu in violation of Section 5, Article II of Republic Act No. 9165[1] (R.A. No. 9165). The Information dated 20 November 2002 against him reads:

> INFORMATION
>
> The undersigned Assistant Provincial Prosecutor (detailed), upon his inquest investigation, accuses GERARDO ORTEZA y Orteza, a resident of Block 9, San Nicolas, Tarlac City and presently detained at Camp Macabulos, Tarlac City of the crime of Violation of Section 5, Article II of Republic Act 9165, (Dangerous Drug of 2002), committed as follows:
>
> That on November 19, 2002, at around 9:00 o'clock in the evening, at Tarlac City and within the jurisdiction of this Honorable Court, accused, did then and there willfully, unlawfully and criminally sell, dispense and deliver .063 gram of Methamphetamine Hydrochloride, known as Shabu, a dangerous drug, to poseur buyer SPO1 Rodolfo Ramos for P100.00, without being authorized by law.
>
> CONTRARY TO LAW.[2]

Upon arraignment, appellant entered a plea of not guilty.[3] During trial, the prosecution adopted the Joint Affidavit of Arrest[4] dated 20 November 2002 executed by PO2 Allan J. Lagasca, PO3 Daniel I. Lingsay, SPO1 Rodolfo L. Ramos, and SPO4 Pascual M. Delos Reyes as their testimonies. Delos Reyes and Lagasca appeared in court and confirmed their statements in the Joint Affidavit.[5]

According to the Joint Affidavit, a team comprised of the above-mentioned police officers was formed to conduct a buy-bust operation at Block 9, San Nicolas, Tarlac City on 19 November 2002 to apprehend suspected drug peddlers. The suspects have previously been under a week-long surveillance after the police officers received reports about their illegal activities.[6]

The team with its back-up arrived at the place at around nine o'clock in the evening of said date. The appointed poseur-buyer SPO1 Ramos, together with the informant, approached the two (2) suspects Leng Leng and Buboy while the back-up team positioned itself nearby. SPO1 Ramos purchased one (1) sachet of shabu for One Hundred Pesos (P100.00) from Buboy. Then, SPO1 Ramos gave the pre-arranged signal. Immediately, the rest of the team rushed to the scene and placed the two (2) suspects under arrest. After a body search, the marked money was recovered from Buboy and another sachet of shabu was confiscated from Leng Leng. Thereafter, the suspects were brought to Camp Macabulos where Buboy identified himself as Gerardo Orteza.[7]

Later upon examination, Engr. Marcene Agala of the Regional Crime Laboratory, Camp Olivas, San Fernando,

Pampanga, confirmed that the two (2) sachets recovered from the scene were positive for methamphetamine hydrochloride.[8]

As lone witness for the defense, appellant testified that on 19 November 2002 at around 5:30 p.m., he was about to enter the house when he was halted by PO2 Lagasca. Then, Lagasca allegedly forced him to go with him. Lagasca supposedly asked appellant not to make a scene as he would be freed later on. Subsequently, appellant was taken to Camp Macabulos. Appellant denied selling shabu. He denied ever speaking to SPO1 Ramos, the poseur-buyer. He also denied knowing a certain Leng Leng.[9]

After trial, the trial court rendered a Decision[10] dated 4 April 2002, disposing as follows:

> WHEREFORE, premises above considered finding the guilt of the accused proven beyond reasonable doubt by the Prosecution for violation of Section 5, Article II of Republic Act [No.] 9165, this Court sentences Gerardo Orteza y Orteza to [a] penalty of life imprisonment to death and a fine ranging from Ph[P]500,000.00 to Ph[P]10,000,000.00 cost against the accused.
>
> SO ORDERED.[11]

The judgment of conviction was elevated to the Court for automatic review. In a Resolution[12] dated 8 November 2005 of the Court in G.R. No. 161678,[13] the case was transferred to the Court of Appeals pursuant to the Court's ruling in People v. Efren Mateo.[14]

Before the Court of Appeals, appellant argued that the trial court erred: (1) in giving credence to the testimonies of the prosecution witnesses; and (2) in finding him guilty of violating Section 5, Article II of R.A. No. 9165. [15]

Except for some modifications, the Court of Appeals in a Decision[16] dated 28 February 2006, in CA-G.R. CR No. 01813, affirmed the decision of the trial court. The dispositive portion of the decision reads:

