

PEOPLE OF THE PHILIPPINES, PETITIONER, VS. HON. JOCELYN A. SOLIS-REYES, IN HER CAPACITY AS PRESIDING JUDGE OF BRANCH 221, REGIONAL TRIAL COURT, QUEZON CITY AND DATU ANDAL AMPATU...

Ponente: SADANG, J.

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SADANG, J.:

This is a petition for certiorari under Rule 65 of the Rules of Court filed by the People seeking to annul and/or set aside the Omnibus Orders dated July 29, 2011,[1] and November 10, 2011[2] of public respondent Judge Jocelyn A. Solis-Reyes, presiding judge of the Regional Trial Court of Quezon City, Branch 211 in Criminal Case Nos. Q-09-162148 to 72, Q-09-162216 to 31, Q-10-162652 to 66 and Q-10-163766.

Antecedents of the Petition

Private respondents were charged, as conspirators, with fifty-seven (57) counts of murder committed on November 23, 2009 at Sitio Masalya, Barangay Salman, Ampatuan, Province of Maguindanao.

On January 5, 2010, February 3, 2010 and July 28, 2010, private respondent Datu Andal Ampatuan, Jr. (hereafter, Andal, Jr.) was arraigned and he entered a plea of not guilty to all the charges.[3] At the hearing of Andal, Jr.'s application for bail, Mohammad S. Sangki (hereafter, Sangki) testified for the prosecution.

On February 9, 2010, Sangki was admitted into the Witness Protection Program (WPP) of the Department of Justice (DOJ).[4]

On February 22, 2010, an Amended Information was filed with the RTC of Quezon City which includes Sangki, PO1 Ranier Ebus and P/Insp. Rex Ariel Diongon, among others, as accused.[5]

On April 22, 2010, the DOJ Panel of Prosecutors (DOJ Panel, for brevity) filed a Motion for Discharge[6] of Sangki, Diongon, Ebus, and P/Insp. Michael Macaraeg alleging that: said accused expressed their desire to testify for the state and had executed sworn statements detailing the commission of the crimes charged and the participation of their co-accused; taking into consideration the number of the accused and the extent and nature of the atrocity committed, there is an absolute necessity for the testimony of said accused especially against those who have not yet been arrested and are free to roam around and unduly influence and/or threaten prosecution witnesses; there is no other direct evidence for the proper prosecution of the crimes committed except said accused's testimonies which could be substantially corroborated in their material points; and they do not appear to be the most guilty and have not been convicted of any crime involving moral turpitude.

During the course of the proceedings, the prosecution manifested[7] that it would no longer pursue the discharge of accused Macaraeg.

On April 21, 2010, Diongon and Ebus entered not guilty pleas to the 57 counts of murder. Sangki also pleaded not guilty on July 28, 2010.

On July 29, 2011, the respondent judge issued the first assailed Omnibus Order[8] denying the Motion for Discharge, among other actions. She ruled that although the accused do not appear to be the most guilty and have not been convicted of a crime involving moral turpitude, their testimonies are not absolutely necessary with respect to private respondent Andal, Jr. and Datu Andal Ampatuan, Sr. and are merely corroborative in nature. The fallo of the Order reads:

WHEREFORE, in view of the foregoing, the Motion to Discharge Accused Mohammad Sangki, P/Insp. Rex Ariel Diongon, and PO2 Rainer Ebus as State Witnesses as well as the Motion for Clarificatory Order which claims that the accused has the right to repeatedly cross-examine the prosecution's witnesses are hereby DENIED for lack of merit.

On the other hand, the Submission praying that the accused's right to adduce evidence supportive of his application for bail be confirmed is GRANTED, and accused Andal Ampatuan, Jr.'s right to adduce evidence after the prosecution has rested its case, is confirmed.

It appearing that the prosecution will no longer present evidence insofar as the bail applications of said accused are concerned, it is directed to file its Formal Offer of Evidence within fifteen (15) days from receipt hereof, furnishing a copy thereof to the accused's counsel who is likewise given the same period within which to file his comment thereon.

