

## PEOPLE OF THE PHILIPPINES, PLAINTIFF-APPELLEE, VS. ALBERT OLAES Y AMOROSO, ACCUSED-APPELLANT.

*G.R. No. 76547. July 30, 1990*

Ponente: REGALADO, J.

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### REGALADO, J.:

The decision[1] of the Regional Trial Court, Branch LXXII in Olongapo City, in Criminal Case No. 3602 involving a violation of Section 4, Article II of Republic Act No. 6425 (Dangerous Drugs Act of 1972) has been brought to us on appeal[2] by accused?appellant who was sentenced to suffer the penalty of life imprisonment and to pay a fine of P30,000.00 and the costs. The confiscation and immediate destruction of six (6) lids of marijuana subject matter of the case was also ordered.[3]

In an information dated March 27, 1978, appellant was charged with unlawfully selling six (6) lids of marijuana.[4] On March 16, 1979, appellant, assisted by his counsel de oficio, was duly arraigned and, having pleaded not guilty,[5] trial on the merits ensued.

Based on the evidence for the prosecution, the court a quo narrated the case for the People as follows:

"That at 12:50 in the afternoon of June 15, 1977, said officers were at their office at the CANU investigating Manuelito Bernardo, whom they arrested earlier at No. 41 Harris St., East Bajac--Bajac, Olongapo City for possession of several lids of marijuana. Bernardo informed them that the lids of marijuana confiscated from him came from one alias 'Abet' and his brother alias 'Bonjing'. They made Bernardo agree to act as buyer and to go to the house which, according to Bernardo, was the source of the confiscated marijuana. After giving instructions to Bernardo about the pre-arranged signal, they all proceeded near the house of 'Abet' located at No. 116 Jones Street, Olongapo City. Bernardo entered the compound bringing with him marked money amounting to P300.00 (These were earlier xeroxed after the signature of Pacifico Mugar was affixed).

"After consummating the deal on the marijuana, Bernardo came out and surrendered the same to the officers. Immediately, they entered 'Abet's' house and found him in the living room with some other persons. 'Abet' was confronted, searched, and in his person was found the P300.00 marked money and lids of marijuana. 'Abet' was interrogated on the spot as to the whereabouts of other marijuana if any. They proceeded next door at his brother Benjamin Olaes' kitchen where they recovered sixty more lids of marijuana. Thereafter, 'Abet', which (sic) was later identified as accused Albert Olaes was brought to the CANU office for investigation. Albert Olaes was fingerprinted by C2C Armando Cases and the booking sheet and arrest report were prepared (Exhibit 'G'). The sworn statement of Olaes was taken by Pacifico Mugar (Exhibit 'K'). Pfc. Abello together with Capitulo, Elgar, Macomb and Cases executed a Joint Affidavit in connection with this case (Exhibit 'H'). The sixty lids of marijuana which were confiscated from the kitchen of Benjamin Olaes are covered and stated in the Receipt for Property Seized (Exhibit 'I')."[6]

On the other hand, the decision makes the factual recital that –

"The defense version per testimony of accused Alberto Olaes tends to show that on June 15, 1977, at around two o'clock in the afternoon, he was at their house located at 116 Jones Street Kalalake, Olongapo City. While

at Room 5 of said address, a certain Eling carrying a bag came to their house asking for his brother Benjamin Olaes who was not home at that time. Eling was carrying a bag of dog food. Upon being told that Benjamin was out, Eling asked to be accompanied to Room 2 also located at 116 Jones Street, Olongapo City, where he left the bag in his brother's room, particularly in the 'lababo'. Thereafter, he and Eling went out of the room and he went home to his residence at Room 5, 116 Jones Street, Olongapo City. He executed a sworn statement in connection with this case. He does not know any person by the name of Lito. He affixed his signature on his statement because he was mauled by the investigator and was threatened to be killed.

"On cross-examination, he stated that he does not know who among the investigators beat him up and neither does he know who arrested him. All his personal circumstances stated in his statement are true. He also declared that Eling came from Saletran, Dasmariñas, Cavite." [7]

Opining that the testimony of appellant is incredible and relying heavily on the testimonies of the prosecution witnesses, as well as the extrajudicial confession executed by appellant "corroborated by evidence of corpus delicti," the court below rendered its judgment of conviction stated at the outset of this decision. Hence, this appeal where appellant submits as alleged reversible errors (1) the conviction based on an extrajudicial confession extracted in violation of due process and the bill of rights of the fundamental law; (2) the conviction under Section 4, Article II of Republic Act No. 6425 (selling) even if one of the elements of the offense is missing; and (3) the resolution of doubt on the defense theory by reason of non-corroboration. [8]

We find for appellant and decree his acquittal.

