



Republic of the Philippines
Supreme Court
Manila

FIRST DIVISION

PHILIPPINE DEPOSIT
INSURANCE CORPORATION
(PDIC),

Petitioner,

- versus -

HON. ORLANDO C.
CASIMIRO, in his capacity as
Overall Deputy Ombudsman,
FIDEL C. CU, CARMELITA B.
ZATE, and MARY LOU S.
APELO,

Respondents.

G.R. No. 206866

Present:

SERENO, C.J., Chairperson,
LEONARDO-DE CASTRO,
BERSAMIN,
PEREZ, and
PERLAS-BERNABE, JJ.

Promulgated:

SEP 02 2015

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DECISION

PERLAS-BERNABE, J.:

Assailed in this petition for *certiorari*¹ are the Resolution² dated January 24, 2012 and the Order³ dated October 29, 2012 of the Office of the Ombudsman (Ombudsman) in OMB-C-C-10-0294-G dismissing the criminal complaint against private respondents Fidel C. Cu (Cu), Carmelita B. Zate (Zate), and Mary Lou S. Apelo (Apelo; collectively, private respondents) for lack of probable cause.

¹ Rollo, pp. 3-28.

² Id. at 37-46. Signed by Graft Investigation and Prosecution Officer II Joseph O. Menzon and approved by Overall Deputy Ombudsman Orlando C. Casimiro.

³ Id. at 47-57.

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The Facts

The instant case arose from a Joint-Affidavit⁴ dated June 18, 2010 filed by petitioner Philippine Deposit Insurance Corporation (PDIC), through its duly-authorized officers, Alexander N. Dojillo and Israel A. Bandoy, charging private respondents of the crimes of Direct Bribery and Corruption of Public Officials, defined and penalized under Articles 210 and 212 of the Revised Penal Code (RPC), respectively, as well as violation of Section 3 (e) of Republic Act No. (RA) 3019, entitled the Anti-Graft and Corrupt Practices Act. Specifically, private respondents were being sued in the following capacities: (a) Cu (together with members of his family) as the 85.99% owner of Bicol Development Bank, Inc. (BDBI); (b) Zate as Chairman/President of BDBI; and (c) Apelo as a former employee of the Bangko Sentral ng Pilipinas (BSP) who acted as the Bank Officer-In-Charge that examined BDBI's books and records as of September 30, 2001, and as one of the assistants of Bank Officer-In-Charge Evangeline C. Velasquez in connection with the Reports of Examination of BDBI's books and records as of August 31, 2000 and October 31, 2002.⁵

The Joint-Affidavit averred that on December 22, 2008, PDIC, acting as statutory receiver, took over the affairs of BDBI after the BSP Monetary Board ordered its closure. As statutory receiver, PDIC purportedly went on to gather, preserve, and administer its records, assets, and liabilities for the benefit of its depositors and creditors. In the course of the receivership, Arsenia T. Gomez (Gomez) – a former Cashier, Service Officer, and Treasurer of BDBI until its closure – went to the PDIC and submitted an Affidavit⁶ dated January 12, 2010 outlining the alleged irregularities committed by private respondents when BDBI was still in operation.⁷

According to Gomez, on November 16, 2006, Cu instructed her to take money from the vault in the amount of ₱30,000.00 and to deposit the same to Apelo's bank account in Philippine National Bank – Legazpi City Branch under Account Number 224-521-5625.⁸ When Gomez asked for the reason, Cu replied "*Professional Fee natin sa kanya yan.*" On further orders/directives from Cu and Zate, additional deposits were made to Apelo's bank account on two (2) separate dates, specifically April 20, 2007 and October 3, 2007, in the respective amounts of ₱60,000.00 and ₱50,000.00. After the deposits were made, Gomez was initially instructed to cover the unofficial and unbooked cash disbursements in favor of Apelo by placing such amounts in BDBI's books as "Other Cash Items;" and thereafter, to regularize and remove from BDBI's books such disbursements by including them in the other accounts of BDBI until they were completely

⁴ Id. at 101-116.

⁵ Id. at 105-107.

⁶ Id. at 146-147.

⁷ Id. at 107-114.