> WHEREFORE, in light of the foregoing premises, the decision appealed from is hereby AFFIRMED save for a modification in the imposed penalty which is now fixed at life imprisonment and a fine of P500,000.00.
>
> SO ORDERED.[17]

The Court of Appeals held that the requisites of the crime of illegal sale of prohibited drugs were borne out by the evidence on record. The identity of appellant as the seller was established by the positive testimonies of the members of the buy-bust team; the test conducted on the crystalline substance sold by appellant showed that it was positive for shabu; third, the exchange between the poseur-buyer and appellant was for a consideration and in fact the marked money was recovered from appellant when a body search was conducted on his person.[18]

Although the poseur-buyer was not presented in court, the appellate court ruled that the unswerving and compatible testimonies of the two members of the buy-bust team, who were eyewitness to the transaction, sufficed to pin down appellant.[19] Against these positive declarations, appellant only professed bare denials which cannot sway judgment when unsupported, the appellate court noted.[20]

The Court of Appeals however modified the penalty imposed considering the trial court's failure to specify the actual penalty to be suffered by appellant and the amount of fine he was supposed to pay. Instead, it sentenced appellant to suffer the penalty of life imprisonment and pay a fine of P500,000.00.[21]

Appellant is now before the Court reiterating his contention that the prosecution was not able to establish with moral certainty the actual transaction or sale of shabu as a fact. He maintains that the non-presentation of the poseur-buyer is fatal to this case as the two police officers who testified were, by their own admission, located at a distance and could not hear the alleged conversation between appellant and the poseur-buyer.[22] Through his

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Manifestation (In Lieu of Supplementary Brief) dated 9 August 2006,[23] appellant stated that he had exhaustively argued all the relevant issues in his Accused-Appellant's Brief filed before the Court of Appeals and that the filing of a supplemental brief might result in a repetition of the same arguments. Thus, he manifested that he was adopting the Accused-Appellant's Brief as Supplemental Brief.[24] The Office of the Solicitor General manifested that it was no longer filing a supplemental brief.[25]

There is merit in the appeal.

The Constitution mandates that an accused shall be presumed innocent until the contrary is proven beyond reasonable doubt. It is the burden of the prosecution to overcome such presumption of innocence by presenting the quantum of evidence required. Corollarily, the prosecution must rest on its own merits and must not rely on the weakness of the defense. In fact, if the prosecution fails to meet the required quantum of evidence, the defense may logically not even present evidence in its own behalf. In which case, the presumption of innocence shall prevail and hence, the accused shall be acquitted. However, once the presumption of innocence is overcome, the defense bears the burden of evidence to show reasonable doubt as to the guilt of the accused. Reasonable doubt is that doubt engendered by an investigation of the whole proof and an inability after such investigation to let the mind rest each upon the certainty of guilt. Absolute certainty of guilt is not demanded by the law to convict a criminal charge, but moral certainty is required as to every proposition of proof requisite to constitute the offense.[26]

In a prosecution for illegal sale of dangerous drugs, the following must be proven: (1) that the transaction or sale took place; (2) the corpus delicti or the illicit drug was presented as evidence; and (3) that the buyer and seller were identified. [27] What is material is the proof that the transaction or sale actually took place, coupled with the presentation in court of the prohibited or regulated drug. The delivery of the contraband to the poseur-buyer and the receipt of the marked money consummate the buy-bust transaction between the entrapping officers and the accused.[28]

The Court believes that the prosecution was not able to establish with certainty all the elements necessary for the conviction of appellant for illegal sale of shabu.

First, there appears nothing in the records showing that police officers complied with the proper procedure in the custody of seized drugs as specified in People v. Lim,[29] i.e., any apprehending team having initial control of said drugs and/or paraphernalia should, immediately after seizure or confiscation, have the same physically inventoried and photographed in the presence of the accused, if there be any, and or his representative, who shall be required to sign the copies of the inventory and be given a copy thereof. The failure of the agents to comply with the requirement raises doubt whether what was submitted for laboratory examination and presented in court was actually recovered from appellant. It negates the presumption that official duties have been regularly performed by the police officers.

In People v. Laxa,[30] where the buy-bust team failed to mark the confiscated marijuana immediately after the apprehension of the accused, the Court held that the deviation from the standard procedure in anti-narcotics operations produced doubts as to the origins of the marijuana. Consequently, the Court concluded that the prosecution failed to establish the identity of the corpus delicti.

