

## PEOPLE OF THE PHILIPPINES, PLAINTIFF-APPELLEE, VS. PABLO RODRIGUEZ Y COTARIAN, ACCUSED-APPELLANT.

*G.R. No. 79965. May 25, 1994*

Ponente: QUIASON, J.

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### QUIASON, J.:

This is an appeal from the decision of the Regional Trial Court, Branch XVIII, Tabaco, Albay, in Criminal Case No. T-1374, finding appellant guilty beyond reasonable doubt of violating Section 4, Article II of the Dangerous Drugs Act of 1972 (R. A. No. 6425 as amended by B. P. No. 179).

### I

The Information charged appellant as follows:

"That on or about the 21st day of June, 1984, at 3:30 o'clock (sic) in the afternoon, more or less, at the ground floor of the Tabaco Bus Terminal, Municipality of Tabaco, Province of Albay, Philippines and within the jurisdiction of this Honorable Court, the above-named accused, without being authorized by law or any government agency, did then and there willfully, unlawfully, feloniously and with deliberate intent to violate the law had in his possession and control dried Marijuana leaves and seeds, sell, deliver and distribute sticks of Marijuana" (Rollo, p. 13).

On May 7, 1985, appellant assisted by his counsel, pleaded not guilty to the information.

On July 8, 1986, the trial court rendered its decision, finding appellant guilty beyond reasonable doubt of delivering, distributing and selling marijuana. The dispositive portion of the decision reads as follows:

"WHEREFORE, judgment is hereby issued, sentencing the accused, Pablo Rodriguez y Cotarian, to the penalty of life imprisonment, to pay a fine of P20,000.00 and with costs" (Rollo, p. 32).

Hence, this appeal.

### II

The facts, as found by the trial court and presented by the Solicitor General, are as follows:

"On July 21, 1981, at about 3:00 o'clock (sic) in the afternoon, the Tabaco Police Station received a report from an unidentified telephone caller that somebody was selling marijuana inside the Wonder Dog Circus. Forthwith, Pats. Rogelio Gonzales and Benito Bongalos proceeded to the Wonder Dog Circus near the public market of Tabaco, to verify the report. Arriving at the place, they spotted appellant Pablo Rodriguez and Gregorio Abrera acting suspiciously. Abrera was putting marijuana inside his pocket (tsn., June 11, 1985, pp. 3-4).

Accordingly, Pats. Gonzales and Bongalos approached appellant and Abrera and, after introducing themselves as police officers, placed the two under arrest. Pat. Gonzales found a small packet containing marijuana

(Exhibit "B") inside the right side pocket of appellant's pants (tsn., June 11, 1985, pp. 4-5). Upon the other hand, Abrera voluntarily handed over a plastic tea bag containing marijuana (Exhibit "C") to Pat. Gonzales (tsn., October 15, 1985, pp. 6, 8).

Appellant and Abrera were then brought to the police station where they, as well as the items confiscated from them, were turned over to Cpl. Santos Colarina, Chief Investigator of the Tabaco Police Station (tsn., June 11, 1985, p. 5).

When investigated, Abrera voluntarily admitted having possessed the marijuana confiscated from him but pointed at appellant as the one who gave him the marijuana and blamed appellant for it (Exhibit "D"). Even as appellant heard Abrera making said statements, appellant kept silent and failed to react (tsn., October 15, 1988, p. 41).

Lt. Lorlie Arroyo, Forensic Chemist of the PC Crime Laboratory, Camp Bagong Ibalon, Legaspi City, conducted an examination on the items seized from the appellant and Abrera and found them to be positive of marijuana (tsn., May 7, 1985, pp. 11, 28).

Consequently, appellant was charged with violating Section 4, Article II, of R. A. No. 6425, as amended. Abrera, upon the other hand, was not similarly charged presumably because he was a user. Anyway, it was allegedly the Station Commander of the Tabaco Police Station who opted not to press charges against Abrera (tsn., October 15, 1985, pp. 19-20)" (Brief for Plaintiff-Appellee, pp. 3-5; Rollo, p. 96).

