EN BANC

G.R. Nos. 212761-62 ***(Senator Jose "Jinggoy" P. Ejercito Estrada vs. Office of the Ombudsman, Sandiganbayan, Field Investigation Office of the Ombudsman, National Bureau of Investigation, and Atty. Levito D. Baligod);*** **G.R. Nos. 213473-74** ***(John Raymund De Asis vs. Conchita Carpio Morales, in her official capacity as Ombudsman, People of the Philippines, and Sandiganbayan, Fifth Division);*** **and G.R. Nos. 213538-39** ***(Janet Lim Napoles vs. Conchita Carpio Morales, in her official capacity as Ombudsman, People of the Philippines, and Sandiganbayan, Fifth Division)***

Promulgated:

July 31, 2018

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CONCURRING AND DISSENTING OPINION

VELASCO, JR., *J.*:

I join with the majority insofar as it sustained the finding of probable cause against petitioner John Raymund De Asis (De Asis).

I, however, register my dissent from the majority's view that there is probable cause to indict petitioner Senator Jose "Jinggoy" P. Ejercito Estrada (Sen. Estrada).

Factual Antecedents

The National Bureau of Investigation (NBI) and the Field Investigation Office (FIO) of the Office of the Ombudsman (Ombudsman) filed two separate complaints against petitioners for their alleged participation in the so-called Priority Development Assistance Fund (PDAF) scam that exposed the irregular utilization and disbursement of the PDAF of several members of Congress, the Malampaya Fund (Special Account in the General Fund 151), and funds allocated for the procurement of fertilizers, which was purportedly orchestrated by Janet Lim Napoles (Napoles) in connivance with several government and private personalities.

Docketed as OMB-C-C-13-0313 and entitled "*National Bureau of Investigation and Atty. Levito D. Baligod vs. Jose "Jinggoy" P. Ejercito Estrada, et. al.*" (NBI Complaint), the NBI charged Sen. Estrada, his Deputy Chief of Staff, Pauline Therese Mary C. Labayen (Labayen), Alan A. Javellana, Gondelina G. Amata (Amata), Antonio Y. Ortiz, Dennis Lacson Cunanan (Cunanan), Victor Roman Cojamco Cacal, Romulo M. Relevo, Maria Ninez Z. Guañizo, Ma. Julie A. Villaralvo-Johnson, Rhodora Bulatad

Mendoza, Gregoria G. Buenaventura (Buenaventura), Alexis G. Sevidal, Sofia D. Cruz, Chita C. Jalandoni, Francisco B. Figura (Figura), Marivic V. Jover, Mario L. Relampagos (Relampagos), "Leah," "Lalaine," "Malou," Ruby Tuason (Tuason), Mylene T. Encarnacion, John/Jane Does, Napoles, and De Asis, with Plunder, as defined and penalized under Sec. 2[1] in relation to Sec. 1(d), sub pars. (1), (2), and (6)[2] of Republic Act (RA) No. 7080, otherwise known as the "Anti-Plunder Law." The NBI alleged that Sen. Estrada acquired and/or received, on various occasions and in conspiracy with his co-respondents, commissions, kickbacks, or rebates in the total amount of at least ₱183,793,750.00 from projects financed by his PDAF from 2004 to 2012.[3]

Meanwhile, in its complaint docketed as OMB-C-C-13-0397 and entitled "*Field Investigation Office v. Jose "Jinggoy" P. Ejercito Estrada, et. al.*" (FIO Complaint), the FIO charged Sen. Estrada, among others, with violation of Sec. 3(e) of RA No. 3019, otherwise known as the "Anti-Graft and Corrupt Practices Act," and Plunder for purportedly giving unwarranted benefits to Napoles and to several Non-Governmental Organizations (NGOs) that she organized, causing injury to the government in an amount exceeding ₱278,000,000.00. The FIO alleged that the Commission on Audit (COA), in its Special Audit Office Report No. 2012-03 (COA Report), unearthed several irregularities in the disbursement and disposition of the 2007-2009 PDAF releases to certain Implementing Agencies (IAs) which implemented the lawmakers' projects, including those chargeable against the PDAF of Sen. Estrada.

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[1] Section 2. *Definition of the Crime of Plunder; Penalties* - Any public officer who, by himself or in connivance with members of his family, relatives by affinity or consanguinity, business associates, subordinates or other persons, amasses, accumulates or acquires ill-gotten wealth through a combination or series of overt or criminal acts as described in Section 1(d) hereof, in the aggregate amount or total value of at least Seventy-five million pesos (₱75,000,000.00), shall be guilty of the crime of plunder and shall be punished by life imprisonment with perpetual absolute disqualification from holding any public office. Any person who participated with said public officer in the commission of plunder shall likewise be punished. In the imposition of penalties, the degree of participation and the attendance of mitigating and extenuating circumstances shall be considered by the court. The court shall declare any and all ill-gotten wealth and their interests and other incomes and assets including the properties and shares of stock derived from the deposit or investment thereof forfeited in favor of the State.

[2] Section 1. *Definition of Terms* - As used in this Act, the term – x x x

d) Ill-gotten wealth means any asset, property, business enterprise or material possession of any person within the purview of Section Two (2) hereof, acquired by him directly or indirectly through dummies, nominees, agents, subordinates and/or business associates by any combination or series of the following means or similar schemes:

1) Through misappropriation, conversion, misuse, or malversation of public funds or raids on the public treasury;

2) By receiving, directly or indirectly, any commission, gift, share, percentage, kickbacks or any other form of pecuniary benefit 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;

x x x

6) 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.

[3] *Rollo*, pp. 94, 246.

Among those charged in the NBI Complaint is De Asis, the driver/messenger/janitor of Napoles during the time material to the complaint, and president of Kaupdanan Para sa Mangunguma Foundation, Inc. (KPMFI), one of the NGOs identified with Napoles. The charge against De Asis stemmed from his alleged assistance in the fraudulent processing and releasing of the PDAF funds to the Napoles NGOs.

On November 19 and 29, 2013, the Ombudsman issued Orders directing the petitioners and their co-respondents in the complaints to submit their counter-affidavits. In compliance therewith, Sen. Estrada submitted his Counter-Affidavit[4] to the NBI Complaint on January 8, 2014, and his Counter-Affidavit[5] to the FIO Complaint on January 16, 2014. De Asis, for his part, failed to submit his counter-affidavit to the NBI Complaint. The petitioners' co-respondents[6] filed their respective counter-affidavits between December 9, 2013 and March 14, 2014.

