A.M. No. SB-14-21-J – *RE: ALLEGATIONS MADE UNDER OATH AT THE SENATE BLUE RIBBON COMMITTEE HEARING HELD ON SEPTEMBER 25, 2013 AGAINST ASSOCIATE JUSTICE GREGORY S. ONG, SANDIGANBAYAN.*

Promulgated:

SEPTEMBER 23, 2014

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CONCURRING AND DISSENTING OPINION

BERSAMIN, *J.*:

The Majority holds Justice Gregory S. Ong of the Sandiganbayan guilty of gross misconduct, dishonesty, and impropriety in violation of the New Code of Judicial Conduct for the Judiciary.

I believe, however, that Justice Ong is administratively liable only for simple misconduct, because that was the offense competently and properly established against him, and the offense for which he is to be justly punished. I join the thorough consideration of the record and recommendation for the suspension of Justice Ong for three months by Justice Jose Portugal Perez and Justice Bienvenido L. Reyes. I humbly opine that it is unjust to punish Justice Ong with the extreme penalty of dismissal from the service if the serious charges of gross misconduct, dishonesty, and impropriety were not clearly and convincingly proven by competent evidence.

In imposing the ultimate penalty of dismissal, the *per curiam* decision of the Majority contained the following observations:

1. Justice Ong's association with Janet Lim Napoles during the pendency of, and after the promulgation of the decision in the Kevlar case resulting in Napoles's acquittal constituted gross misconduct *notwithstanding the absence of direct evidence of corruption or bribery in the rendition of the said judgment.*

2. The testimonies of Benhur Luy and Marina Sula, the former employees of Napoles, were considered *substantial evidence* establishing Napoles's contact with Justice Ong during the pendency of the Kevlar case. The substance of their testimonies given credence by the Majority are the following:

(*a*) Napoles revealed to them that she had a "connect" or "contact" in the Sandiganbayan who could help "fix" the Kevlar case;

(*b*) Luy testified that Napoles told him that she gave money to Justice Ong but did not disclose the amount;

(*c*) Napoles kept a ledger detailing her expense for the Sandiganbayan, which reached ₱100 Million; and

(*d*) Napoles' information about her association with Justice Ong was confirmed when she was eventually acquitted in 2010, and when Luy and Sula saw him visit her office after the promulgation of the decision in the Kevlar case, and given the eleven checks issued by Napoles in 2012;

3. The evidence on record was insufficient to sustain the charge of bribery and corruption against Justice Ong inasmuch as Luy and Sula had not themselves witnessed him actually receiving money from Napoles. Considering that bribery and corruption connote a grave misconduct, the quantum of proof should be more than substantial;

4. By his act of going to Napoles's office on two occasions, Justice Ong exposed himself to the suspicion that he had been partial to Napoles;

5. Investigating Justice Angelina Sandoval-Gutierrez found the testimonies of Luy and Sula credible;

6. Justice Ong's act of voluntarily meeting with Napoles constituted impropriety, because he must at all times be beyond reproach and should avoid even the mere suggestion of partiality and impropriety;

7. According to Justice Sandoval-Gutierrez, the eleven checks supposedly issued as advance interest for Justice Ong's deposit in AFPSLAI were given to him as consideration for the favorable ruling in the Kevlar case; and

8. Justice Ong's denial and failure to disclose his attendance in Napoles's gatherings, and his visits and social calls to Napoles constituted dishonesty.

To the Majority, Justice Ong's guilt for gross misconduct was anchored on the inference from his association with Napoles having led to her acquittal in the Kevlar case. To support the inference, the Majority accorded credence to the statements of Luy and Sula to the effect that: (*a*) Napoles had told them on different occasions that she had a "contact" in the Sandiganbayan; (*b*) Napoles later on disclosed that Justice Ong was her contact in the Sandiganbayan; and (*c*) Napoles told Luy that she had paid money to Justice Ong (whose amounts she did not bother to disclose).

