



Republic of the Philippines
Supreme Court
Manila

THIRD DIVISION

HARRY L. GO, TONNY NGO, G.R. No. 185527
JERRY NGO AND JANE GO,
Petitioners, Present:

-versus-

THE PEOPLE OF THE
PHILIPPINES and HIGHDONE
COMPANY, LTD., ET AL.,
Respondents.

VELASCO, JR., J., Chairperson,
PERALTA,
ABAD,
MENDOZA, and
PERLAS-BERNABE, JJ.

Promulgated:

18 July 2012

X-----

Macapagal
X

DECISION

PERLAS-BERNABE, J.:

The procedure for taking depositions in criminal cases recognizes the prosecution's right to preserve testimonial evidence and prove its case despite the unavailability of its witness. It cannot, however, give license to prosecutorial indifference or unseemly involvement in a prosecution witness' absence from trial. To rule otherwise would effectively deprive the accused of his fundamental right to be confronted with the witnesses against him.

In this Petition for Review on Certiorari under Rule 45 of the Revised Rules of Court, petitioners seek to nullify and set aside the February 19, 2008 Decision¹ and November 28, 2008 Resolution² of the Court of Appeals (CA) in CA-G.R. SP No. 99383, which reversed the September 12, 2006 Order³ issued by the Regional Trial Court (RTC) of Manila, Branch 27 in Civil Case No. 06-114844 and upheld the grant of the prosecution's motion to take the testimony of a witness by oral depositions in Laos, Cambodia.

Petitioners Harry Go, Tonny Ngo, Jerry Ngo and Jane Go were charged before the Metropolitan Trial Court (MeTC) of Manila for *Other Deceits* under Article 318 of the Revised Penal Code (RPC) docketed as Criminal Case No. 396447. The Information⁴ dated September 24, 2003, later amended⁵ on September 14, 2004, reads:

“That sometime in August 1996, in the City of Manila, Philippines, the said accused, conspiring, confederating together and helping one another, did then and there willfully, unlawfully and feloniously defraud Highdone Company Ltd. Represented by Li Luen Ping, in the following manner, to wit: all said accused, by means of false manifestations and fraudulent representations which they made to said Li Luen Ping to the effect that they have chattels such as machinery, spare parts, equipment and raw materials installed and fixed in the premises of BGB Industrial Textile Mills Factory located in the Bataan Export Processing Zone (BEPZ) in Mariveles, Bataan, executed a Deed of Mortgage for a consideration of the amount of \$464,266.90 or its peso equivalent at P20,892,010.50 more or less in favor of ML Resources and Highdone Company Ltd. Representing that the said deed is a FIRST MORTGAGE when in truth and in fact the accused well knew that the same had been previously encumbered, mortgaged and foreclosed by CHINA BANK CORPORATION as early as September 1994 thereby causing damage and prejudice to said HIGHDONE

1 Penned by Associate Justice Monina Arevalo-Zenarosa, with Presiding Justice Conrado M. Vasquez, Jr. and Associate Justice Edgardo F. Sundiam, concurring; *rollo*, pp. 44-55.

2 Annex “B” of the Petition, id. at pp. 56-59.

3 Issued by Judge Teresa P. Soriaso, id. at pp. 136-142.

4 Annex “C” of the Petition, id. at pp. 60-61.

5 Annex “D” of the Petition, id. at pp. 62-63.

COMPANY LTD., in the said amount of \$464,266.90 or its peso equivalent at P20,892,010.50 more or less.”

Upon arraignment, petitioners pleaded not guilty to the charge.

The prosecution's complaining witness, Li Luen Ping, a frail old businessman from Laos, Cambodia, traveled from his home country back to the Philippines in order to attend the hearing held on September 9, 2004. However, trial dates were subsequently postponed due to his unavailability.

On October 13, 2005, the private prosecutor filed with the MeTC a Motion to Take Oral Deposition⁶ of Li Luen Ping, alleging that he was being treated for lung infection at the Cambodia Charity Hospital in Laos, Cambodia and that, upon doctor's advice, he could not make the long travel to the Philippines by reason of ill health.

Notwithstanding petitioners' Opposition,⁷ the MeTC granted⁸ the motion after the prosecution complied with the directive to submit a Medical Certificate of Li Luen Ping. Petitioners sought its reconsideration which the MeTC denied,⁹ prompting petitioners to file a Petition for Certiorari¹⁰ before the RTC.

