

PEOPLE OF THE PHILIPPINES, PLAINTIFF-APPELLEE, VS. MICHAEL HERRERA AND FRANCISCO ABBU, ACCUSED, FRANCISCO ABBU, ACCUSED-APPELLANT.

G.R. No. 93728. August 21, 1995

Ponente: VITUG, J.

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VITUG, J.:

This appeal is interposed by Francisco Abbu from the decision, dated 02 February 1990, of the Regional Trial Court of Misamis Oriental, Branch XXI (Cagayan de Oro City),[1] convicting him for the violation of Section 4, Article II, of Republic Act No. 6425 (Dangerous Drugs Act) and imposing on him the penalty of life imprisonment, a fine of P20,000.00, without subsidiary imprisonment in case of insolvency, and the payment of the costs of suit.

Appellant Abbu and his co-accused Herrera were charged on 14 November 1988 in an information that read:

"That on or about September 22, 1988 at more or less 3:30 o'clock in the afternoon, at Montalban corner Burgos Streets, Cagayan de Oro City, Philippines, and within the jurisdiction of this Honorable Court, the above-named accused, conspiring, confederating together and mutually helping one another, and without being authorized by law, did then and there wilfully, unlawfully and feloniously sell, administer, deliver, give away to another, distribute one (1) tea bag of dried marijuana leaves, well knowing that marijuana is a prohibited drug, by then and there selling and handing over to a NARCOM poseur buyer one (1) tea bag of marijuana leaves (dried) after receiving as consideration thereof P10.00 bill which marked money cannot, however, be used as exhibit as accused eluded arrest thereby bringing with him (Francisco Abbu) the said marked P10.00 bill.

"Contrary to and in violation of Section 4, Article II of R.A. 6425."[2]

When arraigned on 29 May 1989, the two accused pleaded not guilty to the charge.[3]

The prosecution, at the trial, sought to establish that on 22 August 1988, a certain Arnel Macarandan and one Jessie Victor were found in the act of "repacking" a kind of prohibited drug at Suniel Street, Cagayan de Oro City. Charged with having violated Section 8, Article II, of the Dangerous Drugs Law before the Regional Trial Court of Misamis Oriental, the duo, along with an unidentified civilian informant, then implicated Abbu and Herrera. In order to verify this information, Abbu and Herrera were promptly placed under police surveillance.

At about nine o'clock in the morning of 22 September 1988, a NARCOM group, headed by a Captain Silva, finally laid out a plan to entrap and apprehend the two in flagrante through a "buy bust" operation. A team composed of Sgt. Claro Unson, as the group leader, and Sgts. Wayne Burner, Dominador Mosquito, Malagayo and Bolo, as members, was formed. By 3:30 in the afternoon, the team members were already in their respective positions behind thick bushes, approximately three (3) meters away from the corner of Burgos and Montalban streets, near the area where the transaction was to take place.

At the appointed time, the poseur buyer approached Francisco Abbu and his companion. A marked ten-peso bill was handed over to Abbu and, in return, his companion gave the poseur buyer one (1) tea bag of marijuana leaves. The members of the police team thereupon closed in but evidently not swift enough since the duo were able to run away. Unfamiliar with the terrain and pathways in the area, the police failed to apprehend the two (until days later in connection with another incident).[4] Although the police officers were unable to seize the marked money from Abbu,[5] they, however, were able to secure in their possession the marijuana tea bag. The contraband was forwarded the following day[6] by Sgt. Mosquito to the NBI Forensic Chemistry Section; the laboratory examination yielded positive results.[7]

The defense evidence is skimpy.

Accused Michael Herrera (said to be the companion of Abbu during the buy-bust operation) interposed alibi. A regular third year high school student at the Mindanao State University in Marawi City, he presented evidence that he had attended his classes on 22 September 1988. Marawi City is a two-hour and twenty-minute car ride away from Cagayan de Oro City.[8]

Accused Francisco Abbu did not testify; he merely adopted the evidence of Herrera.

On 19 February 1990, the trial court rendered its decision convicting Francisco Abbu and acquitting Michael Herrera.

Francisco Abbu filed a notice of appeal,[9] which was given due course by the trial court.[10] About a week later (05 March 1990), he filed a motion for the reconsideration of his conviction or for new trial, contending that his failure to give testimony resulted in the denial of his constitutional right to due process.[11] He alleged that while he was present in court on the last day of hearing, he was, however, so sick with flu and suffering from "physical pains" that he was unable to communicate with, and to get full legal advice from, his lawyer. Appellant executed an "affidavit of merit" stating that he was in Visayas, not in Cagayan de Oro City, on the day the buy bust operation was supposed to have been conducted.[12]

The trial court denied the motion.

