



REPUBLIC OF THE PHILIPPINES

*Sandiganbayan*

Quezon City

SIXTH DIVISION

PEOPLE OF THE PHILIPPINES, **SB-16-CRM-1207 and 1208**  
Plaintiff, For: Violation of Section 3(b)  
of R.A. No. 3019

*Present*

- versus -

**FERNANDEZ, SJ, J.,**  
Chairperson

**MIRANDA, J. and**  
**TRESPESES,\* J.**

**AL SANCHEZ VITANGCOL III,**  
**ET AL.,**

Accused.

*Promulgated:*

**AUG 16 2018**

*[Handwritten signature]*

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## RESOLUTION

**FERNANDEZ, SJ, J.**

This resolves accused Al S. Vitangcol III's *Motion for Reconsideration of the Resolution dated July 3, 2018.*<sup>1</sup>

He prays that this Court reconsider, reverse and set aside the Resolution dated July 3, 2018.<sup>2</sup> He avers:

1. He was deprived of due process of law when the Court accepted the prosecution's sealed email correspondences with Josef Rychtar and Dr. Vit Makarius.
  - a. Although he was able to file his *Comment/Opposition* to the prosecution's *Motion for Partial Reconsideration*, he cannot be considered as having been afforded due process because he was not given the opportunity to

\* J. Trespeses participated in the assailed Resolution (Per Administrative Order No. 071-2018 dated February 1, 2018; *Revised Internal Rules of the Sandiganbayan*, Rule IX, Sec. 2[a]).

<sup>1</sup> Dated July 16, 2018; Record, Vol. 2, pp. 433-440

<sup>2</sup> Record, Vol. 2, pp. 419-424

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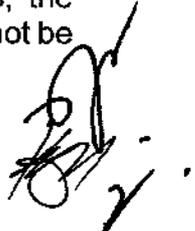
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- examine and counter-validate the purported email correspondence with Josef Rychtar and Dr. Vit Makarius.
- b. Because he was not given a copy of the email correspondences, he was deprived of the opportunity to intelligently comment thereon. The Court should not have considered said email correspondences, or at the very least, should have required the prosecution to provide the accused copies thereof.
2. The assailed Resolution violates the accused' constitutional right to confront the prosecution witnesses face-to-face, meaning, physically cross-examining the witnesses in the same courtroom.
    - a. In *Go v. People*, it was held that there is a great deal of difference between face-to-face confrontation in a public 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.
    - b. The two-fold purpose of the right of confrontation is (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.
    - c. Allowing the prosecution's witnesses to testify via video conferencing will not deter them from lying because they cannot be held liable for perjury.

In its *Comment/Opposition*,<sup>3</sup> the prosecution counters:

1. Accused Vitangcol's Motion was filed beyond the 5-day period for filing a motion for reconsideration. He received a copy of the assailed Resolution on July 4, 2018, but he filed his Motion only on July 17, 2018.
2. Furthermore, accused Vitangcol's Motion contains a defective notice of hearing. It was addressed to the Clerk of Court of the 6<sup>th</sup> Division, and not to the Office of the Special Prosecutor (OSP) and/or to the handling prosecutor.
3. The communication between lawyers and their clients is a matter of privileged communication and cannot be revealed without the express written consent of the client. Thus, the email printouts, which are privileged communications, cannot be

<sup>3</sup> Dated July 24, 2018 and filed on July 25, 2018



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disclosed to any party without the written consent from Amb. Rychtar and Mr. Husek.

4. The issue of the violation of the right of confrontation is already moot and academic. Accused Vitangcol failed to question the constitutionality of Rule 10, Sec. 1 of the Rules on Electronic Evidence (REE) at the earliest opportunity.

THE COURT'S RULING

Accused Vitangcol's *Motion for Reconsideration* should be denied for having been filed beyond the 5-day period within which a motion for reconsideration may be filed.

Under the *Revised Guidelines for Continuous Trial of Criminal Cases*<sup>4</sup> (Revised Guidelines), a motion for reconsideration of the resolution of a meritorious motion must be filed within five (5) calendar days from the receipt of the assailed resolution.<sup>5</sup> Here, accused Vitangcol's Motion was filed thirteen (13) days from receipt of the assailed Resolution.

Even on the merits, his Motion should nonetheless be denied.

This Court already addressed the matter of the printouts of the subject email communications. The pertinent portion<sup>6</sup> of the assailed Resolution is hereunder quoted for convenience:

The Court, after examining the said printouts, and in the interest of justice, resolves to grant the prosecution's Motion. Said printouts, which essentially explained the reason for the inability of said witnesses to travel to the Philippines to testify in the present cases, do not constitute a part of the prosecution's evidence in chief.

