

THE PEOPLE OF THE PHILIPPINES, PLAINTIFF-APPELLEE, VS. YOLANDA GESMUNDO, ACCUSED-APPELLANT.

G.R. No. 89373. March 09, 1993

Ponente: PADILLA, J.

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PADILLA, J.:

Appeal from the decision of the Regional Trial Court (RTC) of San Pablo City, Branch 30,[*] in Criminal Case No. 4858-SP imposing the penalty of reclusion perpetua on the accused-appellant for violation of Section 4, Article II of Republic Act No. 6425 (Dangerous Drugs Act of 1972), as amended; sentencing her to pay a fine of Twenty-Five Thousand (P25,000.00) Pesos with subsidiary imprisonment in case of insolvency and to pay the costs.

In the Information filed by Second Assistant City Fiscal Rogelio B. Javier of San Pablo City, it was alleged:

"That on or about November 17, 1986, in the City of San Pablo, Republic of the Philippines and within the jurisdiction of this Honorable Court, the accused above-named, did then and there wilfully, unlawfully and feloniously distribute and sell marijuana and confiscated in her possession is a plastic bag containing 100 grams of dried marijuana leaves and three (3) rolls of magazine newspaper containing marijuana, a dangerous drug, without being authorized by law.

CONTRARY TO LAW.

City of San Pablo, November 21, 1986."[1]

The facts as presented by the prosecution are stated in the decision of the trial court as follows:

"x x x in the morning of November 17, 1986, police officer Jose Luciano gave money and instructed his civilian informer to buy marijuana from the accused at the back of the Cocoland Hotel at Brgy. Del Remedio, San Pablo City, thereafter with another police officer, Luciano positioned himself at the ground floor of the hotel and watched. He actually saw the accused selling marijuana to his civilian informer by the door outside the house of the accused. Immediately thereafter, that same day Luciano applied for a search warrant.

"At about 2:00 p.m. of that day, a raiding police team armed with Search Warrant No. 10 issued by Hon. Judge Geronima Pueblo Atanacio of RTC, Branch XXXII of the Court, went to the residence of the Brgy. Capt. Angel Capuno for them to be accompanied by him in serving the said warrant at the residence of the accused located at the Cocoland Compound of said barangay.

"Upon reaching the residence of the accused, the police team were allowed entry inside the house on the strength of the said search warrant shown to the accused. The accused cried upon reading the contents of the warrant. She begged the team not to search and to leave her house. But the police team insisted on their search. The accused led the team into her kitchen and she pointed to a metal basin on top of a table as the hiding place of the dried marijuana flowering tops contained in a plastic bag marked ISETANN. The police also recovered from a native "uway" cabinet dried marijuana flowering tops wrapped separately in three (3) pieces of Komiks paper. After the discovery, the accused was photographed together with the confiscated items. Thereafter,

accused was made to acknowledge in writing that the dried marijuana flowering tops were taken from her possession and control inside her residence. Brgy. Capt. Capuno also affixed his countersignature thereto.

"The police forthwith brought the accused to the police station where she was properly booked. Pfc. Luciano, Pat. Rizalde Perez and Brgy. Captain Capuno executed their sworn statements.

"On November 18, 1986, Pat. Angelito Caraan was dispatched to the NBI requesting for the lab examination of the items confiscated from the accused. On that same day, the NBI Forensic Chemist Salud Manguba issued a Certification with a finding that per preliminary examination which she made, the confiscated items gave positive results for marijuana (Exh. "E"). This was confirmed later on by her with the issuance of her Report No. DDN-86-2639 (Exh. "H")."[2]

Accused-Appellant's version, on the other hand, is as follows:

