

THE PEOPLE OF THE PHILIPPINES, PLAINTIFF-APPELLEE, VS. MIKAEL MALMSTEDT, DEFENDANT-APPELLANT.

G.R. No. 91107. June 19, 1991

Ponente: PADILLA, J.

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PADILLA, J.:

In an information dated 15 June 1989, accused-appellant Mikael Malmstedt (hereinafter referred to as the accused) was charged before the Regional Trial Court (RTC) of La Trinidad, Benguet, Branch 10, in Criminal Case No. 89-CR-0663, for violation of Section 4, Art. II of Republic Act 6425, as amended, otherwise known as the Dangerous Drugs Act of 1972, as amended. The factual background of the case is as follows:

Accused Mikael Malmstedt, a Swedish national, entered the Philippines for the third time in December 1988 as a tourist. He had visited the country sometime in 1982 and 1985.

In the evening of 7 May 1989, accused left for Baguio City. Upon his arrival thereat in the morning of the following day, he took a bus to Sagada and stayed in that place for two (2) days.

At around 7:00 o'clock in the morning of 11 May 1989, accused went to the Nangonogan bus stop Sagada to catch the first available trip to Baguio City. From Baguio City, accused planned to take a late afternoon trip to Angeles City, then proceed to Manila to catch his flight out of the country, scheduled on 13 May 1989. From Sagada, accused took a Skyline bus with body number 8005 and Plate number AVC 902.[1]

At about 8:00 o'clock in the morning of that same day (11 May 1989). Captain Alen Vasco, the Commanding Officer of the First Regional Command (NARCOM) stationed at Camp Dangwa, ordered his men to set up a temporary checkpoint at Kilometer 14, Acop, Tublay, Mountain Province, for the purpose of checking all vehicles coming from the Cordillera Region. The order to establish a checkpoint in the said area was prompted by persistent reports that vehicles coming from Sagada were transporting marijuana and other prohibited drugs. Moreover, information was received by the Commanding Officer of NARCOM, that same morning, that a Caucasian coming from Sagada had in his possession prohibited drugs.[2]

The group composed of seven (7) NARCOM officers, in coordination with Tublay Police Station, set up a checkpoint at the designated area at about 10:00 o'clock in the morning and inspected all vehicles coming from the Cordillera Region.

At about 1:30 o'clock in the afternoon, the bus where accused was riding was stopped. Sgt. Fider and CIC Galutan boarded the bus and announced that they were members of the NARCOM and that they would conduct an inspection. The two (2) NARCOM officers started their inspection from the front going towards the rear of the bus. Accused who was the sole foreigner riding the bus was seated at the rear thereof.

During the inspection, CIC Galutan noticed a bulge on accused's waist. Suspecting the bulge on accused's waist to be a gun, the officer asked for accused's passport and other identification papers. When accused failed to comply, the officer required him to bring out whatever it was that was bulging on his waist. The bulging object turned out

to be a pouch bag and when accused opened the same bag, as ordered, the officer noticed four (4) suspicious-looking objects wrapped in brown packing tape, prompting the officer to open one of the wrapped objects. The wrapped objects turned out to contain hashish, a derivative of marijuana.

Thereafter, accused was invited outside the bus for questioning. But before he alighted from the bus, accused stopped to get two (2) travelling bags from the luggage carrier.

Upon stepping out of the bus, the officers got the bags and opened them. A teddy bear was found in each bag. Feeling the teddy bears, the officer noticed that there were bulges inside the same which did not feel like foam stuffing. It was only after the officers had opened the bags that accused finally presented his passport.

Accused was then brought to the headquarters of the NARCOM at Camp Dangwa, La Trinidad, Benguet for further investigation. At the investigation room, the officers opened the teddy bears and they were found to also contain, hashish. Representative samples were taken from the hashish found among the personal effects of accused and the same were brought to the PC Crime Laboratory for chemical analysis.

In the chemistry report, it was established that the objects examined were hashish, a prohibited drug which is a derivative of marijuana. Thus, an information was filed against accused for violation of the Dangerous Drugs Act.

During the arraignment, accused entered a plea of "not guilty." For his defense, he raised the issue of illegal search of his personal effects. He also claimed that the hashish was planted by the NARCOM officers in his pouch bag and that the two (2) travelling bags were not owned by him, but were merely entrusted to him by an Australian couple whom he met in Sagada. He further claimed that the Australian couple intended to take the same bus with him but because there were no more seats available in said bus, they decided to take the next ride and asked accused to take charge of the bags, and that they would meet each other at the Dangwa Station.

Likewise, accused alleged that when the NARCOM officers demanded for his passport and other identification papers, he handed to one of the officers his pouch bag which was hanging on his neck containing, among others, his passport, return ticket to Sweden and other papers. The officer in turn handed it to his companion who brought the bag outside the bus. When said officer came back, he charged the accused that there was hashish in the bag. He was told to get off the bus and his picture was taken with the pouch bag placed around his neck. The trial court did not give credence to accused's defense.