6 Annex “E” of the Petition, id. at pp. 64-66

7 Annex “F” of the Petition, id. at pp. 67-68.

8 Annex “H” of the Petition, id. at pp. 73-74.

9 Annex “L” of the Petition, id. at p. 90.

10 Annex “M” of the Petition, id. at pp. 92-112.

On September 12, 2006, the RTC granted the petition and declared the MeTC Orders null and void.¹¹ The RTC held that Section 17, Rule 23 on the taking of depositions of witnesses in civil cases cannot apply suppletorily to the case since there is a specific provision in the Rules of Court with respect to the taking of depositions of prosecution witnesses in criminal cases, which is primarily intended to safeguard the constitutional rights of the accused to meet the witness against him face to face.

Upon denial by the RTC of their motion for reconsideration through an Order dated March 5, 2006,¹² the prosecution elevated the case to the CA.

On February 19, 2008, the CA promulgated the assailed Decision which held that no grave abuse of discretion can be imputed upon the MeTC for allowing the deposition-taking of the complaining witness Li Luen Ping because no rule of procedure expressly disallows the taking of depositions in criminal cases and that, in any case, petitioners would still have every opportunity to cross-examine the complaining witness and make timely objections during the taking of the oral deposition either through counsel or through the consular officer who would be taking the deposition of the witness.

On November 28, 2008, the CA denied petitioners' motion for reconsideration. Hence, this petition alleging that –

**I.THE COURT OF APPEALS ERRED IN NOT
FINDING THAT THE METROPOLITAN TRIAL
COURT INFRINGED THE CONSTITUTIONAL
RIGHT OF THE PETITIONERS TO A PUBLIC**

¹¹ RTC Order, Annex “O” of the Petition, id. at pp. 136-142.

¹² Annex “R” of the Petition, id. at pp. 173-174.

TRIAL IN ALLOWING THE TAKING OF THE DEPOSITION OF THE COMPLAINING WITNESS IN LAOS, CAMBODIA.

II.THE COURT OF APPEALS ERRED IN NOT FINDING THAT THE DEPOSITION TAKING OF THE COMPLAINING WITNESS IN LAOS, CAMBODIA IS AN INFRINGEMENT OF THE CONSTITUTIONAL RIGHT OF THE PETITIONERS TO CONFRONT THE SAID WITNESS FACE TO FACE.

III.THE COURT OF APPEALS ERRED IN SUSTAINING THE JUDICIAL LEGISLATION COMMITTED BY THE METROPOLITAN TRIAL COURT IN APPLYING THE RULES ON DEPOSITION-TAKING IN CIVIL CASES TO CRIMINAL CASES.

IV.THE COURT OF APPEALS ERRED IN LIMITING THE TRADITIONAL DEFINITION OF GRAVE ABUSE OF DISCRETION, OVERLOOKING THE ESTABLISHED RULE THAT VIOLATION OF THE CONSTITUTION, THE LAW OR JURISPRUDENCE SIMILARLY COMES WITHIN THE PURVIEW OF GRAVE ABUSE OF DISCRETION.

We rule in favor of petitioners.

The Procedure for Testimonial Examination of an Unavailable Prosecution Witness is Covered Under Section 15, Rule 119.

The examination of witnesses must be done orally before a judge in open court.¹³ This is true especially in criminal cases where the

¹³ Section 1, Rule 132, Rules of Court.

Constitution secures to the accused his right to a public trial and to meet the witnessess against him face to face. The requirement is the “safest and most satisfactory method of investigating facts” as it enables the judge to test the witness' credibility through his manner and deportment while testifying.¹⁴ It is not without exceptions, however, as the Rules of Court recognizes the conditional examination of witnesses and the use of their depositions as testimonial evidence in lieu of direct court testimony.

Even in criminal proceedings, there is no doubt as to the availability of conditional examination of witnesses – both for the benefit of the defense, as well as the prosecution. The Court's ruling in the case of *Vda. de Manguerra v. Risos*¹⁵ explicitly states that –

“x x x As exceptions, Rule 23 to 28 of the Rules of Court provide for the different modes of discovery that may be resorted to by a party to an action. These rules are adopted either to perpetuate the testimonies of witnesses or as modes of discovery. In criminal proceedings, Sections 12, 13 and 15, Rule 119 of the Revised Rules of Criminal Procedure, which took effect on December 1, 2000, allow the conditional examination of both the defense and prosecution witnesses.” (Underscoring supplied)¹⁶

The procedure under Rule 23 to 28 of the Rules of Court allows the taking of depositions in civil cases, either upon oral examination or written interrogatories, before any judge, notary public or person authorized to administer oaths at any time or place within the Philippines; or before any Philippine consular official, commissioned officer or person authorized to