Refuting the charges levelled against him, Sen. Estrada denied having received, directly or indirectly, any amount from Napoles, or any person associated with her, or an NGO owned or controlled by her, and having amassed, accumulated, or acquired ill-gotten wealth. He similarly controverted the allegation that he had any knowledge or participation in the transfer of any amount from his PDAF to anyone other than the legally intended recipients or beneficiaries thereof.[7]

Thereafter, upon receiving information from the media that some of the respondents implicated him in the PDAF scam in their respective counter-affidavits, Sen. Estrada filed a request[8] to be furnished with copies of the counter-affidavits of Tuason, Cunanan, Amata, and Relampagos, as well as any filing submitted by all the other respondents and/or additional witnesses of the complainants. The Ombudsman denied the request in its March 27, 2014 Order.[9] In response, Sen. Estrada questioned its denial in a Petition for *Certiorari* before this Court, docketed as G.R. Nos. 212140-41.

On March 28, 2014, the Ombudsman issued a Joint Resolution[10] finding probable cause to charge petitioners and several other respondents in the NBI and FIO Complaints for one (1) count of Plunder and eleven (11) counts of violation of Sec. 3 (e) of R.A. No. 3019.

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[4] Id. at 737-776.
[5] Id. at 777-821.
[6] These are Tuason, Amata, Buenaventura, Sevidal, Cruz; Sucgang, Javellana, Cacal, Villaralvo-Johnson, Mendoza, Guañizo, Cunanan, Jover, Figura, Nuñez, Paule, Bare, and Relampagos.
[7] *Rollo*, p. 783, p. 7 of Counter Affidavit.
[8] Id. at 822-828.
[9] Id. at 829-832.
[10] Id. at 66-187.

The scheme purportedly used in the anomalous utilization of the PDAF is outlined in the adverted Joint Resolution in this wise:

> The scheme commences when Napoles first meets with a legislator and offers to "acquire" his or her PDAF allocation in exchange for a "commission" or kickback amounting to a certain percentage of the PDAF.
>
> Once an agreement is reached, Napoles would then advance to the legislator a down payment representing a portion of his or her kickback. The legislator would then request the Senate President or the House Speaker, as the case may be, for the immediate release of his or her PDAF. The Senate President or Speaker would then indorse the request to the [Department of Budget and Management (DBM)]. This initial letter-request to the DBM contains a program or list of IAs and the amount of PDAF to be released in order to guide the DBM in its preparation and release of the corresponding SARO.
>
> The kickbacks, around 50% of the PDAF amount involved, are received by legislators personally or through their representatives, in the form of cash, fund transfer, manager's check or personal check issued by Napoles.
>
> After the DBM issues the SARO representing the legislator's PDAF allocation, the legislator would forward a copy of said issuance to Napoles. She, in turn, would remit the remaining portion of the kickback due the legislator.
>
> The legislator would then write another letter addressed to the IAs which would identify his or her preferred NGO to undertake the PDAF-funded project. However, the NGO chosen by the legislator would be among those organized and controlled by Janet Napoles. These NGOs were, in fact, specifically set up by Napoles for the purpose.
>
> Upon receipt of the SARO, Napoles would direct her staff, at the time material to these cases, including witnesses Benhur Luy (Luy), Marina Sula (Sula) and Merlina Suñas (Suñas), to prepare the PDAF documents for the approval of the legislator. These documents reflect, among other things, the preferred NGO to implement the undertaking, the project proposals by the identified NGO/s; and [e]ndorsement letters to be signed by the legislator and/or his staff. Once signed by the legislator or his/her authorized staff, the PDAF documents are transmitted to the IA, which, in turn, handles the preparation of the MOA relating to the project to be executed by the legislator's office, the IA and the chosen NGO.
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> The projects are authorized as eligible under the DBM's menu for pork barrel allocations. Note that the NGO is directly selected by the legislator. No public bidding or negotiated procurement takes place in violation of RA 9184 or the Government Procurement Reform Act.
>
> Napoles, through her employees, would then follow up the release of the NCA with the DBM.
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> After the DBM releases the NCA to the IA concerned, the IA would expedite the processing of the transaction and the release of the

> corresponding check representing the PDAF disbursement. Among those tasked by Napoles to pick up the checks and deposit the same to bank accounts in the name of the NGO concerned were witnesses Luy and Suñas as well as respondent De Asis.
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> Once the funds are deposited in the NGO's account, Napoles would then call the bank to facilitate the withdrawal thereof. Her staff would then withdraw the funds and remit the same to her, thereby placing said amount under Napoles' full control and possession.
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> To liquidate the disbursements, Napoles and her staff would then manufacture fictitious lists of beneficiaries, liquidation reports, inspection reports, project activity reports and similar documents that would make it appear that, indeed, the PDAF[-]related project was implemented.[11]

Based from the foregoing, the Ombudsman concluded that petitioners conspired with Napoles, DBM personnel, and the heads of the National Agribusiness Corporation (NABCOR), National Livelihood Development Corporation (NLDC), and Technology Resource Center (TRC)—government agencies tasked with the implementation of the lawmakers' projects—in amassing ill-gotten wealth by diverting the PDAF of Sen. Estrada from its intended project recipients to NGOs controlled by Napoles. Sen. Estrada, in particular, purportedly took advantage of his official position and amassed, accumulated, and acquired ill-gotten wealth by receiving money from Napoles in the amount of ₱183,793,750.00 in exchange for endorsing her NGOs to the IAs of his PDAF-funded projects. The endorsement, in turn, permitted Napoles to gain access to public funds. The collective acts of Sen. Estrada, Napoles, and their cohorts, according to the Ombudsman, enabled public funds to be illegally diverted for their own personal use.[12]

De Asis, for his part, allegedly participated in the conspiracy by facilitating the transfer of the checks from the IAs and depositing the same to the bank accounts of the Napoles NGOs.

Petitioners separately moved for the reconsideration of the Joint Resolution. Pending resolution of the motion, the Ombudsman issued a Joint Order[13] dated May 7, 2014 allowing Sen. Estrada to be furnished with copies of the requested counter-affidavits and enjoining him to file his comment thereon within a non-extendible period of five (5) days from receipt of the affidavits.

