EN BANC

G.R. No. 212761-62 - SENATOR JOSE "JINGGOY" P. EJERCITO ESTRADA, *Petitioner* ***versus*** **OFFICE of the OMBUDSMAN, SANDIGANBAYAN, FIELD INVESTIGATION OFFICE OF THE OMBUDSMAN, NATIONAL BUREAU OF INVESTIGATION and ATTY. LEVITO BALIGOD,** *Respondents*;

G.R. No. 213473-74 - JOHN RAYMUND DE ASIS, *Petitioner* ***versus*** **CONCHITA CARPIO MORALES, in her official capacity as Ombudsman, PEOPLE OF THE PHILIPPINES, and SANDIGANBAYAN, Fifth Division** *Respondents*; and

G.R. No. 213538-39 – JANET LIM NAPOLES, *Petitioner* ***versus*** **CONCHITA CARPIO MORALES, in her official capacity as Ombudsman, PEOPLE OF THE PHILIPPINES, and SANDIGANBAYAN, Fifth Division,** *Respondents.*

Promulgated: July 31, 2018

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CONCURRING OPINION

TIJAM, *J.*:

In this petition, petitioners Senator Jose "Jinggoy" P. Ejercito Estrada (Senator Estrada) and John Raymund De Asis (De Asis) seek to correct the grave abuse of discretion purportedly committed by the public respondent Office of the Ombudsman (Ombudsman) in connection with OMB-C-C-13-1313, entitled *National Bureau of Investigation and Atty. Levito Baligod v. Jose "Jinggoy" P. Ejercito Estrada, et. al.* and OMB-C-C-13-0397 entitled *Field Investigation Office v. Jose "Jinggoy" P. Ejercito Estrada.*

Assailed rulings in these consolidated petitions for *certiorari* are:

1. Joint Resolution dated March 28, 2014 of the Ombudsman, which found probable cause to charge petitioners and several other respondents for one count of Plunder and eleven counts of violation of Section 3(e) of Republic Act (R.A.) No. 3019; and

2. Joint Order dated June 4, 2014 of the Ombudsman, which denied petitioners' motion for reconsideration of the March 28, 2014 Joint Resolution of the Ombudsman.

Petitioners pray that this Court:

1. enjoin the Sandiganbayan from taking cognizance of or acting upon the challenged Joint Resolution and Order, and any and all Informations, orders, resolutions, or other issuances, and from issuing any warrants of arrrest based on such Informations;

2. enjoin the Ombudsman, its FIO, the NBI, and Atty. Levito Baligod, from conducting any further proceedings relative to the NBI and FIO Complaints; from implementing or taking any other actions based on the challenged Joint Resolution and Order; and from prosecuting any and all criminal cases arising from the complaints and prcoeedings in OMB-C-C-13-0313 and OMB-C-C-13-0397;

3. render judgment declaring Senator Estrada as having been denied due process of law and equal protection of the laws, and consequently; and

4. declare the Joint Resolution and Order null and void.

In a petition for *certiorari*, the jurisdiction of the court is narrow in scope. It is limited to resolving only errors of jurisdiction. It is not to stray at will and resolve questions and issues beyond its competence, such as an error of judgment. The courts duty in the pertinent case is confined to determining whether the executive and judicial determination of probable cause was done without or in excess of jurisdiction or with grave abuse of discretion. Although it is possible that error may be committed in the discharge of lawful functions, this does not render the act amenable to correction and annulment by the extraordinary remedy of *certiorari*, absent any showing of grave abuse of discretion amounting to excess of jurisdiction.

Rules in reviewing the findings of the Ombudsman

As a matter of policy, courts are bound to respect the prosecution's preliminary determination of probable cause absent proof of manifest error, grave abuse of discretion and prejudice. "The right to prosecute vests the prosecutor with a wide range of discretion — the discretion of what and whom to charge, the exercise of which depends on a smorgasbord of factors which are best appreciated by prosecutors."[1]

"Thus, when there is no showing of nefarious irregularity or manifest error in the performance of a public prosecutor's duties, courts ought to refrain from interfering with such lawfully and judicially mandated duties."[2]

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[1] *Leviste v. Hon. Alameda, et al.*, 640 Phil. 620, 638 (2010).
[2] *Mendoza v. People, et al.*, 733 Phil. 603, 612 (2014).