⁸ Id. at 148.

covered.⁹ To bolster her allegations, Gomez attached copies of deposit slips and official receipts to show that such deposits were indeed made to Apelo's bank accounts.¹⁰

In this regard, Gomez averred that in the course of her employment with BDBI, she does not know of any official or legitimate transactions that would warrant BDBI to disburse the aforesaid amounts in favor of Apelo. However, speaking from personal experience, Gomez noticed that Cu would always receive an "advance warning" about a surprise examination on BDBI by BSP. During such time and until the actual arrival of the BSP examiner, Cu would instruct BDBI employees on how to cover the possible findings/exceptions of the BSP examiner on the books of BDBI. In addition, Cu shall deliver cash in BDBI's vault in order to make it appear that the cash listed in the books reflect the actual cash in vault; and after such examination, Cu will take the cash he delivered to BDBI's vault and return it to the source.¹¹

In view of Gomez's revelations, PDIC decided to file the instant criminal complaint against private respondents.

In his defense, Cu denied having ordered or instructed Gomez to make such deposits to Apelo's bank account. He pointed to the lack of evidence to prove that Apelo was aware or made aware of any alleged bank deposits made to her bank account, thus, negating the charge of Direct Bribery against her and Corruption of Public Officials against him. For her part, Zate likewise denied the allegations hurled against her, countering that Gomez's statements should not be relied upon for being unfounded. Apelo did not file any counter-affidavit despite the Ombudsman's orders.¹²

The Ombudsman's Ruling

In a Resolution¹³ dated January 24, 2012, the Ombudsman dismissed the criminal complaint for lack of probable cause.¹⁴ The Ombudsman found that while it may be said that certain amounts were indeed deposited to Apelo's bank account, there is no proof that Apelo subsequently withdrew the same. In this regard, the Ombudsman opined that unless it can be shown that Apelo made such withdrawals, it cannot be declared with certainty that she received monetary consideration from Cu and Zate in exchange for the advance information relative to impending BSP examinations conducted on BDBI.¹⁵

⁹ Id. at 146-147.

¹⁰ Id. at 148-150.

¹¹ Id. at 146-147.

¹² Id. at 40-42.

¹³ Id. at 37-46.

¹⁴ Id. at 45.

¹⁵ Id. at 42-45.

PDIC moved for reconsideration, which was, however, denied in an Order¹⁶ dated October 29, 2012. The Ombudsman found Gomez's affidavit showing Apelo as the source of the "advance warnings" received by Cu in connection with the BSP examinations to be inadmissible in evidence for being hearsay.¹⁷ Aggrieved, PDIC filed the instant petition.¹⁸

The Issue Before the Court

The primordial issue raised for the Court's resolution is whether or not the Ombudsman gravely abused its discretion in finding no probable cause to indict private respondents of the crimes charged.

The Court's Ruling

The petition is meritorious.

At the outset, it must be stressed that the Court has consistently refrained from interfering with the discretion of the Ombudsman to determine the existence of probable cause and to decide whether or not an Information should be filed. Nonetheless, this Court is not precluded from reviewing the Ombudsman's action when there is a charge of grave abuse of discretion. Grave abuse of discretion implies a capricious and whimsical exercise of judgment tantamount to lack of jurisdiction. The Ombudsman's exercise of power must have been done in an arbitrary or despotic manner which must be so patent and gross as to amount to an evasion of a positive duty or a virtual refusal to perform the duty enjoined or to act at all in contemplation of law.¹⁹ The Court's pronouncement in *Ciron v. Gutierrez*²⁰ is instructive on this matter, to wit:

x x x **this Court's consistent policy has been to maintain non-interference in the determination of the Ombudsman of the existence of probable cause, provided there is no grave abuse in the exercise of such discretion. This observed policy is based not only on respect for the investigatory and prosecutory powers granted by the Constitution to the Office of the Ombudsman but upon practicality as well.** Otherwise, the functions of the Court will be seriously hampered by innumerable petitions assailing the dismissal of investigatory proceedings conducted by the Office of the Ombudsman with regard to complaints filed before it, in much the same way that the courts would be extremely swamped with cases if they could be compelled to review the exercise of discretion on the part of the fiscals or prosecuting attorneys each time they

¹⁶ Id. at 47-57.

¹⁷ Id. at 42-45. See also id. at 49-53.

¹⁸ Id. at 3-28.