Firstly, the extrajudicial confession [9] executed by appellant on June 15, 1977 is inadmissible in evidence. An examination thereof shows that he was informed of his constitutional rights to remain silent and to be assisted by counsel during said investigation. He was also asked if he was waiving his right to be assisted by counsel and he answered in the affirmative. However, while the rights of a person under custodial investigation may be waived, nonetheless the waiver must be made not only voluntarily, knowingly and intelligently but in the presence and with the assistance of counsel. [10]

In the case at bar, the waiver was made without the assistance of counsel. [11] This omission alone is sufficient to invalidate the confession. [12] While the trial court observed that the narration of the accused in his extrajudicial confession is complete in every detail and did not show any sign of suspicious circumstance to indicate that there was pressure of restraints exerted upon his person, [13] having been made without the mandatory assistance of counsel the same is inadmissible in evidence regardless of the absence of coercion or even if it had been voluntarily given. [14]

Secondly, this case exemplifies the instance where the non-presentation of the supposed poseur-buyer is fatal to the prosecution's case. The records show that the alleged sales transaction took place inside the house of appellant. In other words, the transaction was supposedly witnessed only by the poseur-buyer, Manuelito Bernardo. Only he has personal knowledge of such transaction which is the subject matter of this prosecution. In *People vs. Ramos*, [15] where the alleged informant and poseur-buyer was one and the same person, we stressed that without the testimony of said poseur-buyer, there is no convincing evidence pointing to the accused as having sold marijuana. In this case, the police officers did not see the actual sale of marijuana. For the culprit to be convicted, the element of sale must be unequivocally established. Yet, the alleged poseur-buyer in the "buy-bust" operation, the only one who allegedly dealt directly with appellant in the purchase of marijuana, was not presented at all at the trial. Under such circumstances, we have repeatedly held that the failure of the prosecution to present the alleged buyer was a fatal blow to the case against the accused. [16]

The other prosecution witnesses admitted that it was only when the alleged poseur-buyer left the house of appellant and gave the signal indicating the consummation of the transaction that they started to approach the

house of appellant and entered the same. Thereafter, they allegedly searched the person of appellant and proceeded to the adjoining room where they claimed to have recovered other prohibited drugs.[17] We have carefully reviewed the records and find that the testimonies of the prosecution witnesses do not inspire belief.

While suspiciously dovetailing on certain aspects in their testimonies, the members of said law enforcement team, despite the fact that they claim to have been together before, during and after the operation, enmeshed themselves in significant inconsistencies and contradictions.

Thus, for instance, Cpl. Ernesto Abello claimed that the marked money which was used to purchase the marijuana was zeroxed before it was given to the poseur-buyer who later allegedly paid it to appellant.[18] On the other hand, Pfc. Jaime Capitulo who allegedly recovered the marked money from appellant testified that it was after such money was retrieved and the team had returned to their office that he turned over the money to their superior, Capt. Aldaba, and it was then that zerox copies of the money were made presumably for purposes of evidence,[19] only to subsequently reverse himself by claiming that the same was zeroxed before they were given to the poseur-buyer.[20] It will be noted that it is this evidence, with the confusing testimony thereon, by which the prosecution seeks to link appellant to the supposed sale.

Now, the poseur-buyer, according to the prosecution witnesses, was supposed to give them a prearranged signal after he had made the purchase of the marijuana. He is alleged to have done so but, as to the signal prearranged and given, the versions of said witnesses are in hopeless disarray. According to Cpl. Abello, Bernardo "would be coming out of the backdoor and he will be combing his hair." [21] On the other hand, Sgt. Glenn Logan testified that the prearranged signal was that Bernardo would put out his handkerchief and wipe his face.[22] These were all contradicted in the testimony of Pfc. Jaime Capitulo who claimed that the informant was able to give the prearranged signal because the investigating team had with them an electric device with a receiver that received Bernardo's signal which could be heard by everyone in the group.[23] How this would be possible and why the witnesses are at loggerheads hereon, the prosecution does not say.

Again, Sgt. Logan declared that the search was conducted in the residence of appellant resulting in the seizure of sixty (60) lids of marijuana.[24] On the contrary, Pat. Abella clearly explained that said sixty (60) lids of marijuana were hidden and recovered in the kitchen of the house of Benjamin Olaes, a brother of appellant, which was a separate residence.[25] These conflicting testimonies, which further discredit said witnesses, are apart from the consideration that appellant herein is charged not with illegal possession but with the sale of marijuana.

We also do not lose sight of the fact that without the testimony of the supposed poseur-buyer proving the alleged sale of marijuana inside appellant's house, the unlawful intrusion into the sanctity of appellant's abode and the unreasonable search and seizure proscribed by the Constitution are clearly established. It is undisputed that the police operatives did not have either a search warrant or a warrant of arrest.[26] The searches on the person of appellant and of his house were not also incidental to a lawful arrest. The police officers admittedly did not have personal knowledge at all of what actually transpired inside the appellant's house. They only learned of the alleged consummation of the illicit transaction when they were supposedly given a signal by their so-called poseur-buyer after the latter left appellant's house. However, what they reportedly learned from said poseur-buyer was indubitably hearsay as the latter was never called to appear and testify at the trial. Since what was conducted was a warrantless search and the arrest of appellant was unlawful, any evidence obtained from him is also inadmissible in evidence.