The claim of the accused that the hashish was planted by the NARCOM officers, was belied by his failure to raise such defense at the earliest opportunity. When accused was, investigated at the Provincial Fiscal's Office, he did not inform the Fiscal or his lawyer that the hashish was planted by the NARCOM officers in his bag. It was only two (2) months after said investigation when he told his lawyer about said claim, denying ownership of the two (2) travelling bags as well as having hashish in his pouch bag.

In a decision dated 12 October 1989, the trial court found accused guilty beyond reasonable doubt for violation, of the Dangerous Drugs Act, specifically Section 4. Art. II of RA 6425, as amended.[3] The dispositive portion of the decision reads as follows:

"WHEREFORE, finding the guilt of the accused Mikael Malmstedt established beyond reasonable doubt, this Court finds him GUILTY of violation of Section 4, Article II of Republic Act 6425, as amended, and hereby sentences him to suffer the penalty of life imprisonment and to pay a fine of Twenty Thousand Pesos (P20,000.00) with subsidiary imprisonment in case of insolvency and to pay the costs.

Let the hashish subject of this case be turned over to the First Narcotics Regional Unit at Camp Bado; Dangwa, La Trinidad, Benguet for proper disposition under Section 20, Article IV of Republic Act 6425, as amended.

SO ORDERED."[4]

Seeking the reversal of the decision of the trial court finding him guilty of the crime charged, accused argues that the search of his personal effects was illegal because it was made without a search warrant and, therefore, the prohibited drugs which were discovered during the illegal search are not admissible as evidence against him.

The Constitution guarantees the right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures.[5] However, where the search is made pursuant to a lawful arrest, there is no need to obtain a search warrant. A lawful arrest without a warrant may be made by a peace officer or a private person under the following circumstances:[6]

"SEC. 5. Arrest without warrant; when lawful. - A peace officer or a private person may, without a warrant, arrest a person:

(a) When, in his presence the person to be arrested has committed, is actually committing, or is attempting to commit an offense:

(b) When an offense has in fact just been committed, and he has personal knowledge of facts indicating that the person to be arrested has committed it; and

(c) When the person to be arrested is a prisoner who has escaped from a penal establishment or place where he is serving final judgment or temporarily confined while his case is pending, or has escaped while being transferred from one confinement to another.

In cases falling under paragraphs (a) and (b) hereof, the person arrested without a warrant shall be forthwith delivered to the nearest police station or jail, and he shall be proceeded against in accordance with Rule 112, Section 7. (6a, 17a)."

Accused was searched and arrested while transporting prohibited drugs (hashish). A crime was actually being committed by the accused and he was caught in flagrante delicto. Thus, the search made upon his personal effects falls squarely under paragraph (1) of the foregoing provisions of law, which allow a warrantless search incident to a lawful arrest.[7]

While it is true that the NARCOM officers were not armed with a search warrant when the search was made over the personal effects of accused, however, under the circumstances of the case, there was sufficient probable cause for said officers to believe that accused was then and there committing a crime.

Probable cause has been defined as such facts and circumstances which could lead a reasonable, discreet and prudent man to believe that an offense has been committed, and that the objects sought in connection with the offense are in the place sought to be searched.[8] The required probable cause that will justify a warrantless search and seizure is not determined by any fixed formula but is resolved according to the facts of each case.[9]

Warrantless search of the personal effects of an accused has been declared by this Court as valid, because of existence of probable cause, where the smell of marijuana emanated from a plastic bag owned by the accused,[10] or where the accused was acting suspiciously,[11] and attempted to flee.[12]

Aside from the persistent reports received by the NARCOM that vehicles coming from Sagada were transporting marijuana and other prohibited drugs, their Commanding Officer also received information that a Caucasian coming from Sagada on that particular day had prohibited drugs in his possession. Said information was received by the Commanding Officer of NARCOM the very same morning that accused came down by bus from Sagada on his way to Baguio City.

When NARCOM received the information, a few hours before the apprehension of herein accused, that a

Caucasian travelling from Sagada to Baguio City was carrying with him prohibited drugs, there was no time to obtain a search warrant. In the Tangliben case,[13] the police authorities conducted a surveillance at the Victory Liner Terminal located at Bgy. San Nicolas, San Fernando Pampanga, against persons engaged in the traffic of dangerous drugs, based on information supplied by some informers. Accused Tangliben who was acting suspiciously and pointed out by an informer was apprehended and searched by the police authorities. It was held that when faced with on-the-spot information, the police officers had to act quickly and there was no time to secure a search warrant.

It must be observed that, at first, the NARCOM officers merely conducted a routine check of the bus (where accused was riding) and the passengers therein, and no extensive search was initially made. It was only when one of the officers noticed a bulge on the waist of accused, during the course of the inspection, that accused was required to present his passport. The failure of accused to present his identification papers, when ordered to do so, only managed to arouse the suspicion of the officer that accused was trying to hide his identity. For is it not a regular norm for an innocent man, who has nothing to hide from the authorities, to readily present his identification papers when required to do so?