In any case, if there was palpable error or grave abuse of discretion in the public prosecutor's finding of probable cause, the accused can appeal such finding to the justice secretary and move for the deferment or suspension of the proceedings until such appeal is resolved.[3]

The aforesaid policy of non-interference applies with greater force in the case of the Ombudsman. In *Casing v. Hon. Ombudsman, et al.*,[4] this Court explained:

> In line with the constitutionally-guaranteed independence of the Office of the Ombudsman and coupled with the inherent limitations in a *certiorari* proceeding in reviewing the Ombudsmans discretion, we have consistently held that **so long as *substantial evidence* supports the Ombudsman's ruling, his decision should stand.** In a criminal proceeding before the Ombudsman, the Ombudsman merely determines whether probable cause exists, *i.e.*, whether there is a *sufficient ground* to engender a well-founded belief that a crime has been committed and that the respondent is *probably guilty* thereof. Probable cause is a reasonable ground of presumption that a matter is, or may be, well founded on such a state of facts in the mind of the prosecutor as would lead a person of ordinary caution and prudence to believe, or entertain an honest or strong suspicion, that a thing is so. As the term itself implies, probable cause is concerned merely with probability and not absolute or even moral certainty; it is merely based on opinion and reasonable belief. On this score, *Galario v. Office of the Ombudsman (Mindanao)* is instructive:
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> > [A] finding of probable cause needs only to rest on evidence showing that *more likely* than not a crime has been committed and there is *enough reason* to believe that it was committed by the accused. **It need not be based on clear and convincing evidence of guilt, neither on evidence establishing absolute certainty of guilt.** A finding of probable cause merely binds over the suspect to stand trial. It is not a pronouncement of guilt. x x x
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> A finding of 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. Precisely, there is a trial for the reception of evidence of the prosecution in support of the charge.
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> x x x x
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> In closing, we reiterate the rule that absent good and compelling reason, the Ombudsmans finding of probable cause or lack thereof deserves great respect from the Court. If it were otherwise, t**he Court would be inundated with innumerable petitions ultimately aimed at seeking a review of the Ombudsman's exercise of discretion on whether to file a**

[3] Id.

[4] 687 Phil. 468 (2012).

> **case in the courts, wreaking havoc to our orderly system of government, based on the principles of separation of powers, and checks and balances. It is only in a clear case of grave abuse of discretion that the Court may properly supplant the Ombudsman's exercise of discretion.**[5] (Citations omitted, emphasis ours, italics and underscoring in the original)

Public Respondent Ombudsman did not commit grave abuse of discretion in finding probable cause against Senator Estrada for the crimes of plunder and Section 3(e) of R.A. No. 3019

In *Gov. Garcia, Jr. v. Office of the Ombudsman, et al.*,[6] the Court explained the concept of probable cause, as follows:

> Probable cause, for the purpose of filing a criminal information, exists when the facts are sufficient to engender a well-founded belief that a crime has been committed and that the respondent is probably guilty thereof. To engender a well-founded belief that a crime has been committed, and to determine if the suspect is probably guilty of the same, the elements of the crime charged should, in all reasonable likelihood, be present. This is based on the principle that every crime is defined by its elements, without which there should be, at the most, no criminal offense.[7] (Citation omitted)

In *Enrile v. People of the Philippines*,[8] the Court enumerated the elements of plunder as follows:

> (1) That the offender is a ***public officer*** who acts ***by himself or in connivance*** with members of his family, relatives by affinity or consanguinity, business associates, subordinates, or other persons;
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> (2) That he amassed, accumulated or ***acquired ill-gotten wealth through a combination or series of the following overt or criminal acts***:
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> (a) through misappropriation, conversion, misuse, or malversation of public funds or raids on the public treasury;
>
> (b) by receiving, directly or indirectly, any commission, gift, share, percentage, kickback or any other form of pecuniary benefits from any person and/or entity in connection with any government contract or project or by reason of the office or position of the public officer concerned;

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[5] Id. at 476-478, 481.
[6] 747 Phil. 445 (2014)
[7] Id. at 459.
[8] 766 Phil. 75 (2015).

c) by the illegal or fraudulent conveyance or disposition of assets belonging to the National Government or any of its subdivisions, agencies or instrumentalities of government-owned or -controlled corporations or their subsidiaries;

