



Republic of the Philippines
Sandiganbayan
Quezon City

SEVENTH DIVISION

MINUTES of the proceedings held on 28 May 2018.

Present:

<i>Justice MA. THERESA DOLORES C. GOMEZ-ESTOESTA</i> -----	<i>Chairperson</i>
<i>Justice ZALDY V. TRESPESES</i> -----	<i>Member</i>
<i>Justice BAYANI H. JACINTO*</i> -----	<i>Member</i>

The following resolution was adopted:

Crim. Case No. SB-17-CRM-0129 - People vs. DIONE VILLAFLOR BUSTONERA

This resolves the following:

1. Accused Dione Bustonera's "MOTION TO QUASH SUBPOENA ISSUED BY THE OFFICE OF THE OMBUDSMAN DATED APRIL 10, 2018)" dated April 20, 2018;¹
2. The prosecution's "COMMENT/OPPOSITION (To the Motion to Quash dated April 20, 2018)" dated May 2, 2018;²
3. Accused Bustonera's "REPLY" dated May 11, 2018.

For resolution is accused Dione Villaflor Bustonera's Motion to Quash subpoena issued by the Office of the Ombudsman, the prosecution's Comment/Opposition thereto, and accused's Reply.

ACCUSED'S MOTION

Accused moves for the quashal of the subpoena issued by the Office of the Ombudsman addressed to Ms. Elicita A. Ona.

Accused alleges that Elicita A. Ona is one of the witnesses for accused as contained in the Pre-trial Order dated 15 January 2018. He further alleges

*Sitting as Special Member per Administrative Order No. 284-2017 dated 18 August 2017.

¹ *Rollo*, Vol. 2, pp. 359-363.

² *Id.* at 371-375.

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that based on Sec. 5³ of the Judicial Affidavit Rule, Ms. Ona, the subject of prosecution's subpoena is exempt from such process. Accused believes that the attempt by the prosecution in the guise of subpoena to compel Ms. Ona to testify against him is tantamount to a fishing expedition; an unreasonable move to intimidate, if not to harass accused's intended witness – who allegedly has the impression that the compulsory process issued by the Ombudsman carries with it the power of contempt, or a veiled threat of the charge of obstruction of justice.

Moreover, accused posits that the power of the Ombudsman to issue the compulsory process of subpoena under Sec. 15 (8) of RA No. 6770 no longer holds true when the case is already filed in court. With the filing of the Information in the Sandiganbayan, the latter acquired jurisdiction over the case, and thus, has the authority to hear and determine the case, including the issuance of subpoena and other processes. Thus, the Ombudsman has no jurisdiction to compel accused's witness to testify.

PROSECUTION'S OPPOSITION

In its Comment/Opposition, the prosecution avers that the subpoena issued by the prosecutor was addressed to Elicita A. Ona as a government employee and incumbent custodian of the public and/or official documents at the Office of the Provincial Prosecutor (OPP), Province of Quezon.

The prosecution adds that the subpoena was not addressed to accused Bustonera and therefore, the filing of the motion by said accused is a mere scrap of paper. It contends that the remedy of the quashal of subpoena provided under Sec. 4, Rule 21 of the Rules of Court is available only to the person to whom the subpoena was issued; Ms. Ona in this case. It is also Ms. Ona who should justify the quashal of the subpoena on grounds that it is unreasonable and oppressive, or the relevancy of the books, documents or things does not appear. Nevertheless, the matters covered by the subpoena are neither unreasonable or oppressive and completely relevant to the fact in issue, as the document requested is directly related to Ona's duties and functions as an employee of the OPP.

³ Section 5. *Subpoena*. - If the government employee or official, or the requested witness, who is neither the witness of the adverse party nor a hostile witness, unjustifiably declines to execute a judicial affidavit or refuses without just cause to make the relevant books, documents, or other things under his control available for copying, authentication, and eventual production in court, the requesting party may avail himself of the issuance of a subpoena *ad testificandum* or *duces tecum* under Rule 21 of the Rules of Court. The rules governing the issuance of a subpoena to the witness in this case shall be the same as when taking his deposition except that the taking of a judicial affidavit shall be understood to be *ex parte*.

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Moreover, in the Joint Stipulation of Facts and in the Pre-trial Order, the prosecution enumerated its witnesses including an “employee/Prosecutor of the OPP.” Thus, accused cannot claim that Ona is his exclusive witness.

The prosecution further argues that the authority of the Ombudsman to issue subpoena on matters relating to public and/or official functions of a government employee does not cease upon the termination of the preliminary investigation. It alleges that issuance of subpoena to a government employee as prosecution witness is a necessary and indispensable action in the discharge of the duties and functions of the prosecutors of the Office of the Special Prosecutor pursuant to Sec. 11,⁴ Republic Act No. 6770.