The receipt of information by NARCOM that a Caucasian coming from Sagada had prohibited drugs in his possession, plus the suspicious failure of the accused to produce his passport, taken together as a whole, led the NARCOM officers to reasonably believe that the accused was trying to hide something illegal from the authorities. From these circumstances arose a probable cause which justified the warrantless search that was made on the personal effects of the accused. In other words, the acts of the NARCOM officers in requiring the accused to open his pouch bag and in opening one of the wrapped objects found inside said bag (which was discovered to contain hashish) as well as the two (2) travelling bags containing two (2) teddy bears with hashish stuffed inside them were prompted by accused's own attempt to hide his identity by refusing to present his passport, and by the information received by the NARCOM that a Caucasian coming from Sagada had prohibited drugs in his possession. To deprive the NARCOM agents of the ability and facility to act accordingly, including, to search even without warrant, in the light of such circumstances, would be to sanction impotence and ineffectiveness in law enforcement, to the detriment of society.

WHEREFORE, premises considered, the appealed judgment of conviction by the trial court is hereby AFFIRMED. Costs against the accused-appellant.

SO ORDERED.

Melencio-Herrera, Paras, Feliciano, Bidin, Grino-Aquino, Medialdea, Regalado, and Davide, Jr., JJ., concur
Fernan, C.J., and Gutierrez, Jr., J., join J. Narvasa and J. Cruz in their dissenting opinion.
Gancayco, J., join J. Narvasa in his dissenting opinion.
Sarmiento, J., on leave.

[1] Brief for Defendant-appellant, Rollo, pp. 43-44

[2] Brief for Plaintiff-appellee, Rollo, p. 89

[3] Decision of the RTC of La Trinidad, Branch 10, dated 12 October 1989, Rollo, pp. 14-20

[4] Rollo, pp. 16-17

[5] Art. III, Sec. 2, 1987 Constitution

[6] Sec. 5, Rule 113 of the Rules on Criminal Procedure

[7] *People vs. Maspil*, G.R. No. 85177, 20 August 1990; *People vs. Tangliben*, G.R. No. 63630, 6 April 1990, 184 SCRA 220; *People vs. Claudio*, G.R. No. 72564, 15 April 1988, 160 SCRA 646

[8] *Quintero vs. NBI*, G.R. No. 35149, 23 June 1988, 162 SCRA 467

[9] *Valmonte vs. De Villa*, G.R. No. 83988, 29 September 1989, 178 SCRA 211

[10] *People vs. Claudio*, *supra*.

[11] *People vs. Tangliben*, *supra*.

[12] *Posadas vs. Court of Appeals*, G.R. No. 83139, 2 August 1990

[13] *Supra*.

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DISSENTING OPINION

CRUZ, J.:

I join Mr. Justice Andres R. Narvasa in his dissent, which I believe represents the correct application to the facts of this case of the provisions of the Bill of Rights and the Rules of Court on searches and seizures. It is consistent with my ponencia in *People v. Amminudin*, 163 SCRA 402, and also with *Alih v. Castro*, 151 SCRA 279, the latter being a unanimous decision of the Court en banc, and my dissents in *Umil v. Ramos* (on warrantless arrests), 187 SCRA 311, *Valmonte v. De Villa* (on checkpoints), 178 SCRA 211, 185 SCRA 665, and *Guazon v. De Villa* (on "zonas"), 181 SCRA 623.

I write this separate opinion merely to remark on an observation made during the deliberation on this case that some members of the Court seem to be coddling criminals instead of extending its protection to society, which deserves our higher concern. The inference is that because of our wrong priorities, criminals are being imprudently let free, to violate our laws again; and it is all our fault.

Believing myself to be among those alluded to, I will say without apology that I do not consider a person a criminal until he is convicted by final judgment after a fair trial by a competent and impartial court. Until then, the Constitution bids us to presume him innocent. He may seem boorish or speak crudely or sport tattoos or dress weirdly or otherwise fall short of our own standards of propriety and decorum. None of these makes him a criminal although he may look like a criminal.

It is so easy to condemn a person on the basis of his appearance but it is also so wrong.

On the question before us, it seems to be the inclination of some judges to wink at an illegal search and seizure as long as the suspect has been actually found in possession of a prohibited article. That fact will retroactively validate the violation of the Bill of Rights for after all, as they would rationalize, the suspect is a criminal. What matters to them is the fact of illegal possession, not the fact of illegal search and seizure.

This kind of thinking takes us back to the intolerant days of *Moncado v. People's Court*, 80 Phil. 1, which was discredited in *Stonehill v. Diokno*, 20 SCRA 383, even before it was definitely rejected by an express provision in

the 1973 Constitution. That provision, which has been retained in the present Constitution, again explicitly declares that any evidence illegally obtained "shall be inadmissible for any purpose in any proceeding."

The fruit of the forbidden tree should not be allowed to poison our system of criminal justice. In the case at bar, the search was made at a checkpoint established for the preposterous reason that the route was being used by marijuana dealers and on an individual who had something bulging at his waist that excited the soldier's suspicion. Was that probable cause? The ponencia notes that the military had advance information that a Caucasian was coming from the Sagada with prohibited drugs in his possession. This is what the military says now, after the fact, to justify the warrantless search. It is so easy to make such a claim, and I am surprised that the majority should readily accept it.

The conclusion that there was probable cause may have been influenced by the subsequent discovery that the accused was carrying a prohibited drug. This is supposed to justify the soldier's suspicion. In other words, it was the fact of illegal possession that retroactively established the probable cause that validated the illegal search and seizure. It was the fruit of the forbidden tree that washed clean the tree itself.