Due to the pendency of G.R. Nos. 212140-41 before Us, Sen. Estrada sought to suspend the proceedings in OMB-CC-13-0313 and OMB-C-C-13-0397 until the case has been resolved with finality. The Ombudsman denied the motion and refused to suspend the proceedings in an Order[14] dated May

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[11] Id. at 119-122.
[12] Id. at 123, 127, 150-151.
[13] Id. at 859-860.
[14] Id. at 1639-1642.

15, 2014. The motion for the reconsideration of the said order was similarly denied in an Ofrder[15] dated June 3, 2014.

The Ombudsman then issued a Joint Order[16] dated June 4, 2014 denying petitioners' motions for the reconsideration of the Joint Resolution dated March 28, 2014. The Joint Order effectively rejected petitioners' contention that they were denied due process for failure to be furnished copies of their co-respondents' counter-affidavits. The Ombudsman insists that, upon re-evaluation of Sen. Estrada's request, he was eventually furnished with copies of the requested counter-affidavits and given ample time to formally respond to his co-respondents' claims.

Following the denial of the petitioners' motions for reconsideration, the Ombudsman filed several Informations[17] before the Sandiganbayan, charging petitioners with one (1) count of Plunder and eleven (11) counts of violation of Sec. 3 (e) of R.A. No. 3019.

Petitioners now come before this Court, seeking redress from the March 28, 2014 Joint Resolution and June 4, 2014 Joint Order of the Ombudsman and praying for this Court to: 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, issued, promulgated, and/or filed as a result of such challenged issuances, and from issuing any warrants of arrest 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 proceedings in OMB-C-C-13-0313 and OMB-C-C-13-0397; 3) render judgment declaring Sen. Estrada as having been denied due process of law and equal protection of the laws; and 4) consequently declare the Joint Resolution and Order null and void.

Issues

I.

Whether or not the Ombudsman committed grave abuse of discretion in refusing to furnish Sen. Estrada copies of his co-respondents' counter-affidavits prior to resolving the preliminary investigation, in violation of his right to due process; and

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[15] Id. at

[16] Id. at 188-232.

[17] Docketed as Crim. Case Nos. SB14CRM0256, SB14CRM0257, SB14CRM0258, SB14CRM0259, SB14CRM0260, SB14CRM0261, SB14CRM0262, SB14CRM0263, SB14CRM0264, SB14CRM0265, SB14CRM0266; id. at 1656-1691.

II.

Whether or not the Ombudsman committed grave abuse of discretion amounting to lack or excess of jurisdiction in finding probable cause to indict petitioners for Plunder and violation of Sec. 3(e) of RA 3019.

Discussion

At the outset, the Ombudsman is given wide latitude, in the exercise of its investigatory and prosecutory powers, to prosecute offenses involving public officials and employees, pursuant to Sec. 15[18] of RA No. 6770, otherwise known as the Ombudsman Act of 1989. As such, the Ombudsman possesses the authority to determine whether probable cause exists or not in a given set of facts and circumstances that would warrant the filing of a criminal case against erring government employees.[19]

This rule, nevertheless, is not without exception. Under the mantle of its power of judicial review, this Court may inquire into the propriety of, and intervene with, the Ombudsman's findings and conclusions to determine whether its determination of probable cause has been gravely abused.[20] This is buttressed by Our pronouncement in *Aguilar v. Department of Justice*, wherein the Court underscored this particular exception to the prosecutor's exclusive prerogative:

> A public prosecutor's determination of probable cause - that is, one made for the purpose of filing an information in court - is essentially an executive function and, therefore, generally lies beyond the pale of judicial scrutiny. The exception to this rule is when such determination is tainted with grave abuse of discretion and perforce becomes correctible through the extraordinary writ of *certiorari.* It is fundamental that the concept of grave abuse of discretion transcends mere judgmental error as it properly pertains to a jurisdictional aberration.[21]

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[18] As mandated under in Section 15 of [RA] No. 6770, otherwise known as the Ombudsman Act of 1989:

Sec. 15. Powers, Functions and Duties. - The Office of the Ombudsman shall have the following powers, functions and duties:

(1) Investigate and prosecute on its own or on complaint by any person, any act or omission of any public officer or employee, office or agency, when such act or omission appears to be illegal, unjust, improper or inefficient. It has primary jurisdiction over cases cognizable by the Sandiganbayan and, in the exercise of this primary jurisdiction, it may take over, at any stage, from any investigatory agency of government, the investigation of such cases.

[19] *Joson v. Office of the Ombudsman*, G.R. Nos. 210220-21, April 6, 2016, 788 SCRA 647, 658.

[20] Section 1, Article VIII of the Constitution states: Section 1. The judicial power shall be vested in one Supreme Court and in such lower courts as may be established by law.

Judicial power includes the duty of the courts of justice to settle actual controversies involving rights which are legally demandable and enforceable, and to determine whether or not there has been a grave abuse of discretion amounting to lack or excess of jurisdiction on the part of any branch or instrumentality of the Government.

[21] G.R. No. 197522, September 11, 2013, 705 SCRA 629, 638.

Certainly, a public prosecutor's determination of probable cause – that is, one made for the purpose of filing an information in court – is essentially an executive function and, therefore, generally lies beyond the pale of judicial scrutiny. By way of exception, however, judicial review is allowed where the petitioner has clearly established that the prosecutor committed grave abuse of discretion. Grave abuse of discretion implies a capricious and whimsical exercise of judgment tantamount to lack of jurisdiction.

In the extant case, the Court is asked, did the Ombudsman, in the exercise of its prosecutorial power, gravely abuse its discretion and acted beyond the bounds of its jurisdiction? Specifically, did the Ombudsman act in an arbitrary, capricious, whimsical, or despotic manner in determining the existence of probable cause against the petitioners, such that it amounted to an evasion of or virtual refusal to perform a duty enjoined by law?

Sec. 1, Rule 112, Rules of Court defines preliminary investigation as "an inquiry or proceeding to determine whether sufficient ground exists to engender a well-founded belief that a crime has been committed, that the respondent is probably guilty of this crime, and should be held for trial." Otherwise stated, the prosecution determines during preliminary investigation whether probable cause exists to indict the respondents therein for the crime charged.