In this appeal, accused-appellant asseverates that the judgment of conviction lacks factual bases. In main, he avers thusly: First, the marked P10.00 bill supposedly handed over to him should have been presented to substantiate the sale; second, the failure of the prosecution to present the poseur buyer is a fatal flaw in its case, and third, the NARCOM agents have kept the marijuana tea bag in their possession for about twenty (20) hours giving rise to the strong suspicion of its being just a piece of "planted evidence."

Regrettably for accused-appellant, his position is much too tenuous to overcome the findings of the trial court.

The presentation in court of "marked money" used in "buy bust operations" is not indispensable in drug cases.[13] What the Dangerous Drugs Act punishes is the delivery of the prohibited drug or the act of knowingly passing a dangerous drug to another.[14] The offense is committed by the mere act of delivery or transfer of the prohibited drug; the consideration for the transaction is of no moment.[15]

Appellant would insist that there being no evidence that could show his having been in possession at any time of the seized drug, implicating him to the illegal transaction would be unwarranted. Absent conspiracy, he would be right but conspiracy there was; the "buy-bust" transaction was successfully consummated between the entrapping officers and accused-appellant, together with his companion, with accused-appellant himself receiving the marked money and the other delivering the contraband to the poseur buyer. No other logical conclusion could follow from the duo's concerted action except that they had a common purpose and community of interest, the accepted indicia

that could establish the existence of conspiracy.[16]

The failure to present in court the poseur buyer did not affect the prosecution's case.[17] In *People vs. Lucero*,[18] reiterating previous pronouncements, we have said:

"It is now well-settled that except for a situation where the appellant vehemently denies selling any prohibited drugs coupled with the inconsistent testimonies of the arresting officers or coupled with the possibility that there exist reasons to believe that the arresting officers had motives to testify falsely against the appellant, or the situation where it was only the informant-poseur-buyer who witnessed the entire transaction, the testimony of the informant-poseur-buyer can be dispensed with as it will be merely corroborative of the apprehending officers-eyewitnesses' testimonies."

Nothing in this case is shown to even suspect that the NARCOM agents have been impelled by improper motives in implicating accused-appellant.

The concern expressed by accused-appellant on the delay in the submission of the marijuana tea bag to the National Bureau of Investigation for examination would appear to have no basis at all. The tea bag of marijuana was personally received by the Forensic Chemist at 11:15 in the morning of 23 September 1988,[19] the day following the "buy bust" operation conducted at 3:30 p.m. on 22 September 1988. The Solicitor General explained that "the confiscated item could not have been forwarded to the NBI before the close of office hours on the same day because of the steps that had to be taken to assure the integrity of the evidence, such as proper recording, safekeeping and preparation of the forwarding communication." [20]

Accused-appellant next puts to issue the validity of the entrapment made by the NARCOM agents. A "buy bust" operation has long received judicial sanction as long as it is carried out with due regard to constitutional and legal safeguards.[21] Since a violator of the Dangerous Drugs Act in a "buy bust" operation is caught in flagrante delicto, the apprehending officers are not only authorized but duty-bound to immediately apprehend the felon and to search him for anything which may be so used as proof of the commission of the offense.[22] The fact that the malefactor is able to successfully evade arrest does not render inadmissible in evidence the confiscated subject of the offense.[23]

Accused-appellant claims to have been denied his right to due process. The records do not appear to bear him out. The exchange of remarks between the court and Atty. Sagrado, counsel for accused-appellant, shows thusly:

"COURT: Are you not presenting any evidence?

ATTY. SAGRADO: We have no evidence.

COURT: Not even the accused.

ATTY. SAGRADO: We are no longer presenting the accused." [24]

The defense then joined the prosecution in praying for a 20-day period within which to submit their respective memoranda.[25] The opportunity to be heard is the essence of due process.[26]

Accused-appellant, finally, assails the credibility of the witnesses. We have carefully examined the records, and we see nothing that can impel us to depart from the settled rule that we ordinarily must give due weight and respect to the trial court's findings.[27]

Accused-appellant's co-accused, Michael Herrera, was acquitted. It is a judgment that cannot here be questioned; certainly, it cannot be invoked to win accused-appellant's own acquittal.