¹⁹ See *Ciron v. Gutierrez*, G.R. No. 194339-41, April 20, 2015, citing *Soriano v. Marcelo*, 610 Phil. 72, 79 (2009).

²⁰ See id.

decide to file an information in court or dismiss a complaint by a private complainant.²¹ (Emphasis and underscoring supplied)

In this regard, it is worthy to note that the conduct of preliminary investigation proceedings – whether by the Ombudsman or by a public prosecutor – is geared only to determine whether or not probable cause exists to hold an accused-respondent for trial for the supposed crime that he committed. In *Fenequito v. Vergara, Jr.*,²² the Court defined probable cause and the parameters in finding the existence thereof in the following manner:

Probable cause, for the purpose of filing a criminal information, has been defined as **such facts as are sufficient to engender a well-founded belief that a crime has been committed and that respondent is probably guilty thereof.** The term does not mean “actual or positive cause” nor does it import absolute certainty. It is merely based on opinion and reasonable belief. **Probable cause does not require an inquiry into whether there is sufficient evidence to procure a conviction. It is enough that it is believed that the act or omission complained of constitutes the offense charged.**

A finding of probable cause needs only to rest on evidence showing that, more likely than not, a crime has been committed by the suspects. **It need not be based on clear and convincing evidence of guilt, not on evidence establishing guilt beyond reasonable doubt, and definitely not on evidence establishing absolute certainty of guilt.** In determining probable cause, the average man weighs facts and circumstances without resorting to the calibrations of the rules of evidence of which he has no technical knowledge. He relies on common sense. **What is determined is whether there is sufficient ground to engender a well-founded belief that a crime has been committed, and that the accused is probably guilty thereof and should be held for trial. It does not require an inquiry as to whether there is sufficient evidence to secure a conviction.**²³ (Emphases and underscoring supplied)

Verily, preliminary investigation is merely an inquisitorial mode of discovering whether or not there is reasonable basis to believe that a crime has been committed and that the person charged should be held responsible for it. Being merely based on opinion and belief, a finding of probable cause does not require an inquiry as to whether there is sufficient evidence to secure a conviction.²⁴ “[A preliminary investigation] is not the occasion for the full and exhaustive display of [the prosecution’s] evidence. The presence or absence of the elements of the crime is evidentiary in nature and is a matter of defense that may be passed upon after a full-blown trial on the merits.”²⁵ Hence, “the validity and merits of a party’s defense or accusation,

²¹ See *id.*, citing *Tetangco v. Ombudsman*, 515 Phil. 230, 234-235 (2006).

²² G.R. No. 172829, July 18, 2012, 677 SCRA 113.

²³ *Id.* at 121, citing *Reyes v. Pearlbank Securities, Inc.*, 582 Phil. 505, 518-519 (2008).

²⁴ See *Clay & Feather International, Inc. v. Lichaytoo*, 664 Phil. 764, 771 (2011); citations omitted.

²⁵ *Lee v. KBC Bank N.V.*, 624 Phil. 115, 126 (2010), citing *Andres v. Cuevas*, 499 Phil. 36, 49-50 (2005).

as well as the admissibility of testimonies and evidence, are better ventilated during trial proper than at the preliminary investigation level.”²⁶

Guided by the foregoing considerations, the Court finds that the Ombudsman gravely abused its discretion in dismissing the criminal complaint against private respondents for lack of probable cause, as will be explained hereunder.

As already stated, Apelo was accused of committing the crime of Direct Bribery, which has the following elements: (a) that the accused is a public officer; (b) that he received directly or through another some gift or present, offer or promise; (c) that such gift, present or promise has been given in consideration of his commission of some crime, or any act not constituting a crime, or to refrain from doing something which is his official duty to do; and (d) that the crime or act relates to the exercise of his functions as a public officer.²⁷ On the other hand, Cu and Zate were accused of committing the crime of Corruption of Public Officials, the elements of which are as follows: (a) that the offender makes offers or promises, or gives gifts or presents to a public officer; and (b) that the offers or promises are made or the gifts or presents are given to a public officer under circumstances that will make the public officer liable for direct bribery or indirect bribery.²⁸ In addition, all private respondents were charged with violation of Section 3 (e) of RA 3019. The essential elements of such crime are as follows: (a) that the accused must be a public officer discharging administrative, judicial, or official functions (or a private individual acting in conspiracy with such public officers²⁹); (b) that he acted with manifest partiality, evident bad faith, or inexcusable negligence; and (c) that his action caused any undue injury to any party, including the government, or giving any private party unwarranted benefits, advantage, or preference in the discharge of his functions.³⁰

A review of the records of the case reveals that after BDBI’s closure, PDIC started to perform its functions as statutory receiver, which includes, among others, the control, management, and administration of BDBI as well as investigating the causes of BDBI’s closure.³¹ In the course of the receivership, Gomez – a former Cashier, Service Officer, and Treasurer of

²⁶ Id. at 126-127.