In *Olmstead v. U.S.*, 277 U.S. 438, Justice Holmes said sixty-four years ago:

x x x It is desirable that criminals should be detected, and to that end that all available evidence should be used. It is also desirable that the government should not itself foster and pay for other crimes, when they are the means by which the evidence is to be obtained. If it pays its officers for having got evidence by crime, I do not see why it may not as well pay them for getting it in the same way, and I can attach no importance to protestations of disapproval if it knowingly accepts and pays and announces that in the future it will pay for the fruits. We have to choose, and for my part I think it a less evil that some criminals should escape than that the government should play an ignoble part.

If by deterring the government from playing "an ignoble part," I am "coddling criminals," I welcome the accusation and take pride in it. I would rather err in favor of the accused who is impaled with outlawed evidence than exalt order at the price of liberty.

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SEPARATE OPINION*

NARVASA, J.:

The ancient tradition that a man's home is his castle, safe from intrusion even by the king, has not only found its niche in all our charters, from 1935 to the present; it has also received unvarying recognition and acceptance in our case law.[1] The present Constitution[2] declares that -

"The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures of whatever nature and for any purpose, shall be inviolable, and no search warrant or warrant of arrest shall issue except upon probable cause to be determined personally by the judge after examination under oath or affirmation of the complainant and the witnesses he may produce, and particularly describing the place to be searched, and the persons or things to be seized."

It further ordains that any evidence obtained in violation of said right, among others, "shall be inadmissible for

any purpose in any proceeding." [3]

The rule is that no person may be subjected by the police or other government authority to a search of his body, or his personal effects or belongings, or his residence except by virtue of a search warrant or on the occasion of a legitimate arrest. [4] An arrest is legitimate, of course, if effected by virtue of a warrant of arrest. Even without a warrant, an arrest may also be lawfully made by a peace officer or a private person: [5]

"(a) When in his presence, the person to be arrested has committed, is actually committing, or is attempting to commit an offense;

(b) When an offense has in fact just been committed, and he has personal knowledge of facts indicating that the person to be arrested has committed it; and

(c) When the person to be arrested is a prisoner who has escaped from a penal establishment or place where he is serving final judgment or temporarily confined while his case is pending, or has escaped while being transferred from one confinement to another.

In cases falling under paragraphs (a) and (b) hereof, the person arrested without a warrant shall be forthwith delivered to the nearest police station or jail, and he shall be proceeded against in accordance with Rule 112, Section 7."

In any of these instances of a lawful arrest, the person arrested "may be searched for dangerous weapons or anything which may be used as proof of the commission of an offense, without a search warrant." [6] And it has been held that the search may extend to the area "within his immediate control," i.e., the area from which said person arrested might gain possession of a weapon or destructible evidence. [7]

Apart from "search incidental to an arrest," a warrantless search has also been held to be proper in cases of "search of a moving vehicle," [8] and "seizure of evidence in plain view." [9] This was the pronouncement in *Manipon, Jr. v. Sandiganbayan*, 143 SCRA 267, 276, which drew attention to *Moreno v. Ago Chi*; [10] *Alvero v. Dizon*, [11] *Papa v. Mago*, [12] and an American precedent, *Harris v. U.S.* [13]

If, on the other hand, a person is searched without a warrant, or under circumstances other than those justifying an arrest without warrant in accordance with law, *supra*, 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." [14] In that event, any evidence taken, even if confirmatory of the initial suspicion, is inadmissible "for any purpose in any proceeding." [15] But the right against an unreasonable search and seizure may be waived by the person arrested, provided he knew of such right and knowingly decided not to invoke it. [16]

There is unanimity among the members of the Court upon the continuing validity of these established principles. However, the Court is divided as regards the ultimate conclusions which may properly be derived from the proven facts and consequently, the manner in which the principles just cited should apply thereto.

The proofs of the prosecution and those of the defense are diametrically at odds. What is certain, however, is that the soldiers had no warrant of arrest when they conducted a search of Malmstedt's person and the things in his possession at the time. Indeed, the Court *quo* acknowledged that the soldiers could "not be expected to be armed with a warrant or arrest nor a search warrant everytime they establish a temporary checkpoint ** (and) no judge would issue them one considering that searching questions have to be asked before a warrant could be issued." Equally plain is that prior to the search, a warrantless arrest of Malmstedt could not validly have been made in accordance with the norms of the law. For Malmstedt had not committed, nor was he actually committing or attempting to commit a crime, in the soldiers' presence, nor did said soldiers have personal and competent

knowledge that Malmstedt had in fact just committed a crime. All they had was a suspicion that Malmstedt might have some prohibited drug on him or in his bags; all they had was, in the words of the Trial Court, "the hope of intercepting any dangerous drug being transported," or, as the Office of the Solicitor General asserts, "information that most of the buses coming ** (from the Cordillera) were transporting marijuana and other prohibited drugs."

