Republic of the Philippines
Sandiganbayan
Quezon City

SIXTH DIVISION

PEOPLE OF THE PHILIPPINES,
Plaintiff,

SB-16-CRM-1207 to 1208
For: Violation of Section 3(b) of Republic Act No. 3019, as amended

- versus –

Present

FERNANDEZ, SJ, J.
Chairperson
MIRANDA, *J.* and
VIVERO, *J.*

AL SANCHEZ VITANGCOL III and WILSON TIGNO DE VERA,
Accused.

Promulgated:

October 7, 2019

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DECISION

VIVERO, J.:

This resolves the following:

a) *Demurrer to Evidence*[1] filed by accused Wilson T. De Vera and received *via* registered mail on June 14, 2019;

b) *Demurrer to Evidence*[2] attached to the *Manifestation*[3] of accused Al Sanchez Vitangcol III, which was filed on January 15, 2019; and

[1] *Rollo*, Vol. III, pp. 287 - 289.

[2] Dated 11 January 2019, *Rollo*, Vol. III, pp. 128 - 147.

c) *Consolidated Comment/Opposition (To Accused' Motions for Leave to File Demurrer to Evidence)*[4] filed on June 21, 2019 by the prosecution.

The instant cases arise from two (2) Informations (Criminal Case Nos. SB-16-CRM-1207 and SB-16-CRM-1208) charging herein accused-movants for violation of Section 3(b) of Republic Act No. 3019, as amended, otherwise known as the Anti-Graft and Corrupt Practices Act.[5]

In SB-16-CRM-1207, accused-movants Al Sanchez Vitangcol III and Wilson Tigno De Vera were charged with having acted in conspiracy in violating Section 3(b) of R.A. No. 3019 by attempting to extort money in the amount of US$30 million, which was reduced to US$2.5 million, from the representatives of the INEKON Group, a.s. (INEKON), a Czech company engaged in the supply of Light Rail Vehicles (LRVs), as a condition for INEKON to secure the contract or transaction for the supply of additional LRVs under the MRT3 Capacity Expansion Project. The material allegation in the Information[6] filed with this Court on November 23, 2016 is herein quoted:

> "From July 9 to 10, 2012, or for sometime prior or subsequent thereto, in Makati City, Metro Manila and Quezon City, Metro Manila, respectively, both in the Philippines, and within the jurisdiction of the Honorable Court, the above-named accused AL SANCHEZ VITANGCOL III, a public officer, being then General Manager (Director V, SG 29) of the Metro Rail Transit Line 3 (MRT3), Department of Transportation and Communications, taking advantage of his official

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[3] Dated 11 January 2019, *Rollo*, Vol. III, p. 124.

[4] Dated 19 June 2019.

[5] **Sec. 3. Corrupt practices of public officers.** In addition to acts or omissions of public officers already penalized by existing law, the following shall constitute corrupt practices of any public officer and are hereby declared to be unlawful:

x x x

(b) Directly or indirectly requesting or receiving any gift, present, share, percentage, or benefit, for himself or for any other person, in connection with any contract or transaction between the Government and any other part, wherein the public officer in his official capacity has to intervene under the law.

[6] *Rollo*, Vol. I, pp. 1 - 3.

position, with the connivance, conspiracy and confederation of accused WILSON TIGNO DE VERA, a private person, did then and there willfully, unlawfully, and criminally, directly or indirectly request, demand or attempt to extort money in the amount of US$30 million, later reduced to US$2.5 million, from the representatives of Czech company INEKON Group, a.s. (INEKON) in connection with the contract or transaction for the supply of Light Rail Vehicles (LRVs) under Lot 1 of the MRT3 Capacity Expansion Project or in exchange for the selection of INEKON as the supplier of said LRVs in said contract or transaction, which accused VITANGCOL, in his official capacity under the law as MRT3 General Manager, as head of the end-user MRT3, and as the one who officially approved the MRT3 Capacity Expansion Project's Estimated Unit Cost Breakdown for Lot 1 and Terms of Reference, has the right to intervene in the contract or transaction for the supply of LRVs, as he in fact intervened, with said request or demand for US$30 million having been made through and by accused DE VERA on the night of July 9, 2012 at the residence of then Czech Ambassador to the Philippines Josef Rychtar in Forbes Park, Makati City, which request or demand was refused by the INEKON representatives right then and there, that accused DE VERA reduced the request or demand to US$2.5 million after consulting with accused VITANGCOL over the phone, which reduced amount was likewise refused by the INEKON representatives right then and there, that before the INEKON representatives left Ambassador Rychtar's residence, accused, DE VERA told them to think about the request or demand until the meeting, on the following day, July 10, 2012, at the MRT3 office in Quezon City, and on July 10, 2012, accused VITANGCOL at his MRT3 office in Quezon City, in the presence of accused DE VERA, Ambassador Rychtar and the INEKON representatives, repeated said request or demand by asking the INEKON representatives if they would accept said request or demand made by accused De Vera the previous night, July 9, 2012, but the INEKON representatives likewise turned down said request or demand right then and there, and said request or demand was for the benefit of accused VITANGCOL and DE VERA.