The evidence required in administrative cases is concededly only substantial;[1] that is, the requirement of substantial evidence is satisfied although the evidence is not overwhelming, for as long as there is reasonable ground to believe that the person charged is guilty of the act complained of.[2] **However, the substantial evidence rule should not be invoked to sanction the use in administrative proceedings of clearly inadmissible evidence. Although strict adherence to technical rules is not required in administrative proceedings, this lenity should not be considered a license to disregard fundamental evidentiary rules**.[3] **The evidence presented must at least have a modicum of admissibility in order for it to have probative value. Not only must there be some evidence to support a finding or conclusion, but the evidence must be substantial. Substantial evidence is more than a mere scintilla; it means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion**.[4] **In my opinion, administrative proceedings should not be treated differently under pain of being perceived as arbitrary in our administrative adjudications**.

The statements of Luy and Sula being relied upon were based not on the declarants' personal knowledge, but on statements made to them by Napoles. I find it very odd that the Majority would accord credence to such statements by Luy and Sula if they themselves did not personally acquire knowledge of such matters. I insist that elementary evidentiary rules must be observed even in administrative proceedings.

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1 Section 5, Rule 133 of the *Rules of Court* states:

Section 5. *Substantial evidence*. - In cases filed before administrative or quasi-judicial bodies, a fact may be deemed established if it is supported by substantial evidence, or that amount of relevant evidence which a reasonable mind might accept as adequate to justify a conclusion. (n)

2 *Office of the Ombudsman v. Dechavez*, G.R. No. 176702, November 13, 2013, 709 SCRA 375, 382-383.

3 *Miro v. Mendoza Vda. de Erederos*, G.R. Nos. 172532 & 172544-45, November 20, 2013, 710 SCRA 371, 396.

4 *Lepanto Consolidated Mining Company v. Dumapis*, G.R. No. 163210, August 13, 2008, 562 SCRA 103, 113-114.

A most basic rule is that a witness can only testify on matters that he or she knows of her personal knowledge.[5] **This rule does not change even if the required standard be substantial evidence, preponderance of evidence, proof beyond reasonable doubt, or clear and convincing evidence.** The observations that the statements of Luy and Sula were made amidst the "challenging and difficult setting"[6] of the Senate hearings, and that the witnesses were "candid, straightforward and categorical" during the administrative investigation[7] did not excise the defect from them. **The concern of the hearsay rule is not the credibility of the witness presently testifying, but the veracity and competence of the extrajudicial source of the witness's information.**

To be clear, personal knowledge is a substantive prerequisite for accepting testimonial evidence to establish the truth of a disputed fact. The Court amply explained this in *Patula v. People*:[8]

> To elucidate why x x x hearsay evidence was unreliable and untrustworthy, and thus devoid of probative value, reference is made to Section 36 of Rule 130, *Rules of Court*, a rule that states that a witness can testify only to those facts that she knows of her personal knowledge; that is, which are derived from her own perception, except as otherwise provided in the *Rules of Court*. **The personal knowledge of a witness is a substantive prerequisite for accepting testimonial evidence that establishes the truth of a disputed fact. A witness bereft of personal knowledge of the disputed fact cannot be called upon for that purpose because her testimony derives its value not from the credit accorded to her as a witness presently testifying but from the veracity and competency of the extrajudicial source of her information.**
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> **In case a witness is permitted to testify based on what she has heard another person say about the facts in dispute, the person from whom the witness derived the information on the facts in dispute is not *in court* and *under oath* to be examined and cross-examined. The weight of such testimony then depends not upon the veracity of the witness but upon the veracity of the other person giving the information to the witness without oath. The information cannot be tested because the declarant is not standing in court as a witness and cannot, therefore, be cross-examined.**
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> **It is apparent, too, that a person who relates a hearsay is not obliged to enter into any particular, to answer any question, to solve any difficulties, to reconcile any contradictions, to explain any obscurities, to remove any ambiguities; and that she entrenches herself in the simple assertion that she was told so, and leaves the burden entirely upon the dead or absent author. Thus, the rule**

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5 Section 36, Rule 130 of the *Rules of Court*, to wit:

Section 36. *Testimony generally confined to personal knowledge; hearsay excluded*. - A witness can testify only to those facts which he knows of his personal knowledge; that is, which are derived from his own perception, except as otherwise provided in these rules. (30a)

6 *Per curiam* decision, p. 26.

