VICTORIO P. DIAZ, PETITIONER, VS. PEOPLE OF THE PHILIPPINES AND LEVI STRAUSS [PHILS.], INC., RESPONDENTS.

G.R. No. 180677. February 18, 2013

Ponente: BERSAMIN, J.

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BERSAMIN, J.:

It is the tendency of the allegedly infringing mark to be confused with the registered trademark that is the gravamen of the offense of infringement of a registered trademark. The acquittal of the accused should follow if the allegedly infringing mark is not likely to cause confusion. Thereby, the evidence of the State does not satisfy the quantum of proof beyond reasonable doubt.

Accused Victorio P. Diaz (Diaz) appeals the resolutions promulgated on July 17, 2007[1] and November 22, 2007,[2] whereby the Court of Appeals (CA), respectively, dismissed his appeal in C.A.-G.R. CR No. 30133 for the belated filing of the appellant's brief, and denied his motion for reconsideration. Thereby, the decision rendered on February 13, 2006 in Criminal Case No. 00-0318 and Criminal Case No. 00-0319 by the Regional Trial Court, Branch 255, in Las Piñas City (RTC) convicting him for two counts of infringement of trademark were affirmed.[3]

Antecedents

On February 10, 2000, the Department of Justice filed two informations in the RTC of Las Piñas City, charging Diaz with violation of Section 155, in relation to Section 170, of Republic Act No. 8293, also known as the Intellectual Property Code of the Philippines (Intellectual Property Code), to wit:

> Criminal Case No. 00-0318
> That on or about August 28, 1998, and on dates prior thereto, in Las Piñas City, and within the jurisdiction of this Honorable Court, the above-named accused, with criminal intent to defraud Levi's Strauss (Phil.) Inc. (hereinafter referred to as LEVI'S), did then and there, willfully, unlawfully, feloniously, knowingly and intentionally engaged in commerce by reproducing, counterfeiting, copying and colorably imitating Levi's registered trademarks or dominant features thereof such as the ARCUATE DESIGN, TWO HORSE BRAND, TWO HORSE PATCH, TWO HORSE LABEL WITH PATTERNED ARCUATE DESIGN, TAB AND COMPOSITE ARCUATE/TAB/TWO HORSE PATCH, and in connection thereto, sold, offered for sale, manufactured, distributed counterfeit patches and jeans, including other preparatory steps necessary to carry out the sale of said patches and jeans, which likely caused confusion, mistake, and /or deceived the general consuming public, without the consent, permit or authority of the registered owner, LEVI'S, thus depriving and defrauding the latter of its right to the exclusive use of its trademarks and legitimate trade, to the damage and prejudice of LEVI'S.
>
> CONTRARY TO LAW.[4]
>
> Criminal Case No. 00-0319
> That on or about August 28, 1998, and on dates prior thereto, in Las Piñas City, and within the jurisdiction of this Honorable Court, the above-named accused, with criminal intent to defraud Levi's Strauss (Phil.) Inc.

> (hereinafter referred to as LEVI'S), did then and there, willfully, unlawfully, feloniously, knowingly and intentionally engaged in commerce by reproducing, counterfeiting, copying and colorably imitating Levi's registered trademarks or dominant features thereof such as the ARCUATE DESIGN, TWO HORSE BRAND, TWO HORSE PATCH, TWO HORSE LABEL WITH PATTERNED ARCUATE DESIGN, TAB AND COMPOSITE ARCUATE/TAB/TWO HORSE PATCH, and in connection thereto, sold, offered for sale, manufactured, distributed counterfeit patches and jeans, including other preparatory steps necessary to carry out the sale of said patches and jeans, which likely caused confusion, mistake, and /or deceived the general consuming public, without the consent, permit or authority of the registered owner, LEVI'S, thus depriving and defrauding the latter of its right to the exclusive use of its trademarks and legitimate trade, to the damage and prejudice of LEVI'S.
>
> CONTRARY TO LAW.[5]

The cases were consolidated for a joint trial. Diaz entered his pleas of not guilty to each information on June 21, 2000.[6]