"CONTRARY TO LAW."

In SB-16-CRIM-1208, accused-movants Al Sanchez Vitangcol III and Wilson Tigno De Vera were charged with having acted in conspiracy in violating Section 3(b) of R.A. No. 3019 by insisting to INEKON representatives to sign a joint venture agreement between INEKON and a group of people proposed by Vitangcol to assume the new contract or transaction for the maintenance of the MRT3 line since the then existing maintenance contract was to expire in a few months. The material allegation in the Information[7] filed with this Court on November 23, 2016 is herein quoted:

> "On July 10, 2012, or sometime prior or subsequent thereto, in Quezon City, Metro Manila, Philippines, and within the jurisdiction of the Honorable Court; the above-named accused AL SANCHEZ VITANGCOL III, a public officer, being then General Manager (Director V, SG 29) of the Metro Rail Transit Line 3 (MRT3), Department of Transportation and Communications, taking advantage of his official position, with the connivance, conspiracy and confederation of accused WILSON TIGNO DE VERA, a private person, did then and there willfully, unlawfully, and criminally, during a meeting at accused VITANGCOL's MRT3 office in Quezon City, in the presence of accused DE VERA, then Czech Ambassador to the Philippines Josef Rychtar and representatives of the Czech company INEKON Group, a.s. (INEKON), directly or indirectly request or demand from or insist to the representatives of INEKON to enter into and sign a joint venture agreement with a group of persons including accused DE VERA, that said group of persons having been proposed by accused VITANGCOL himself, for a sixty percent (60%) and forty percent (40%) sharing agreement between INEKON and said group of persons, respectively, in connection with the contract or transaction for the maintenance service of the MRT3 line or for the joint venture to assume the contract or transaction for the maintenance service of the MRT3 line since the then existing contract with Sumimoto Corporation for

[7] *Rollo*, Vol. III, pp. 4 - 6.

maintenance service was about to expire, which request or demand was for maintenance service was about to expire, which request or demand was refused by the INEKON representatives right then and there, with accused VITANGCOL in his official capacity under the law as MRT3 General Manager, having the right to intervene in said contract or transaction for the maintenance service of the MRT3 line, as he in fact intervened as head of the end-user MRT3, as head of the negotiating team that recommended the award to CB&T PH TRAMS JOINT VENTURE (JV) of the contract for the maintenance service of the MRT3 line through a negotiated contract, as member of the Bids and Awards Committee that awarded to CB&T PH TRAMS JV said contract that started on October 20, 2012 or after the expiration of the contract with Sumitomo Corporation for the maintenance service on October 19, 2012, and as signatory and representative of MRT3 in said contract with CB&T PH TRAMS JV, and said request or demand was for the benefit of said group of persons including accused DE VERA.

"CONTRARY TO LAW."

Accused Vitangcol's Demurrer

With the Court's Resolution dated 17 May 2019[8] granting his *Motion for Leave of Court to File Demurrer to Evidence* dated 11 January 2018,[9] accused Vitangcol filed the instant *Demurrer to Evidence*[10] dated 11 January 2018[11] seeking the dismissal of the two Informations on the ground of the alleged failure of the Prosecution to produce sufficient evidence to prove the existence of all the elements constituting the offense as charged.

Accused Vitangcol argues that the totality of the evidence presented by the prosecution was not sufficient to prove that there

[8] *Rollo*, Vol. III, pp. 269 - 273.

[9] *Rollo*, Vol. III, pp. 124 - 126.

[10] *Rollo*, Vol. III, pp. 128 - 147.

[11] The *Demurrer* was attached to the *Motion*.

was any violation of Section 3(b) of R.A. No. 3019. Accused contends that:

1. He is presumed innocent unless the contrary is proven beyond reasonable doubt.[12]

2. That the Prosecution failed to prove his participation in the "concocted" 9 and 10 July 2012 incidents.[13]

3. That the prosecution failed to establish the essential elements of Section 3(b) of R.A. No. 3019, as amended – except that the accused is a public officer.[14]

4. The prosecution was not able to establish that accused Vitangcol "requested or received a gift, a present, a share, a percentage, or benefit" on behalf of himself or any other person and that there was no pending "contract or transaction with the government" during the time of the alleged commission of the crimes.[15]

5. That the evidence-in-chief of the prosecution – the testimony of Atty. Rholie C. Besoña, then Associate Graft Investigation Officer III of the Field Investigation Office on March 21, 2018 – was more favorable to the accused than to the prosecution.[16]

6. That the other prosecution's witnesses – Rosalia Vista, Noland Santiago, Rita Caraan, Evette Briones, and Luningning Sarmiento – only identified official documents coming from the records of the Department of Transportation and/or MRT3, thus only proving the existence of such documents but not their contents and execution.[17]

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[12] *Demurrer to Evidence* dated 11 January 2018; *Rollo*, Vol. III, pp. 128 - 147.