This case, is remarkably similar to *Peo. v. Aminnudin*, decided on July 6, 1988 also by the First Division.[17] There, Aminnudin was arrested without a warrant by PC officers as he was disembarking from an inter-island vessel. The officers were waiting for him because he was, according to an informer's report, then transporting marijuana. The search of Aminnudin's bag confirmed the informer's report: the bag indeed contained marijuana. The Court nevertheless held that since the PC officers had failed to procure a search warrant although they had sufficient time (two days) to do so and therefore, the case presented no such urgency as to justify a warrantless search, the search of Aminnudin's person and bag, the seizure of the marijuana and his subsequent arrest were illegal; and the marijuana was inadmissible in evidence in the criminal action subsequently instituted against Aminnudin for violating the Dangerous Drugs Act.

There are, on the other hand, other cases adjudicated by this Court in which apparently different conclusions were reached. It is needful to devote a few words to them so that the relevant constitutional and legal propositions are not misunderstood.

In *People v. Claudio* (decision promulgated on April 15, 1988),[18] the accused boarded a "Victory Liner" passenger bus going to Olongapo from Baguio City. She placed the plastic bag she was carrying at the back of the seat then occupied by Obiña, an INP member "on Detached Service with the Anti-Narcotics Unit." This avowedly aroused Obiña's suspicion, and at the first opportunity, and without Claudio's knowledge, he surreptitiously looked into the plastic bag and noted that it contained camote tops as well as a package, and that there emanated from the package the smell of marijuana with which he had become familiar on account of his work. So when the bus stopped at Sta. Rita, and Claudio alighted, Obiña accosted her, showed her his ID, identified himself as a policeman, and announced his intention to search her bag which he said contained marijuana because of the distinctive odor detected by him. Ignoring her plea -- "Please go with me, let us settle this at home" -- he brought her to the police headquarters, where examination of the package in Claudio's bag confirmed his suspicion that it indeed contained marijuana. The Court held the warrantless arrest under the circumstances to be lawful, the search justified, and the evidence thus discovered admissible in evidence against the accused.

In *People v. Tangliben* (decision promulgated on April 6, 1990),[19] two police officers and a barangay tanod were conducting a "surveillance mission" at the Victory Liner Terminal at San Nicolas, San Fernando, Pampanga "aimed not only against persons who may commit misdemeanors ** (there) but also on persons who may be engaging in the traffic of dangerous drugs based on information supplied by informers; * * they noticed a person carrying a red traveling bag; ** who was acting suspiciously;" they asked him to open the bag; the person did so only after they identified themselves as peace officers; found in the bag were marijuana leaves wrapped in plastic weighing one kilogram, more or less; the person was then taken to the police headquarters at San Fernando, Pampanga, where he was investigated; and an information was thereafter filed against that person, Tangliben, charging him with a violation of the Dangerous Drugs Act of 1972 (RA 6425), as amended. Upon these facts it was ruled, citing *Claudio*, supra, that there was a valid warrantless arrest and a proper warrantless search incident thereto.

The facts in *Tangliben* were pronounced to be different from those in *People v. Aminnudin*, supra. "In contrast" to *Aminnudin* where the Court perceived no urgency as to preclude the application for and obtention of a search warrant, it was declared that the *Tangliben* case -

" * * presented urgency. ** (The evidence revealed) that there was an informer who pointed to the

accused-appellant as carrying marijuana. ** Faced with such on-the-spot information, the police officers had to act quickly. There was not enough time to secure a search warrant. * * To require search warrants during on-the-spot apprehensions of drug pushers, illegal possessors of firearms, jueteng collectors, smugglers of contraband goods, robbers, etc. would make it extremely difficult, if not impossible to contain the crimes with which these persons are associated."

In Tangliben, therefore, there was in the Court's view sufficient evidence on hand to enable the PC officers to secure a search warrant, had there been time. But because there was actually no time to get the warrant, and there were "on-the-spot" indications that Tangliben was then actually committing a crime, the search of his person and his effects was considered valid.

Two other decisions presented substantially similar circumstances: *Posadas v. C.A., et al.*, decided on August 2, 1990,[20] and *People v. Moises Maspil, Jr., et al.*, decided on August 20, 1990.[21]

In the first case, *Posadas* was seen to be acting suspiciously by two members of the INP, Davao Metrodiscom, and when he was accosted by the two, who identified themselves as police officers, he suddenly fled. He was pursued, overtaken and, notwithstanding his resistance, placed in custody. The buri bag *Posadas* was then carrying was found to contain a revolver, for which he could produce no license or authority to possess, four rounds of live ammunition, and a tear gas grenade. He was prosecuted for illegal possession of firearms and ammunition and convicted after trial. This Court affirmed *Posadas*' conviction, holding that there was, in the premises, probable cause for a search without warrant, i.e., the appellant was acting suspiciously and attempted to flee with the buri bag he had with him at the time. The Court cited with approval the ruling of the U.S. Federal Supreme Court in *John W. Terry v. State of Ohio*,[22] a 1968 case, which the Solicitor General had invoked to justify the search.