The Court made a similar ruling in People v. Kimura,[31] where the Narcom operatives failed to place markings on the seized marijuana at the time the accused was arrested and to observe the procedure and take custody of the drug.

More recently, in Zarraga v. People,[32] the Court held that the material inconsistencies with regard to when and

where the markings on the shabu were made and the lack of inventory on the seized drugs created reasonable doubt as to the identity of the corpus delicti. The Court thus acquitted the accused due to the prosecution's failure to indubitably show the identity of the shabu.

Significantly, Engr. Agala, the chemical engineer who conducted the laboratory test on the two (2) sachets, testified in part as follows:

> ON CROSS-EXAMINATION
> BY ATTY. ABRENICA
>
> x x x x
>
> Q -
>
> Likewise, you did not conduct the fingerprint examination to find out or dusting of fingerprint on these sachets to find out if these indeed were handled by the accused Gerardo Orteza, correct?
>
> A -
>
> Yes ma'am. [33]

Secondly, the Court observes that the prosecution did not present the poseur-buyer who had personal knowledge of the transaction. In People v. Uy,[34] the Court ruled that the non-presentation of the poseur-buyer is fatal only if there is no other eyewitness to the illicit transaction. This doctrine was reiterated in People v. Ambrosio.[35] In both cases, however, not only were there other eyewitnesses to the illegal sale, the non-presentation of the poseur-buyer was also satisfactorily explained. In People v. Uy, the police officer who acted as the poseur-buyer at the time of the trial was paralyzed and confined in a hospital due to gunshot wounds. In People v. Ambrosio, the poseur-buyer was working on another buy-bust operation. The Court therein stated that to require her to testify in open court would divulge her identity and expose her to danger considering that there was another buy-bust operation going on.

In this case, though, after the poseur-buyer, SPO1 Ramos, failed to appear in court despite having been subpoenaed six (6) times,[36] the prosecution did not even bother to offer any explanation for his non-appearance considering that he, a police officer, was no different from the other witnesses who were presented in the end by the prosecution. In Ramos's place, the prosecution presented two other police officers, who although members of the back-up team of the buy-bust operation were, in the Court's view, not reliable eyewitnesses to the transaction. Pertinently, PO2 Lagasca feebly testified as follows:

> ON CROSS-EXAMINATION BY
>
> ATTY. ABRENICA- Counsel for the Accused
>
> Q –
>
> Mr. Witness, this is your first time to see the accused [sic]?
>
> A –
>
> No, ma'am.
>
> Q –
>
> What do you mean no[?] [H]ave you seen him before?
>
> A –

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Yes, ma'am.

Q –

Did you conduct surveillance on him, Mr. Witness?

A –

Yes, ma'am.

Q –

Then you could have easily gotten a search warrant or a warrant of arrest for him[,] isn't it[?] [O]r you did not, did you, Mr. Witness?

A –

Buy-bust operation, ma'am.

Q –

Prior to this, you have not arrest [sic] the accused, is that correct?

A –

Not yet, ma'am.

Q –

Do you know SPO1 Rodolfo Lindo Ramos?

A –

Yes, ma'am.

Q –

And you are the back-up in this incident or his arrest[,] Mr. Witness, or you are the poseur-buyer?

A –

I was the back-up, ma'am.

Q –

So as a back-up, you positioned yourself at a place where you will not be seen by the accused, correct?

A –

We can see then, ma'am.

Q –

But he cannot see you?

A –

Yes, ma'am.

Q –

And it was Lindo Ramos who acted as a poseur buyer?

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A –

Yes, ma'am.

Q –

Now it was only when this Lindo Ramos gave a pre-arranged signal that you approached the accused, is that correct?

A –

Yes, ma'am.

Q –

So from a distance you can only see the signal, what was that signal, Mr. Witness?

A –

By waving his right hand, ma'am.

Q –

So you cannot hear or what they were talking about, is that correct?

A –

Yes, ma'am. [37]

Moreover, the testimonies of the two police officers did not include any positive face-to-face identification in open court of appellant as the seller of shabu, an aspect which was crucial to establish appellant's role in the alleged transaction. It is likewise unclear in the Joint Affidavit of Arrest, which was adopted by the two police officers as their direct testimony, whether the two had a clear and close view of the alleged sale of shabu to support the assertion that they were eyewitnesses to it. The affidavit only stated that the back-up men "who were then placed in a strategically [sic] position near the vicinity are watching the on going deal."[38] As such, the testimony of the poseur-buyer, in this case Ramos, was pivotal as only he could testify on what had really transpired during the moment of the alleged sale of shabu. His non-presentation in this case was fatal, absent any explanation for his non-appearance and reliable eyewitness who could testify in his place.