"On November 17, 1986 at around 1:00 p.m. while accused-appellant was in the terrace of their house located at Barangay del Remedio, San Pablo City, a jeep with policemen on board arrived. (TSN, p - 3, December 16, 1988). She identified Sgt. Yte and PFC Jose Luciano to be among the group. Sgt. Yte was invited by accused-appellant to enter the house while PFC Luciano was left in the jeep that was parked near the house. (TSN, p - 4, *ibid*). While seated at the sala, Sgt. Yte was showing to accused-appellant something which he claimed to be a search warrant when someone uttered the following words "ito na" coming from the direction where the kitchen of the house is. She, together with Sgt. Yte proceeded to the kitchen and saw PFC Luciano holding a plastic bag with four other companions who entered the house through the back door which was opened at that time. (TSN, p - 5, *ibid*). Luciano handed the bag to Sgt. Yte who, after examining the contents, confronted the accused-appellant and insisted that the plastic bag came from her. (TSN, p - 6, *ibid*). She vehemently denied the accusation of Sgt. Yte and told him that she does not know anything about it. But Sgt. Yte persisted and accused-appellant, who was then seven (7) months on the family way, was seized by abdominal pains which made her cry. Then she was made to sign a prepared document with her name already printed on it. Under extreme pressure and promised that they will just talk with her at the City Hall, accused-appellant was constrained to sign said document. Afterwards, she was brought to the police station and detained. (TSN, pp. 7-8, *ibid*). That before the incident in question, Sgt. Yte asked help from accused-appellant to testify against one Warner Marquez, son of her former landlord, for drug pushing. Accused refused, reasoning out that it would be unfair since she is totally unaware of this thing. But Sgt. Yte remained undaunted and was forcing her for the second time to testify against Marquez. Spurned, Sgt. Yte left word that she, accused, should be careful as she might be the next to be charged with drug pushing. (TSN, pp. 11-13, *ibid*)."[3]

On 14 April 1989, the trial court rendered its decision, the dispositive portion of which reads:

"WHEREFORE, premises considered, the Court hereby renders judgment finding the accused Yolanda Gesmundo guilty beyond reasonable doubt of the crime of violaton of Section 4, Article II, R.A. 6425, as amended without any modifying circum-stance to consider, hereby sentences her to suffer the penalty of reclusion perpetua, to pay the fine of P25,000.00, with subsidiary imprisonment in case of insolvency and to pay the costs.

"The confiscated specimens are forfeited in favor of the government and to be disposed of in accordance with law.

"The bail bond for her provisional liberty is hereby cancelled and the accused is hereby ordered immediately incarcerated."[4]

A notice of appeal was filed on 21 April 1989 with the Regional Trial Court which, on the same day, ordered the elevation of the records of the case to this Court.

Assailing the Regional Trial Court's decision both on questions of law and fact, accused-appellant assigns the following errors allegedly committed by the trial court:

"I. LOWER COURT ERRED IN CONVICTING THE ACCUSED ON THE BASIS OF AN ILLEGALLY SEIZED AND OR PLANTED EVIDENCE.

II. LOWER COURT ERRED IN GIVING FAITH AND CREDENCE TO THE TESTIMONIES OF THE WITNESSES FOR THE PROSECUTION DESPITE VARIANCE AND MATERIAL CONTRADICTIONS.

III. THE LOWER COURT ERRED IN ADMITTING PROSECUTION'S EXHIBITS "F" - "F-1" AND "F-2" IN THE ABSENCE OF COMPETENT EVIDENCE THAT THEY WERE THE ONES ALLEGEDLY SEIZED AND RECOVERED FROM THE HOUSE OF THE ACCUSED."[5]

The accused-appellant's conviction by the lower court is anchored on the marijuana seized in her possession and control by virtue of a Search Warrant issued by Judge Atanacio. Her arrest did not result from a "buy-bust" operation supposedly conducted by police officers. Although Pfc. Luciano states that he actually saw the accused-appellant selling marijuana to his civilian informer outside the house of the accused-appellant, she (accused) was not placed under police custody at that very moment. Rather, the police officers decided to let her go and effect her arrest later in the day through a search warrant, so as to apprehend her with a larger amount.[6]

There is no question that a search warrant was issued by Judge Geronima P. Atanacio of the RTC of San Pablo City, Branch 32, as declared by the Court Interpreter of said Branch (a defense witness).[7] The accused-appellant herself also testified that Sgt. Yte showed her the search warrant obtained by the police.[8] The controversy centers on the allegation by the accused-appellant that the marijuana supposedly seized by the raiding police team in her possession, was planted by the police officers.