Next, the accused' right of confrontation, which is enshrined in Art. III, Sec. 14, par. (2) of the Constitution. The provision reads:

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<sup>4</sup> A.M. No. 15-06-10-SC

<sup>5</sup> III. 2. (c) x x x The motion for reconsideration of the resolution of a meritorious motion shall be filed within a non-extendible period of five (5) calendar days from receipt of such resolution, and the adverse party shall be given an equal period of five (5) calendar days from receipt of the motion for reconsideration within which to submit its comment. Thereafter, the motion for reconsideration shall be resolved by the court within a non-extendible period of five (5) calendar days from the expiration of the five (5)-day period to submit the comment.

<sup>6</sup> Resolution dated July 3, 2018, p. 3; Record, Vol. 2, p. 421

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Sec. 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 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)

Accused Vitangcol, citing *Go v. People*,<sup>7</sup> argues that allowing the prosecution's witnesses to testify via video conferencing will violate his right of confrontation.

This Court, citing the very same case, already touched upon the matter of the accused' right of confrontation in the Resolution dated April 24, 2018.<sup>8</sup> The pertinent portion<sup>9</sup> of said Resolution is hereunder quoted for convenience:

In *Go v. People*, the Supreme Court explained that the reason for this is to protect the constitutionally guaranteed rights of the accused – whose liberty is at stake – to a public trial, and to meet the witnesses face to face. While this is the general rule, it is not without exceptions. *Viz.:*

The examination of witnesses must be done orally before a judge in open court. This is true especially in criminal cases where the Constitution secures to the accused his right to a public trial and to meet the witnesses 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. 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.

(underscoring supplied)

Among the exceptions to the general rule include examination of witnesses under Sections 12, 13 and 15, Rule 119 of the Rules of Court, where depositions may be used in lieu of direct examination in court during trial. Likewise, Sections 23 to 27 of the Rule on

<sup>7</sup> G.R. No. 185527, July 18, 2012

<sup>8</sup> Record, Vol. 2, pp. 339-346

<sup>9</sup> Resolution dated April 24, 2018, pp. 4-5; Record, Vol. 2, pp. 342-343

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Examination of a Child Witness allow the exclusion of the public and/or the accused during the examination of a child witness.

The prosecution contends that Sec. 1, Rule 10 of the Rules on Electronic Evidence is also an exception to the general rule. This Court is inclined to agree.

x x x

However, it appears that there is a need for a more extensive discussion of *Go vis-à-vis* the present cases.

First, the factual backdrop of *Go*. In that case, the Metropolitan Trial Court (MeTC) of Manila issued Orders allowing the taking of the oral deposition of the complaining witness before the Philippine consular official in Cambodia because said witness could not travel to the Philippines by reason of ill health.

Subsequently, the Regional Trial Court (RTC), upon therein accused' petition for certiorari, declared the MeTC Orders null and void. The RTC held that the provisions on the taking of depositions of witnesses in civil cases, in particular, Rule 23<sup>10</sup> of the Rules of Court, cannot apply suppletorily because there is a specific provision in the Rules of Court with respect to the taking of depositions of prosecution witnesses in criminal cases.

Thereafter, the prosecution elevated the case to the Court of Appeals (CA), which reversed the Order issued by the RTC on the grounds that there was no rule of procedure which expressly disallows such deposition-taking, and that the accused may still cross-examine the witness during the taking of the oral deposition.

In setting aside the Resolution of the CA, the Supreme Court held that Rule 119, Sec. 15 of the Rules of Court squarely covers the situation at hand, and allowing such deposition-taking without strictly complying with Sec. 15 will violate the accused' rights of confrontation and to due process. According to the High Court, the purpose of the right of confrontation is as follows:

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

<sup>10</sup> Depositions pending action

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observe the deportment of the witnesses. The Court explained in *People v. Seneris* 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.”

It bears stressing that in *Go*, the Supreme Court recognized that there are exceptions to the general rule that the examination of witnesses must be done orally before a judge. Among the exceptions thereto is the conditional examination of witnesses and the use of their depositions as testimonial evidence in lieu of direct court testimony. Rule 119, Sec. 15<sup>11</sup> of the Rules of Court, in particular, provides for the examination of witnesses for the prosecution. The Supreme Court nevertheless disallowed the deposition-taking of the witness in Cambodia because although the situation in that case, *i.e.*, the witness was too sick to appear at the trial, was squarely covered by Sec. 15, said provision was not complied with.

Here, this Court held in the Resolution dated April 24, 2018 that Rule 10, Sec. 1 of the Rules on Electronic Evidence<sup>12</sup> (REE) may be considered as another exception to the general rule that the examination of witnesses must be done orally before a judge. There is nothing in the REE that expressly prohibits the application of Rule 10, Sec. 1 in criminal cases.

Rule 10, Sec. 1 of the REE provides for the requirements before the court may authorize the presentation of testimonial evidence by electronic means. To wit:

**Sec. 1. Electronic testimony.** – After summarily hearing the parties pursuant to Rule 9 of these Rules, the court may authorize the presentation of testimonial evidence by electronic means. Before so authorizing, the court shall determine the necessity for such presentation and prescribe terms and conditions as may be

<sup>11</sup> **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.