In the case of *Maspil, et al.*, a checkpoint was set up by elements of the First Narcotics Regional Unit of the Narcotics Command at Sayangan, Atok, Benguet, to monitor, inspect and scrutinize vehicles on the highway going towards Baguio City. This was done because of a confidential report by informers that *Maspil* and another person, *Bagking*, would be transporting a large quantity of marijuana to Baguio City. In fact, the informers were with the policemen manning the checkpoint. As expected, at about 2 o'clock in the early morning of November 1, 1986, a jeepney approached the checkpoint, driven by *Maspil*, with *Bagking* as passenger. The officers stopped the vehicle and saw that on it were loaded 2 plastic sacks, a jute sack, and 3 big round tin cans. When opened, the sacks and cans were seen to contain what appeared to be marijuana leaves. The policemen thereupon placed *Maspil* and *Bagking* under arrest, and confiscated the leaves which, upon scientific examination, were verified to be marijuana leaves. The Court upheld the validity of the search thus conducted, as being incidental to a lawful warrantless arrest,[23] and declared that, as in *Tangliben*, *supra*, *Maspil* and *Bagking* had been caught in flagrante delicto transporting prohibited drugs at the time of their arrest. Again, the Court took occasion to distinguish the case from *Aminnudin*[24] in which, as aforesaid, it appeared that the police officers were aware of *Aminnudin*'s identity, his projected criminal enterprise and the vessel on which he would be arriving, and, equally as importantly, had sufficient time and opportunity to obtain a search warrant. In the case of *Maspil* and *Bagking*, the Court found that the officers concerned had no exact description of the vehicle the former would be using to transport marijuana, and no inkling of the definite time of the suspects' arrival, and pointed out that a jeepney on the road is not the same as a passenger boat on the high seas whose route and time of arrival are more or less certain, and which ordinarily cannot deviate from or otherwise alter its course, or select another destination.[25]

The most recent decision treating of warrantless search and seizure appears to be *People v. Lo Ho Wing, etc.*, et al, G.R. No. 88017, decided on January 21, 1991 (per Gancayco, J.). In that case, an undercover or "deep penetration" agent, *Tia*, managed somehow to gain acceptance into a group of suspected drug smugglers, which included *Peter Lo* and *Lim Ching Huat*. *Tia* accompanied *Peter Lo*, to Guangzhou, China, where he saw him and

other persons empty the contents of six (6) tins of tea and replace them with white powder. On their return to Manila with the cans of substituted "tea," they were met at the airport by Lim. As they were leaving the airport in separate vehicles, they were intercepted by officers and operatives of the Narcotics Command (NARCOM), who had earlier been tipped off by Tia, and placed under arrest. A search of the luggage brought in by Tia and Peter Lo, loaded on the group's vehicles, quickly disclosed the six (6) tin cans containing fifty-six (56) bags of white crystalline powder which, upon analysis, was identified as metamphetamine. Tia, Lo and Lim were indicted for violation of the Dangerous Drugs Act of 1972. Tia was discharged as state witness. Lo and Lim were subsequently convicted and sentenced to life imprisonment. One of the questions raised by them in this Court on appeal was whether the warrantless search of their vehicles and personal effects was legal. The Court, citing *Manipon, Jr. v. Sandiganbayan*, 143 SCRA 267 (1986),^[26] held legal the search of the appellants' moving vehicles and the seizure therefrom of the dangerous drug, considering that there was intelligence information, including clandestine reports by a planted spy actually participating in the activity, that the appellants were bringing prohibited drugs into the country; that the requirement of obtaining a search warrant "borders on the impossible in the case of smuggling effected by the use of a moving vehicle that can transport contraband from one place to another with impunity," and "it is not practicable to secure a warrant because the vehicle can be quickly moved out of the locality or jurisdiction in which the warrant must be sought."^[27]

In all five cases, Claudio, Tangliben, Posadas, Maspil, and Lo Ho Wing, facts existed which were found by the Court as justifying warrantless arrests. In Claudio, the arresting officer had secretly ascertained that the woman he was arresting was in fact in possession of marijuana: he had personally seen that her bag contained not only vegetables but also a package emitting the odor of marijuana. In Tangliben, the person arrested and searched was acting suspiciously, and had been positively pointed to as carrying marijuana. And in both cases, the accused were about to board passenger buses, making it urgent for the police officers concerned to take quick and decisive action. In Posadas, the person arrested and searched was acting suspiciously, too, and when accosted had attempted to flee from the police officers. And in Maspil and Lo Ho Wing, there was definite information of the precise identity of the persons engaged in transporting prohibited drugs at a particular time and place.

Now, as regards the precise issue at hand, whether or not the facts in the case at bar make out a legitimate instance of a warrantless search and seizure, there, is, as earlier pointed out, a regrettable divergence of views among the members of the Court.

Contrary to the conclusion reached by the majority, I believe that the appellant should be absolved on reasonable doubt. There was in this case no confidential report from, or positive identification by an informer; no attempt to flee; no bag or package emitting tell-tale odors; no other reasonably persuasive indications that Malmstedt was at the time in process of perpetrating the offense for which he was subsequently prosecuted. Hence, when the soldiers searched Malmstedt's pouch and the bags in his possession, they were simply "fishing" for evidence. It matters not that the search disclosed that the bags contained prohibited substances, confirming their initial information and suspicion. The search was not made by virtue of a warrant or as an incident of a lawful warrantless arrest, i.e., under circumstances sufficient to engender a reasonable belief that some crime was being or about to be committed, or had just been committed. There was no intelligent and intentional waiver of the right against unreasonable searches and seizure. The search was therefore illegal, since the law requires that there first be a lawful arrest of an individual before a search of his body and his belongings may licitly be made. The process cannot be reversed, i.e., a search be first undertaken, and then an arrest effected, on the strength of the evidence yielded by the search. An arrest made in that case would be unlawful, and the search undertaken as an incident of such an unlawful arrest, also unlawful.