Further, the Motion to Expunge filed by accused Andal Ampatuan, Jr. is considered moot and academic.

SO ORDERED.

Diongon filed a Motion for Reconsideration of the July 29, 2011 Order alleging that his testimony is absolutely necessary and not corroborative because he positively identified several other accused named in the 57 informations and testified on the participation of his co-accused Andal Jr., Datu Kanor, Norodim Datumanong Ampatuan, P/Insp. Saudi Mukamad, PCI Sukarno Adil Dicapay, and a certain P/Insp. Mariga at the conspiratorial meeting held on November 19, 2009.

The DOJ Panel also filed a Partial Motion for Reconsideration[9] of the July 29, 2011 Order on these grounds: 1) it is the prosecution's prerogative how it will prosecute a case, including whom it will choose as state witnesses; 2) the application for the discharge of Sangki, Ebus and Diongon are proper under the rules and jurisprudence; and 3) Sangki's admission into the WPP automatically discharged him as an accused.

On November 10, 2011, respondent judge issued the second assailed Omnibus Order.[10] Among others, she denied Diongon's and the DOJ Panel's motions for reconsideration upon a ruling that the accused against whom Sangki, Diongon and Ebus had testified remain at-large, hence, their testimonies would be of no benefit to the State. The dispositive portion of the Omnibus Order reads:

WHEREFORE, in view of the foregoing, and finding the Partial Motion for Reconsideration filed by accused Andal Ampatuan, Jr. impressed with merit, the same is hereby GRANTED and the Omnibus Order dated July 29, 2011 is reconsidered insofar as it denied the accused's Motion for Clarificatory Order which claims that he has the right to repeatedly cross-examine the prosecution's witnesses.

As prayed for, the right of said accused to cross-examine the eight (8) earlier witnesses presented by the prosecution who have not yet been subjected to cross-examination for Criminal Case No. Q-10-163766 is hereby recognized.

Accordingly, let the cross-examination of the aforesaid witnesses be set on November 21, 2011 at 9:00 o'clock in the morning at Camp Bagong Diwa, Bicutan, Taguig.

Further, finding no cogent reason to reconsider the Omnibus Order dated July 29, 2011 insofar as it denied the

Motion to Discharge Accused Mohammad Sangki, P/Insp. Rex Ariel Diongon and PO1 Rainer Ebus as State Witnesses, the Motion for Reconsideration filed by P/Insp. Rex Ariel Diongon and Partial Motion for Reconsideration filed by the people, are hereby DENIED for lack of merit.

SO ORDERED.

Hence, the present petition for certiorari[11] filed by the People through the Office of the Solicitor General (OSG).

During the pendency of this petition, or on June 27, 2012, the DOJ Panel filed a new Motion To Discharge Accused[12] Diongon and Esmael Canapia[13] before the RTC.

On July 24, 2012, respondent judge issued an Order setting the hearing of the second Motion for Discharge of accused Diongon.

On August 6, 2012, private respondent Andal, Jr. filed before this Court a Motion for Show Cause Order[14] arguing that by filing the second Motion to Discharge, the DOJ Panel is guilty of forum shopping, thus, they should be held in contempt of this Court after they are allowed to explain their side.

The DOJ Panel filed their Comment to the Motion for Show Cause Order alleging that although the second motion at first blush appears to be a repetition of the first motion they are independent of each other, thus, there is no forum shopping. They argue that the first motion was intended against the earlier set of accused, particularly Andal, Jr. and those already arrested; however, with the arrest of the other accused the second motion became timely and necessary because it is only Diongon who can identify them, particularly the police officers who were members of the 1507[th] and 1508[th] PMG. They also argue that the motion to show cause has been overtaken by Diongon's having been allowed to testify after counsel for movant withdrew his opposition thereto.