The Investigation Report prepared by Pfc. Jose V. Luciano as Investigating Officer and which was noted by Sgt. Bayani R. Yte as Chief of Intelligence and Investigation Division stated that:

"5. At about 171430 H November 1986, we conducted raid at said residence and premises. During the search we discovered a hole at the backyard of the house of the suspect with a big biscuit can inside the hole and on top of the cover a flower pot was placed wherein the marijuana were kept. Confiscated were more or less 100 grams of dried marijuana leaves and three rolls of magazine newspaper containing marijuana which is ready for disposal."[9]

On direct examination, however, Pfc. Luciano said that the marijuana leaves contained inside the plastic bag covered by a basin weighed about 800 grams since he himself weighed them on the weighing scale found in the accused-appellant's house; and he also saw other marijuana wrapped in a komiks magazine found in an away cabinet or rattan cabinet.[10] Sgt. Bayani Yte, on the other hand, affirmed the investigation report when he testified that during the search, they found dried marijuana leaves, more or less 100 grams on top of the dining table, placed inside a plastic bag and covered by a metal basin.[11] Angel Capuno, the Barangay Chairman, on cross-examination, said that the only marijuana confiscated by the police was the one contained in the white plastic bag.[12]

In all their testimonies, there was no mention of any marijuana obtained from a flower pot placed on top of a biscuit can inside a hole at the backyard of the accused's house as stated in the investigation report. It would seem that the raiding party "could not put their act together", as to how much marijuana was recovered and where. The trial court held that the fact of discovery of the hole at the backyard was merely for the purpose of reporting the hiding place of the marijuana.[13] But how, it may be asked, could one conclude that it was the hiding place, if no marijuana was actually seen inside?

Moreover, during the pre-trial, Fiscal Javier requested the marking of a photograph depicting buried marijuana on the ground for the purpose of showing the place where the dried marijuana was recovered.[14]

Not only are there inconsistencies as to what was recovered and where but also as to whom the marijuana was supposed to have been surrendered by the accused. Pfc. Luciano pointed out during his direct examination that it was the accused-appellant who actually gave the marijuana leaves to Sgt. Yte in the kitchen, and that he (Pfc. Luciano) was asked by Sgt. Puhawan to come inside the house and they saw the other marijuana leaves wrapped in a magazine located at the uway cabinet.[15] Unfortunately, Sgt. Yte contradicted Pfc. Luciano's testimony. During his cross examination, Sgt. Yte asserted that the marijuana leaves were surrendered by the accused-appellant to Pfc. Luciano upon the presentation of search warrant and before the search was actually conducted.[16] When asked to explain why their inconsistent statements, Sgt. Yte merely answered: "That was the testimony of Pat. Luciano that accused personally . . ."[17]

We do not agree with the trial court in its conclusion that these discrepancies are trivial. We must be absolutely convinced that marijuana was actually surrendered by the accused-appellant and not planted as claimed by her. As held in *People of the Philippines vs. Romeo F Remorosa*: [18]

"Irreconcilable and unexplained contra-dictions in the testimonies of the prosecution witnesses cast doubt on the guilt of appellant and his culpability to the crime charged."

Furthermore, the claim of the accused-appellant that the marijuana was planted is strengthened by the manner in which the search was conducted by the police authorities. The accused-appellant was seated at the sala together with Sgt. Yte when they heard someone in the kitchen uttered "ito na". Apparently, the search of the accused-appellant's house was conducted in violation of Section 7, Rule 126 of the Rules of Court which specifically provides that no search of a house, room or any other premise shall be made except in the presence of the lawful occupant thereof or any member of his family or in the absence of the latter, in the presence of two (2) witnesses of sufficient age and discretion residing in the same locality. This requirement is mandatory to ensure regularity in the execution of the search warrant. Violation of said rule is in fact punishable under Article 130 of the Revised Penal Code.[19]

As we have ruled in *Eduardo Quintero vs. The National Bureau of Investigation, et al.*[20] a procedure, wherein members of a raiding party can roam around the raided premises unaccompanied by any witness, as the only witnesses available as prescribed by law are made to witness a search conducted by the other members of the raiding party in another part of the house, is violative of both the spirit and the letter of the law.

