

## PEOPLE OF THE PHILIPPINES, APPELLEE, VS. JOSELITO NOQUE Y GOMEZ, APPELLANT.

*G.R. No. 175319. January 15, 2010*

Ponente: DEL CASTILLO, J.

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### DEL CASTILLO, J.:

The illicit trade and use of dangerous drugs destroys the moral fiber of society. It has eroded and disrupted family life, increased the transmission of sexually related diseases, resulted in permanent and fatal damage to the physical and mental health, and wasted dreams, opportunities and hopes for a better future. As an ardent sentinel of the people's rights and welfare, this Court shall not hesitate to dispense justice on people who engage in such an activity.[1] The commitment to this end is exemplified in this appeal.

#### The Charges

The appeal stems from two Informations filed before the Regional Trial Court (RTC) of Manila, which were subsequently docketed as Criminal Case Nos. 01-189458 and 01-189459, and raffled to Branch 35 of said court. The Information in Criminal Case No. 01-189458 charging appellant Joselito Noque y Gomez with violation of Section 15, Article III in relation to Section 21 (e), (f), (m), (o), Article 1 of Republic Act (RA) No. 6425, as amended by Presidential Decree (PD) No. 1683 and as further amended by RA 7659 reads:

That on or about January 30, 2001, in the City of Manila, Philippines, the said accused, not having been authorized by law to sell, dispense, deliver, transport or distribute any regulated drug, did then and there willfully, unlawfully and knowingly sell or offer for sale, dispense, deliver, transport or distribute 2.779 (two point seven seven nine grams) and 2.729 (two point seven two nine grams) of white crystalline substance known as 'shabu' containing methamphetamine hydrochloride, which is a regulated drug.

Contrary to law.[2]

On the other hand, the Information in Criminal Case No. 01-189459 contains the following accusatory allegations for violation of Section 16, Article III in relation to Section 2 (e-2) Article I of RA 6425 as amended by Batas Pambansa (BP) Bilang 179 and as further amended by RA 7659:

That on or about January 30, 2001, in the City of Manila, Philippines, the said accused without being authorized by law to possess or use any regulated drug, did then and there willfully, unlawfully and knowingly have in his possession and under his custody and control (six seven nine point two one five grams) 679.215 grams of white crystalline substance known as 'shabu' containing methamphetamine hydrochloride, a regulated drug, without the corresponding license or prescription thereof.

Contrary to law.[3]

During his arraignment on July 23, 2001, appellant pleaded not guilty to both charges. Pre-trial conference was conducted and upon its termination a joint trial ensued.

#### Version of the Prosecution

At 9 o'clock in the evening of January 30, 2001, a confidential informant of

Senior Police Officer 4 (SPO4) Norberto Murillo, went to Police Station No. 4 of the Western Police District (WPD) to tip off on the drug trafficking activities of the appellant in Malate, Manila. SP04 Murillo immediately directed Police Officers (POs) Christian Balais (Balais) and Dionisio Borca (Borca) to conduct surveillance in the area mentioned by the informant. The surveillance confirmed appellant's illegal operations being conducted at No. 630 San Andres Street, Malate, Manila. Thereafter, SP04 Murillo formed and led a buy-bust team with POs Balais, Borca, Ramon Pablo, Roberto Godoy, Edgardo Book, Bernard Mino, Rodante Bollotano, and Melchor Barolo as members. PO1 Balais was designated as poseur-buyer and was provided with 10 pieces of 100 peso bills as buy-bust money.

The buy-bust team, together with the informant, proceeded to the aforementioned address and upon arrival thereat, positioned themselves outside the appellant's house. PO1 Balais and the informant thereafter called out the appellant, who welcomed the two and brought them to his bedroom. The informant asked the appellant if he had P1,000.00 worth of methamphetamine hydrochloride or "shabu" then pointed to PO1 Balais as the actual buyer. When PO1 Balais handed the marked money to the appellant, the latter brought out from under a table a "pranela" bag from which he took two plastic sachets containing white crystalline granules suspected to be shabu. The informant slipped out of the house as the pre-arranged signal to the buy-bust team that the sale had been consummated.