The fact that when investigated at the headquarters of the Narcotics Command at Camp Dangwa, La Trinidad,

Malmstedt had, it is said, willingly admitted that there was hashish inside the "teddy bears" in the luggage found in his possession -- an admission subsequently confirmed by laboratory examination -- does not help the cause of the prosecution one bit. Nothing in the record even remotely suggests that Malmstedt was accorded the rights guaranteed by the Constitution to all persons under custodial investigation.[28] He was not informed, prior to being interrogated, that he had the "right to remain silent and to have competent and independent counsel preferably of his own choice," and that if he could not afford the services of counsel, he would be provided with one; not does it appear at all that he waived those rights "in writing and in the presence of counsel." The soldiers and the police officers simply went ahead with the investigation of Malmstedt, without counsel. The admissions elicited from Malmstedt under these circumstances, as the Constitution clearly states, are "inadmissible in evidence against him." [29]

The prohibited drugs supposedly discovered in Malmstedt's bags, having been taken in violation of the constitutional right against unreasonable searches and seizures, are inadmissible against him "for any purpose in any proceeding." Also pronounced as incompetent evidence against him are the admissions supposedly made by him without his first being accorded the constitutional rights of persons under custodial investigation. Without such object evidence and admissions, nothing remains of the case against Malmstedt.

It may be conceded that, as the Trial Court points out, the evidence presented by Malmstedt in his defense is feeble, unworthy of credence. This is beside the point; for conformably to the familiar axiom, the State must rely on the strength of its evidence and not on the weakness of the defense. The unfortunate fact is that although the existence of the hashish is an objective physical reality that cannot but be conceded, there is in law no evidence to demonstrate with any degree of persuasion, much less beyond reasonable doubt, that Malmstedt was engaged in a criminal activity. This is the paradox created by the disregard of the applicable constitutional safeguards. The tangible benefit is that the hashish in question has been correctly confiscated and thus effectively withdrawn from private use.

What is here said should not by any means be taken as a disapproval or a disparagement of the efforts of the police and military authorities to deter and detect offenses, whether they be possession of and traffic in prohibited drugs, or some other. Those efforts obviously merit the support and commendation of the Courts and indeed of every responsible citizen. But those efforts must take account of the basic rights granted by the Constitution and the law to persons who may fall under suspicion of engaging in criminal acts. Disregard of those rights may not be justified by the objective of ferreting out and punishing crime, no matter how eminently desirable attainment of that objective might be. Disregard of those rights, as this Court has earlier stressed, may result in the escape of the guilty, and all because the "constable has blundered," rendering the evidence inadmissible even if truthful or otherwise credible.[30]

I therefore vote to reverse the Trial Court's judgment of October 12, 1989 and to acquit the appellant on reasonable doubt.

* The case was referred to the Court En Banc by the First Division (to which it had originally been assigned). Thereafter the Court En Banc resolved to accept and itself decide the case.

[1] SEE *Peo. v. Burgos*, 144 SCRA 1 (1986); *Roan v. Gonzales*, 145 SCRA 687 (1986); *Alih v. Castro*, 151 SCRA 279 (1987); *Guazon v. de Villa*, G.R. No. 80508, Jan. 30, 1990

[2] ART. III, Sec. 2, 1987 Constitution; to the same effect: ART. IV, Sec. 3, 1973 Constitution, and ART. IV, Sec. 3, 1935 Constitution

[3] ART III, Sec. 3 (2)

[4] *Peo v. de la Cruz*, G.R. No. 83260, April 18, 1990.

[5] Sec. 5, Rule 113, Rules of Court; *SEE Cruz, I.A.*, Constitutional Law, 1987 ed., pp. 141-142, citing *Adams v. Williams*, 47 U.S. 143 and *Terry v. Ohio*, 392 U.S. 1

[6] Sec. 12, Rule 126, Rules of Court

[7] *SEE Chimel v. California*, 395 U.S. 752 (1969), cited in the monograph of Mr. Justice Mendoza, V.V. entitled *Reflections on the Constitutional Law of Arrest, Search and Seizure*, Philippine Law Journal, Vol. LXIII, Third Quarter, September, 1988, p. 241.

[8] As pointed out in *Cruz*, op. cit., p. 142, in the U.S., "searches without warrant may also be made of automobiles for the purpose of preventing violations of smuggling or immigration laws, provided such searches are made at borders or 'constructive borders' like checkpoints near the boundary lines of the State," but "the mere mobility of these vehicles does not justify their indiscriminate searches without warrants if made within the interior of the territory and in the absence of probable cause (*Almeida-Sanchez v. U.S.*, 37 L. ed. 2d 596; *Carroll v. U.S.* 267 U.S. 132)."