All that has been said, notwithstanding, accused-appellant must now be ordered released and spared from the

penalty of life imprisonment imposed upon him by the trial court.[28] In *People vs. Simon*,[29] the Court has sanctioned the retrospective application of the reduced penalties under Republic Act No. 7659.

Following *Simon*, the penalty in this instance, considering the quantity of marijuana involved and there being no mitigating or aggravating circumstances, should be within the medium period[30] of prision correccional.[31] Applying the Indeterminate Sentence Law, the full range of the penalty imposable upon accused-appellant is six (6) months of arresto mayor maximum, as minimum penalty, to four (4) years and two (2) months of prision correccional medium, as maximum penalty.[32] The fine of P20,000 imposed by the trial court, which is conjunctive only if the penalty is reclusion perpetua to death,[33] should accordingly be deleted.

WHEREFORE, the decision of the trial court convicting accused-appellant for the violation of Section 4, Article II, of Republic Act No. 6425, as amended, is hereby **AFFIRMED**. The penalty imposed, however, is hereby **MODIFIED**; instead of life imprisonment and fine of P20,000, accused-appellant shall suffer the indeterminate sentence of six (6) months of arresto mayor maximum, as minimum penalty, to four (4) years and two (2) months of prision correccional medium, as maximum penalty. Considering that accused-appellant has already served[34] more than the maximum penalty herein imposed, his **IMMEDIATE RELEASE**[35] from confinement, unless his continued detention can be justified for other valid reasons, is hereby **ORDERED**. Costs against accused-appellant.

SO ORDERED.

Feliciano, Acting Chief Justice, (Chairman), Romero, and Melo, JJ., concur.

[1] Presided by Judge Celso P. Largo.

[2] Rollo, p. 7.

[3] Record, p. 24.

[4] TSN, 05 September 1989, pp. 20-22.

[5] TSN, 12 July 1989, p. 9.

[6] TSN, 05 September 1989, p. 25; TSN, 13 September 1989, p. 27.

[7] Exh. A.

[8] TSN, 10 October 1989, p. 6.

[9] Record, p. 82.

[10] *Ibid.*, p. 88.

[11] *Ibid.*, p. 83.

[12] *Ibid.*, p. 85.

[13] *People vs. Dismuke*, 234 SCRA 51; *People vs. Cuachon*, 238 SCRA 540.

[14] *People vs. Lucero*, 229 SCRA 1.

[15] *People vs. Jumao-as*, 230 SCRA 70; *People vs. Macasa*, 229 SCRA 422, 428 citing *People vs. Fabian*, 204 SCRA 730.

[16] *People vs. Merabueno*, 239 SCRA 197.

[17] *People vs. Kyamko*, 222 SCRA 183; *People vs. San Andres*, 222 SCRA 666; *People vs. Malakas*, 228 SCRA 310.

[18] *Supra* at pp. 9-10 citing *People vs. Ale*, 145 SCRA 50; *People vs. Sillo*, 214 SCRA 74; *People vs. Sahagun*, 182 SCRA 91 and *People vs. Abelita*, 210 SCRA 497.

[19] Exh. A.

[20] Rollo, p. 64.

[21] *People vs. BasiIgo*, 235 SCRA 191.

[22] *People vs. Rodriguez*, 232 SCRA 493, *People vs. Garcia*, 235 SCRA 371.

[23] Sec. 2, Rule 126, Revised Rules on Criminal Procedure.

[24] Record, pp. 8-9.

[25] Record, p. 65.

[26] *Philippine Phosphate Fertilizer Corporation vs. Torres*, 231 SCRA 335; *People vs. Acol*, 232 SCRA 406.

[27] *People vs. Basilgo*, *supra*.

[28] The trial court noted certain discrepancies in the Dangerous Drugs Law as regards the penalties imposed on violators thereof and recommended that remedial measures which the legislature should undertake (Decision, pp. 8-9).

[29] *Supra*.

[30] Article 64 (1), Revised Penal Code.

[31] *People vs. Utinas*, 239 SCRA 362, 372.

[32] See *People vs. Simon*, *supra*.

[33] *Ibid.*, p. 573.

[34] Accused-appellant has been incarcerated since 1989.

[35] *People vs. Utinas*, *supra* at 372, *Ordoñez vs. Vinarao*, 239 SCRA 114; *Angeles vs. Director of New Bilibid Prison*, 240 SCRA 49.

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