The significance of a preliminary investigation cannot be gainsaid. Preliminary investigation, although an executive function, is part of a criminal proceeding[22] conducted not only to prosecute the guilty, but to protect the innocent from the embarrassment, expense and anxiety of a public trial. It is the crucial sieve in the criminal justice system which spells for an individual the difference between months, if not years, of agonizing trial and possibly jail term, on the one hand, and peace of mind and liberty, on the other.[23] More than a tool for prosecution, jurisprudence lays down another more significant objective and purpose of a preliminary investigation. In *People v. Yecyec*,[24] the Court explained that preliminary investigations are designed to exculpate the respondents from the difficulties of a formal trial, unless and until the probability of his or her guilt for the crime charged has been reasonably established:

> The **primary objective of a preliminary investigation is to free respondent from the inconvenience, expense, ignominy and stress of defending himself/herself in the course of a formal trial, until the reasonable probability of his or her guilt in a more or less summary proceeding by a competent office designated by law for that purpose**. Secondarily, such summary proceeding also protects the state from the

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[22] *Heirs of Federico C. Delgado v. Gonzalez*, G.R. No. 184337, August 7, 2009, 595 SCRA 501, 522.

[23] *Arroyo v. Department of Justice*, G.R. No. 199082, September 18, 2012, 681 SCRA 181, 232, citing *Ladlad v. Velasco*, G.R. Nos. 170270-72, June 1, 2007, 523 SCRA 318, 344.

[24] G.R. No. 183551, November 12, 2014, 734 SCRA 719, 730-731, citing *Ledesma v. Court of Appeals*, 344 Phil. 207, 226, 227 (1997).

> burden of the unnecessary expense [for] an effort in prosecuting alleged offenses and in holding trials arising from false, frivolous or groundless charges. (Emphasis supplied)

Thus, the Court has characterized the right to a preliminary investigation as not a mere formal or technical right but a substantive one, forming part of due process in criminal justice.[25] Accordingly, preliminary investigations should be scrupulously conducted not only to protect the constitutional right to liberty of a potential accused from any material damage,[26] but also to protect the State from the burden of unnecessary expenses in prosecuting and trying cases arising from false, fraudulent or groundless charges.[27]

The foregoing disquisition sheds light on the issue of whether the Ombudsman gravely abused its discretion in issuing the Joint Resolution and Joint Order finding probable cause against the petitioners and holding them for trial for plunder and graft and corruption.

G.R. Nos. 212761-62 (Sen. Estrada)

Sen. Estrada seeks to invalidate the Joint Resolution and Joint Order of the Ombudsman for being issued with grave abuse of discretion, following the supposed transgression of his right to due process of law during preliminary investigation. He laments that he was denied due process when the Ombudsman failed to furnish him with copies of the counter-affidavits of his co-respondents *prior* to the resolution of the preliminary investigation. This denial, according to the Senator, violated his right to be fully informed of, and to effectively respond to, the allegations regarding his supposed participation in the PDAF scam.

In addition, Sen. Estrada asserts that there is no admissible nor reasonable evidence that proves that he acquired, amassed, or accumulated ill-gotten wealth from illegal activities, or that he instructed anyone to divert public funds for his personal use.[28] Invoking the doctrine of *res inter alios acta*, he further contends that he cannot be bound by the actions and utterances of his co-respondents and the whistleblowers Luy, Suñas, and Sula; thus, their testimonies, upon which the Ombudsman based its findings of probable cause, cannot be utilized against him. Consequently, he maintains that the public respondent has not sufficiently established all the elements of Plunder or of violation of Sec. 3(e) of RA No. 3019 and that his indictment was merely meant to harass and persecute members of the past administration's political opposition. This pernicious design is purportedly evidenced by the Ombudsman's intentional refusal to investigate or file charges against the political allies of the past administration who were also

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[25] *Maza v. Gonzalez*, G.R. Nos. 172074-76, June 1, 2007, 523 SCRA 318, 344.
[26] *Webb v. De Leon*, 317 Phil. 759, 803 (1995).
[27] *Cam v. Casimiro*, G.R. No. 184130, June 29, 2015, 760 SCRA 467, 480.
[28] *Rollo*, p. 20.

mentioned in the COA Report,[29] as well as the testimony of one Rodante Berou, an agent of the NBI who testified in Criminal Case Nos. SB14CRM0256 to 0266 that the members of the bureau were instructed to be selective in their investigation of the PDAF Scam. Public respondent's selective prosecution, Sen. Estrada asserts, violated his constitutional right to equal protection of the laws and constituted a grave abuse of its discretion which amounted to lack or excess of jurisdiction.[30]

The Ombudsman's denial in its March 27, 2014 Order of Sen. Estrada's request did not constitute grave abuse of discretion

The issue of whether the Ombudsman gravely abused its discretion in failing to furnish Sen. Estrada with copies of his co-respondents' counter-affidavits had been sufficiently settled in this Court's Decision[31] in G.R. Nos. 212140-41.

There, the majority discussed the absence of law or rule requiring the investigating officer to furnish the respondent with copies of the affidavits of his co-respondents. As stated in Section 3(b),[32] Rule 112 of the Revised Rules of Criminal Procedure, the right of the respondent is only limited to examining the evidence submitted by the *complainant*. Neither the Revised Rules of Criminal Procedure nor the Revised Rules of Procedures of the Office of the Ombudsman require the investigating officer to furnish the respondent with copies of the affidavits of his or her co-respondents.[33]

Furthermore, following Our pronouncement in *Paderanga v. Drilon*,[34] the Court reiterated that the accused in a preliminary investigation has no right to cross-examine the witnesses whom the complainant may present. Section 3, Rule 112 of the Rules of Court is clear in that the accused only has the right 1) to submit a counter-affidavit, 2) to examine all other evidence *submitted by the complainant* and, 3) where the fiscal sets a hearing to propound clarificatory questions to the parties or their witnesses,

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[29] Second Supplement to the Petition, p. 2.

[30] Id. at 6.

[31] Promulgated on January 21, 2015, 748 SCRA 1.

[32] Section 3. *Procedure.* — The preliminary investigation shall be conducted in the following manner: x x x

(b) Within ten (10) days after the filing of the complaint, the investigating officer shall either dismiss it if he finds no ground to continue with the investigation, or issue a subpoena to the respondent attaching to it a copy of the complaint and its supporting affidavits and documents.

x x x

The respondent shall have the right to examine the evidence submitted by the complainant which he may not have been furnished and to copy them at his expense. If the evidence is voluminous, the complainant may be required to specify those which he intends to present against the respondent, and these shall be made available for examination or copying by the respondent at his expense.