[13] *Ibid.*

[14] *Ibid.*

[15] *Ibid.*

[16] *Ibid.*

[17] *Ibid.*

7. That such documents lack probative value to warrant the conviction of the accused.[18]

8. That the Sworn Statement of Joseph Rychtar (***Exhibit "J"***) must be excluded from the proceedings for being hearsay and having no probative value considering that the affiant himself did not take the witness stand to affirm the averments in the affidavit.[19]

9. That the testimony of Atty. Nicanor B. Jimeno, who allegedly notarized the Sworn Statement of Joseph Rychtar, belies the Prosecution's claims due to the fact that: (1) Atty. Jimeno admitted that he does not know Rychtar and has no knowledge as to the genuineness or truthfulness of the allegations in the said sworn statement and (2) that the notarization of the statement of Rychtar was plagued with multiple irregularities: (a) while the document was allegedly notarized in Makati City, an inquiry with the Notarial Section, Office of the Clerk of Court, Regional Trial Court, Makati City revealed that it was not submitted to the office and (b) that the indicated Roll of Attorneys Number of Atty. Jimeno in the seal is "61165", however, the Roll of Attorneys Number of Atty. Nicanor B. Jimeno, as published in the website of the Supreme Court, is "25559".[20]

10. That the Prosecution failed to prove its theory of "conspiracy", much less show that his actions were "for the benefit of said group of persons including accused De Vera."[21]

All told, accused Vitangcol insists that the evidence presented by the Prosecution, as it stands on record, falls short of the standard of guilt beyond reasonable doubt.

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[18] *Ibid.*

[19] *Ibid.*

[20] *Ibid.*

[21] *Ibid.*

Accused De Vera's Demurrer

On the basis of the Court's Resolution dated 17 May 2019[22] granting his *Motion for Leave to File Demurrer to Evidence* dated 13 January 2019,[23] accused De Vera filed the instant *Demurrer to Evidence*[24] similarly seeking the dismissal of the two Informations for failure of the prosecution to prove beyond reasonable doubt the existence of all acts and/or elements constituting the offense as charged.

Accused De Vera argues that the prosecution failed to prove the fact of the commission of the crime charged and the fact that the accused was the perpetrator of the crime. Accused contends that:

1. With respect to the first requirement of proving the elements of the crime, De Vera adopts the exhaustive discussion of the Demurrer to Evidence of co-accused Vitangcol. [25]

2. With respect to the second requirement of positive identification, accused De Vera contends that not one of the seven witnesses of the prosecution positively identified him.[26]

Prosecution's Consolidated Comment/Opposition

In its *Consolidated Comment/Opposition* dated 19 June 2019,[27] the prosecution assails the foregoing arguments of the two accused and counters:

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[22] *Rollo*, Vol. III, pp. 269 - 273.

[23] *Rollo*, Vol. III, pp. 149 - 150.

[24] *Demurrer to Evidence* received through registered mail on June 14, 2019.

[25] *Ibid.*

[26] *Ibid.*

[27] Received on June 21, 2019.

1. That the quantum of evidence of proof beyond reasonable doubt is not the yardstick to be used in determining the propriety of a Demurrer to Evidence, but only a *prima facie* case against the accused, citing the case of ***Bautista v. Sarmiento***[28].

2. That "using the yardstick of *prima facie* evidence," the prosecution was able to establish the existence of evidence to sustain the Informations and to support a guilty verdict if not unrebutted.[29]

3. That the first element – that the offender is a public officer – is not disputed considering that accused Vitangcol admitted his position.[30]

4. That as to the second and third elements, the prosecution was able to present evidence to establish that at the very least, accused Vitangcol in conspiracy with accused De Vera requested or demanded from INEKON Group that they should enter and sign the Joint Venture Agreement together with other persons chosen by accused De Vera in connection with the contract for the maintenance service of MRT3 line "in relation to CRM-16-CRM-1208 [sic]".[31]

5. That in "CRM-16-CRM-1207 [sic]", the prosecution was also able to present evidence to establish that accused De Vera, in conspiracy with accused Vitangcol, demanded or attempted to extort money from INEKON in the amount of US$ 30,000,000.00, which was later on reduced to US$ 2,500,000.00.[32]

6. That despite the lack of direct evidence, the prosecution was still able to present enough circumstantial evidence to support the presence of

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[28] *Bautista v. Sarmiento*, G.R. No. L-45137, September 23, 1985.

[29] *Consolidated Comment/Opposition* dated 19 June 2019.