1.
Evidence of the Prosecution

Levi Strauss and Company (Levi's), a foreign corporation based in the State of Delaware, United States of America, had been engaged in the apparel business. It is the owner of trademarks and designs of Levi's jeans like LEVI'S 501, the arcuate design, the two-horse brand, the two-horse patch, the two-horse patch with pattern arcuate, and the composite tab arcuate. LEVI'S 501 has the following registered trademarks, to wit: (1) the leather patch showing two horses pulling a pair of pants; (2) the arcuate pattern with the inscription "LEVI STRAUSS & CO;" (3) the arcuate design that refers to "the two parallel stitching curving downward that are being sewn on both back pockets of a Levi's Jeans;" and (4) the tab or piece of cloth located on the structural seam of the right back pocket, upper left side. All these trademarks were registered in the Philippine Patent Office in the 1970's, 1980's and early part of 1990's.[7]

Levi Strauss Philippines, Inc. (Levi's Philippines) is a licensee of Levi's. After receiving information that Diaz was selling counterfeit LEVI'S 501 jeans in his tailoring shops in Almanza and Talon, Las Piñas City, Levi's Philippines hired a private investigation group to verify the information. Surveillance and the purchase of jeans from the tailoring shops of Diaz established that the jeans bought from the tailoring shops of Diaz were counterfeit or imitations of LEVI'S 501. Levi's Philippines then sought the assistance of the National Bureau of Investigation (NBI) for purposes of applying for a search warrant against Diaz to be served at his tailoring shops. The search warrants were issued in due course. Armed with the search warrants, NBI agents searched the tailoring shops of Diaz and seized several fake LEVI'S 501 jeans from them. Levi's Philippines claimed that it did not authorize the making and selling of the seized jeans; that each of the jeans were mere imitations of genuine LEVI'S 501 jeans by each of them bearing the registered trademarks, like the arcuate design, the tab, and the leather patch; and that the seized jeans could be mistaken for original LEVI'S 501 jeans due to the placement of the arcuate, tab, and two-horse leather patch.[8]

2.
Evidence of the Defense
On his part, Diaz admitted being the owner of the shops searched, but he denied any criminal liability.

Diaz stated that he did not manufacture Levi's jeans, and that he used the label "LS Jeans Tailoring" in the jeans that he made and sold; that the label "LS Jeans Tailoring" was registered with the Intellectual Property Office; that his shops received clothes for sewing or repair; that his shops offered made-to-order jeans, whose styles or designs were done in accordance with instructions of the customers; that since the time his shops began operating

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in 1992, he had received no notice or warning regarding his operations; that the jeans he produced were easily recognizable because the label "LS Jeans Tailoring," and the names of the customers were placed inside the pockets, and each of the jeans had an "LSJT" red tab; that "LS" stood for "Latest Style;" and that the leather patch on his jeans had two buffaloes, not two horses.[9]

Ruling of the RTC

On February 13, 2006, the RTC rendered its decision finding Diaz guilty as charged, disposing thus:

> WHEREFORE, premises considered, the Court finds accused Victorio P. Diaz, a.k.a. Vic Diaz, GUILTY beyond reasonable doubt of twice violating Sec. 155, in relation to Sec. 170, of RA No. 8293, as alleged in the Informations in Criminal Case Nos. 00-0318 & 00-0319, respectively, and hereby sentences him to suffer in each of the cases the penalty of imprisonment of TWO (2) YEARS of prision correcional, as minimum, up to FIVE (5) YEARS of prision correcional, as maximum, as well as pay a fine of P50,000.00 for each of the herein cases, with subsidiary imprisonment in case of insolvency, and to suffer the accessory penalties provided for by law.
>
> Also, accused Diaz is hereby ordered to pay to the private complainant Levi's Strauss (Phils.), Inc. the following, thus:
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> - P50,000.00 in exemplary damages; and
>
> - P222,000.00 as and by way of attorney's fees.
>
> Costs de officio.
>
> SO ORDERED.[10]

Ruling of the CA

Diaz appealed, but the CA dismissed the appeal on July 17, 2007 on the ground that Diaz had not filed his appellant's brief on time despite being granted his requested several extension periods.

Upon denial of his motion for reconsideration, Diaz is now before the Court to plead for his acquittal.