[9] *SEE* footnote 13, *infra*

[10] 12 Phil. 439, to the effect that, "An officer making an arrest may take from the person arrested any money or property found upon his persons which was used in the commission of the crime or was the fruit of the crime of which might furnish the prisoner with the means of committing violence or escaping, or which may be used in evidence in the trial of the case."

[11] 76 Phil. 637 to the effect that, "The most important exception to the necessity for a search warrant is the right of search and seizure as an incident to a lawful arrest. A lawful arrest may be made either while a crime is being committed or after its commission. The right to search includes in both instances that of searching the person of him who is arrested, in order to find and seize things connected with the crime as its fruits or as the means by which it was committed (*Agnello vs. United States*, 269 U.S., 20)."

[12] 22 SCRA 857 -- that the "Tariff and Customs Code does not require any search warrant issued by a competent court before police authorities can effect the seizure. But the Code requires it in the search of a dwelling house."

[13] 390 U.S. 234, holding that "prohibited articles within plain view, 'open to eye and hand,' of the law-enforcement officer who comes upon them 'inadvertently,' may also be seized by him even without warrant (*SEE Cruz*, op. cit., p. 143)

[14] *SEE U.S. v. Hachaw*, 21 Phil. 514 (1912); *U.S. v. Santos*, 36 Phil. 853 (1917), *Integrated Bar of the Philippines v. Enrile*, Oct. 21, 1985, cited in *Gupit, Rules of Criminal Procedure*, 1986 ed., pp. 179-182; *Peo. v. Aminnudin*, 163 SCRA 402 (1988); *Guazon v. de Villa*, G.R. No. 80508, Jan. 30, 1990; cf., *Peo. v. Cruz*, 165 SCRA 135 (1988)

[15] *Nolasco v. Ermani Cruz-Paño*, 147 SCRA 509 (1987); *SEE*, also, *People v. Burgos*, 144 SCRA 1 (1986) where the petitioner, while plowing his field, was arrested and his premises searched on the basis of information that he was in possession of unlicensed firearms, and thereafter, on discovery by the authorities of a gun and subversive documents, had admitted ownership thereof -- upon which facts, this Court ruled the gun and documents to be inadmissible in evidence because their seizure was not an incident of a lawful arrest, and his acknowledgment of ownership thereof equally incompetent because obtained in violation of the Miranda doctrine.

[16] SEE Cruz, *op. cit.*, p. 142, citing *Terry v. Ohio*, *supra*, and *Magoncia v. Palacio*, 80 Phil. 770, and pointing out, on the authority of *Callanta v. Villanueva*, 77 SCRA 377 and *Bagcal v. Villaraza*, 120 SCRA 525, that the posting by the accused of a bail bond constitutes waiver of any irregularity attending his arrest and estops him from questioning its validity.

[17] 163 SCRA 402, per Cruz, J., Griño-Aquino, J., dissenting; SEE footnote 6 at page 2, *supra*

[18] 160 SCRA 646, Third Division, per Gutierrez, Jr., J.

[19] 184 SCRA 220, Third Division, per Gutierrez, Jr., J.

[20] G.R. No. 83139, First Division, per Gancayco, J.

[21] G.R. No. 85177, Third Division, per Gutierrez, Jr., J.

[22] 392 US 1, 20 L Ed 2d 889, 88 S Ct 1868

[23] Sec. 12, Rule 126 in relation to Sec. 5, Rule 113 of the 1985 Rules of Criminal Procedure

[24] SEE footnote 20, *supra*

[25] Attention may be drawn, in this connection, to the Resolution of May 24, 1990 in G.R. No. 83988 (*Valmonte v. de Villa*, [Sept. 29, 1989], 178 SCRA 211) where the Court cited with approval a ruling of the U.S. Supreme Court that "Automobiles, because of their mobility, may be searched without a warrant upon facts not justifying a warrantless search of a residence or office. *Brinegar v. United States*, 338 US 160, 93 L Ed 1879, 69 S Ct 1302 (1949); *Carroll v. United States*, 267 US 132, 69 L Ed 543, 45 S Ct 280, 39 ALR 790 (1925). The cases so holding have, however, always insisted that the officers conducting the search have 'reasonable or probable cause' to believe that they will find the instrumentality of a crime or evidence pertaining to a crime before they begin their warrantless search. ** (*Dyke v. Taylor*, 391 US 216, 20 L Ed 538, 88 S Ct 1472)."

[26] SEE footnotes 9 and 13, *supra*

[27] Citing *Carroll v. U.S.*, 267 U.S. 132, 153 (1925)

[28] ART. III, Sec. 12 (1)

[29] *Id.*, Sec. 12 (3); *Peo. v. Buenaflor*, G.R. No. 62805, Jan. 22, 1990; *Peo. v. Camalog*, G.R. No. 77116, Jan. 31, 1989; *Peo. v. Lagahan*, G.R. No. 78692, Dec. 8, 1988; *Peo. v. Newman*, G.R. No. 45354, July 26, 1988

[30] *Peo. v. Hizon*, G.R. No. 71273, July 29, 1988, per Cruz, J.

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