After seeing the informant leave, the team entered appellant's house. SPO4 Murillo frisked the appellant and recovered the buy-bust money. He also confiscated the "pranela" bag that contained a large quantity of crystalline granules suspected to be shabu. The two persons who were in a "pot session" with the appellant at the time of the raid were likewise arrested and brought to the WPD Station No. 9 for investigation.

The seized articles were taken to the police station and submitted to the crime laboratory for examination to determine the chemical composition of the crystalline substance. Police Inspector (P/Insp.) and Forensic Chemical Officer Miladenia Tapan examined one self-sealing transparent plastic bag with markings "JNG" containing 679.215 grams of white crystalline granules; and two heat-sealed transparent plastic sachets each containing white crystalline substance, pre-marked "JNG-1" weighing 2.779 grams and "JNG-2" weighing 2.729 grams. The qualitative examinations yielded positive results for ephedrine, a regulated drug.

#### Version of the Defense

The appellant gave a different version of the events that transpired. He testified that he was in his house in the evening of January 23, 2001 when six policemen led by SPO4 Murillo entered and arrested an unidentified occupant of the room next to his. The arresting team returned after 30 minutes and apprehended another person. When they came back the third time, they took him with them to WPD Station No. 9 where his wallet, belt and shoes were taken. While under detention, SPO4 Murillo ordered him to admit selling illegal substances but he refused. He was released on January 26, 2001 only to be rearrested at around 9 o'clock in the evening on January 30, 2001 when SPO4 Murillo and his team returned to his house and took him at gunpoint to the police station where he was detained for 24 hours. Police officers presented him later to Mayor Lito Atienza and General Avelino Razon for a press conference.

#### Ruling of the Regional Trial Court

In its Decision[4] dated February 28, 2003, the trial court convicted the appellant of both charges. It declared that the evidence adduced by the prosecution established with moral certainty his guilt for committing the crimes in the manner narrated in the Informations. The testimonies of police officers that they caught appellant in flagrante

delicto of selling and possessing a dangerous drug are clear and positive evidence that deserve more evidentiary weight than appellant's defenses of denial and frame-up, which are mere negative and self-serving assertions unsubstantiated by clear and convincing evidence. The trial court also ruled that it cannot deviate from the presumption of regularity in the performance of duty on the part of the police officers since no ill motives were ascribed to them that would entice them to testify falsely against the appellant.

The trial court also held that while the Informations alleged methamphetamine hydrochloride as the drug seized from the appellant, the drug actually confiscated which was ephedrine, is a precursor of methamphetamine, i.e., methamphetamine is an element of, and is present in ephedrine. Ephedrine is the raw material while methamphetamine is its refined product. Both drugs have the same chemical formula except for the presence of a single atom of oxygen which when removed by means of chemical reaction changes ephedrine to methamphetamine. Thus, the trial court ruled that the appellant can be convicted of the offenses charged, which are included in the crimes proved. The trial court further held that under Section 4, Rule 120 of the Rules of Court, a variance in the offense charged in the complaint or information and that proved shall result in the conviction for the offense charged which is included in the offense proved.

In determining the quantity of methamphetamine hydrochloride upon which the proper imposable penalty on the appellant must be based, the trial court gave credence to the testimony of prosecution witness, P/Insp. Tapan that a gram of ephedrine would produce  $\frac{1}{2}$  gram of methamphetamine when refined.[5]

Conformably, the methamphetamine contents of 5.508 grams[6] of ephedrine in Criminal Case No. 01-189458 would be 2.754 grams. Moreover, the methamphetamine contents of 679.215 grams of ephedrine in Criminal Case No. 01-189459 would be 339.6075 grams.

The dispositive portion of the Decision of the trial court reads:

WHEREFORE, judgment is rendered:

In Criminal Case No. 01-189458, pronouncing accused JOSELITO NOQUE y GOMEZ guilty beyond reasonable doubt of selling a net quantity of 2.754 grams of methamphetamine hydrochloride without authority of law, penalized under Section 15 in relation to Section 20 of Republic Act No. 6425, as amended, and sentencing the said accused to the indeterminate penalty ranging from four (4) years and two (2) months of prision correccional, as minimum, to six (6) years and one (1) day of prision mayor, as maximum, and to pay the costs.