Issue

Diaz submits that:

> THE COURT OF APPEALS VIOLATED EXISTING LAW AND JURISPRUDENCE WHEN IT APPLIED RIGIDLY THE RULE ON TECHNICALITIES AND OVERRIDE SUBSTANTIAL JUSTICE BY DISMISSING THE APPEAL OF THE PETITIONER FOR LATE FILING OF APPELLANT'S BRIEF.[11]

Ruling

The Court first resolves whether the CA properly dismissed the appeal of Diaz due to the late filing of his appellant's brief.

Under Section 7, Rule 44 of the Rules of Court, the appellant is required to file the appellant's brief in the CA "within forty-five (45) days from receipt of the notice of the clerk that all the evidence, oral and documentary, are attached to the record, seven (7) copies of his legibly typewritten, mimeographed or printed brief, with proof of service of two (2) copies thereof upon the appellee." Section 1(e) of Rule 50 of the Rules of Court grants to the CA the discretion to dismiss an appeal either motu proprio or on motion of the appellee should the appellant fail to serve and file the required number of copies of the appellant's brief within the time provided by the Rules of Court.[12]

The usage of the word may in Section 1(e) of Rule 50 indicates that the dismissal of the appeal upon failure to file

the appellant's brief is not mandatory, but discretionary. Verily, the failure to serve and file the required number of copies of the appellant's brief within the time provided by the Rules of Court does not have the immediate effect of causing the outright dismissal of the appeal. This means that the discretion to dismiss the appeal on that basis is lodged in the CA, by virtue of which the CA may still allow the appeal to proceed despite the late filing of the appellant's brief, when the circumstances so warrant its liberality. In deciding to dismiss the appeal, then, the CA is bound to exercise its sound discretion upon taking all the pertinent circumstances into due consideration.

The records reveal that Diaz's counsel thrice sought an extension of the period to file the appellant's brief. The first time was on March 12, 2007, the request being for an extension of 30 days to commence on March 11, 2007. The CA granted his motion under its resolution of March 21, 2007. On April 10, 2007, the last day of the 30-day extension, the counsel filed another motion, seeking an additional 15 days. The CA allowed the counsel until April 25, 2007 to serve and file the appellant's brief. On April 25, 2007, the counsel went a third time to the CA with another request for 15 days. The CA still granted such third motion for extension, giving the counsel until May 10, 2007. Notwithstanding the liberality of the CA, the counsel did not literally comply, filing the appellant's brief only on May 28, 2007, which was the 18th day beyond the third extension period granted.

Under the circumstances, the failure to file the appellant's brief on time rightly deserved the outright rejection of the appeal. The acts of his counsel bound Diaz like any other client. It was, of course, only the counsel who was well aware that the Rules of Court fixed the periods to file pleadings and equally significant papers like the appellant's brief with the lofty objective of avoiding delays in the administration of justice.

Yet, we have before us an appeal in two criminal cases in which the appellant lost his chance to be heard by the CA on appeal because of the failure of his counsel to serve and file the appellant's brief on time despite the grant of several extensions the counsel requested. Diaz was convicted and sentenced to suffer two indeterminate sentences that would require him to spend time in detention for each conviction lasting two years, as minimum, to five years, as maximum, and to pay fines totaling P100,000.00 (with subsidiary imprisonment in case of his insolvency). His personal liberty is now no less at stake. This reality impels us to look beyond the technicality and delve into the merits of the case to see for ourselves if the appeal, had it not been dismissed, would have been worth the time of the CA to pass upon. After all, his appellant's brief had been meanwhile submitted to the CA. While delving into the merits of the case, we have uncovered a weakness in the evidence of guilt that cannot be simply ignored and glossed over if we were to be true to our oaths to do justice to everyone.