Objects as evidence need not be furnished a party but shall be made available for examination, copying, or photographing at the expense of the requesting party.

[33] *Estrada v. Office of the Ombudsman*, supra note 31, at 37.

[34] 273 Phil. 290, 299 (1991).

to be afforded an opportunity to be present but without the right to examine or cross-examine.[35]

As this Court's pronouncement in G.R. Nos. 212140-41 has already attained finality, the same constitutes *stare decisis* as regards the first issue herein raised and can no longer be disturbed.

The evidence adduced is insufficient to sustain a prima facie case against Sen. Estrada for Plunder and violation of Sec. 3(e) of RA No. 3019

Probable cause, for purposes of filing a criminal information in court, is defined under case law as "such facts as are sufficient to engender a well-founded belief that a crime has been committed and that respondents are probably guilty thereof."[36] It is such set of facts and circumstances which would lead a reasonably discreet and prudent man to believe that the offense charged in the Information, or any offense included therein, has been committed by the person sought to be arrested.[37] A finding of probable cause needs only to rest on evidence showing that, more likely than not, a crime has been committed by the suspects. It need not be based on clear and convincing evidence of guilt, not on evidence establishing guilt beyond reasonable doubt, and definitely not on evidence establishing absolute certainty of guilt.[38]

Certainly, prosecutors are given a wide latitude of discretion in determining whether an information should be filed in court or whether the complaint should be dismissed,[39] and the courts must respect the exercise of such discretion when the information filed against the person charged is valid on its face, and that no manifest error or grave abuse of discretion can be imputed to the public prosecutor.[40] It is for this reason that Sen. Estrada's asseveration of political persecution has no leg to stand on. Before such a claim may prosper, it must be proved that the public prosecutor – the Ombudsman, in this case – employed bad faith in prosecuting the case, or that it has employed schemes that lead to no other purpose than to place Sen. Estrada in contempt and disrepute.[41] I do not find such malevolent designs in the case at bar.

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[35] *Estrada v. Office of the Ombudsman*, supra note 31, at 40.

[36] *People v. Borje, Jr.*, G.R. No. 170046, December 10, 2014, 744 SCRA 399, 409; *Aguilar v. Department of Justice*, supra note 23, at 639-640.

[37] *Kalalo v. Office of the Ombudsman*, G.R. No. 158189, April 23, 2010, 619 SCRA 141, 148. citing *Advincula v. Court of Appeals*, G.R. No. 131144, October 18, 2000, 343 SCRA 583, 589-590.

[38] *Reyes v. Pearlbank Securities, Inc.*, G.R. No. 171435, July 30, 2008, 560 SCRA 518.

[39] *De Lima v. Reyes*, G.R. No. 209330, January 11, 2016, 779 SCRA 1, 27, citing *Crespo v. Mogul*, 235 Phil. 465 (1987)

[40] *People of the Philippines v. Castillo*, G.R. No. 171188, June 19, 2009, 590 SCRA 95, citing *Schroeder v. Saldevar*, G.R. No. 163656, April 27, 2007, 522 SCRA 624

[41] *Paredes, Jr. v. Sandiganbayan*, G.R. No. 108251, January 31, 1996, 252 SCRA 641, citing *Dimayuga v. Fernandez*, 43 Phil 304, 306-307 (1922).

Nevertheless, *Ang-Abaya v. Ang*[42] emphasizes that for the public prosecutor to determine that there exists a probable cause, **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**. Hence, it behooves the Ombudsman to maintain a level of certainty that the elements of the crimes charged are extant based on the facts and evidence gathered, and that the respondents are the ones who may be criminally liable therefor. To this end, the Court in *Salapuddin v. Court of Appeals*[43] instructs that, even during preliminary investigations, the investigating prosecutors are required to thoroughly evaluate the evidence before them to ensure that neither the State nor the accused would be burdened with unnecessary and frivolous suits, thus:

> Hence, even at this stage, the investigating prosecutors are duty-bound to sift through all the documents, objects, and testimonies to determine what may serve as a relevant and competent evidentiary foundation of a possible case against the accused persons. They cannot defer and entirely leave this verification of all the various matters to the courts. Otherwise, the conduct of a preliminary investigation would be rendered worthless; the State would still be forced to prosecute frivolous suits and innocent men would still be unnecessarily dragged to defend themselves in courts against groundless charges. Indeed, while prosecutors are not required to determine the rights and liabilities of the parties, a preliminary investigation still constitutes a realistic judicial appraisal of the merits of the case so that the investigating prosecutor is not excused from the duty to weigh the evidence submitted and ensure that what will be filed in court is only such criminal charge that the evidence and inferences can properly warrant.

In the case at bench, the Ombudsman primarily based its conclusion that Sen. Estrada agreed with Napoles to funnel his PDAF to her NGOs in exchange for commissions corresponding to a percentage of the amounts disbursed to her on the statements of the three whistleblowers, along with that of Tuason, Cunanan, Amata, Buenaventura, Figura, and Relampagos, not on any concrete, much less written proof of such agreement or contract.

I submit that the adverted statements are insufficient to support such conclusion for being inadmissible in evidence.

First, under Sec. 28,[44] Rule 130 of the Rules of Court, the rights of a party cannot be prejudiced by an act, declaration, or omission of another. Consequently, **an extrajudicial confession is binding only on the confessant and is not admissible against his or her co-accused because it is considered as hearsay against them**.[45] This rule, otherwise known as

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[42] G.R. No. 178511, December 4, 2008, 573 SCRA 129, 143.

[43] G.R. No. 184681, February 25, 2013, 691 SCRA 578, 599.

[44] Section 28. *Admission by third party.* — The rights of a party cannot be prejudiced by an act, declaration, or omission of another, except as hereinafter provided.