On the other hand, appellant gave the following version of the incident:

"xxx. On June 21, 1984 at about 3:30 o'clock in the afternoon, he and a certain Rogello "Lilio" Cardano were at the "Wonder Dog Circus" at the bus terminal of Tabaco, Albay, as they were selling an amplifier. Suddenly, they were searched by Patrolman Gonzales and Bongalos, without any warrant, due to alleged information that they were selling marijuana (TSN, May 12, 1986, p. 4). But the policemen did not find any marijuana. Instead, they found in his bag three (3) fifty-peso bills (P150.00), the price of the amplifier, which was already in the possession of the buyer, the owner of the circus (TSN, id., p. 5). Pat. Gonzales took the amount and returned it to the operator of the circus (TSN, id., p. 7). Subsequently, the accused and Abrera were brought to the Police Station, where the accused was locked-up and mauled inside the prison cell (TSN, id., p. 5). While in prison, the accused was approached by Pat. Gonzales, who told him that he also had marijuana for sale at P200.00 which he showed him (TSN, id., p. 6). However, the accused refused the offer (TSN, id., p. 7). The amplifier was brought to the police station and returned to the accused by investigator Colarina (TSN, id., pp. 7-8). The accused was detained for one-and-a-half months, while Abrera was not (TSN, id., p. 6)" (Appellant's Brief, pp. 9-10).

Appellant contends that the trial court erred in convicting him of the offense charged. He assigns the following errors:

THE TRIAL COURT ERRED IN CONVICTING THE ACCUSED BASED ON THE CONJECTURAL AND CONFLICTING TESTIMONIES OF THE PROSECUTION.

THE TRIAL COURT ERRED IN CONVICTING THE ACCUSED BASED ON THE MARIJUANA SEIZED BY THE ARRESTING OFFICERS WITHOUT WARRANT.

THE TRIAL COURT ERRED IN CONVICTING THE ACCUSED BASED ON HIS SILENCE.

THE TRIAL COURT ERRED IN ADMITTING IN EVIDENCE THE SWORN STATEMENT OF GREGORIO ABRERA, WHO DID NOT TAKE THE WITNESS STAND, DESPITE HAVING BEEN LISTED AS ONE OF THE PROSECUTION WITNESSES.

THE TRIAL COURT ERRED IN CONVICTING THE ACCUSED BASED ON THE PRESUMPTION

THAT OFFICIAL DUTY HAS BEEN REGULARLY PERFORMED.

### III

In his brief, the Solicitor General agreed with appellant's posture that the prosecution failed to establish the act of unlawfully selling, distributing and delivering marijuana as alleged in the Information (Brief for Plaintiff-Appellee, p. 7; Rollo; p. 96). But he claimed that the prosecution's evidence indubitably established that appellant, having been caught in flagrante delicto in possession of marijuana committed the crime of illegal possession of marijuana under Section 8, Article II of R. A. No. 6425, as amended (Brief for Plaintiff-Appellee, p. 9; Rollo, p. 96).

We agree with the Solicitor General's assertion that the prosecution failed to establish that appellant sold, distributed and delivered marijuana.

The records show that the two prosecution witnesses did not actually see appellant transact any business dealing with marijuana. On cross examination, Pat. Gonzales testified as follows:

ATTY. GONZAGA:

"Q You mentioned of an investigation. There was actually no selling or transacting of marijuana. Is that right?

A I did not see them actually transacting. However we saw them acting suspiciously.

Q But you did not see Pablo Rodriguez giving any marijuana to Abrera?

A I did not. But when we were getting near them (accused), they started to leave. (TSN, June 11, 1985, p. 10; underscoring supplied).

Pat. Gonzales, upon further questioning by the trial court, said that:

COURT:

"Q But you did not see actually (sic) Rodriguez giving the marijuana to Abrera?

A. No, Your Honor, I did not" (TSN, June 11, 1985, p. 10, underscoring supplied).

Pat. Bongalos also could not say whether appellant was selling, distributing or delivering marijuana to Abrera when he was placed under arrest.

The person, who is in the best position to testify whether appellant sold marijuana or not, was Abrera, as he was the person whom appellant allegedly dealt with. We are placed at a quandary as to why Abrera was not prosecuted together with appellant nor was he made to testify for the prosecution when he was named as one of the its witnesses. As testified to by the prosecution witnesses, Abrera was not similarly charged with appellant because Abrera, when investigated, pointed to appellant as the person who gave him the marijuana. The reliance made by the police investigator on Abrera's word is simply puzzling.

We have held that "xxx, when a party has it in his possession or power to produce the best evidence of which the case in its nature is susceptible and withholds it, the fair presumption is that the evidence is withheld for some sinister motive and that its production would thwart his evil or fraudulent purpose (Ching Sui Yong v. Intermediate Appellate Court, 191 SCRA 187 [1990]).

The sworn statement executed by Abrera, (Exh. D) pointing to appellant as the person who gave him a tinfoil of marijuana is inadmissible in evidence and has no probative value. The failure of the prosecution to present Abrera in court although he was named as one of the prosecution witnesses deprived the accused the opportunity to

cross-examine his accuser. "xxx [C]ross-examination is an indispensable instrument of criminal justice to give substance and meaning to the constitutional right of the accused to confront the witnesses against him and to show that the presumption of innocence has remained steadfast and firm" (People v. Pido, 200 SCRA 45 [1991]).