It is true that the police were able to get an admission from the accused-appellant that marijuana was found in her possession but said admission embodied in a document entitled "PAGPAPATUNAY" previously prepared by the police, is inadmissible in evidence against the accused-appellant for having been obtained in violation of her rights as a person under custodial investigation for the commission of an offense.[21] The records show that the accused-appellant was not informed of her right not to sign the document; neither was she informed of her right to the assistance of counsel and the fact that the document may be used as evidence against her.[22]

The accused-appellant also contends that the prosecution failed to present evidence to prove that the marijuana marked as exhibit in court are the same marijuana allegedly confiscated by the police from her. The contention is well taken.

Not only does the law require the presence of witnesses when the search is conducted, but it also imposes upon the person making the search the duty to issue a detailed receipt for the property seized.[23] He is likewise required to deliver the property seized to the judge who issued the warrant, together with a true and accurate inventory thereof duly verified under oath.[24] Again, these duties are mandatory and are required to preclude

substitution of the items seized by interested parties.

The police authorities in the case at bar testified that they submitted an inventory to the court without the marijuana, the latter having been turned over to the National Bureau of Investigation (NBI). Whether an inventory was actually made by the police was not clearly established in the trial court. The records show that an inventory was not part of the documents transmitted from Branch 32 (the warrant issuing branch) to Branch 30 (the trial branch) of the RTC of San Pablo City. And when asked by the trial judge, the court Interpreter said that Judge Atanacio (who issued the warrant) confirmed that she does not have among her files the inventory supposedly submitted by the police.[25] If indeed an inventory of the seized items was made, it must be part of the records of the case. But this was not so.

On the issue of non-delivery of the seized marijuana to the court, the trial court held that it takes "judicial notice of the usual practice of the San Pablo City police force of retaining possession of confiscated specimens suspected of being marijuana by immediately forwarding them to the NBI or to an NBI accredited physician for preliminary examination and/or laboratory examination before filing a case with the city prosecutor's office." [26] The mere tolerance by the trial court of such a practice does not make it right. Clearly, such practice violates the mandatory requirements of the law and defeats the very purpose for which they were enacted. Speculations as to the probability of tampering with the evidence cannot then be avoided.

The trial judge cites the case of *Yee Sue Koy, et al. vs. Mariano Almeda, et al.* (70 Phil. 141) to justify the retention by the police and the NBI of the custody of the allegedly confiscated specimens. While in said decision, this Court recognized the fact that the objects seized were retained by the agents of the Anti-Usury Board, instead of being turned over to the Justice of the Peace of Sagay, yet the Court also held that it was "for the reason that the custody of said agents is the custody of the issuing officer or court, the retention having been approved by the latter." [27] Thus, approval by the court which issued the search warrant is necessary for the retention of the property seized by the police officers; and only then will their custody be considered custody of the court. Absent such approval, the police officers have no authority to retain possession of the marijuana and more so, to deliver the property to another agency, like the NBI.

Having made no return or inventory to the warrant-issuing court, there is no proof that the police really found marijuana in the house of the accused. Besides, Salud Manguba, the Forensic Chemist who examined the marijuana allegedly confiscated by the police from the appellant, asserted that when the police officer turned over said items to the NBI, there were no identifying marks on the plastic bag.[28] How sure are we then that the marijuana submitted for examination was the same marijuana allegedly seized from the accused-appellant?

Lastly, the prosecution in the Information averred that the accused-appellant engaged in the distribution and sale of marijuana. And yet, as held by this Court,

"... In order to sustain conviction for selling prohibited drugs, the element of sale must be unequivocally established. Also, what the law proscribes is not only the act of selling but also, albeit not limited to, the act of delivering. The commission of the offense of illegal sale of marijuana requires merely the consummation of the selling transaction. What is important is that the poseur-buyer received the marijuana from the accused." [29]

It is also required that the marijuana received by the poseur-buyer be presented as evidence in court. The identity of the marijuana which constitutes the corpus delicti must be established before the court.[30]

Undisputedly, the accused-appellant was not caught in the act of selling marijuana. Sgt. Yte himself testified during cross-examination that accused-appellant was not actually dispensing marijuana when the search warrant was served.[31] Neither was the marijuana, object of the supposed sale, presented in court to support the allegation of the prosecution that accused-appellant was engaged in the sale of marijuana.