In Criminal Case No. 01-189459, pronouncing the same accused JOSELITO NOQUE y GOMEZ guilty beyond reasonable doubt of possession of a net quantity of 339.6075 grams of methamphetamine hydrochloride without license or prescription, penalized under Section 16 in relation to Section 20 of Republic Act No. 6425, as amended, and sentencing the said accused to the penalty of reclusion perpetua and to pay a fine of P5,000,000.00, plus the costs.

In the service of his sentences, the full time during which the accused had been under preventive imprisonment should be credited in his favor provided that he had agreed voluntarily in writing to abide with the same disciplinary rules imposed on convicted prisoner. Otherwise, he should be credited with four-fifths (4/5) only of the time he had been under preventive imprisonment.

Exhibits "B" and "C" are ordered confiscated and forfeited in favor of the government. Within ten (10) days following the promulgation of this judgment, the Branch Clerk of this Court, is ordered to turn over, under proper receipt, the regulated drug involved in these cases to the Philippine Drug Enforcement Agency (PDEA) for proper disposal.

SO ORDERED.[7]

## Ruling of the Court of Appeals

The CA affirmed the trial court's judgment. It held that the designations in the Informations are for violations of Sections 15 and 16 of RA 6425 that define and penalize the crimes of illegal sale and illegal possession of regulated drugs. While the allegations in the Informations refer to unauthorized sale and possession of "shabu" or methamphetamine hydrochloride, and not of ephedrine, the allegations are however immediately followed by the qualifying phrase "which is a regulated drug." Stated differently, the CA held that the designations and allegations in the informations are for the crimes of illegal sale and illegal possession of regulated drugs. There being no dispute that ephedrine is a regulated drug, pursuant to Board Resolution No. 2, Series of 1988, issued by the Dangerous Drugs Board on March 17, 1988, the CA ruled that the appellant is deemed to have been sufficiently informed of the nature of the crime with which he is accused. The fact that the chemical structures of ephedrine and methamphetamine are the same except for the presence of an atom of oxygen in the former strengthens this ruling.[8]

However, the CA modified the penalty imposed by the trial court in Criminal Case No. 01-189458. It held that in the absence of any mitigating or aggravating circumstances in this case, the penalty should be imposed in its medium period, ranging from six months of *arresto mayor*, as minimum, to two years, four months and one day of *prision correccional*, as maximum. Thus, the dispositive portion of the Decision of the CA reads:

WHEREFORE, premises considered, the February 28, 2003 Decision of the Regional Trial Court of Manila, Branch 35, is hereby AFFIRMED with the MODIFICATION that in Criminal Case No. 01-189458, accused-appellant is hereby sentenced to suffer the indeterminate penalty of six (6) months of *arresto mayor*, as minimum, to two (2) years, four (4) months and one (1) day of *prision correccional*, as maximum.

SO ORDERED.[9]

## Our Ruling

The appeal is bereft of merit.

The prosecution's evidence satisfactorily proved that appellant is guilty of illegal sale of a dangerous drug.

The prosecution successfully proved that appellant violated Section 15, Article III of RA 6425. The prosecution's evidence established the concurrence of the elements of an illegal sale of a dangerous drug, to wit: (1) the identity of the buyer and seller, object, and consideration; and (2) the delivery of the thing sold and the payment therefor.[10]

In the instant case, the police officers conducted a buy-bust operation after receiving confirmed surveillance reports that the appellant was engaged in the illicit sale of dangerous drugs at No. 630 San Andres Street, Malate, Manila. PO1 Balais, the designated poseur-buyer of the buy-bust team, personally identified the appellant as the person who volunteered to sell to him P1,000.00 worth of white crystalline substance alleged to be shabu. The police officer received this illegal merchandise after giving the appellant the marked money as payment. Undoubtedly, the appellant is guilty of selling a dangerous drug.

The prosecution's evidence satisfactorily proved that appellant illegally possessed a dangerous drug.