²⁷ *Balderama v. People*, 566 Phil. 412, 419 (2008), citing *Manipon, Jr. v. Sandiganbayan*, 227 Phil. 249, 253 (1986).

²⁸ *Disini v. Sandiganbayan*, G.R. No. 169823-24, September 11, 2013, 705 SCRA 459, 487.

²⁹ See *People v. Balao*, 655 Phil. 563, 572 (2011), citing *Dela Chica v. Sandiganbayan*, 462 Phil. 712, 720 (2003).

³⁰ See *Ciron v. Gutierrez*, supra note 19, citing *Consigna v. People*, G.R. No. 175750-51, April 2, 2014, 720 SCRA 350, 366.

³¹ See Section 10 of RA No. 3591, entitled “AN ACT ESTABLISHING THE PHILIPPINE DEPOSIT INSURANCE CORPORATION (PDIC), DEFINING ITS POWERS AND DUTIES AND FOR OTHER PURPOSES” (approved on June 22, 1963), as amended by Republic Act No. 9302, entitled “AN ACT AMENDING REPUBLIC ACT NUMBERED THREE THOUSAND FIVE HUNDRED NINETY-ONE, AS AMENDED, OTHERWISE KNOWN AS THE ‘CHARTER OF THE PHILIPPINE DEPOSIT INSURANCE CORPORATION’ AND FOR OTHER PURPOSES” (August 12, 2004).

BDBI – came forward and through her affidavit, reported the purported scheme perpetrated by private respondents that fraudulently concealed BDBI's true condition as a banking entity. Gomez's affidavit outlines such scheme as follows: (a) Apelo would provide Cu an "advance warning" of any impending surprise bank examinations on BDBI by BSP; (b) upon receipt of the "advance warning," Cu would then make the necessary steps to misrepresent BDBI's status, such as instructing BDBI employees on how to cover the possible findings/exceptions of the BSP examiner on the books of BDBI, as well as infusing cash into BDBI's vault in order to make it appear that the cash listed in the books reflect the actual cash in vault, and thereafter returning such cash to the source; (c) in exchange for such "advance warnings," Cu and/or Zate gave Apelo as "professional fees" the aggregate amount of ₱140,000.00 by depositing the same to the latter's bank account; and (d) to cover up such amounts given to Apelo, Cu and/or Zate, instructed Gomez to initially cover the unofficial and unbooked cash disbursements in favor of Apelo by placing such amounts in BDBI's books as "Other Cash Items," and thereafter, regularize and remove from BDBI's books such disbursements by including them in the other accounts of BDBI until they were completely covered. To support such statements, Gomez provided copies of deposit slips showing that such amount was indeed deposited to Apelo's bank account. She likewise asserted that in the course of her employment at BDBI, she does not know of any official or legitimate transactions that BDBI had with Apelo that would warrant the disbursement of the aforesaid amount in the latter's favor.

In view of such grave accusations against them, Cu and Zate resorted to mere denials, while Apelo ignored the complaint by not filing a counter-affidavit despite due notice, thus, miserably failing to debunk the charges hurled against them. Indubitably, the foregoing establishes probable cause to believe that private respondents may have indeed committed such acts constituting the crimes charged against them. As such, they must defend themselves in a full-blown trial on the merits.

Finally, it was error on the part of the Ombudsman to simply discredit Gomez's affidavit as inadmissible in evidence for being hearsay. It is noteworthy to point out that owing to the initiatory nature of preliminary investigations, the technical rules of evidence should not be applied in the course of its proceedings.³² In the recent case of *Estrada v. Ombudsman*,³³ the Court declared that hearsay evidence is admissible in determining probable cause in preliminary investigations because such investigation is merely preliminary, and does not finally adjudicate rights and obligations of parties. Citing a case decided by the Supreme Court of the United States, it was held that probable cause can be established with hearsay evidence, as long as there is substantial basis for crediting the hearsay, viz.:

³² See *De Chavez v. Ombudsman*, 543 Phil. 600, 619-620 (2007).