[45] *People v. Cachuela*, G.R. No. 191752, June 10, 2013.

res inter alios acta, is based on the tenet that it is manifestly unjust and inconvenient if a person should be bound by the acts of mere unauthorized strangers; thus, if a party ought not to be bound by the acts of strangers, neither ought their acts or conduct be used as evidence against him.[46]

Admittedly, the *res inter alios acta* rule admits of certain exceptions, such as the rule on the admissions by conspirators under Sec. 29,[47] Rule 130. Nevertheless, in order that the admission of a conspirator may be received as evidence against his co-conspirator, it is necessary that *first*, the conspiracy be first proved by evidence other than the admission itself; *second*, the admission relates to the common object; and *third*, it has been made while the declarant was engaged in carrying out the conspiracy.[48]

It is, therefore, indispensable that the conspiracy must first be established by evidence of intentional participation in the transaction with a view to the furtherance of the common design or purpose.[49] As the Court stressed in *People v. Furugganan*,[50] "conspiracy must be established, not by conjectures, but by positive and conclusive evidence. In fact, the same degree of proof necessary to establish the crime is required to support a finding of the presence of a criminal conspiracy, which is, proof beyond reasonable doubt."

Here, no competent and independent evidence, other than the bare statements and admissions of Sen. Estrada's co-respondents, has been presented to establish conspiracy, among others, and his complicity therein. While the Ombudsman adduced evidence to support the scheme described by the whistleblowers, *i.e.*, a) Luy's business ledgers, b) the 2007-2009 COA Report which detailed the irregularities in the disbursement of the PDAF of several lawmakers from 2007-2009, and c) the independent field verifications conducted in 2013 by the FIO,[51] the same does not sufficiently establish Sen. Estrada's participation in the purported conspiracy.

In his *Sinumpaang Salaysay*[52] dated September 12, 2013, Luy himself admitted having forged various PDAF documents, such as the liquidation papers, certificate of inspection and acceptance from the office of the proponent or lawmaker, among others:

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[46] *People v. Tena*, G.R. No. 100909, October 21, 1992 (citations omitted).

[47] Section 29. *Admission by co-partner or agent.*— The act or declaration of a partner or agent of the party within the scope of his authority and during the existence of the partnership or agency, may be given in evidence against such party after the partnership or agency is shown by evidence other than such act or declaration. The same rule applies to the act or declaration of a joint owner, joint debtor, or other person jointly interested with the party.

[48] *People v. Bokingo*, G.R. No. 187536, August 10, 2011, 655 SCRA 313, 333.

[49] *Medija, Jr. v. Sandiganbayan (First Div.)*, 291 Phil. 236, 241 (1993).

[50] 271 Phil. 496, 507 (1991).

[51] *Rollo*, p. 126.

[52] Id. at 598-631.

116. T: May iba pa ba kayong gagawin maliban sa report of disbursement patungkol sa liquidation?

S: Mayroon pa po. Pini-prepare din yung list of beneficiaries, certificate of inspection and acceptance coming from the office ng proponent or legislators, certificate of project completion, delivery receipts, sales invoice, official receipts from the supplier, independent auditor's report, accomplishment report, at pictures ng implementation kung mayroong implementation. Kung wala pong implementation, wala po kaming i-attach na pictures. At sa mga nasabing mga dokumento na kailangan ang pirma ng legislators, may mga panahon po na kami na ang pumipirma sa mga pangalan ng mga Chief of Staff ng mga legislators o sa pangalan ng iilang Congressman sa utos ni Madame Janet Lim Napoles.

117. T: Nabanggit mo na may mga panahon na kayo ang pumipirma sa pangalan ng mga Chief of Staff ng mga legislators or sa pangalan ng iilang Congressman, ano ang ibig sabihin dito at sinu-sino ang mga kasama mong pumipirma?

S: Kapag kami ay nagli-liquidate at may mga dokumento na kailangan ang pirma ng Chief of Staff ng mga legislators o ng Congressman ay kami na po ang pumipirma para sa kanila sa utos po ni Madame Janel Lim Napoles. Ang mga kasama ko po na pumipirma sa mga nasabing dokumento ay sila Evelyn de Leon, at Merlina Suñas.[53]

The admission of falsification of PDAF-related documents casts serious doubt on the credibility of the documents proffered by the whistleblowers, including Luy's ledger, which the Ombudsman relied upon as presumptive proof of Sen. Estrada's receipt of commissions from the PDAF in the amount of ₱183,793,750.00.

The endorsement letters, which ostensibly show Sen. Estrada's instructions to the IAs to have his PDAF-funded projects implemented by Napoles' NGOs and consequently enabled the latter to divert the funds to her own personal use, are likewise inadequate to presume his involvement in the scheme.

As stated by the Ombudsman, the IAs were mandated to comply with the guidelines set forth in National Budget Circular (NBC) No. 476[54] and Sec. 53.11[55] of the Revised Implementing Rules and Regulations of the R.A. No. 9184, otherwise known as the Government Procurement Reform Act (GPRA), in the implementation of government projects, particularly those

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[53] Id. at 618-619.

[54] Otherwise known as "Guidelines for the Release and Utilization of the PDAF for FY 2001 and thereafter."

[55] 53.11. NGO Participation.

When an appropriation law or ordinance earmarks an amount to be specifically contracted out to Non-Governmental Organizations (NGOs), the procuring entity may enter into a Memorandum of Agreement with an NGO, subject to guidelines to be issued by the GPPB.

with NGO participation. Sen. Estrada did not have the authority to compel or direct the heads of the IAs on the manner of implementation of his PDAF projects. Hence, the accountability for any irregularities on the implementation of the projects, including the contracting of NGOs and disbursement of funds, falls on the IAs and cannot be attributed to Sen. Estrada.

With respect to the COA Report and FIO verifications, it was determined in these reports that the IAs directly released the funds to the NGOs that were selected without compliance with COA Circular No. 2007-001 and GPPB Resolution No. 12-2007, and that the PDAF projects implemented by some lawmakers are ghost or inexistent. The same, however, does not adequately support the allegation that Sen. Estrada received commissions from Napoles, nor his involvement in the perpetration of these irregularities. His participation was limited to merely identifying the projects to be implemented and recommending its project partner.

Anent the requirement that the statements and admissions of the conspirators must have been made during the existence of the conspiracy to be admissible against the co-conspirators, the same does not obtain in this case. The statements of the whistleblowers, **as well as of Tuason, Cunanan, Relampagos, Buenaventura, Amata, and Figura, were evidently made long after the supposed conspiracy ceased. At any rate, there are no allegations that such statements were made by the affiants during the existence of the conspiracy**.