7 Id.

8 G.R. No. 164457, April 11, 2012, 669 SCRA 135.

against hearsay testimony rests mainly on the ground that there was no opportunity to cross-examine the declarant. The testimony may have been given under oath and before a court of justice, but if it is offered against a party who is afforded no opportunity to cross-examine the witness, it is hearsay just the same.

Moreover, the theory of the hearsay rule is that when a human utterance is offered as evidence of the truth of the fact asserted, the credit of the assertor becomes the basis of inference, and, therefore, the assertion can be received as evidence only when made on the witness stand, subject to the test of cross-examination. However, if an extrajudicial utterance is offered, not as an assertion to prove the matter asserted but without reference to the truth of the matter asserted, the hearsay rule does not apply. For example, in a slander case, if a prosecution witness testifies that he heard the accused say that the complainant was a thief, this testimony is admissible not to prove that the complainant was really a thief, but merely to show that the accused uttered those words. This kind of utterance is hearsay in character but is not legal hearsay. The distinction is, therefore, between (*a*) the fact that the statement was made, to which the hearsay rule does not apply, and (*b*) the truth of the facts asserted in the statement, to which the hearsay rule applies.

Section 36, Rule 130 of the *Rules of Court* is understandably not the only rule that explains why testimony that is hearsay should be excluded from consideration. Excluding hearsay also aims to preserve the right of the opposing party to cross-examine the *original* declarant claiming to have a direct knowledge of the transaction or occurrence. If hearsay is allowed, the right stands to be denied because the declarant is not in court. It is then to be stressed that the right to cross-examine the adverse party's witness, being the only means of testing the credibility of witnesses and their testimonies, is essential to the administration of justice.

To address the problem of controlling inadmissible hearsay as evidence to establish the truth in a dispute while also safeguarding a party's right to cross-examine her adversary's witness, the *Rules of Court* offers two solutions. The first solution is to require that *all* the witnesses in a judicial trial or hearing be examined only in court *under oath or affirmation*. Section 1, Rule 132 of the *Rules of Court* formalizes this solution, *viz*:

> Section 1. *Examination to be done in open court*. - The examination of witnesses presented in a trial or hearing shall be done in open court, and under oath or affirmation. Unless the witness is incapacitated to speak, or the question calls for a different mode of answer, the answers of the witness shall be given orally. (1a)

The second solution is to require that *all* witnesses be *subject to the cross-examination by the adverse party*. Section 6, Rule 132 of the *Rules of Court* ensures this solution thusly:

> Section 6. *Cross-examination; its purpose and extent*. – Upon the termination of the direct examination, the witness may be cross-examined by the adverse party as to any matters

> stated in the direct examination, or connected therewith, with sufficient fullness and freedom to test his accuracy and truthfulness and freedom from interest or bias, or the reverse, and to elicit all important facts bearing upon the issue. (8a)

> Although the second solution traces its existence to a Constitutional precept relevant to criminal cases, *i.e*., Section 14, (2), Article III, of the 1987 *Constitution*, which guarantees that: "*In all criminal prosecutions, the accused shall xxx enjoy the right xxx to meet the witnesses face to face xxx*," the rule requiring the cross-examination by the adverse party equally applies to non-criminal proceedings.
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> **We thus stress that the rule excluding hearsay as evidence is based upon serious concerns about the trustworthiness and reliability of hearsay evidence due to its not being given under oath or solemn affirmation and due to its not being subjected to cross-examination by the opposing counsel to test the perception, memory, veracity and articulateness of the out-of-court declarant or actor upon whose reliability the worth of the out-of-court statement depends**.[9]

In addition, the Majority adverted to the following statements of Luy and Sula, to wit: (*a*) Luy and Sula saw Justice Ong visit Napoles in her office; (*b*) there was a ledger listing Napoles's alleged "Sandiganbayan" expenses; and (*c*) Luy personally prepared the 11 checks allegedly issued by Napoles to Justice Ong as advance interest for the latter's deposit in AFPSLAI as the basis for concluding that Justice Ong's association with Napoles was more than merely casual; and that such association was instrumental in Napoles's acquittal in the Kevlar case supposedly orchestrated by Justice Ong in return for monetary consideration.

I cannot agree with the Majority.

Justice Ong admitted making visits to Napoles, but such visits apparently happened in 2012, or long after the promulgation of the decision in the Kevlar case. He maintained that he had made his visits only to thank her for accommodating his request for access to the robe of the Black Nazarene.