As required, the OSG filed a Compliance informing this Court of the status of the motion to discharge accused Diongon and Canapia. The OSG alleged that the trial court issued, on February 25, 2013, an Order denying the People's motion to allow the presentation of prosecution witnesses Diongon, Sukarno Badal and Ebus; however, at the May 22, 2013 hearing, Atty. Philip Sigrid Fortun manifested that he is withdrawing his opposition to the presentation of Diongon in support of his Second Motion to Discharge, subject to the outcome of procedural and substantial questions raised before this Court. The OSG also informed that pursuant to its August 17, 2012 Omnibus Order,[15] the trial court allowed the testimony of Canapia in support of his motion to discharge and said order partially modified the July 24, 2012 Order.

The motion to declare in contempt shall be resolved with the petition.

The OSG's petition for certiorari is anchored on these grounds:

I. RESPONDENT JUDGE COMMITTED GRAVE ABUSE OF DISCRETION AND ACTED IN EXCESS OF JURISDICTION WHEN SHE DENIED PETITIONER'S MOTION TO DISCHARGE ACCUSED MOHAMMAD S. SANGKI, PO1 RAINER EBUS AND P/INSP. REX ARIEL DIONGON AS STATE WITNESSES NOTWITHSTANDING THE FOLLOWING UNDISPUTED FACTS WHICH WARRANT THE GRANT THEREOF, NAMELY:

A) CONTRARY TO THE ARBITRARY RULING OF RESPONDENT JUDGE, THE PROSECUTION HAD TIMELY FILED THE MOTION TO DISCHARGE IN ACCORDANCE WITH SECTION 14, RULE 110, AND EVEN WITH SECTION 17, RULE 119, BOTH OF THE REVISED RULES OF CRIMINAL PROCEDURE.

B) THE DISCHARGE OF ACCUSED MOHAMMAD S. SANGKI IS IN ACCORDANCE WITH AND PURSUANT TO REPUBLIC ACT NO. 6981, AND RESPONDENT JUDGE'S DENIAL OF THE

DISCHARGE OF SAID ACCUSED DEPRIVES HIM, WITHOUT DUE PROCESS, OF THE BENEFITS UNDER THE SAID LAW.

II. ASSUMING ARGUENDO THAT SECTION 17, RULE 119 OF THE REVISED RULES OF CRIMINAL PROCEDURE IS THE APPLICABLE RULE IN THE DISCHARGE OF ACCUSED SANGKI, EBUS AND DIONGON, RESPONDENT JUDGE NONETHELESS COMMITTED GRAVE ABUSE OF DISCRETION AND ACTED IN EXCESS OF JURISDICTION WHEN SHE DENIED PETITIONER'S MOTION BASED ON THE FINDING THAT THERE IS NO ABSOLUTE NECESSITY FOR THEIR TESTIMONIES AS THEY ARE ALLEGEDLY ONLY CORROBORATIVE IN NATURE.

III. RESPONDENT ANDAL AMPATUAN, JR., VIOLATED THE RULE AGAINST FORUM SHOPPING, WHEN HE FILED A PETITION FOR CERTIORARI AND PROHIBITION, DOCKETED AS CIVIL CASE NO. 10-124479, BEFORE THE RTC-MANILA (BRANCH 173) SEEKING TO PREVENT THE DEPARTMENT OF JUSTICE FROM PRESENTING SANGKI AS A STATE WITNESS IN ANY OF THE HEARINGS IN THE AFORESAID CRIMINAL CASES WHICH CASE IS NOW UNDER REVIEW BEFORE THIS HONORABLE COURT IN CA-SP NO. 121675.

VI. CERTIORARI IS THE PROPER REMEDY IN THE INSTANT CASE.

Arguments

The OSG contends that: respondent judge gravely abused her discretion in ruling that the testimonies of Sangki, Diongon and Ebus are not absolutely necessary and are corroborative in nature and by so ruling respondent judge had encroached on the power of the prosecution to determine who to charge and how to prove the charge; contrary to the finding of respondent judge, the motion to discharge was timely because it was filed before the aforesaid three accused were arraigned and before the RTC had acquired jurisdiction over their persons; assuming that Sangki's discharge was sought under Section 117, Rule 119 of the Revised Rules of Criminal Procedure (the Rules), the motion was filed before the prosecution had rested its case.