Tuason, Cunanan, Relampagos, Amata, Buenaventura, and Figura are similarly charged with Sen. Estrada for purportedly conspiring with Napoles in furthering the PDAF scam. Considering that the alleged conspiracy has not been sufficiently proved by independent evidence, the statements of Sen. Estrada's co-respondents respecting his complicity in the PDAF scam are inadmissible against him as mere hearsay.

Second, the allegations fail to show that Sen. Estrada indeed diverted public funds amounting to at least ₱50,000,000.00 for his own personal use in conspiracy with his co-respondents, nor that he caused the disbursement of his PDAF to the Napoles NGOs through illegal means.

To reiterate, the elements of the crime charged should in all likelihood be present in order to engender the well-founded belief that a crime has been committed. This rule is based on the principle that every crime is defined by its elements, without which there should be – at the most – no criminal offense.[56]

The crime of Plunder is defined under Sec. 2 of R.A. 7080 in the following wise:

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[56] *Ang-Abaya v. Ang*, supra note 42.

> Sec. 2. Definition of the Crime of Plunder; Penalties. - Any public officer who, by himself or in connivance with members of his family, relatives by affinity or consanguinity, business associates, subordinates or other persons, amasses, accumulates or acquires ill-gotten wealth through a combination or series of overt criminal acts as described in Section 1 (d) hereof in the aggregate amount or total value of at least Fifty million pesos (₱50,000,000.00) shall be guilty of the crime of plunder and shall be punished by *reclusion perpetua* to death. Any person who participated with the said public officer in the commission of an offense contributing to the crime of plunder shall likewise be punished for such offense. In the imposition of penalties, the degree of participation and the attendance of mitigating and extenuating circumstances, as provided by the Revised Penal Code, shall be considered by the court. The court shall declare any and all ill-gotten wealth and their interests and other incomes and assets including the properties and shares of stocks derived from the deposit or investment thereof forfeited in favor of the State.

To constitute the crime of plunder, the following elements must be alleged and established:

> 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;
>
> 2. That the offender amasses, accumulates or acquires ill-gotten wealth through a combination or series of the following overt or criminal acts:
>
> (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;
>
> (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 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 P50,000,000.00.[57]

On the other hand, a prosecution for violation of Sec. 3 (e)[58] of RA No. 3019 requires the concurrence of the following elements: (a) the offender must be a public officer discharging administrative, judicial, or official functions; (b) he must have acted with manifest partiality, evident bad faith or gross inexcusable negligence; and (c) his action caused any undue injury to any party, including the government, or gave any private party unwarranted benefits, advantage or preference in the discharge of his functions.[59] Thus, Sec. 3 (e) of RA No. 3019 states:

> (e) Causing any undue injury to any party, including the Government, or giving any private party any unwarranted benefits, advantage or preference in the discharge of his official administrative or judicial functions through manifest partiality, evident bad faith or gross inexcusable negligence. This provision shall apply to officers and employees of offices or government corporations charged with the grant of licenses or permits or other concessions.

The paucity of evidence establishing the elements of the crimes charged is glaring in the present case.

The *corpus delicti* of plunder is the amassment, accumulation or acquisition of ill-gotten wealth valued at not less than ₱50,000,000.00.[60] Yet, there is no evidence pointing to the fact that Sen. Estrada indeed received such amount through illegal means. Tuason's testimony, which the Ombudsman repeatedly relied on to create a direct link between Napoles and Sen. Estrada and to prove his receipt of commissions from her, failed to categorically establish such fact. In the same vein, Luy himself cannot personally attest to the purported delivery of money to Sen. Estrada, as borne by his statements in his *Sinumpaang Salaysay* dated September 12, 2013:

> 67. T: Mayroon bang pagkakataon na ikaw mismo ay nakapagbigay ng pera na "rebates" ng transaction sa Senador o Congressman o sa kung sino mang representative ng pulitiko?

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[57] *Macapagal-Arroyo v. People of the Philippines*, G.R. No. 220598, July 19, 2016, 797 SCRA 241, 329-330.

[58] Section 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

(e) Causing any undue injury to any party, including the Government, or giving any private party any unwarranted benefits, advantage or preference in the discharge of his official administrative or judicial functions through manifest partiality, evident bad faith or gross inexcusable negligence. This provision shall apply to officers and employees of offices or government corporations charged with the grant of licenses or permits or other concessions.

[59] *Garcia v. Office of the Ombudsman*, G.R. No. 197567, November 19, 2014, 741 SCRA 172, 184-185, citing *Lihaylihay v. People*, G.R. No. 191219, July 31, 2013, 702 SCRA 755.

[60] *Macapagal-Arroyo v. People of the Philippines*, supra note 57, at 330.

> S: Opo. Sa mga Chief-of-Staff ng mga Senador at sa mga Congressman mismo ay nakapag-abot na po ako ng personal. Pero sa mga Senador po ay wala pong pagkakataon na ako mismo ang nag-abot. **Naririnig ko lang kay Madame JANET LIM NAPOLES na nagbibigay daw siya sa mga Senador.**[61] (Emphasis supplied)

Luy's business ledgers, which supposedly validate Tuason's statements, cannot serve to bolster the allegation that Sen. Estrada amassed such amount from the supposed illegal disbursement of his PDAF for being hearsay and lacking in credibility. Indubitably, the receipt of money was not shown to be corroborated by other hard evidence other than the bare assertions of the whistleblowers and Tuason. On the contrary, even the whistleblowers' testimonies lack credence. Luy's knowledge of Sen. Estrada's alleged receipt of commissions and kickbacks was evidently derived only from information fed to him by Napoles and not based on his personal knowledge. This being the case, the same is considered hearsay and lacks probative value.

Without any reliable evidence showing that Sen. Estrada repeatedly received sums of money from Napoles, the *corpus delicti* cannot be established. Consequently, the failure to establish the *corpus delicti* should lead to the dismissal of the criminal prosecution.[62]

With respect to the violation of Sec. 3 (e) of R.A. No. 3019, the Court explained in *Cosigna v. People*[63] that there are two (2) ways by which a public official violates it in the performance of his functions, namely: (a) by causing undue injury to any party, including the Government; or (b) by giving any private party any unwarranted benefits, advantage or preference. The accused may be charged under either mode or under both.