Another befuddling point was the non-prosecution of Leng Leng for the same crime. It was testified that both he and appellant participated in the illegal sale but records were silent as to why he was not indicted for the crime especially since the amount of shabu mentioned in the information was the total sum of the shabu found in the two (2) sachets recovered from the scene, one from appellant and the other one from Leng Leng.[39] In addition, no proof of conspiracy was adduced to hold appellant liable for the sale of both sachets. In fact, the second sachet was never sold as it was confiscated from Leng Leng after a body search. While Section 5, Article II, R.A. No. 9165 prohibits and penalizes the illegal sale of shabu regardless of the amount, the paucity of evidence on these material points engender reasonable doubt on the credibility of the prosecution's theory.

All told, the totality of the evidence presented in the instant case did not support appellant's conviction for violation of Section 5, Article II, R.A. No. 9165, since the prosecution failed to prove beyond reasonable doubt all the elements of the offense. Accordingly, the presumption of innocence should prevail and the exoneration of appellant declared as a matter of right.

WHEREFORE, the Decision dated 29 October 2003 of the Regional Trial Court of Tarlac City, Branch 64 in

Criminal Case No. 12420 is REVERSED and SET ASIDE. Appellant GERARDO ORTEZA y ORTEZA is ACQUITTED of the crime charged on the ground of reasonable doubt and ordered immediately RELEASED from custody, unless he is being held for some other lawful cause.

The Director of the Bureau of Corrections is ORDERED to implement this Decision forthwith and to INFORM this Court, within five (5) days from receipt hereof, of the date appellant was actually released from confinement. Costs de oficio.

SO ORDERED.

Quisumbing, (Chairperson), Carpio, Carpio-Morales, and Velasco, Jr., JJ., concur.

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[1] Otherwise known as the "Comprehensive Dangerous Drugs Act of 2002."

[2] Records, p. 1.

[3] Id. at 9.

[4] Id. at 3-4.

[5] TSN, 20 May 2003, pp. 2-3; TSN, 25 July 2003, pp. 3-6.

[6] Records, p. 3.

[7] Id.

[8] TSN, 26 August 2003, pp. 2-5.

[9] TSN, 26 September 2003, pp. 2-5.

[10] Records, pp. 53-61; Penned by Honorable Martonino R. Marcos.

[11] Id. at 60-61.

[12] Rollo, p. 2.

[13] The docket number of the case when first elevated to the Court.

[14] G.R. Nos. 147678-87, 7 July 2004, 433 SCRA 640.

[15] CA rollo, p. 47.

[16]Rollo, pp. 3-9; Penned by Associate Justice Bienvenido L. Reyes with the concurrence of Associate Justices Arturo D. Brion and Mariflor Punzalan Castillo.

[17] Id. at 9.

[18] Id. at 6.

[19] Id.

[20] Id. at 7.

[21] Id. at 8-9.

[22] CA rollo, p. 48.

[23] Rollo, pp. 11-12.

[24] Id.

[25] Id. at 13-14.

[26] People v. Uy, 392 Phil. 773, 782-783 (2000).

[27] People v. Bandang, G.R. No. 151314, 3 June 2004, 430 SCRA 570, 579.

[28] People v. Zeng Hua Dian, G.R. No. 145348, 14 June 2004, 432 SCRA 25, 34.

[29] 435 Phil. 640, 659 (2002), citing the Dangerous Drugs Board Regulation No. 3, Series of 1979, as amended by Resolution No. 2, S. 1990.

[30] 414 Phil. 156 (2001) .

[31] G.R. No. 130805, 27 April 2004, 428 SCRA 51.

[32] G.R. No. 162064, 14 March 2006, 484 SCRA 639.

[33] TSN, 26 August 2003, p. 4.

[34] 392 Phil. 773, 786 (2000).

[35] G.R. No. 135378, 14 April 2004, 427 SCRA 312, 327.

[36] Records, pp. 12, 15, 17, 22, 27, and 32.

[37] TSN, 25 July 2003, pp. 6-9. Emphasis supplied.

[38] Records, p. 3.

[39] Id. at 3, 41; One sachet contains .035 gram of shabu while the other contains .028 gram of shabu. The Information states that Orteza sold .063 gram of shabu.

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