The prosecution was also successful in proving that appellant violated Section 16, Article III of RA 6425. It adduced evidence that established the presence of the elements of illegal possession of a dangerous drug. It showed that (1) the appellant was in possession of an item or an object identified to be a prohibited or regulated drug, (2) such possession is not authorized by law, and (3) the appellant was freely and consciously aware of being in possession of the drug.[11]

The police buy-bust team apprehended the appellant for the sale of a white crystalline substance then proceeded to search the premises. They found a large quantity of the same substance inside the bag that contained the two sachets of the regulated drug sold to PO1 Balais. Appellant did not offer any explanation why he is in custody of the said substance. Neither did the appellant present any authorization to possess the same. "Mere possession of a regulated drug per se constitutes prima facie evidence of knowledge or animus possidendi sufficient to convict an accused absent a satisfactory explanation of such possession - the onus probandi is shifted to the accused, to explain the absence of knowledge or animus possidendi." [12] With the burden of evidence shifted to the appellant, it was his duty to explain his innocence on the regulated drug seized from his person. However, as already mentioned, he did not offer any excuse or explanation regarding his possession thereof.

There is no evidence showing that the police officers are actuated by ill motives.

Likewise to be considered against the appellant is his failure to present evidence imputing evil motive on the part of the police officers who participated in the entrapment operation to testify falsely against him. "Where there is no evidence that the principal witness of the prosecution was actuated by ill or devious motive, the testimony is entitled to full faith and credit." [13]

Appellant's right to be informed of the nature and cause of the accusations was not violated.

The only issue raised by the appellant in this petition is that his conviction for the sale and possession of shabu, despite the fact that what was established and proven was the sale and possession of ephedrine, violated his constitutional right to be informed of the nature and cause of the accusations against him since the charges in the Informations are for selling and possessing methamphetamine hydrochloride.

We agree with the findings of the CA and the trial court, as well as the testimony of the forensic chemical officer, that the drug known as ephedrine has a central nervous stimulating effect similar to that of methamphetamine. In fact, ephedrine is an important precursor used in the clandestine synthesis of methamphetamine, which in crystallized form is methamphetamine hydrochloride.

Thus, on March 17, 1988, pursuant to Section 20(8) of RA 6425, as amended, the Dangerous Drugs Board in its Board Regulation No. 2, S. 1988, classified as regulated drug all raw materials of ephedrine, as well as preparations containing the said drug. The chemical formula of ephedrine is C<sub>10</sub> H<sub>15</sub> NO, whereas that of methamphetamine is C<sub>10</sub> H<sub>15</sub> N. The only difference between ephedrine and methamphetamine is the presence of a single atom of oxygen in the former. The removal of the oxygen in ephedrine will produce methamphetamine. With ephedrine containing fifty percent (50%) of methamphetamine hydrochloride if the oxygen content in the former is removed, the nearly 680 grams of ephedrine seized from the appellant contains about 340 grams of methamphetamine hydrochloride.

Moreover, as correctly observed by CA, the offenses designated in the Informations are for violations of Sections 15 and 16 of RA 6425, which define and penalize the crimes of illegal sale and possession of regulated drugs. The allegations in the Informations for the unauthorized sale and possession of "shabu" or methamphetamine

hydrochloride are immediately followed by the qualifying phrase "which is a regulated drug". Thus, it is clear that the designations and allegations in the Informations are for the crimes of illegal sale and illegal possession of regulated drugs. Ephedrine has been classified as a regulated drug by the Dangerous Drugs Board in Board Resolution No. 2, Series of 1988.

The CA correctly ruled that Sections 4 and 5, Rule 120 of the Rules of Court,[14] can be applied by analogy in convicting the appellant of the offenses charged, which are included in the crimes proved. Under these provisions, an offense charged is necessarily included in the offense proved when the essential ingredients of the former constitute or form part of those constituting the latter. At any rate, a minor variance between the information and the evidence does not alter the nature of the offense, nor does it determine or qualify the crime or penalty, so that even if a discrepancy exists, this cannot be pleaded as a ground for acquittal.[15] In other words, his right to be informed of the charges against him has not been violated because where an accused is charged with a specific crime, he is duly informed not only of such specific crime but also of lesser crimes or offenses included therein.[16]

### The Penalties

In Criminal Case No. 01-189458, appellant is found guilty of violation of Section 15, Article III of RA 6425, as amended. We explained in *People v. Isnani*[17] that:

Under Section 15, Article III in relation to the second paragraph of Sections 20 and 21 of Article IV of Republic Act No. 6425, as amended by Section 17 of R.A. No. 7659, the imposable penalty of illegal sale of a regulated drug (shabu), less than 200 grams, as in this case, is prision correccional to reclusion perpetua. Based on the quantity of the regulated drug subject of the offense, the imposable penalty shall be as follows:

#### QUANTITY

#### IMPOSABLE PENALTY

Less than one (1) gram to 49.25 grams

prision correccional

49.26 grams to 98.50 grams

prision mayor

98.51 grams to 147.75 grams

reclusion temporal

147.76 grams to 199 grams

reclusion perpetua

The quantity of shabu involved is 0.060 grams. Pursuant to the second paragraph of Sections 20 and 21 of Article IV of R.A. No. 6425, as amended by Section 17 of R.A. No. 7659 (for unauthorized sale of less than 200 grams of shabu) and considering our ruling in the above case, the imposable penalty is prision correccional.

Applying the Indeterminate Sentence Law, and there being no aggravating or mitigating circumstance that attended the commission of the crime, the maximum period is prision correccional in its medium period which has a duration of 2 years, 4 months and 1 day to 4 years and 2 months. The minimum period is within the range of the penalty next lower in degree which is arresto mayor, the duration of which is 1 month and 1 day to 6 months. Hence, appellant should be sentenced to 6 months of arresto mayor, as minimum, to 2 years, 4 months and 1 days

of prision correccional in its medium period, as maximum.

In Criminal Case No. 01-189458, the quantity of the prohibited drug seized from appellant is 2.754 grams. Accordingly, the Court of Appeals correctly modified the penalty imposed by the trial court to six months of arresto mayor, as minimum, to two years, four months and one day of prision correccional, as maximum.

As regards Criminal Case No. 01-189459, Section 16, Article III of RA 6425, as amended, provides for the penalty of reclusion perpetua to death and a fine ranging from P500,000.00 to P10 million upon any person who shall possess or use any regulated drug without the corresponding license or prescription. Section 20 of RA 6425, as amended, further provides that the penalty imposed for the offense under Section 16, Article III shall be applied if the dangerous drug involved is 200 grams or more of shabu. In this case, the appellant was found in illegal possession of 339.6075 grams of prohibited drug. Therefore, both the trial court and the Court of Appeals correctly imposed the penalty of reclusion perpetua and a fine of P500,000.00 to appellant.

WHEREFORE, the Decision of the Court of Appeals in CA-G.R. CR-H.C. No. 00684 is AFFIRMED.

**SO ORDERED.**

Carpio, (Chairperson), Brion, Abad, and Perez, JJ., concur.

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[1] See *People v. San Juan*, 427 Phil. 236, 247-248 (2002).

[2] Records, p. 2.

[3] Id. at 3.

[4] Id. at 140-153; penned by Judge Ramon P. Makasiar.

[5] TSN, October 11, 2002, p. 15.

[6] 2.729 grams plus 2.779 grams.

[7] Records, pp. 152-153.

[8] CA rollo, pp. 109-110.

[9] Records, p. 17.

[10] *People v. Lee Hoi Ming*, 459 Phil. 187, 193 (2003).

[11] *People v. Tiu Won Chua*, 453 Phil. 177, 186 (2003).

[12] *People v. Tee*, 443 Phil. 521, 551 (2003).

[13] *People v. Bocalan*, 457 Phil. 472, 482 (2003).

[14] Sec. 4. Judgment in case of variance between allegation and proof. - When there is a variance between the offense charged in the complaint or information, and that proved, and the offense charged is included in or necessarily includes the offense proved, the accused shall be convicted of the offense proved which is included in the offense charged, or of the offense charged which is included in the offense proved.

Sec. 5. When an offense includes or is included in another. - An offense charged necessarily includes the offense proved when some of the essential elements or ingredients of the former, as alleged in the complaint or information, constitute the latter. An offense charged is necessarily included in the offense proved, when the

essential ingredients of the former constitute or form part of those constituting the latter.

[15] *People v. Bunsol*, 159 Phil. 846, 851 (1975).

[16] See *People v. Villamar*, 358 Phil. 886, 894 (1998).

[17] G.R. No. 133006, June 9, 2004, 431 SCRA 439, 456-457, citing *People v. Tira*, G.R. No. 139615, May 28, 2004, 430 SCRA 134.

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