14 Francisco, R.J., Evidence, 1993 Edition, p. 437.

15 G.R. No. 152643, August 28, 2008, 563 SCRA 499.

16 Id. at pp. 506-507.

administer oaths in a foreign state or country, with no additional requirement except reasonable notice in writing to the other party.¹⁷

But for purposes of taking the deposition in criminal cases, more particularly of a prosecution witness who would foreseeably be unavailable for trial, the testimonial examination should be made before the court, or at least before the judge, where the case is pending as required by the clear mandate of Section 15, Rule 119 of the Revised Rules of Criminal Procedure. The pertinent provision reads thus:

SEC. 15. Examination of witness for the prosecution. – When it satisfactorily appears that a witness for the prosecution is *too sick or infirm to appear at the trial* as directed by the court, or *has to leave the Philippines with no definite date of returning*, he may forthwith be conditionally examined before the court where the case is pending. Such examination, in the presence of the accused, or in his absence after reasonable notice to attend the examination has been served on him shall be conducted in the same manner as an examination at the trial. Failure or refusal of the accused to attend the examination after notice shall be considered a waiver. The statement taken may be admitted in behalf of or against the accused.

Since the conditional examination of a prosecution witness must take place at no other place than the court where the case is pending, the RTC properly nullified the MeTC's orders granting the motion to take the deposition of Li Luen Ping before the Philippine consular official in Laos, Cambodia. We quote with approval the RTC's ratiocination in this wise:

The condition of the private complainant being sick and of advanced age falls within the provision of Section 15 Rule 119 of the Rules of Court. However, said rule substantially provides that he should be conditionally examined before the court where the case is pending. Thus,

¹⁷ Sections 1, 10, 11, 14 and 15, Rule 23, *1997 Rules of Civil Procedure*.

this Court concludes that the language of Section 15 Rule 119 must be interpreted to require the parties to present testimony at the hearing through live witnesses, whose demeanor and credibility can be evaluated by the judge presiding at the hearing, rather than by means of deposition. No where in the said rule permits the taking of deposition outside the Philippines whether the deponent is sick or not.¹⁸ (Underscoring supplied)

Certainly, to take the deposition of the prosecution witness elsewhere and not before the very same court where the case is pending would not only deprive a detained accused of his right to attend the proceedings but also deprive the trial judge of the opportunity to observe the prosecution witness' deportment and properly assess his credibility, which is especially intolerable when the witness' testimony is crucial to the prosecution's case against the accused. This is the import of the Court's ruling in *Vda. de Manguerra*¹⁹ where we further declared that –

While we recognize the prosecution's right to preserve the testimony of its witness in order to prove its case, we cannot disregard the rules which are designed mainly for the protection of the accused's constitutional rights. The giving of testimony during trial is the general rule. The conditional examination of a witness outside of the trial is only an exception, and as such, calls for a strict construction of the rules.²⁰ (Underscoring supplied)

It is argued that since the Rules of Civil Procedure is made explicitly applicable in all cases, both civil and criminal as well as special proceedings, the deposition-taking before a Philippine consular official under Rule 23 should be deemed allowable also under the circumstances. However, the suggested suppletory application of Rule 23 in the testimonial examination of an unavailable prosecution witness has been categorically ruled out by the Court in the same case of *Vda. de Manguerra*, as follows:

¹⁸ RTC Order, *rollo*, pp. 138-139.

¹⁹ G.R. No. 152643, August 28, 2008, 563 SCRA 499.

²⁰ *Id.* at p. 510.

It is true that Section 3, Rule 1 of the Rules of Court provides that the rules of civil procedure apply to all actions, civil or criminal, and special proceedings. In effect, it says that the rules of civil procedure have suppletory application to criminal cases. However, it is likewise true that criminal proceedings are primarily governed by the Revised Rules of Criminal Procedure. Considering that Rule 119 adequately and squarely covers the situation in the instant case, we find no cogent reason to apply Rule 23 suppletorily or otherwise." (Underscoring supplied)

*The Conditional Examination of a
Prosecution Witness Cannot Defeat
the Rights of the Accused to Public
Trial and Confrontation of Witnesses*

The CA took a simplistic view on the use of depositions in criminal cases and overlooked fundamental considerations no less than the Constitution secures to the accused, *i.e.*, the right to a public trial and the right to confrontation of witnesses. Section 14(2), Article III of the Constitution provides as follows:

Section 14. (1) x x x

(2) In all criminal prosecutions, the accused shall be presumed innocent until the contrary is proved, and shall enjoy the right to be heard by himself and counsel, to be informed of the nature and cause of the accusation against him, to have a speedy, impartial and public trial, to meet the witnesses face to face, and to have compulsory process to secure the attendance of witnesses and the production of evidence in his behalf. However, after arraignment, trial may proceed notwithstanding the absence of the accused provided that he has been duly notified and his failure to appear is unjustifiable. (Underscoring supplied)

In dismissing petitioners' apprehensions concerning the deprivation of their constitutional rights to a public trial and confrontation, the CA opined that petitioners would still be accorded the right to cross-examine the deponent witness and raise their objections during the deposition-taking in the same manner as in a regular court trial.