The public respondent has not shown any concrete proof that Sen. Estrada, by himself or through Labayen, carried out any of the modes of committing the crime. Suffice it to state that Sen. Estrada's endorsement of an NGO or the act of following up on the release of the PDAF allocations cannot, in no uncertain terms, constitute an illegal act. Without more, the endorsements cannot be equated to any intentional or overt instruction to the heads of the IAs to circumvent the laws and procedural requirements in the implementation of his projects.

Sen. Estrada likewise cannot be said to have been complicit with his co-respondents in allegedly giving unwarranted benefits to Napoles by funneling his PDAF to her NGOs. For one, it is the DBM that releases the PDAF to the heads of the IAs, and the latter, in turn, are tasked to disburse it within the parameters of the applicable appropriations law, the GPRA as

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[61] *Rollo*, p. 984.

[62] *Macapagal-Arroyo v. People of the Philippines*, supra note 57, at 331.

[63] G.R. Nos. 175750-51, April 2, 2014, 720 SCRA 350, 367-368, citing *Cabrera v. Sandiganbayan*, 484 Phil. 350, 360 (2004).

well as its implementing rules, and NBC Nos. 476[64] and 537.[65] Sen. Estrada neither exercises control over the DBM or the IAs, nor is he allowed to dictate the course of the implementation of his projects.

In sum, the conclusion that Sen. Estrada colluded with his co-respondents in amassing wealth through the illegal disbursement of his PDAF proves to be grounded more on conjectures and surmises, rather than tangible and concrete proof. Accordingly, the finding of probable cause against Sen. Estrada crumbles in the absence of competent, admissible, and independent evidence of any overt act on the part of Sen. Estrada to intentionally commit illegal acts constituting plunder and/or violation of Sec. 3 (e) of R.A. No. 3019.

I, therefore, submit that the reversal of the Joint Resolution and Joint Order as to Sen. Estrada is warranted.

G.R. Nos. 213473-74 ***(De Asis)***

For his part, De Asis contends that the Ombudsman had no valid reason to charge him as the NBI and FIO Complaints do not cover transactions with KPMFI, the Napoles NGO of which he is alleged to be the president. He likewise insists that he had no knowledge of the incorporation of KPMFI and no participation in the management of its affairs; and even on the assumption that he participated in the incorporation and management thereof, it was not among the NGOs found by the Ombudsman to have been used as a conduit in the PDAF scam.[66]

De Asis similarly takes exception to the charge of violation of Sec. 3 (e) of RA No. 3019 in the Joint Resolution, noting that the FIO Complaint did not include him among those charged therefor.[67] He avers that his inclusion in the complaints was based solely on his functions as driver and messenger of Napoles and is insufficient to charge him for the crimes of Plunder and violation of Sec. 3 (e) of RA No. 3019. His alleged act of delivering monies to Sen. Estrada, without proof that he was knowingly and purposely delivering his commissions or kickbacks, belies any reasonable ground to doubt his criminal intent and overt act constitutive of Plunder. Finally, he claims that, as a private individual, he cannot be held liable for Plunder in the absence of proof that he conspired with the public officials charged.

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[64] Guidelines on the Release of Funds Chargeable Against the Priority Development Assistance Fund for the Second Semester of FY 2001 and Thereafter.

[65] Guidelines on the Release of Funds Chargeable Against the Priority Development Assistance Fund for FY 2012.

[66] *Rollo*, pp. 41-42.

[67] Id. at 49.

Notably, the arguments and defenses raised by De Asis herein are similar to those raised in G.R. Nos. 213477-78. Specifically, that his performance of his duties as driver and messenger of Napoles does not amount to a willful participation in the crimes for which he is being charged.

I concur with the majority that the petition is without merit.

First, contrary to De Asis' claim, a cursory reading of the NBI Complaint would show that KMPFI is alleged to be one of the Napoles NGOs that Napoles used as a conduit in the diversion of public funds. In any case, his position and/or role in KMPFI are immaterial since the charges against him stem from his alleged participation in directly aiding Napoles to transfer the funds received from the IAs to the bank accounts of her NGOs, in conspiracy with other public officials.

Second, good faith is ordinarily used to describe that state of mind denoting honesty of intention and freedom from knowledge of circumstances which ought to put the holder upon inquiry; an honest intention to abstain from taking any unconscientious advantage of another, even through technicalities of law, together with absence of all information, notice, or benefit or belief of facts which render transaction unconscientious. It is actually a question of intention, which can be **ascertained by relying not on a person's own protestations of good faith, which is self-serving, but on evidence of his conduct and outward acts**.[68]

Third, the issue of whether a person acted in good faith is a question of fact, the determination of which is beyond the ambit of this Court's power of review. Only questions of law may be raised under this Rule as this Court is not a trier of facts.[69] As the Court stated in G.R. Nos. 213477-78, De Asis' defenses are better ventilated during trial and not during preliminary investigation.

Notably, Sen. Estrada is not the only named public officer involved in this issue; there are others against whom the Ombudsman found probable cause. De Asis, therefore, may be charged with Plunder despite being a private individual due to the existence of probable cause that he acted in concert with other public officers.

In view of the foregoing, I register my vote:

1. To **DISMISS** the petition in G.R. Nos. 213473-74 for lack of merit; and

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[68] *Civil Service Commission v. Maala*, G.R. No. 165253, August 18, 2005, 467 SCRA 390, 399.
[69] Id. at 398, citing *Alfredo v. Borras*, G.R. No. 144225, June 17, 2003, 404 SCRA 145.

2. To **GRANT** the petition in G.R. Nos. 212761-62 and to **REVERSE** and **SET ASIDE** the assailed Joint Resolution and Joint Order issued by the Ombudsman on March 28, 2014 and June 4, 2014, respectively, insofar as they found probable cause to indict Sen. Estrada for the crimes indicated therein.

Accordingly, I vote to **DISMISS** charges for plunder and violation of Sec. 3 (e) of Republic Act No. 3019 against Sen. Estrada and to order his name dropped in Crim. Case Nos. SB14CRIM0239, SB14CRM0256, SB14CRM0257, SB14CRM0258, SB14CRM0259, SB14CRM0260, SB14CRM0261, SB14CRM0262, SB14CRM0263, SB14CRM0264, SB14CRM0265, and SB14CRM0266.

PRESBITERO J. VELASCO, JR.
Associate Justice

CERTIFIED TRUE COPY

EDGAR O. ARICHETA
Clerk of Court En Banc
Supreme Court