[30] *Ibid.*

[31] *Ibid.*

[32] *Ibid.*

the second and third elements of the crime charged.[33]

7. That with respect to the fourth element, the evidence offered and admitted established that accused Vitangcol has the capacity to intervene in the maintenance contract and Capacity Expansion Project.[34]

8. That there is no need for the prosecution to provide evidence to support the positive identification of accused De Vera as the identity of the accused was already admitted by him during the pre-trial in these cases.[35]

COURT'S ANALYSIS AND RULING

The prosecution failed to establish all the elements of Section 3(b) of R.A. No. 3019.

After the prosecution rests its case, the Court may dismiss the action on the ground of insufficiency of evidence upon demurrer to evidence filed by the accused with or without leave of court.[36] In ***Rivera v. People,***[37] the Supreme Court explained the nature of a demurrer to evidence, *viz.*:

> "x x x A demurrer to evidence is defined as 'an objection by one of the parties in an action, to the effect that the evidence which his adversary produced is insufficient in point of law, whether true or not, to make out a case or sustain the issue'. The party demurring challenges the sufficiency of the whole evidence to sustain a verdict. In passing upon the sufficiency of the evidence raised in a demurrer, the court is merely required to **ascertain whether there**

[33] *Ibid.*

[34] *Ibid.*

[35] *Ibid.*

[36] Section 23 of Rule 119, Rules of Court.

[37] *Rivera v. People*, G.R. No. 163996, June 9, 2005.

> **is competent or sufficient evidence to sustain the indictment or to support a verdict of guilt.** x x x" (Emphasis and Underscoring Supplied.)

As to what is considered sufficient evidence, ***People v. Go, et al.,***[38] is instructive:

> "x x x Sufficient evidence for purposes of frustrating a demurrer thereto is such evidence in character, weight or amount as will legally justify the judicial or official action demanded according to the circumstances. To be considered sufficient therefore, the evidence must prove: (a) the commission of the crime, and (b) the precise degree of participation therein by the accused. Thus, **when the accused files a demurrer, the court must evaluate whether the prosecution evidence is sufficient enough to warrant the conviction of the accused beyond reasonable doubt**. x x x" (Emphasis and Underscoring Supplied.)

Thus, this Court will determine if the prosecution's evidence proved beyond reasonable doubt the commission of the crime charged, and the precise degree of the accused' participation therein.

The relevant provision of Section 3 (b) of R.A. No. 3019, as amended provides as follows:

> "**Sec. 3. Corrupt practices of public officers.** In addition to acts or omissions of public officers already penalized by existing law, the following shall constitute corrupt practices of any public officer and are hereby declared to be unlawful:
>
> "x x x
>
> "(b) Directly or indirectly requesting or receiving any gift, present, share, percentage, or benefit, for himself or for any other person, in connection with any contract or transaction between the Government and any other part, wherein

[38] *People v. Go*, G.R. No. 191015, August 6, 2014.

> the public officer in his official capacity has to intervene under the law.
>
> "x x x"

In the case of ***Cadiao-Palacios v. People***[39], the Supreme Court discussed the elements of a violation of Section 3(b) of R.A. No. 3019, as amended, to wit:

> "x x x To be convicted of violation of Section 3(b) of R.A. No. 3019, the prosecution has the burden of proving the following elements:
>
> (1) the offender is a public officer;
>
> (2) who requested or received a gift, a present, a share, a percentage, or benefit;
>
> (3) on behalf of the offender or any other person;
>
> (4) in connection with a contract or transaction with the government;
>
> (5) in which the public officer, in an official capacity under the law, has the right to intervene. x x x"

Additionally, the Supreme Court discussed in the same case what acts are penalized by the provision, *viz.*:

> "x x x Section 3(b) penalizes three distinct acts – (1) demanding or requesting; (2) receiving; or (3) demanding, requesting and receiving – any gift, present, share, percentage, or benefit for oneself or for any other person, in connection with any contract or transaction between the government and any other party, wherein a public officer in an official capacity has to intervene under the law. Each of these modes of committing the offense is distinct and different from one another. Proof of existence of any of them suffices to warrant conviction. x x x."

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[39] *Cadiao-Palacios v. People*, G.R. No. 168544, March 31, 2009.

After a judicious consideration of the evidence adduced by the prosecution, the court is convinced that the guilt of the accused for the crime charged has not been proven with the required quantum of proof at this stage of the proceedings. The prosecution failed to prove the five elements as listed above.

With respect to the first element, the same has been admitted by the accused Vitangcol.[40] That the alleged act is in connection with a contract or transaction with the government can be gleaned from documentary evidence, namely: (1) ***Exhibit "A:*** – a contract for the MRT3 expansion project – as identified by Noland Santiago and (2) ***Exhibit "B"*** – an invitation to bid – as identified by Luningning Sarmiento. That Vitangcol is a public officer who has a right to intervene may also be seen from documentary evidence, namely: (1) ***Exhibit "F"*** – the DOTC-MRT3 System Temporary Maintenance Provider for One year – as identified by Rosalia T. Vista; (2) ***Exhibits "H"***, "***H-1"***, "***H-2"***, "***BB"***, and "***BB-1"*** – which are Service Records, Attachments, and the Position Description of Vitangcol's position – all of which were identified by Rita Caraan; and (3) ***Exhibit "I"*** – an undated MRT Capacity Expansion Project – as identified by Luningning Sarmiento.