We disagree. There is a great deal of difference between the face-to-face confrontation in a public criminal trial in the presence of the presiding judge and the cross-examination of a witness in a foreign place outside the courtroom in the absence of a trial judge. In the aptly cited case of *People v. Estenzo*,²¹ the Court noted the uniqueness and significance of a witness testifying in open court, thus:

“The main and essential purpose of requiring a witness to appear and testify orally at a trial is to secure for the adverse party the opportunity of cross-examination. “The opponent”, according to an eminent authority, “demands confrontation, not for the idle purpose of gazing upon the witness, or of being gazed upon by him, but for the purpose of cross examination which cannot be had except by the direct and personal putting of questions and obtaining immediate answers.” There is also the advantage of the witness before the judge, and it is this – it enables the judge as trier of facts “to obtain the elusive and incommunicable evidence of a witness' deportment while testifying, and a certain subjective moral effect is produced upon the witness. It is only when the witness testifies orally that the judge may have a true idea of his countenance, manner and expression, which may confirm or detract from the weight of his testimony. Certainly, the physical condition of the witness will reveal his capacity for accurate observation and memory, and his deportment and physiognomy will reveal clues to his character. These can only be observed by the judge if the witness testifies orally in court. x x x”²² (Underscoring supplied)

21 No. L-41166, August 25, 1976, 72 SCRA 428

22 Id. at 432.

The right of confrontation, on the other hand, is held to apply specifically to criminal proceedings and to have a twofold purpose: (1) to afford the accused an opportunity to test the testimony of witnesses by cross-examination, and (2) to allow the judge to observe the deportment of witnesses.²³ The Court explained in *People v. Seneris*²⁴ that the constitutional requirement “insures that the witness will give his testimony under oath, thus deterring lying by the threat of perjury charge; it forces the witness to submit to cross-examination, a valuable instrument in exposing falsehood and bringing out the truth; and it enables the court to observe the demeanor of the witness and assess his credibility.”²⁵

As the right of confrontation is intended “to secure the accused in the right to be tried as far as facts provable by witnesses as meet him face to face at the trial who give their testimony in his presence, and give to the accused an opportunity of cross-examination,”²⁶ it is properly viewed as a guarantee against the use of unreliable testimony in criminal trials. In the American case of *Crawford v. Washington*,²⁷ the US Supreme Court had expounded on the procedural intent of the confrontation requirement, thus:

Where testimonial statements are involved, we do not think the Framers meant to leave the Sixth Amendment's [right to confront witness face to face] protection to the vagaries of the rules of evidence, much less to amorphous notions of “reliability”. Certainly, none of the authorities discussed above acknowledges any general reliability exception to the common-law rule. Admitting statements deemed reliable by a judge is fundamentally at odds with the right of confrontation. To be sure, the Clause's ultimate goal is to ensure reliability of evidence, but it is a procedural rather than a substantive

23 Bernas, J.G., *The 1987 Constitution: A Commentary*, 1996 Edition, p. 463, citing *U.S. v. Anastacio*, 6 Phil. 413, 416 (1906); *U.S. v. Raymundo*, 14 Phil. 416, 438 (1909); and *U.S. v. Javier*, 37 Phil. 449, 452 (1918).

24 No. L-48883, August 6, 1980, 99 SCRA 92.

25 Citing *California v. Green*, 339 US 157 (1970).

26 *United States v. Javier*, No. L-12990, January 21, 1918, 37 Phil. 449, citing *Dowdell v. U.S.*, 22 US 325.