We feel that despite the CA being probably right in dismissing the excuses of oversight and excusable negligence tendered by Diaz's counsel to justify the belated filing of the appellant's brief as unworthy of serious consideration, Diaz should not be made to suffer the dire consequence. Any accused in his shoes, with his personal liberty as well as his personal fortune at stake, expectedly but innocently put his fullest trust in his counsel's abilities and professionalism in the handling of his appeal. He thereby delivered his fate to the hands of his counsel. Whether or not those hands were efficient or trained enough for the job of handling the appeal was a learning that he would get only in the end. Likelier than not, he was probably even unaware of the three times that his counsel had requested the CA for extensions. If he were now to be left to his unwanted fate, he would surely suffer despite his innocence. How costly a learning it would be for him! That is where the Court comes in. It is most important for us as dispensers of justice not to allow the inadvertence or incompetence of any counsel to result in the outright deprivation of an appellant's right to life, liberty or property.[13]

We do not mind if this softening of judicial attitudes be mislabeled as excessive leniency. With so much on the line, the people whose futures hang in a balance should not be left to suffer from the incompetence, mindlessness or lack of professionalism of any member of the Law Profession. They reasonably expect a just result in every litigation. The courts must give them that just result. That assurance is the people's birthright. Thus, we have to

undo Diaz's dire fate.

Even as we now set aside the CA's rejection of the appeal of Diaz, we will not remand the records to the CA for its review. In an appeal of criminal convictions, the records are laid open for review. To avoid further delays, therefore, we take it upon ourselves to review the records and resolve the issue of guilt, considering that the records are already before us.

Section 155 of R.A. No. 8293 defines the acts that constitute infringement of trademark, viz:

> Remedies; Infringement. — Any person who shall, without the consent of the owner of the registered mark:
>
> 155.1. Use in commerce any reproduction, counterfeit, copy, or colorable imitation of a registered mark or the same container or a dominant feature thereof in connection with the sale, offering for sale, distribution, advertising of any goods or services including other preparatory steps necessary to carry out the sale of any goods or services on or in connection with which such use is likely to cause confusion, or to cause mistake, or to deceive; or
>
> 155.2. Reproduce, counterfeit, copy or colorably imitate a registered mark or a dominant feature thereof and apply such reproduction, counterfeit, copy or colorable imitation to labels, signs, prints, packages, wrappers, receptacles or advertisements intended to be used in commerce upon or in connection with the sale, offering for sale, distribution, or advertising of goods or services on or in connection with which such use is likely to cause confusion, or to cause mistake, or to deceive, shall be liable in a civil action for infringement by the registrant for the remedies hereinafter set forth: Provided, That the infringement takes place at the moment any of the acts stated in Subsection 155.1 or this subsection are committed regardless of whether there is actual sale of goods or services using the infringing material.

The elements of the offense of trademark infringement under the Intellectual Property Code are, therefore, the following:

> - The trademark being infringed is registered in the Intellectual Property Office;
>
> - The trademark is reproduced, counterfeited, copied, or colorably imitated by the infringer;
>
> - The infringing mark is used in connection with the sale, offering for sale, or advertising of any goods, business or services; or the infringing mark is applied to labels, signs, prints, packages, wrappers, receptacles or advertisements intended to be used upon or in connection with such goods, business or services;
>
> - The use or application of the infringing mark is likely to cause confusion or mistake or to deceive purchasers or others as to the goods or services themselves or as to the source or origin of such goods or services or the identity of such business; and
>
> - The use or application of the infringing mark is without the consent of the trademark owner or the assignee thereof.[14]

As can be seen, the likelihood of confusion is the gravamen of the offense of trademark infringement.[15] There are two tests to determine likelihood of confusion, namely: the dominancy test, and the holistic test. The contrasting concept of these tests was explained in Societes Des Produits Nestle, S.A. v. Dy, Jr., thus:

> x x x. The dominancy test focuses on the similarity of the main, prevalent or essential features of the competing trademarks that might cause confusion. Infringement takes place when the competing trademark contains the essential features of another. Imitation or an effort to imitate is unnecessary. The question is whether the use of the marks is likely to cause confusion or deceive purchasers.
>
> The holistic test considers the entirety of the marks, including labels and packaging, in determining confusing similarity. The focus is not only on the predominant words but also on the other features appearing on the

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> labels.[16]

As to what test should be applied in a trademark infringement case, we said in McDonald's Corporation v. Macjoy Fastfood Corporation[17] that:

> In trademark cases, particularly in ascertaining whether one trademark is confusingly similar to another, no set rules can be deduced because each case must be decided on its merits. In such cases, even more than in any other litigation, precedent must be studied in the light of the facts of the particular case. That is the reason why in trademark cases, jurisprudential precedents should be applied only to a case if they are specifically in point.