However, with respect to the second and third elements, there was no evidence that was properly adduced to prove them. With respect to the second and third elements, the prosecution asserts that:

> "As to the second and third elements, the prosecution was able to present witnesses and documentary evidence to establish that, at the very least, accused Vitangcol in conspiracy with accused De Vera requested or demanded from INEKON Group (INEKON) that they should enter and sign the Joint Venture Agreement (JV) together with other persons chosen by accused De Vera in connection with the contract for the maintenance service of MRT3 line considering that the then existing contract with Sumitomo Corporation for maintenance service was about to expire in relation to CRM-16-CRM-1208. (sic)

[40] Pre trial Order.

"While in CRM-16-CRM-1207 (sic), the prosecution again was also able to present witnesses and documentary evidence to establish that accused De Vera, in conspiracy with accused Vitangcol, demanded or attempted to extort money from INEKON in the amount of US$ 30,000,000.00, which was later on reduced to US$ 2,500,000.00.

"x x x

"In this case, although the direct evidence establishing the second and third elements of the crime charged under 16-CRM-1207 to 1208 were not presented in Court due to impossibility of compelling Amb. Rychtar and Mr. Husek to testify in Court, the same elements can be proven by circumstantial evidence using the testimony of Atty. Besoña and Atty. Atty. (sic) Jimeno, the one who notarized the Sworn Statements of Amb. Rychtar.

"Atty. Besoña executed a complaint under oath (***Exhibit "S"***) detailing the facts as alleged in the Informations. Considering that the said complaint was executed while Atty. Besoña was in the performance of his duty, it has the presumption of regularity; meaning, it is a *prima facie* evidence of the facts stated therein. Equally important, Atty. Besoña testified and affirmed in court the contents of his affidavit and confirmed that the contents indicated therein are based on his official investigation, interview with Amb. Rychtar and documents gathered.

"Further, the prosecution likewise was able to present Atty. Jimeno who testified on the existence, authenticity, and due execution of the sworn statements of Amb. Rychtar. More importantly, he also testified that Amb. Rychtar personally appeared before him to subscribe the affidavit under oath.

"In addition, the prosecution likewise offered as evidence, the sworn statements of Amb. Rychtar (***Exhibit "J"*** series) and Mr. Husek (***Exhibit "K"*** *series*) in support of the allegations in the Informations., These documents are public documents having been executed before an authorized officer. Thus, said

> documents enjoy the presumption of regularity and are *prima facie* evidence of the facts stated therein and a conclusive presumption of then (sic) existence and due execution. x x x."[41]

The Prosecution's assertions do not sway.

Exhibits "J" and "***K***" were excluded by this Court for being hearsay. Jurisprudence dictates that an affidavit is merely hearsay evidence when its affiant or maker did not take the witness stand.[42] Basic is the rule that, while affidavits may be considered as public documents if they are acknowledged before a notary public, these affidavits are still classified as hearsay evidence. The reason for this rule is that they are not generally prepared by the affiant, but by another one who uses his or her own language in writing the affiant's statements, parts of which may thus be either omitted or misunderstood by the one writing them. Moreover, the adverse party is deprived of the opportunity to cross-examine the affiants. For this reason, affidavits are generally rejected for being hearsay, unless the affiants themselves are placed on the witness stand to testify thereon.[43]

Exhibit "S" is objected to by Vitangcol for being "purely hearsay, biased, and self-serving" as "[t]he complainant/affiant does not have any personal knowledge of the factual circumstances of the instant case."[44] A cursory inspection of the Transcript of Stenographic Notes (TSN) of the testimony of the prosecution witness, Atty. Rholie C. Besoña, bolsters the stance of Vitangcol, *viz.*:

> "Q: And in fact, you do not have any personal knowledge of the incidents that are alleged in your Complaint-Affidavit.

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[41] *Consolidated Comment/Opposition (To Accused' Motions for Leave to File Demurrer to Evidence)* dated 19 June 2019.

[42] *Dantis v. Maghinang, Jr.*, G.R. No. 191696, April 10, 2013.

[43] *Republic v.* Gimenez, G.R. No. 174673, January 11, 2016.

[44] *Comments on and Objections (to the Prosecution's Formal Offer of Exhibits) with Opposition (to Prosecution's Motion for the Removal of provisional Marking for Exhibits "K" and "S" and Tender of Excluded Evidence both dated 26 October 2018)* dated 05 November 2018; *Rollo*, Vol. III, pp. 95 - 103.