The trial court held that the possession of a considerable quantity of marijuana, coupled with the fact that the accused-appellant is not a user of prohibited drugs, indicates an intention of the accused-appellant to sell, distribute and deliver marijuana as held in *People of the Philippines vs. Roberto Toledo y Tejarlo alias "OBET."*[32]

The reliance of the trial court on the above-mentioned case is not quite accurate. The basis of the conviction of the accused in said case was his confession, and thus, the reiteration by the Court of the trial court's pronouncement amounts to an obiter dictum. Moreover, a person is always presumed innocent until proven guilty.

From a careful review of the proceedings a quo, this Court is constrained to set aside the lower court's findings, and we hold that the guilt of the accused-appellant Yolanda Gesmundo has not been established beyond reasonable doubt.

If the inculpatory facts and circumstances are capable of two (2) or more explanations, one of which is consistent with the innocence of the accused and the other consistent with his guilt, then the evidence does not fulfill the test of moral certainty and is not sufficient to support a conviction. (*People v. Parayno*, 24 SCRA 3; *U.S. v. Maano*, 2 Phil. 718; *People v. Pacana*, 47 Phil. 48).[33]

WHEREFORE, the appealed judgment is REVERSED, and on reasonable doubt, the appellant is hereby ACQUITTED of the crime charged. She is ordered immediately released from detention unless she is being held for some other legal cause or ground.

SO ORDERED.

Narvasa, C.J., (Chairman), Regalado, Nocon, and Campos, Jr., JJ., concur.

[*] Hon. Ausberto B. Jaramillo, Jr., presiding Judge.

[1] Original Record, p.1

[2] Original Record, pp. 193-194

[3] Appellant's Brief, pp. 2-3

[4] Original Record, p. 199

[5] Appellant's Brief, p. 2

[6] TSN, 12 December 1986, p.16

[7] TSN, 30 March 1989, p. 5

[8] TSN, 6 December 1988, p. 4

[9] Exhibit A-1, Records of the RTC, List of Exhibits, p. 2

[10] TSN, 12 December 1986, p. 7

[11] TSN, 22 December 1986, pp. 5-6

[12] TSN, 11 February 1987, p. 5

[13] Original Record, p. 197

[14] TSN, 11 December 1986, p. 3

[15] TSN, 12 December 1986, p. 7

[16] TSN, 12 March 1987, p. 8

[17] Ibid, p. 10

[18] G.R. No. 81768, August 7, 1991, 200 SCRA 350

[19] Article 130, Revised Penal Code, reads as follows:

"ART. 130. Searching domicile without witnesses. - The penalty of arresto mayor in its medium and maximum periods shall be imposed upon a public officer or employee who, in cases where a search is proper, shall search the domicile, papers or other belongings of any person, in the absence of the latter, any member of his family, or in their default, without the presence of two witnesses residing in the same locality."

[20] G.R. No. L-35149, June 23, 1988, 162 SCRA 467

[21] Article III, Section 12(3), 1987 Constitution

[22] TSN, 6 December 1988, p. 9

[23] Section 10, Rule 126, Rules of Court

[24] Section 11, Rule 126, Rules of Court

[25] TSN, 30 March 1989, p.7

[26] Original Record, p. 198

[27] Yee Sue Koy, et al. vs. Mariano G. Almeda, et al., No. 47021, June 25, 1940, 70 Phil. 141

[28] TSN, 25 March 1987, p. 8

[29] People of the Philippines vs. Rudy Dekingco, G.R. No. 87685, September 13, 1990, 189 SCRA 512

[30] The People of the Philippines vs. Apollo Mariano y Ding-Ding, G.R. No. 86656, October 31, 1990, 191 SCRA 136

[31] TSN, 12 March 1987, p. 7

[32] G.R. No. 67609, November 22, 1985, 140 SCRA 259

[33] The People of the Philippines vs. Rogelio Ale Y Campeseno, G.R. No. 70998, October 14, 1986, 145 SCRA 50

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