27 541 U.S. 26 (2004).

guarantee. It commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination. The Clause thus reflects a judgment, not only about the desirability of reliable evidence (a point on which there could be little dissent), but about how reliability can best be determined.”
(Underscoring supplied)

*The Webb Ruling is Not on All Fours
with the Instant Case*

The CA found the frail and infirm condition of the prosecution witness as sufficient and compelling reason to uphold the MeTC Orders granting the deposition-taking, following the ruling in the case of *People v. Webb*²⁸ that the taking of an unavailable witness' deposition is in the nature of a discovery procedure the use of which is within the trial court's sound discretion which needs only to be exercised in a reasonable manner and in consonance with the spirit of the law.²⁹

But the ruling in the cited case is not instantly applicable herein as the factual settings are not similar. The accused in the *Webb* case had sought to take the oral deposition of five defense witnesses before a Philippine consular agent in lieu of presenting them as live witnesses, alleging that they were all residents of the United States who could not be compelled by subpoena to testify in court. The trial court denied the motion of the accused but the CA differed and ordered the deposition taken. When the matter was raised before this Court, we sustained the trial court's disallowance of the deposition-taking on the limited ground that there was no necessity for the procedure as the matter sought to be proved by way of

28 G.R. No. 132577, August 17, 1999, 312 SCRA 573.

29 CA Decision, *rollo*, p. 52.

deposition was considered merely corroborative of the evidence for the defense.³⁰

In this case, where it is the prosecution that seeks to depose the complaining witness against the accused, the stringent procedure under Section 15, Rule 119 cannot be ignored without violating the constitutional rights of the accused to due process.

Finally, the Court takes note that prosecution witness Li Luen Ping had managed to attend the initial trial proceedings before the MeTC of Manila on September 9, 2004. At that time, Li Luen Ping's old age and fragile constitution should have been unmistakably apparent and yet the prosecution failed to act with zeal and foresight in having his deposition or testimony taken before the MeTC pursuant to Section 15, Rule 119 of the Revised Rules of Court. In fact, it should have been imperative for the prosecution to have moved for the preservation of Li Luen Ping's testimony at that first instance given the fact that the witness is a non-resident alien who can leave the Philippines anytime without any definite date of return. Obviously, the prosecution allowed its main witness to leave the court's jurisdiction without availing of the court procedure intended to preserve the testimony of such witness. The loss of its cause is attributable to no other party.

Still, even after failing to secure Li Luen Ping's conditional examination before the MeTC prior to said witness' becoming sick and unavailable, the prosecution would capitalize upon its own failure by pleading for a liberal application of the rules on depositions. It must be emphasized that while the prosecution must provide the accused every

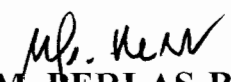
³⁰ *People v. Webb*, supra note 25, at 592.

opportunity to take the deposition of witnesses that are material to his defense in order to avoid charges of violating the right of the accused to compulsory process, the State itself must resort to deposition-taking sparingly if it is to guard against accusations of violating the right of the accused to meet the witnesses against him face to face. Great care must be observed in the taking and use of depositions of prosecution witnesses to the end that no conviction of an accused will rely on *ex parte* affidavits and depositions.³¹

Thus, the CA ignored the procedure under the Revised Rules of Criminal Procedure for taking the deposition of an unavailable prosecution witness when it upheld the trial court's order allowing the deposition of prosecution witness Li Luen Ping to take place in a venue other than the court where the case is pending. This was certainly grave abuse of discretion.


WHEREFORE, the petition is hereby **GRANTED**. The assailed Decision dated February 19, 2008 and the Resolution dated November 28, 2008 of the Court of Appeals are **REVERSED** and **SET ASIDE**. Accordingly, the Decision of the Regional Trial Court which disallowed the deposition-taking in Laos, Cambodia is **REINSTATED**.

SO ORDERED.


ESTELA M. BERLAS-BERNABE
Associate Justice

³¹ See Cruz, I., *Constitutional Law*, 1995 Edition, p. 324.

WE CONCUR:


PRESBITERO J. VELASCO, JR.

Associate Justice

Chairperson


DIOSDADO M. PERALTA

Associate Justice


ROBERTO A. ABAD

Associate Justice


JOSE CATRAL MENDOZA

Associate Justice

ATTESTATION

I attest that the conclusions in the above Decision had been reached in consultation before the case was assigned to the writer of the opinion of the Court's Division.


PRESBITERO J. VELASCO, JR.

Associate Justice

Chairperson, Third Division

CERTIFICATION

I certify that the conclusions in the above Decision had been reached in consultation before the case was assigned to the writer of the opinion of the Court's Division.

A handwritten signature in black ink, appearing to read 'Antonio T. Carpio', with a stylized, cursive script.**ANTONIO T. CARPIO**

Senior Associate Justice

(Per Section 12, R.A. 296,

The Judiciary Act of 1948, as amended)