"A: Yes, sir.

"Q: And, you also do not have any personal knowledge of the other allegations in your Complaint-Affidavit.

"A: I based my findings and recommendation on the contents of the documents that we've gathered during the investigation.

"Q: Precisely, on the basis of the documents that you were able to gather and or were presented to you.

"A: Yes, sir.

"Q: And therefore, you do not have any personal knowledge of the contents of these documents.

"A: Yes, sir.

"x x x

"Q: You merely read the statements.

"A: Yes, sir.

"Q: But you are a lawyer, Atty, Besona. You know what I am referring to. You do not have any personal knowledge of the contents of these documents.

"A: Yes, sir.

"Q: You also could not have any personal knowledge of the other documents that have been attached to your Complaint. I am referring to Exhibits A to O aside from Exhibit J and K.

"A: Yes, sir.

"Q: And, that is because you do not have any participation in the preparation of these documents having attached to your Complaint.

"A: Yes, sir.

"ATTY. AREZA: No further questions, Your Honor."[45]

Exhibits "J", "***K***", and "***S***" being thus excluded, there is no evidence on record which establishes the second and third elements of the crime charged.

The prosecution has the burden of proving beyond reasonable doubt each element of the crime as its case will rise or fall on the strength of its own evidence, never on the weakness or even absence of that of the defense.[46] Unless it sufficiently discharges that burden, the accused need not even offer evidence in his behalf, and he would be entitled to an acquittal.[47]

The prosecution failed to prove conspiracy between De Vera and Vitangcol.

This Court is not inclined to rule on the presence of conspiracy between accused De Vera and accused Vitangcol. The prosecution anchors its allegation of conspiracy on the same pieces of evidence (namely ***Exhibits "J"***, "***K***", and "***I***") it submitted to prove the second and third elements.

Conspiracy exists when two or more persons come to an agreement concerning the commission of a felony and decide to commit it.[48] The essence of conspiracy is the unity of action and purpose. When there is conspiracy, the act of one is the act of all. Conspiracy is not presumed. Like the physical acts constituting the crime itself, the elements of conspiracy must be proven beyond reasonable doubt. While conspiracy need not be established by direct evidence, for it may be inferred from the conduct of the accused before, during and after the commission of the crime, all taken together, however, the evidence must be strong enough to show the

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[45] Lines 17 to 39 of Page 12 to Line 1 of Page 13, Lines 5 to 33 of Page 15, TSN dated March 21, 2018.

[46] *Alferez v.People, et al.*, G.R. No. 182301, January 31, 2011.

[47] *Macayan v. People,* G.R. No. 175842, March 18, 2015.

[48] REVISED PENAL CODE, Article 8.

community of criminal design.[49] Additionally, to hold an accused guilty as a co-principal by reason of conspiracy, he must be shown to have performed an overt act in pursuance or furtherance of the plan to commit the felony.[50] The prosecution miserably failed in this wise.

There is no evidence on record to show that De Vera had any agreement or understanding with Vitangcol for them to have allegedly extort or request any gift. No proof was adduced showing that they performed overt acts aimed at the same criminal design.

To our mind, the mere allegation that there was conspiracy between the two co-accused is not sufficient to prove the same.

In fine, the Court concludes that the prosecution failed to adduce sufficient evidence to support a verdict of guilt against the two co-accused Al Vitangcol III and Wilson De Vera.

WHEREFORE, in light of all the foregoing, the following judgment is hereby rendered:

1. The *Demurrer to Evidence* of accused Al Sanchez Vitangcol III in SB-16-CRM-1207 and 1208 is hereby ***GRANTED***.

2. The *Demurrer to Evidence* of accused Wilson Tigno De Vera in SB-16-CRM-1207 and 1208 is hereby ***GRANTED***.

These cases are hereby ***DISMISSED*** for insufficiency of evidence.

Let the hold departure order against the accused by reason of these cases be lifted and set aside, and their bonds for the present cases be released, subject to the usual accounting and auditing procedure.

SO ORDERED.

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[49] *Bahilidad v. People,* G.R. No. 185195, March 17, 2010.

[50] *People v. Dizon,* G.R. No. 130742, July 18, 2000.

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KEVIN NARCE B. VIVERO
Associate Justice

WE CONCUR:

pls see separate concurring opinion.

SARAH JANE T. FERNANDEZ
Associate Justice
Chairperson

KARL B. MIRANDA
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.

SARAH JANE T. FERNANDEZ
Associate Justice
Chairperson, Sixth Division

CERTIFICATION

Pursuant to Section 13, Article VIII of the 1987 Constitution and the Division Chairperson's Attestation, 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.