<sup>12</sup> A.M. No. 01-7-01-SC, *Re: Expansion of the Coverage of the Rules on Electronic Evidence* dated September 24, 2002 expanded the coverage of the REE to include criminal cases.

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necessary under the circumstance, including the protection of the rights of the parties and witnesses concerned.

Thus, pursuant to the aforementioned provision, this Court, in the Resolution dated July 3, 2018 determined that the presentation of the prosecution witnesses via video conferencing was necessary, and prescribed the terms and conditions therefor.

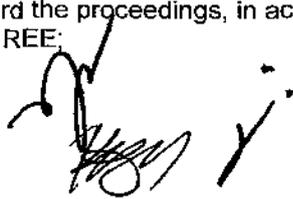
In *Go*, it was clear that the deposition-taking before the Philippine consular official in Cambodia—which was not in compliance with Rule 119, Sec. 15 of the Rules of Court—if allowed, would have violated the accused' right of confrontation, considering that one of the purposes of such right is to allow the judge to observe the deportment of the witness to assess the credibility of such witness. But the same cannot be said in the present cases.

Here, especially considering the accused' right of confrontation, this Court, in the Resolution dated July 3, 2018, laid down the following terms and conditions:<sup>13</sup>

The following are the terms and conditions that must be complied with to protect the rights of the parties, to comply with the provisions of the REE, and also considering that this Court currently does not have the facilities and/or equipment necessary for video conferencing:

1. Mr. Husek shall give his testimony at the Philippine Embassy in Prague, Czech Republic. On the other hand, Amb. Rychtar will give his testimony at the Philippine Embassy in Santiago, Chile. Both locations shall be considered as an extension of the courtroom during the proceedings;
2. The prosecution shall be responsible for making arrangements with Mr. Husek and Amb. Rychtar, and with said Philippine Embassies for the testimonies of said witnesses;
3. The rooms where the witnesses will be testifying must be well-lit;
4. The prosecution shall provide for, and shall bear all the costs of the video conferencing facilities and/or the necessary equipment, as well as other costs in connection therewith, including, but not limited to the installation and operation of such facilities and/or equipment;
5. The video conferencing equipment must have the following features:
  - a. It must be able to record the proceedings, in accordance with Rule 10, Sec. 3 of the REE;

<sup>13</sup> Pp. 4-5; Record, Vol. 2, pp. 422-423



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- b. The Court and all parties must be able to view each other, and converse with each other simultaneously;
  - c. The Court and all parties must be able to clearly see each others' facial expressions, and clearly understand the persons who are speaking;
  - d. The Court and all parties must be able to view and examine relevant documents;
  - e. Monitors in the courtroom must be sufficiently large as to enable the public to view the remote proceedings;
  - f. The internet connection must be suitable for video conferencing, without disconnections, lags or other such interruptions;
  - g. There should be a minimum of three (3) cameras at the places where the testimonies will be given.
    - i. One camera must be located in front of, and close to the witness.
    - ii. The other two (2) cameras must enable the Court to see the entire room where the testimonies will be given. At all times, the two (2) other cameras should be visible from each of these cameras.
6. The Court or its duly authorized representative shall inspect and test the video conferencing facilities and/or equipment located in the Philippines prior to the hearing date/s. The Court will allow the presentation of said witnesses by video conferencing only if it is convinced that the video conferencing facilities and/or equipment has all the required features; and
7. This Court shall discontinue the video conferencing if it appears that technical issues, if any, will cause the violation or tend to cause the violation of the rights of the accused.

It must be emphasized that this Court prescribed such requirements to reasonably ensure that the twofold purpose of the right of confrontation will be met. The places where the witnesses will give their respective testimonies will be considered as extensions of the courtroom during the proceedings. The accused should be able to cross-examine the witnesses, and at the same time, allow the Court to observe the deportment of such witnesses.

It must be further emphasized that the Court will allow the presentation of the prosecution's witnesses via video conferencing if, and only if the Court, upon inspection of the equipment prior to the time of the testimonies, is convinced that **each and every condition** prescribed in the assailed Resolution has been complied with. Moreover, if the presentation of the prosecution's witnesses via video

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conferencing proceeds, the Court may discontinue the video conferencing **at any time** if it becomes apparent that the accused' rights will be violated.

In fine, accused Vitangcol's reliance on *Go v. People* is misplaced. This Court finds no reason to warrant the reversal of the assailed Resolution.

**WHEREFORE**, accused Vitangcol's *Motion for Reconsideration* is hereby DENIED for lack of merit.

SO ORDERED.

  
**SARAH JANE T. FERNANDEZ**  
Associate Justice  
Chairperson

**We Concur:**

  
**KARL B. MIRANDA**  
Associate Justice

  
**ZALDY V. TRESPESES**  
Associate Justice