³³ See G.R. Nos. 212140-41, January 21, 2015.

Justice Brion's pronouncement in *Unilever* that "the determination of probable cause does not depend on the validity or merits of a party's accusation or defense or on the admissibility or veracity of testimonies presented" correctly recognizes the doctrine in the United States that **the determination of probable cause can rest partially, or even entirely, on hearsay evidence, as long as the person making the hearsay statement is credible**. In *United States v. Ventresca*, the United States Supreme Court held:

While a warrant may issue only upon a finding of "probable cause," this Court has long held that "the term 'probable cause' ... means less than evidence which would justify condemnation," x x x and that a finding of "probable cause" may rest upon evidence which is not legally competent in a criminal trial. x x x As the Court stated in *Brinegar v. United States* x x x, "There is a large difference between two things to be proved (guilt and probable cause), as well as between the tribunals which determine them, and therefore a like difference in the quanta and modes of proof required to establish them." **Thus, hearsay may be the bases for issuance of the warrant "so long as there ... [is] a substantial basis for crediting the hearsay."** x x x And, in *Aguilar*, we recognized that **"an affidavit may be based on hearsay information and need not reflect the direct personal observations of the affiant," so long as the magistrate is "informed of some of the underlying circumstances" supporting the affiant's conclusions and his belief that any informant involved "whose identity need not be disclosed..." was "credible" or his information "reliable."** x x x.

Thus, **probable cause can be established with hearsay evidence, as long as there is substantial basis for crediting the hearsay. Hearsay evidence is admissible in determining probable cause in a preliminary investigation because such investigation is merely preliminary, and does not finally adjudicate rights and obligations of parties.** x x x.³⁴
(Emphases and underscoring supplied)

In this case, assuming *arguendo* that Gomez's statements, as written in her affidavit are indeed hearsay, there is nevertheless substantial basis to credit the same, considering that she was a former Cashier, Service Officer, and Treasurer of BDBI – a high-ranking officer that may be privy to delicate transactions such as the purported "under-the-table" deal involving private respondents. In this regard, it must be emphasized that in determining the elements of the crime charged for purposes of arriving at a finding of probable cause, only facts sufficient to support a *prima facie* case against the respondents are required, not absolute certainty. Probable cause implies mere probability of guilt, *i.e.*, a finding based on more than bare suspicion but less than evidence that would justify a conviction.³⁵ To reiterate, the validity of the merits of a party's defense or accusations as well as the admissibility of

³⁴ See *id.*; citations omitted.

³⁵ *Shu v. Dee*, G.R. No. 182573, April 23, 2014, 723 SCRA 512, 523.

testimonies and evidences are better ventilated during the trial stage than in the preliminary stage.³⁶


In sum, the Court is convinced that there is probable cause to indict private respondents of the crimes charged against them. Hence, the Ombudsman committed grave abuse of discretion amounting to lack or excess of jurisdiction when it ordered the dismissal of the criminal complaint against private respondents.


WHEREFORE, the petition is **GRANTED**. The Resolution dated January 24, 2012 and the Order dated October 29, 2012 of the Office of the Ombudsman in OMB-C-C-10-0294-G are hereby **REVERSED** and **SET ASIDE**. Accordingly, the Office of the Ombudsman is **DIRECTED** to issue the proper resolution in order to indict private respondents Fidel C. Cu, Carmelita B. Zate, and Mary Lou S. Apelo in accordance with this Decision.

SO ORDERED.


ESTELA M. PERLAS-BERNABE
Associate Justice

WE CONCUR:


MARIA LOURDES P. A. SERENO
Chief Justice
Chairperson


TERESITA J. LEONARDO-DE CASTRO
Associate Justice


LUCAS P. BERSAMIN
Associate Justice


JOSE PORTUGAL PEREZ
Associate Justice

³⁶ *De Chavez v. Ombudsman*, supra note 32, at 620.

CERTIFICATION

Pursuant to Section 13, Article VIII of the Constitution, 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.

**MARIA LOURDES P. A. SERENO**

Chief Justice