AMPARO M. CABOTAJE – TANG
Presiding Justice

People v. Al Sanchez Vitangcol III, et al. (SB-16-CRM-1207 and 1208)

SEPARATE CONCURRING OPINION

FERNANDEZ, SJ, J.:

I concur with the *ponencia* of Justice Kevin Narce B. Vivero in finding that the prosecution failed to adduce sufficient evidence to support a verdict of guilt against accused Vitangcol and De Vera.

The prosecution argued that notwithstanding the fact that Amb. Rychtar and Mr. Husek did not testify in Court, their sworn statements[1] should be considered because they are public documents, and as such, enjoy the presumption of regularity and are *prima facie* evidence of the facts stated therein and a conclusive presumption of their existence and due execution. This argument does not convince.

The sworn statements of Amb. Rychtar and Mr. Husek, as well as Atty. Besoña's Complaint[2] were admitted in evidence.[3] Together with the testimonies of Atty. Jimeno and Atty. Besoña, the existence and due execution of said documents have been conclusively established. Had Amb. Rychtar and Mr. Husek testified, said documents may serve to bolster their credibility and the credibility of their respective testimonies, considering that they executed their sworn statements as early as 2013 and 2014. However, without their testimonies in Court, the factual statements made in their affidavits are bereft of probative value for being hearsay.

In *Philippine Trust Company v. Court of Appeals*,[4] the Supreme Court clarified that notarized documents, such as sworn statements, are not included in the public documents that are deemed *prima facie* evidence of the facts therein stated. It was held:

> Notarized documents fall under the second classification of public documents.[5] However, not all types of public documents are deemed *prima facie* evidence of the facts therein stated:
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> > Sec. 23. *Public documents as evidence.* – Document consisting of entries in public records made in the performance of a duty by a public officer are *prima facie* evidence of the facts therein stated. All other public documents are evidence, even against a third person, of the fact which gave rise to their execution and of the date of the latter.

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[1] Exhibits J (Amb. Rychtar) and K (Mr. Husek)

[2] Exhibit S

[3] Resolution dated December 3, 2018; Record, Vol. 3, pp. 112-113

[4] G.R. No. 150318, November 22, 2010

[5] *Rules of Court.* **Rule 132, Sec. 19.** – *Classes of Documents.* – For the purpose of their presentation in evidence, documents are either public or private. Public documents are: x x x (b) Documents acknowledged before a notary public except last wills and testaments; and x x x

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"Public records made in the performance of a duty by a public officer" include those specified as public documents under Section 19(a), Rule 132 of the Rules of Court and the *acknowledgement, affirmation or oath, or jurat* portion of public documents under Section 19(c). Hence, under Section 23, notarized documents are merely proof of the fact which gave rise to their execution (*e.g.*, the notarized Answer to Interrogatories in the case at bar is proof that Philtrust had been served with Written Interrogatories), and of the date of the latter (*e.g.*, the notarized Answer to Interrogatories is proof that the same was executed on October 12, 1992, the date stated thereon), but is not *prima facie* evidence of the facts therein stated. Additionally, under Section 30 of the same Rule, the acknowledgement in notarized documents is *prima facie* evidence of the execution of the instrument or document involved (*e.g.*, the notarized Answer to Interrogatories is *prima facie* proof that petitioner executed the same).

The reason for the distinction lies with the respective official duties attending the execution of the different kinds of public instruments. Official duties are disputably presumed to have been regularly performed. As regards affidavits, including Answers to Interrogatories which are required to be sworn to by the person making them, the only portion thereof executed by the person authorized to take oaths is the *jurat*. The presumption that official duty has been regularly performed therefore applies only to the latter portion, wherein the notary public merely attests that the affidavit was subscribed and sworn to before him or her, on the date mentioned thereon. Thus, even though affidavits are notarized documents, we have ruled that affidavits, being self-serving, must be received with caution.

(underscoring supplied)

In *People v. Crispin*,[6] the Supreme Court explained that unless the affiant is placed on the witness stand to testify on an affidavit, such affidavit is hearsay, and has weak probative value. *viz.*:

An affidavit is hearsay and has weak probative value, unless the affiant is placed on the witness stand to testify on it. Being hearsay evidence, it is inadmissible because the party against whom it is presented is deprived of his right and opportunity to cross-examine the person to whom the statement or writing is attributed. The right to confront and cross-examine the witnesses against him is a fundamental right of every accused which may not be summarily done away with. Another reason why the right to confrontation is so essential is because the trial judge's duty to observe and test the credibility of the affiant can only be met by his being brought to the witness stand. x x x. The prosecution having failed to present Cesar Delima as a witness, his sworn statement was patently inadmissible and deserves no consideration at all.

[6] G.R. No. 128360, March 2, 2000

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In the cases at bar, the Court gave the prosecution several opportunities to present Amb. Rychtar and Mr. Husek as witnesses.[7] However, despite having been given the opportunity, the prosecution still failed to present them. Without Amb. Rychtar and Mr. Husek's testimonies, the Court has no choice but to disregard their sworn statements.