(d) by obtaining, receiving or accepting directly or indirectly any shares of stock, equity or any other form of interest or participation including the promise of future employment in any business enterprise or undertaking;

(e) by establishing agricultural, industrial or commercial monopolies or other combinations and/or implementation of decrees and orders intended to benefit particular persons or special interests; or

(f) by taking undue advantage of official position, authority, relationship, connection or influence to unjustly enrich himself or themselves at the expense and to the damage and prejudice of the Filipino people and the Republic of the Philippines; and

(3) That the aggregate amount or total value of the ill-gotten wealth amassed, accumulated or acquired is at least ₱50,000,000.00.[9] (Emphasis in the original)

Meanwhile, the essential elements of Section 3(e) of R.A. No. 3019, are:

1. The accused must be a public officer discharging administrative, judicial or official functions;

2. He must have acted with manifest partiality, evident bad faith or inexcusable negligence; and

3. 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.

In the instant case, I find that the pieces of evidence relied upon by the Ombudsman are sufficient for purposes of establishing probable cause.

Evidently, the facts of this case are identical to *Cambe v. Office of the Ombudsman*,[10] where this Court upheld the March 28, 2014 Resolution of the Ombudsman finding probable cause to indict Senator Ramon "Bong" Revilla Jr. for his alleged involvement in the PDAF scheme. The Court already ruled as to the sufficiency of identical pieces of evidence as to the respondent Senator's purported involvement in the PDAF scheme.

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[9] Id. at 115-116.
[10] G.R. Nos. 212014-15, December 6, 2016, 812 SCRA 537.

The majority in the *Cambe* case deemed the pieces of evidence relied upon by the Ombudsman sufficient to establish a *prima facie* case against the public respondent Senator. It must be noted that the evidentiary bases of the Ombudsman in that case are identical to those mentioned in the instant case. The relevant portions of the Court's discussion in *Cambe* are summarized below:

Evidence	***Court's findings***
1. Luy's business ledgers	Corroborate Luy's testimony that Senator Revilla dealt with Napoles and received kickbacks]
2. COA Report in SAO Report NO. 2012-2013 detailing the irregularities in the PDAF disbursement and Field Investigation Office (FIO) verifications conducted in 2013	*Prima facie* establishes that the implementing agencies not actually implementing the projects and instead directly releasing the funds to the NGOs, at the behest of Senator Revilla
3. Endorsement letters signed by Sen. Bong Revilla asking the Implementing Agencies to release his PDAF to the Napoles identified NGOs	Directly implicates the Senator because all were issued under his authority

In that case, the Court did not stricly apply the rules of evidence and primarily held the whistleblowers' testimonies as sufficient to justify the finding of probable cause against respondent Senator. Specifically, the Court made the following findings:

- The Court deemed sufficient Luy's testimony to implicate respondent Senator despite his admission that sometimes the whistleblowers would forge the signatures of the legislators in the PDAF documents. The Court noted that the "forging"of the PDAF documents would be under the authority and subject to prior agreement between Napoles **and the legislators**. The Court deemed such arrangement favorable to the legislators because it would give them plausible deniability of responsibility.

- The Court rejected the application of the *res inter alios acta* rule, stating that technical rules of evidence should not apply during preliminary investigation. The Court also found that even if the testimonies of Luy etc. were to be deemed hearsay, the same can be considered an exception because they are independently relevant statements.

Considering that the pieces of evidence and the factual antecedents of *Cambe* and the instant case are identical, there is no reason to depart from Our ruling therein.

The dissent of Justice Presbitero J. Velasco, Jr. found public respondent Ombudsman to have committed grave abuse of discretion because the allegation that Senator Estrada colluded with his co-respondents in amassing wealth through illegal disbursement of his PDAF was not grounded on "concrete proof." It found the testimonies of the three whistleblowers, either lacking in credibility or insufficient for purposes of establishing Senator Estrada's purported participation in the illegal PDAF scheme. Specifically, Justice Velasco found the following pieces of evidence unreliable for the following reasons:

Evidence	***Justice Velasco's findings***
4. Luy's business ledgers	Unreliable because Luy himself, in his affidavit, admitted having forged various PDAF documents, including certificate of inspection and acceptance from the office of the proponent or lawmaker.
5. COA Report in SAO Report NO. 2012-2013 detailing the irregularities in the PDAF disbursement and Field Investigation Office (FIO) verifications conducted in 2013	Not material to establish his involvement because he merely identified the projects to be implemented and recommended a project partner. The COA Reports merely stated that the implementing agencies directly released the funds to the NGOS that were selected in violation of public bidding requirements.
6. Endorsement letters signed by Sen. Jinggoy Estrada asking the Implementing Agencies to release his PDAF to the Napoles identified NGOs	Inadequate to presume his involvement in the scheme

Evidently, such findings digress from this Court's findings in *Cambe* with respect to the same pieces of evidence. I am thus constrained to agree with the *ponencia* in upholding the Ombudsman as there appears no logical, nor legal reason to treat Senator Estrada differently.

Echoing my separate concurring opinion in *De Lima v. Guerrero*, owing primarily to the nature of preliminary investigation, and being cognizant of the stage at which the case is currently in, it would be baseless, not to mention unfair, to examine every single piece of evidence presented by the prosecution under the same rules observed during trial.

Senator Estrada's participation in identifying projects for implementation and recommending the project partner facilitates the illegal disbursement of funds

The dissent of Justice Velasco, Jr. downplays Senator Estrada's role in the PDAF scheme by stating that "*his participation was limited to merely identifying the projects to be implemented and recommending its project partner.*" Hence, the ponencia concluded that such act does not support the allegation that Senator Estrada received commissions from Napoles, nor his involvement in the perpertration of irregularities.

It must be noted, however, that the Court, in *Belgica, et al. v. Hon. Exec. Sec. Ochoa, Jr. et al.*,[11] ruled that it is precisely this authority of the legislators to identify the projects for implementation which facilitates the Pork Barrel system. To quote the relevant portion of the Court's discussion in:

> Clearly, these post-enactment measures which govern the areas of project identification, fund release and fund realignment are not related to functions of congressional oversight and, **hence, allow legislators to intervene and/or assume duties that properly belong to the sphere of budget execution. Indeed, by virtue of the foregoing, legislators have been, in one form or another, authorized to participate in** – as *Guingona, Jr.* puts it — "the *various operational aspects of budgeting*," including "*the evaluation of work and financial plans for individual activities*" and the "*regulation and release of funds*" in violation of the separation of powers principle. The fundamental rule, as categorically articulated in *Abakada*, cannot be overstated — *from the moment the law becomes effective, any provision of law that empowers Congress or any of its members to play any role in the implementation or enforcement of the law violates the principle of separation of powers and is thus unconstitutional.* **That the said authority is treated as merely**

[11] 721 Phil. 416 (2013).

> **recommendatory in nature does not alter its unconstitutional tenor since the prohibition, to repeat, covers any role in the implementation or enforcement of the law.** Towards this end, the Court must therefore abandon its ruling in *Philconsa* which sanctioned the conduct of legislator identification on the guise that the same is merely recommendatory and, as such, respondents' reliance on the same falters altogether.
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> Besides, it must be pointed out that respondents have nonetheless failed to substantiate their position that the identification authority of legislators is only of recommendatory import. **Quite the contrary, respondents — through the statements of the Solicitor General during the Oral Arguments — have admitted that the identification of the legislator constitutes a mandatory requirement before his PDAF can be tapped as a funding source,** thereby highlighting the indispensability of the said act to the entire budget execution process[.][12] (Citation omitted, Emphasis in the original, and emphasis ours)

Based from the foregoing, Senator Estrada's identification of a project partner should, at the very least, be treated as a *prima facie* indication of his participation in the PDAF scheme.

To end, the majority's opinion merely touches on the preliminary issue regarding the Ombudsman's purported grave abuse of discretion. Petitioners' innocence or guilt on the charges is yet to be determined during trial. Incidentally, petitioners are not prevented nor estopped from raising the same or similar objections as the ones they stated in these petitions. In any case, as discussed above, the circumstances of the instant case fail to establish that the Ombudsman's acts were exercised in an arbitrary or despotic manner by reason of passion, prejudice, or personal hostility as to satisfy reversal of its assailed Resolution.

Accordingly, I vote to **DISMISS** the petitions.

NOEL GIMENEZ TIJAM
Associate Justice

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EDGAR O. ARICHETA
Clerk of Court En Banc
Supreme Court

[12] Id. at 542-543.