The OSG further contends that respondent judge gravely abused her discretion in ruling that Sangki cannot be discharged despite his admission to the WPP and in applying Section 17, Rule 119 of the Rules. The OSG argues that: the discharge of an accused under R.A. 6981, which was availed of by the prosecution only for Sangki, is distinct and separate from the discharge of an accused under Section 17, Rule 119; pursuant to *Yu v. Velasco, et al.*,^[16] the discharge of an accused under R.A. 6981 requires only compliance with Section 14, Rule 110 and not Section 17, Rule 119 of the Rules; Sangki's admission to the WPP was purely an executive prerogative which is beyond judicial review and the effects of R.A. 6981 had already attached in favor of Sangki and the State cannot renege on its undertaking to protect him; assuming that Section 17, Rule 119 applies, there is absolute necessity for the testimonies of Sangki, Diongon and Ebus not only against Andal Sr. but also against the other accused who are members of the Ampatuan clan, such as, Maguindanao Governor Andal Sr., Mamasapano. Maguindanao Mayor Datu Baharin Ampatuan, Salibo, Maguindanao Vice-Mayor Dato Kanor Ampatuan, Maguindanao PNP Deputy Provincial Director Major Sukarno Dikay who assigned Diongon as aide-de-camp of Sajid Ampatuan whenever he goes to Manila, and Director Saudi Mukamad of the Police Povincial Mobile Group (PMG); Sangkil was a member of the sanggunian of Datu Abdullah Sangki town, Ebu was a security or back-up escort of Andal Jr., and Diongon was the director of the 1508th Infantry Battalion and they all gave detailed accounts of the events before and leading to the massacre; the matter of who to present as witnesses is not within the discretion of the judge but the prosecution which has possession of the evidence ahead of the court and respondent judge abused her discretion in denying the discharge only on the ground that there is already an enormous number of prosecution witnesses.

In their Comment,^[17] private respondents Datu Said Islam Ampatuan, Datu Anwar U. Ampatuan, Datu Akmad

"Tato" Ampatuan, Sr., Hadji Datukan Malang Salibo, Nasser Esmael, Nicomedes A. Tolentino, Bulatukan Omar Kayansang and Datutucon Malaguial Esmail argue that it is the court and not the prosecution that has the power to discharge an accused and the court may refuse the discharge if the objective of the prosecution will not be served thereby. They contend that there is no absolute necessity for the discharge because the alleged crimes were not committed clandestinely and Sangi, Diongon and Ebus cannot be considered the least guilty because they admitted that they were part of the armed men who flagged down the convoy of the Mangudadatus and shot the victims; and it would not be proper to discharge the three accused because the prosecution has not yet presented the 292 other witnesses.

RULING

The pertinent provisions of the Rules provide:

Section 17 (Rule 119). Discharge of accused to be state witness. — When two or more persons are jointly charged with the commission of any offense, upon motion of the prosecution before resting its case, the court may direct one or more of the accused to be discharged with their consent so that they may be witnesses for the state when, after requiring the prosecution to present evidence and the sworn statement of each proposed state witness at a hearing in support of the discharge, the court is satisfied that:

- (a) There is absolute necessity for the testimony of the accused whose discharge is requested;
- (b) There is no other direct evidence available for the proper prosecution of the offense committed, except the testimony of said accused;
- (c) The testimony of said accused can be substantially corroborated in its material points;
- (d) Said accused does not appear to be the most guilty; and
- (e) Said accused has not at any time been convicted of any offense involving moral turpitude.

Evidence adduced in support of the discharge shall automatically form part of the trial. If the court denies the motion for discharge of the accused as state witness, his sworn statement shall be inadmissible in evidence.