The Court must similarly reject Atty. Besoña's Complaint and testimony as evidence of the facts alleged in the Informations. In *Patula v. People*,[8] the Supreme Court made the following disquisition on hearsay evidence:

> To elucidate why the Prosecution's hearsay evidence was unreliable and untrustworthy, and thus devoid of probative value, reference is made to Section 36 of Rule 130 Rules of Court, a rule that states that a witness can testify only to those facts that she knows of her personal knowledge; that is, which are derived from her own perception, except as otherwise provided in the Rules of Court. The personal knowledge of a witness is a substantive prerequisite for accepting testimonial evidence that establishes the truth of a disputed fact. A witness bereft of personal knowledge of the disputed fact cannot be called upon for that purpose because her testimony derives its value not from the credit accorded to her as a witness presently testifying but from the veracity and competency of the extrajudicial source of her information.
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> In case a witness is permitted to testify based on what she has heard another person say about the facts in dispute, the person from whom the witness derived the information on the facts in dispute is not in court and under oath to be examined and cross-examined. The weight of such testimony then depends not upon the veracity of the witness but upon the veracity of the other person giving the information to the witness without oath. The information cannot be tested because the declarant is not standing in court as a witness and cannot, therefore, be cross-examined.
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> It is apparent, too, that a person who relates a hearsay is not obliged to enter into any particular, to answer any question, to solve any difficulties, to reconcile any contradictions, to explain any obscurities, to remove any ambiguities; and that she entrenches herself in the simple assertion that she was told so, and leaves the burden entirely upon the absent author. Thus, the rule against hearsay testimony rests mainly on the ground that there was no opportunity to cross-examine the declarant. The testimony may have been given under oath and before a court of justice, but if it is offered against a party who is afforded no opportunity to cross-examine the witness, it is hearsay just the same.

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[7] Resolution dated July 3, 2018 (Record, Vol. 2, pp. 419-424); Order dated August 31, 2018 (Record, Vol. 2, pp. 472-A and 472-B)

[8] G.R. No. 164457, April 11. 2012

> Moreover, the theory of the hearsay rule is that when a human utterance is offered as evidence of the truth of the fact asserted, the credit of the assertor becomes the basis of inference, and, therefore, the assertion can be received as evidence only when made on the witness stand, subject to the test of cross-examination. However, if an extrajudicial utterance is offered, not as assertion to prove the matter asserted but without reference to the truth of the matter asserted, the hearsay rule does not apply. For example, in a slander case, if a prosecution witness testifies that he heard the accused say that the complainant was a thief, this testimony is admissible not to prove that the complainant was really a thief, but merely to show that the accused uttered those words. This kind of utterance is hearsay in character but is not legal hearsay. The distinction is, therefore, between (a) the fact that the statement was made, to which the hearsay rule does not apply, and (b) the truth of the facts asserted in the statement, to which the hearsay rule applies.
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> Section 36, Rule 130 of the Rules of Court is understandably not the only rule that explains why testimony that is hearsay should be excluded from consideration. Excluding hearsay also aims to preserve the right of the opposing party to cross-examine the original declarant claiming to have a direct knowledge of the transaction or occurrence. If hearsay is allowed, the right stands to be denied because the declarant is not in court. It is then to be stressed that the right to cross-examine the adverse party's witness, being the only means of testing the credibility of witnesses and their testimonies, is essential to the administration of justice.

Basic is the rule that, subject to certain exceptions, a witness can testify only on matters which he or she knows of his or her personal knowledge.[9] As Atty. Besoña admitted, he does not have personal knowledge of the matters subject of his Complaint. His knowledge of the matters subject of the present cases are based on the documents submitted to him and his interview with Amb. Rychtar.[10] Atty. Besoña's Complaint and testimony may only prove that he conducted an investigation, that he interviewed Amb. Rychtar, and that Amb. Rychtar made certain statements—matters that are undoubtedly of Atty. Besoña's personal knowledge. But Atty. Besoña's Complaint and testimony cannot be considered as proof of the truth of Amb. Rychtar's statements, or the truth of the facts stated in the documents submitted to him.

There being no other piece of evidence that would establish the alleged request or demand made by accused Vitangcol, the prosecution's evidence is insufficient, such request or demand being an essential element of violation of Sec. 3(b) of R.A. No. 3019. The commission of

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[9] *Rules of Court.* **Rule 130, Sec. 36.** – *Testimony generally confined to personal knowledge; hearsay excluded.* – A witness can testify only to those facts which he knows of his personal knowledge; that is, which are derived from his own perception, except as otherwise provided in these Rules.

[10] TSN, March 21, 2018, pp. 12-13, 16 and 20

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violation of Sec. 3(b) not having been convincingly established, a determination of whether accused De Vera, a private individual, conspired with accused Vitangcol will be nothing but an exercise in futility.

SARAH JANE T. FERNANDEZ
Associate Justice
Chairperson