ACCUSED’S REPLY

In his Reply, accused alleges that when it named Ms. Ona as one of its witnesses, he has the responsibility to protect said witness from any compulsion through fishing expedition.

Moreover, Ms. Ona is a resident of Lucena City and lives 140 kilometers away from the Office of the Ombudsman. Thus, under Sec. 10 of Rule 21⁵ of the Rules of Court applies.

OUR RULING

We deny accused’s motion to quash subpoena for lack of merit.

⁴ Section 11. *Structural Organization.* — The authority and responsibility for the exercise of the mandate of the Office of the Ombudsman and for the discharge of its powers and functions shall be vested in the Ombudsman, who shall have supervision and control of the said office.

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(3) The Office of the Special Prosecutor shall be composed of the Special Prosecutor and his prosecution staff. The Office of the Special Prosecutor shall be an organic component of the Office of the Ombudsman and shall be under the supervision and control of the Ombudsman.

(4) The Office of the Special Prosecutor shall, under the supervision and control and upon the authority of the Ombudsman, have the following powers:

- (a) To conduct preliminary investigation and prosecute criminal cases within the jurisdiction of the Sandiganbayan;
- (b) To enter into plea bargaining agreements; and
- (c) To perform such other duties assigned to it by the Ombudsman.

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⁵ Section 10. *Exceptions.* — The provisions of sections 8 and 9 of this Rule shall not apply to a witness who resides more than one hundred (100) kilometers from his residence to the place where he is to testify by the ordinary course of travel, or to a detention prisoner if no permission of the court in which his case is pending was obtained.

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Sec. 1 of Rule 21 of the Rules of Court states that a subpoena is a process directed to a person requiring him to attend and to testify at the hearing or the trial of an action, or at any investigation conducted by competent authority, or for the taking of his deposition. It may also require him to bring with him any books, documents, or other things under his control. Therefore, it is a means to obtain the relevant and necessary pieces of evidence for a particular case.

In the instant case, the prosecution claims that during pre-trial, it has reserved its right to present additional witnesses, including an "employee/prosecutor of the OPP." As such, the prosecution filed on 27 April 2018 a request⁶ for the issuance of a subpoena to require Elicita A. Ona, Administrative Officer V of the Office of the Provincial Prosecutor-Quezon Province, to appear in court to testify.

Prior thereto, the Office of the Special Prosecutor (OSP) under the Office of the Ombudsman, issued a subpoena to Elicita A. Ona for the taking of her judicial affidavit.⁷ Record shows however that Ms. Ona was initially named in the Pre-trial Order as one of the witnesses for the defense.

Accused now comes to Court and prays for the quashal of the subpoena issued by the OSP on the ground that Sec. 5 of the Judicial Affidavit Rule (JAR) does not apply to Ona.

*Sec. 5 of the Judicial Affidavit
Rule does not apply to the
adverse party witness*

On the question of whether Ona may be subpoenaed by the prosecution to appear and testify in court pursuant to Sec. 5 of the JAR, the Court agrees with accused's contention that Sec. 5 of the JAR does not apply to Ona.

Under Sec. 5 of the JAR, the requesting party may avail himself of the issuance of a subpoena under Rule 21 of the Rules of Court if a witness unjustifiably declines to (a) execute a judicial affidavit, or (b) refuses without just cause to make the relevant books, documents, or other things under his control available for copying, authentication, and eventual production in court.

It should be noted that the witness referred in this provision is a government employee or official, or a *requested witness, who is neither the witness of the adverse party* nor a hostile witness.

⁶ Rollo, Vol. 2, pp. 369-370.

⁷ Id. at 363.

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Minute Resolution

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The Supreme Court, in *Ng Meng Tam v. China Banking Corp.*,⁸ also categorically declared that Sec. 5 of the JAR does not apply to adverse party witnesses. It explained that:

Section 5 of the JAR contemplates a situation where there is a (a) government employee or official or (b) requested witness who is not the (1) adverse party's witness nor (2) a hostile witness. If this person either (a) unjustifiably declines to execute a judicial affidavit or (b) refuses without just cause to make the relevant documents available to the other party and its presentation to court, Section 5 allows the requesting party to avail of issuance of subpoena *ad testificandum* or *duces tecum* under Rule 21 of the Rules of Court. Thus, adverse party witnesses and hostile witnesses being excluded they are not covered by Section 5. *Expressio unius est exclusion alterius*: the express mention of one person, thing, or consequence implies the exclusion of all others.