The case of Emerald Garment Manufacturing Corporation v. Court of Appeals,[18] which involved an alleged trademark infringement of jeans products, is worth referring to. There, H.D. Lee Co., Inc. (H.D. Lee), a corporation based in the United States of America, claimed that Emerald Garment's trademark of "STYLISTIC MR. LEE" that it used on its jeans products was confusingly similar to the "LEE" trademark that H.D. Lee used on its own jeans products. Applying the holistic test, the Court ruled that there was no infringement.

The holistic test is applicable here considering that the herein criminal cases also involved trademark infringement in relation to jeans products. Accordingly, the jeans trademarks of Levi's Philippines and Diaz must be considered as a whole in determining the likelihood of confusion between them. The maong pants or jeans made and sold by Levi's Philippines, which included LEVI'S 501, were very popular in the Philippines. The consuming public knew that the original LEVI'S 501 jeans were under a foreign brand and quite expensive. Such jeans could be purchased only in malls or boutiques as ready-to-wear items, and were not available in tailoring shops like those of Diaz's as well as not acquired on a "made-to-order" basis. Under the circumstances, the consuming public could easily discern if the jeans were original or fake LEVI'S 501, or were manufactured by other brands of jeans. Confusion and deception were remote, for, as the Court has observed in Emerald Garments:

> First, the products involved in the case at bar are, in the main, various kinds of jeans. These are not your ordinary household items like catsup, soy sauce or soap which are of minimal cost. Maong pants or jeans are not inexpensive. Accordingly, the casual buyer is predisposed to be more cautious and discriminating in and would prefer to mull over his purchase. Confusion and deception, then, is less likely. In Del Monte Corporation v. Court of Appeals, we noted that:
>
> .... Among these, what essentially determines the attitudes of the purchaser, specifically his inclination to be cautious, is the cost of the goods. To be sure, a person who buys a box of candies will not exercise as much care as one who buys an expensive watch. As a general rule, an ordinary buyer does not exercise as much prudence in buying an article for which he pays a few centavos as he does in purchasing a more valuable thing. Expensive and valuable items are normally bought only after deliberate, comparative and analytical investigation. But mass products, low priced articles in wide use, and matters of everyday purchase requiring frequent replacement are bought by the casual consumer without great care....

Second, like his beer, the average Filipino consumer generally buys his jeans by brand. He does not ask the sales clerk for generic jeans but for, say, a Levis, Guess, Wrangler or even an Armani. He is, therefore, more or less knowledgeable and familiar with his preference and will not easily be distracted.

Finally, in line with the foregoing discussions, more credit should be given to the "ordinary purchaser." Cast in this particular controversy, the ordinary purchaser is not the "completely unwary consumer" but is the "ordinarily intelligent buyer" considering the type of product involved.

The definition laid down in Dy Buncio v. Tan Tiao Bok is better suited to the present case. There, the "ordinary purchaser" was defined as one "accustomed to buy, and therefore to some extent familiar with, the goods in question. The test of fraudulent simulation is to be found in the likelihood of the deception of some persons in

some measure acquainted with an established design and desirous of purchasing the commodity with which that design has been associated. The test is not found in the deception, or the possibility of deception, of the person who knows nothing about the design which has been counterfeited, and who must be indifferent between that and the other. The simulation, in order to be objectionable, must be such as appears likely to mislead the ordinary intelligent buyer who has a need to supply and is familiar with the article that he seeks to purchase.[19]

Diaz used the trademark "LS JEANS TAILORING" for the jeans he produced and sold in his tailoring shops. His trademark was visually and aurally different from the trademark "LEVI STRAUSS & CO" appearing on the patch of original jeans under the trademark LEVI'S 501. The word "LS" could not be confused as a derivative from "LEVI STRAUSS" by virtue of the "LS" being connected to the word "TAILORING", thereby openly suggesting that the jeans bearing the trademark "LS JEANS TAILORING" came or were bought from the tailoring shops of Diaz, not from the malls or boutiques selling original LEVI'S 501 jeans to the consuming public.