Having held that appellant is not guilty of the offense charged under Section 4, Article II of the Dangerous Drugs Act, we shall now dwell on the question whether appellant is guilty of possession of marijuana under Section 8, Article I of the same Act.

After a careful review of the records and transcript of stenographic notes, we find that appellant should likewise be acquitted of the offense of possession of marijuana.

Admittedly, Pat. Gonzales searched appellant without a warrant. It is contended however that the warrantless search was incidental to a lawful arrest. The arrest of appellant itself was also made without a warrant of arrest. In such a case, the arrest can be justified only if there was a crime committed in the presence of the arresting officers.

The arresting officers went to the "Wonder Dog Circus" to verify a telephone call that a person with a knapsack had marijuana in his possession. Pat. Gonzales admitted that they arrested appellant because he acted suspiciously.

Part of his testimony is reproduced as follows:

ATTY GONZAGA:

(CROSS EXAMINATION)

"Q You said that at the premises of the Wonder Dogs circus, you saw the accused acting suspiciously. Is that right?

A Yes, sir.

Q But you were actually there?

A Yes, sir.

Q And you introduced yourselves as members of the INP?

A Yes, sir.

Q After which, you frisked Pablo Rodriquez?

A Yes, sir.

Q And in fact, you found inside his pocket this Exhibit "B". Is that right?

A Yes, sir.

Q You did the investigation per instruction from your police headquarters. Is that right?

A Yes, sir.

Q So you acted merely from the information thru the telephone and the suspicious acting of the accused.

A Yes, sir.

Pat. Bongalos also admitted that he did not personally know whether appellant was in possession of the prohibited drug. He testified as follows:

FISCAL VILLAMIN: (Continuing)

"Q. For what was he investigated of?

A For the possession of marijuana.

Q Why do you know that he was in possession of marijuana?

A Because from (sic) the information received thru a telephone call that a person with a knapsack was in possession of marijuana" (TSN, October 15, 1985, p. 11; Underscoring supplied).

There is no evidence to show that appellant was committing any crime at the time of his arrest.

The testimony of Pat. Gonzales on the arrest of appellant is reproduced as follows:

FISCAL VILLAMIN:

(DIRECT EXAMINATION)

"Q How did you effect the apprehension?

A While we were approaching the accused, we saw them putting something inside a bag.

Q What did you do then?

A We apprehended them.

Q Whom did you apprehend?

A Pablo Rodriquez and Abrera.

Q What procedure did you observe in arresting Rodriquez?

A Furnished with the necessary information, we arrested the accused while he was transacting marijuana.

Q While making the arrest, what did you do?

A I asked the accused what he was placing inside his pocket, and I found out that it was marijuana" (TSN, June 11, 1985, p. 4; Underscoring supplied).

To the question of the defense counsel as to whether he saw appellant selling marijuana, Pat. Gonzales answered:

"I did not see them actually transacting. However, we saw them acting suspiciously" (TSN, June 11, 1985; p. 10).

To the same question of the trial court, Pat. Gonzales answered:

"No, Your Honor, I did not" (TSN, June 11, 1985, p. 10).

The cardinal rule is that no person may be subjected by the police to a search of his house, body or personal belonging except by virtue of a search warrant or on the occasion of a lawful arrest (People v. De la Cruz, 184 SCRA 416 [1990]).

"If a person is searched without a warrant, or under circumstances other than those justifying an arrest without warrant in accordance with law, merely on suspicion that he is engaged in some felonious enterprise, and in order to discover if he has indeed committed a crime, it is not only the arrest which is illegal but also, the search on the occasion thereof as being 'the fruit of the poisonous tree'" (Guazon v. De Villa, 181 SCRA 623 [1990]; People v. Aminnudin, 163 SCRA 402 [1988]; U.S. v. Santos, 36 Phil. 853 [1917]; U.S. v. Hachaw, 21 Phil. 514 [1912]). In

that event, any evidence taken, even if confirmatory of the initial suspicion, is inadmissible "for any purpose in any proceeding" (*Nolasco v. Paño*, 147 SCRA 509 [1987]; *People v. Burgos*, 144 SCRA 1 [1986]).

The marijuana supposedly confiscated from appellant is therefore inadmissible in evidence for having been taken in violation of his constitutional right against unreasonable searches and seizures.

WHEREFORE, the Decision of the Regional Trial Court convicting appellant is REVERSED AND SET ASIDE. Appellant is ACQUITTED of the offense charged for failure of the prosecution to prove his guilt beyond reasonable doubt.

**SO ORDERED.**

Davide, Jr., and Bellosillo, JJ., concur.

Cruz, (Chairman), and Kapunan, JJ., on leave.

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