Here, Yap is a requested witness who is the adverse party's witness. Regardless of whether he unjustifiably declines to execute a judicial affidavit or refuses without just cause to present the documents, Section 5 cannot be made to apply to him for the reason that he is included in a group of individuals expressly exempt from the provision's application.

In this case, both parties claim that Ms. Ona is a government employee/legal custodian of public and official documents in the OPP. However, *Ms. Ona, the requested witness by the prosecution, is also the adverse party's witness*. Therefore, Sec. 5 of the JAR cannot be made to apply to her.

*The subpoena can be quashed
only by the issuing court*

The next issue to be resolved is, can the Court order for the quashal of the subpoena? Considering the attendant circumstances, the Court answers in the negative.

It bears to stress that the subpoena sought to be quashed in this case was the one issued by the OSP. The Court has not as yet issued any subpoena to Ona although there is a pending request made by the prosecution.

It is settled that a subpoena issued by the Court may be quashed if it can be shown that it failed to meet the test of relevancy and definiteness.⁹ However, the court can only quash the subpoena it issued in the same way that

⁸ G.R. No. 214054, 5 August 2015.

⁹ *Lozada, Jr. v. Macapagal-Arroyo*, G.R. Nos. 184379-80, 24 April 2012.

v. *d*

in case of failure of a witness to attend, only the issuing court can compel his/her attendance by issuing a warrant for his/her arrest.¹⁰

Moreover, it is significant to note that the Office of the Ombudsman and the Office of the Special Prosecutor (OSP) are creations of the 1987 Constitution under the executive branch of the government. On the other hand, the courts including the Sandiganbayan are under the judicial branch of the government. Since they belong to different branches of the government, the Ombudsman/OSP cannot be considered as offices under or inferior to the Sandiganbayan, such that the latter can quash the processes which the former may issue.

Accordingly, the Court is constrained to deny accused's motion to quash the subpoena issued by the OSP.

The prosecution's argument that accused Bustonera cannot claim Ms. Ona as his exclusive witness since it also reserved the right to present witnesses from the OPP of Quezon Province, cannot be given credence. A reading of the pre-trial order shows that the prosecution did not specifically identify the person from the OPP which it intends to present.

Nonetheless, the fact that Ms. Ona is an adverse party witness does not necessarily mean that the prosecution is precluded from presenting her as its own witness if the prosecution finds it necessary to present her in order to establish the guilt of accused beyond reasonable doubt. It is settled that the prosecution has the exclusive prerogative to determine whom to present as witnesses. It is not for the courts, much more the defense, to dictate what evidence to present or who should take the witness stand at the trial of a case.¹¹

But considering the limitation provided in Sec. 5 of the JAR excluding from its application adverse party and hostile witnesses, to present these type of witnesses, the provisions on the Rules of Court under the Revised Rules of Evidence and all other correlative rules including the modes of deposition and discovery should be taken into account by the prosecution.¹²

Finally, this Court would like to stress that when a criminal action is initiated via the filing of a complaint or information in court, the court thereby acquires jurisdiction over the case, which is the authority to hear and determine the case. While the prosecutor retains the direction and control of

¹⁰ Rule 21. Section 8. *Compelling attendance.* — In case of failure of a witness to attend, the court or judge issuing the subpoena, upon proof of the service thereof and of the failure of the witness, may issue a warrant to the sheriff of the province, or his deputy, to arrest the witness and bring him before the court or officer where his attendance is required, and the cost of such warrant and seizure of such witness shall be paid by the witness if the court issuing it shall determine that his failure to answer the subpoena was willful and without just excuse.

¹¹ *People v. Nicolas y Ringor*, G.R. No. 137782, 1 April 2003.

¹² *Supra* note 8.

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the prosecution of criminal cases, the court remains the best and sole judge on what to do with the case before it.¹³

WHEREFORE, premises considered, accused Dione Villaflor Bustonera's Motion to Quash Subpoena issued by the Office of the Ombudsman is denied for lack of merit.

SO ORDERED.

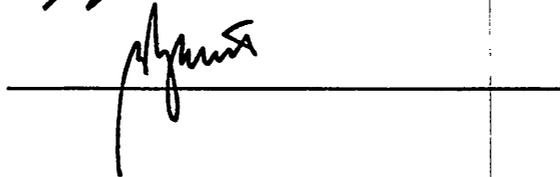
GOMEZ-ESTOESTA, J. Chairperson



TRESPESES, J.



JACINTO, J.



¹³ *Gandarosa v. Flores*, G.R. No. 167910, 17 July 2007.