Section 14 (Rule 110). Amendment or substitution.- A complaint or information may be amended, in form or in substance, without leave of court, at any time before the accused enters his plea. After the plea and during the trial, a formal amendment may only be made with leave of court and when it can be done without causing prejudice to the rights of the accused.

However, any amendment before plea, which downgrades the nature of the offense charged or excludes any accused from the complaint or information can be made only upon motion by the prosecutor, with notice to the offended party and with leave of court. The court shall state its reasons in resolving the motion and copies of its order shall be furnished all parties, especially the offended party. (Underscoring supplied)

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On the other hand, RA No. 6981 provides:

Section 3. Admission into the Program. - Any person who has witnessed or has knowledge or information on the commission of a crime and has testified or is testifying or about to testify before any judicial or quasi-judicial body, or before any investigating authority, may be admitted into the Program: Provided, That:

- a) the offense in which his testimony will be used is a grave felony as defined under the Revised Penal Code, or its equivalent under special laws;
- b) his testimony can be substantially corroborated in its material points;

c) he or any member of his family within the second civil degree of consanguinity or affinity is subjected to threats to his life or bodily injury or there is a likelihood that he will be killed, forced, intimidated, harassed or corrupted to prevent him from testifying, or to testify falsely, or evasively, because or on account of his testimony; and

d) he is not a law enforcement officer, even if he would be testifying against the other law enforcement officers. In such a case, only the immediate members of his family may avail themselves of the protection provided for under this Act.

If the Department, after examination of said applicant and other relevant facts, is convinced that the requirements of this Act and its implementing rules and regulations have been complied with, it shall admit said applicant to the Program, require said witness to execute a sworn statement detailing his knowledge or information on the commission of the crime, and thereafter issue the proper certification. For purposes of this Act, any such person admitted to the Program shall be known as the Witness x x x.

Section 10. State Witness. - Any person who has participated in the commission of a crime and desires to be a witness for the State, can apply and, if qualified as determined in this Act and by the Department, shall be admitted into the Program whenever the following circumstances are present:

- (a) the offense in which his testimony will be used is a grave felony as defined under the Revised Penal Code or its equivalent under special laws;
- (b) there is absolute necessity for his testimony;
- (c) there is no other direct evidence available for the proper prosecution of the offense committed;
- (d) his testimony can be substantially corroborated on its material points;
- (e) he does not appear to be most guilty; and
- (f) he has not at any time been convicted of any crime involving moral turpitude.

An accused discharged from an information or criminal complaint by the court in order that he may be a State Witness pursuant to Sections 9[18] and 10[19] of Rule 119 of the Revised Rules of Court may upon his petition be admitted to the Program if he complies with the other requirements of this Act. Nothing in this Act shall prevent the discharge of an accused so that he can be used as a State Witness under Rule 119 of the Revised Rules of Court. (Underscoring supplied)

Section 14, Rule 110 governs amendments in the information. Under this rule, an information may be amended, in form or substance, without leave of court at any time before the accused enters his plea. However, where the amendment consists of the exclusion of an accused from the information, such amendment may only be made upon motion of the prosecution, with notice to the offended party and with leave of court.

Section 14, Rule 110 does not qualify the grounds for the exclusion of the accused. Thus, said provision applies in equal force when the exclusion is sought on the usual ground of lack of probable cause, or when it is for utilization of the accused as state witness, or on some other ground.[20] At this level, the procedural requirements on the need for the prosecution to present evidence and the sworn statement of each state witness at a hearing in support of the discharge do not yet come into play. This is because the determination of who should be criminally charged in court is essentially an executive function, not a judicial function.[21] The prosecution of crimes appertains to the executive department of government whose principal power and responsibility is to see that our laws are faithfully executed. A necessary component of the power to prosecute our laws is the right to prosecute their violators. The right to prosecute vests the prosecutor with a wide range of discretion-the discretion of whether, what and whom to charge, the exercise of which depends on a smorgasbord of factors which are best appreciated by prosecutors.[22] It must be stated though that the prosecution's discretion is not boundless or infinite. The prosecution must satisfy for itself that an accused excluded from the information for purposes of utilizing him as state witness is qualified therefor.[23]