There were other remarkable differences between the two trademarks that the consuming public would easily perceive. Diaz aptly noted such differences, as follows:

> The prosecution also alleged that the accused copied the "two horse design" of the petitioner-private complainant but the evidence will show that there was no such design in the seized jeans. Instead, what is shown is "buffalo design." Again, a horse and a buffalo are two different animals which an ordinary customer can easily distinguish. x x x.
>
> The prosecution further alleged that the red tab was copied by the accused. However, evidence will show that the red tab used by the private complainant indicates the word "LEVI'S" while that of the accused indicates the letters "LSJT" which means LS JEANS TAILORING. Again, even an ordinary customer can distinguish the word LEVI'S from the letters LSJT.
>
> x x x x
>
> In terms of classes of customers and channels of trade, the jeans products of the private complainant and the accused cater to different classes of customers and flow through the different channels of trade. The customers of the private complainant are mall goers belonging to class A and B market group – while that of the accused are those who belong to class D and E market who can only afford Php 300 for a pair of made-to-order pants.[20] x x x.

Moreover, based on the certificate issued by the Intellectual Property Office, "LS JEANS TAILORING" was a registered trademark of Diaz. He had registered his trademark prior to the filing of the present cases.[21] The Intellectual Property Office would certainly not have allowed the registration had Diaz's trademark been confusingly similar with the registered trademark for LEVI'S 501 jeans.

Given the foregoing, it should be plain that there was no likelihood of confusion between the trademarks involved. Thereby, the evidence of guilt did not satisfy the quantum of proof required for a criminal conviction, which is proof beyond reasonable doubt. According to Section 2, Rule 133 of the Rules of Court, proof beyond a reasonable doubt does not mean such a degree of proof as, excluding possibility of error, produces absolute certainty. Moral certainty only is required, or that degree of proof which produces conviction in an unprejudiced mind. Consequently, Diaz should be acquitted of the charges.

WHEREFORE, the Court ACQUITS petitioner VICTORIO P. DIAZ of the crimes of infringement of trademark charged in Criminal Case No. 00-0318 and Criminal Case No. 00-0319 for failure of the State to establish his guilt by proof beyond reasonable doubt.

No pronouncement on costs of suit.

SO ORDERED.

Sereno, C.J., Leonardo-De Castro, Villarama, Jr., and Reyes, JJ., concur.

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[1] Rollo, pp. 29-32; penned by Associate Justice Ramon M. Bato, Jr., with Associate Justice Andres B. Reyes, Jr. (now Presiding Justice) and Associate Justice Jose C. Mendoza (now a Member of the Court) concurring.

[2] Id. at 34-36.

[3] Id. at 37-56.

[4] Records, p. 3.

[5] Id. at 9.

[6] Id. at 192.

[7] Id. at 26-101.

[8] Id. at 98-148.

[9] TSN, November 11, 2004, pp. 1-30.

[10] Rollo, p. 56.

[11] Id. at 10-11.

[12] Section 1(e), Rule 50, Rules of Court, states:

Section 1. Grounds for dismissal of appeal. – An appeal may be dismissed by the Court of Appeals, on its own motion or on that of the appellee, on the following grounds:

x x x x

(e) Failure of the appellant to serve and file the required number of copies of his brief or memorandum within the time provided by these Rules.

x x x x

[13] See, e.g., The Government of the Kingdom of Belgium v. Court of Appeals, G.R. No. 164150, April 14, 2008, 551 SCRA 223, 242.

[14] Societe Des Produits Nestle, S.A. v. Dy, Jr., G.R. No. 172276, August 9, 2010, 627 SCRA 223, 233-234; citing Prosource International, Inc. v. Horphag Research Management SA, G.R. No. 180073, November 25, 2009, 605 SCRA 523, 530.

[15] Societe Des Produits Nestle, S.A. v. Dy, Jr., id.

[16] Id. at 235.

[17] G.R. No. 166115, February 2, 2007, 514 SCRA 95, 107.

[18] G.R. No. 100098, December 29, 1995, 251 SCRA 600.

[19] Id. at 616-617.

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[20] Rollo, pp. 19-20.

[21] Records, p. 696.

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