The claim about the ledger and checks remained uncorroborated. No ledger or checks or any other documents indicating the preparation of the ledger or the issuance of the checks were actually presented. Nor was the connection of such ledger or the checks to the fixing of the Kevlar case for monetary consideration ever established. In that light, the adverse statements by Luy and Sula remained to be mere allegations that could not be considered as evidence by any means.[10]

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[9] Id. at 152-155.

[10] See *Real v. Sangu Philippines, Inc.*, G.R. No. 168757, January 19, 2011, 640 SCRA 67, 84-85.

If the Majority concede that there was no sufficient evidence to support the charge of bribery and corruption against Justice Ong, it became unreasonable for the Majority to hold that the totality of the circumstances still showed his corrupt inclination. To let ourselves as judges reach a conclusion of corrupt inclination despite the insufficient basis to find bribery and corruption is to set at naught all our learning of rendering a judgment of guilt only upon evidence that is sufficient, credible and reliable.

Having admitted visiting Napoles after the promulgation of the decision in the Kevlar case, Justice Ong could be considered as fraternizing with a litigant, by which he surely transgressed his duty as a judge to be beyond reproach and suspicion.[11] He thereby violated Section 1 of Canon 4 (*Propriety*) of the New Code of Judicial Conduct.[12] Yet, such association with Napoles was still censurable. Under Rule 140 of the *Rules of Court*, fraternizing with lawyers or litigants is classified as a light charge penalized with a fine of not less than ₱1,000.00 but not exceeding ₱10,000.00 and/or censure, reprimand, or admonition with warning.

The dishonesty of Justice Ong for having initially denied any acquaintance with Napoles was not of the seriousness or gravity to merit the extreme penalty of dismissal. His denial neither related to his official duties, nor to his qualifications as a Justice of the Sandiganbayan. It was not akin to an act of dishonesty committed through the falsification of one's daily time records,[13] and was not similar to a judge's failure to disclose in his application for appointment to the Judiciary pending criminal cases filed against him.[14]

It is relevant to note that dishonesty is a serious charge punishable by the following: (*a*) dismissal from the service, forfeiture of all or part of the benefits as the Court may determine, and disqualification from reinstatement or appointment to any public office, including government-owned or controlled corporations. Provided, however, that the forfeiture of benefits shall in no case include accrued leave credits; or (*b*) suspension from office without salary and other benefits for more than three (3) but not exceeding six (6) months; or (*c*) a fine of more than ₱20,000.00 but not exceeding ₱40,000.00.[15] Even so, the Court refrained in several instances from imposing these stiff administrative penalties because of the presence of mitigating circumstances, like the length of service, acknowledgment of fault, and feeling of remorse and humanitarian considerations.[16]

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[11] See *De Guzman, Jr. v. Judge Sison*, A.M. No. RTJ-01-1629, March 26, 2001, 355 SCRA 69, 90.

[12] Section 1. Judges shall avoid impropriety and the appearance of impropriety in all their activities.

[13] *Concerned Employees of the Municipal Trial Court of Meycauayan, Bulacan v. Paguio-Bacani*, A.M. No. P-06-2217, July 30, 2009, 594 SCRA 242, 258.

[14] *Gutierrez v. Belan*, A.M. No. MTJ-95-1059. August 7, 1998, 294 SCRA 1, 17.

[15] Section 11, Rule 140 of the *Rules of Court*.

[16] *Office of the Court Administrator v. Judge Aguilar*, A.M. No. RTJ-07-2087, 7 June 2011, 651 SCRA 13, 25.

Nonetheless, the Court should appreciate mitigating circumstances in determining the proper penalty to be imposed upon Justice Ong. At present, he is the longest-sitting Justice in the Sandiganbayan. Moreover, as mentioned by the Majority, he has admitted that his having associated himself to a former litigant in his court was an error, and has asked forgiveness during the proceedings held by Justice Sandoval-Gutierrez.

ACCORDINGLY, I **VOTE** to hold respondent **JUSTICE GREGORY S. ONG** guilty of **SIMPLE MISCONDUCT**, to be punished with suspension from office for a period of three months.

LUCAS P. BERSAMIN
Associate Justice