On the other hand, Section 17, Rule 119 governs the discharge of an accused to be a state witness. It contemplates a situation wherein the information is already filed, the accused is already arraigned, the case is undergoing trial, and the prosecution has not yet rested its case. In this scenario, where the prosecution wishes to discharge an accused to be a state witness, it shall file a motion to discharge and the court shall require the prosecution to present evidence and the sworn statement of the proposed state witness at a hearing in support of the discharge.[24]

The OSG contends that respondent judge gravely abused her discretion in ruling that Sangki cannot be discharged despite his admission to the WPP. It is argued that the admission of Sangki under the WPP is purely an executive prerogative and beyond judicial review. Citing *Yu v. Velasco, et al.*, [25] the People posit that Sangki's discharge is governed by Section 14, Rule 110, not Section 17, Rule 119 of the Rules.

We are not persuaded.

The pertinent antecedent proceedings are shown in the timeline provided by the OSG.[26] Thus, on February 9, 2010, Sangki was admitted into the WPP. On February 22, 2010, the prosecution filed an Amended Information which included Sangki, Diongon and Ebus, among others, as accused. On April 20, 2010, the DOJ Panel filed the Motion to Discharge "in favor of" said three accused. The following day, April 21, 2010, before respondent judge could act on the motion to discharge, Diongon and Ebus were arraigned. Sangki was also arraigned on July 28, 2010. On July 29, 2011, respondent judge denied the motion to discharge.

From the foregoing, it is clear that the three accused sought to be discharged were included in the Amended Information. Sangki was included despite his previous admission into the WPP. Thereafter, the three accused were arraigned.

Considering that the three accused were already arraigned, Section 14, Rule 110 no longer applies. First, it is patent that said rule applies only if the accused has not yet been arraigned. There are no exceptions to the rule. Moreover, because the rule is clear, there is no room for interpretation. Second, the three accused were included in the Amended Information, hence, their discharge is subject to the discretion of respondent judge. Thus, in *Soberano v. People*, it was held:

Prescinding from the foregoing, it is in a situation where the accused to be discharged is included in the information that the prosecution must present evidence and the sworn statement of each proposed witness at a hearing in support of the discharge in order to convinced the judge, upon whom discretion rests, as to the propriety of discharging the accused as state witness.[27] (Underscoring supplied)

There can be no question that the DOJ has the power to determine who can qualify as a witness under the WPP and granted immunity from prosecution. It is not constitutionally impermissible for Congress to enact R.A. 6981 and vest the DOJ with the aforesaid power.[28] It is also settled that the power to choose who shall be a state witness is not an inherent judicial prerogative.[29] It is an executive prerogative and Section 12, R.A. 6981 even gives the DOJ the power to exclude a witness outright from the information and to admit him or her into the WPP. Thus, Section 12[30] of R.A. 6981 mandates that the admission of a witness into the WPP shall be given full faith and credence by the prosecutor who shall be required not to include the witness in the information and, if included, to petition the court for his discharge, albeit subject to the condition that the accused witness has not yet been arraigned.

In this case, the DOJ Panel included the three accused in the Amended Information and they were subsequently arraigned. Consequently, the trial court had already acquired jurisdiction over the crime and the accused and, pursuant to the seminal doctrine in *Crespo v. Mogul*, [31] "whatever disposition the prosecutor may feel should be proper in the case thereafter should be addressed for the consideration of the court." Clearly, by including the

three accused in the information and by omitting to object to their arraignment before the resolution of the motion to discharge, the DOJ Panel submitted itself to the jurisdiction of the court. Respondent judge acted within her authority and jurisdiction by applying Section 17, Rule 119 of the Rules and determining whether the three accused are qualified to be discharged as state witnesses.