It is further undisputed that the six (6) lids of marijuana supposedly bought by the poseur-buyer was taken by the police officers not from appellant but from said poseur-buyer.[27] Appellant's disclaimer of ownership of the prohibited drug should have cautioned and alerted the prosecution to the fact that the testimony of their alleged

poseur-buyer was not merely corroborative nor cumulative but direct and material to the defense of appellant who claims innocence of the offense imputed to him.[28] It is also significant that the identity of the informer and/or poseur-buyer was already known during the trial.[29] Despite all these, the prosecution opted not to present him for reasons which remain unknown. Such unexplained failure to present this vital witness gives rise to the presumption that, if he had been presented, his testimony would probably not have supported the case of the prosecution.[30]

The foregoing considerations cannot but rule out a verdict of guilty, there being an exiguity of any other independent incriminating evidence, aside from appellant's uncounselled and inadmissible extrajudicial confession. While the theory of the defense is not totally convincing, the Court cannot tip the scales of justice against him in the face of the cardinal and long entrenched rule that the prosecution must rely on the strength of its own evidence and not on the weakness of that of the defense.

One final observation. What cannot escape our attention is the penalty imposed by the trial court, that is, life imprisonment and a fine of P30,000.00. The court a quo obviously failed to consider that the alleged crime was committed on June 15, 1977. Under Section 4 of Republic Act. No. 6425, prior to its amendment on February 17, 1980 by Presidential Decree No. 1675, the act of selling marijuana was punishable by imprisonment ranging from twelve (12) years and one (1) day to twenty (20) years and a fine ranging from P12,000.00 to P20,000.00.[31] Due to the urgent necessity of reinforcing the drive against dangerous drugs by making "drug-pushing" a capital offense, Presidential Decree No. 1675 was subsequently passed providing for the penalty of life imprisonment to death and a fine ranging from P20,000.00 to P30,000.00. Obviously, this amendment having taken effect after the alleged commission of the crime in the case at bar, it could not have been given retroactive effect.

WHEREFORE, the guilt of accused-appellant not having been proved with the requisite quantum of evidence, the appealed decision is REVERSED and he is hereby ACQUITTED on reasonable doubt, with costs de officio.

### **SO ORDERED.**

Melencio-Herrera, (Chairman), Paras, Padilla, and Sarmiento, JJ., concur.

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[1] Penned by Judge Esther Nobles Bans.

[2] Original Record, 367.

[3] Ibid., 365-366.

[4] Ibid., 1.

[5] Ibid., 21.

[6] Ibid., 363-364.

[7] Ibid., 364.

[8] Appellant's Brief, 1; Rollo, 69.

[9] Exh. K; Original Record, 360.

[10] People vs. Hernandez, et al., 162 SCRA 422 (1988); People vs. Repe, etc., et al., G.R. No. 64935, July 19, 1989; People vs. Estevan, G.R. No. 69676, June 4, 1990.

[11] TSN, Feb. 27, 1981, 165.

- [12] *People vs. Nolasco*, 163 SCRA 623 (1988); *People vs. Rama*, G.R. No. 80738, Feb. 26, 1990; *Aballe vs. People, et al.*, G.R. No. 64086, Mar. 15, 1990.
- [13] Original Record, 365.
- [14] *People vs. Hizon, etc., et al.*, 163 SCRA 760 (1988); *People vs. Repe, etc., et al.*, *supra*.
- [15] G.R. Nos. 85401-02, June 4, 1990.
- [16] *People vs. Rojo*, G.R. No. 82737, July 5, 1989; *People vs. Guinto, et al.*, G.R. No. 88400, April 6, 1990.
- [17] TSN, Aug. 22, 1979, 27-29, 31-33; Nov. 29, 1979, 51-53; July 2, 1980, 109-112.
- [18] TSN, Nov. 29, 1979, 48-49.
- [19] TSN, May 26, 1980, 7-8; Exhs. F, F-1, F-1-A to F-1-D.
- [20] TSN, *id.*, 15.
- [21] TSN, Nov. 29, 1979, 51.
- [22] TSN, July 2, 1980, 27-28; Aug. 11, 1980, 3-4.
- [23] TSN, May 26, 1980, 18-19.
- [24] TSN, July 2, 1980, 13.
- [25] TSN, Aug. 22, 1979, 14-16.
- [26] TSN, Nov. 29, 1979, 56-57; Aug. 11, 1980, 6-7.
- [27] TSN, Nov. 29, 1979, 52.
- [28] *People vs. Ale*, 145 SCRA 50 (1986); *People vs. Bagano*, G.R. No. 77777, Feb. 5, 1990.
- [29] TSN, Aug. 22, 1979, 23-24.
- [30] *People vs. De Luna*, G.R. No. 82180, Nov. 8, 1989; *People vs. Lati*, G.R. No. 70393, April 17, 1990; *People vs. Guinto, et al.*, *supra*.
- [31] *Philippine Permanent and General Statutes, Revised Edition*, Vol. V, 335.

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