The OSG contends that the effects of Sangki's admission into the WPP has already attached and the State can not renege on its duty to protect Sangki. To reiterate, Sangki was included in the Amended Information even after he was admitted into the WPP. As stated earlier, the DOJ, pursuant to Section 12 of R.A. 6981, has the power not to include a witness in the information and to admit him or her into the WPP. Such power is exercised on the basis of the DOJ's evaluation of the evidence before it and upon a determination that the witness meets the following requisites to be a state witness: 1) the offense is a grave felony; 2) there is an absolute necessity for the testimony of the witness; 3) there is no other direct evidence for the proper prosecution of the offense committed; 4) his or her testimony may be substantially corroborated in its material points; 5) he or she does not appear to be the most guilty; and 6) he or she has not been convicted of any crime involving moral turpitude. These are the very same requirements under Section 17, Rule 119 of the Rules. However, notwithstanding such authority, the DOJ Panel included Sangki in the Information after he had been admitted to the WPP. The only logical conclusion is that the prosecution submitted the issue to the discretion of the court. In any case, should the respondent judge ultimately deny the second motion to discharge, the rights of the three accused are protected because the law clearly provides that their testimony would then be rendered inadmissible in evidence.[32] It must also be noted that respondent judge has not foreclosed the possibility that the three accused could still be discharged with respect to the accused who have yet to be arrested.

We shall now resolve the issue of whether respondent judge gravely abused her discretion in denying the first motion to discharge.

It bears to stress, that the sole office of the writ of certiorari is the correction of errors of jurisdiction including the commission of grave abuse of discretion amounting to lack of jurisdiction and does not include a correction of public respondent's evaluation of the evidence and factual findings thereon.[33] By grave abuse of discretion is meant such capricious and whimsical exercise of judgment as is equivalent to lack of jurisdiction.[34] The abuse of discretion must be grave as where the power is exercised in an arbitrary or despotic manner by reason of passion or personal hostility and must be so patent and gross as to amount to an evasion of positive duty or to a virtual refusal to perform the duty enjoined by or to act at all in contemplation of law.[35]

Here, respondent judge denied the motion to discharge on the grounds that there was no absolute necessity for the testimonies of the three accused because their testimonies are merely corroborative, and that their discharge would not benefit the state because the accused against whom they will testify have not yet been arrested and brought under the court's jurisdiction. Respondent judge ruled thus:

As held in the Omnibus Order sought to be reconsidered, there is no absolute necessity for the testimonies of accused Diongon, Ebus and Sangki insofar as accused Datu Andal Ampatuan, Jr. and Sr. are concerned. Such finding, at this point, does not apply to said accused only but even to those (accused) whose names were mentioned (not identified) by the three accused when they were presented on the witnesses stand. The reason for this is obvious. The prosecution had already presented witnesses who claim to have actual knowledge not only of the alleged plan to kill but also of the actual commission of the offense of murder x x x With the enormous number of prosecution witnesses excluding all accused, it is not unlikely that a number of them will be able to give an account of how the mass murder was committed and the participation of the accused who were mentioned by the proposed state witnesses x x x.

The court likewise found the testimonies of Diongon, Ebus and Sangki as merely corroborative in nature

considering that, except for the names of some of their co-accused whose names they were able to mention, the same are substantially similar to what prosecution witnesses Rasul Sangki, Mauyag, Esmael and Saliao had testified to on the stand. While it is indubitable that the power to choose who to discharge as a state witness is an executive function, it cannot likewise be gainsaid that the trial court is the best and sole judge of what to do with the case before it.

Moreover, having heard the testimonies of the proposed state witnesses, the court is of the view that the objective of the state to prosecute those who appear to be guilty of having committed a crime and obtain conviction of the more guilty criminals, will not be achieved, with the discharge of the three (3) accused considering that their co-accused whom they had mentioned, have remained at large. In other words, the discharge of the three (3) accused at this point, will not at all benefit the state, as their testimonies will be of no use in light of the non-apprehension of their co-accused whom they had mentioned to have participated in the commission of the offense charged.

The court so holds that unless and until the prosecution has already presented all the witnesses and the accused whose names were mentioned by Diongon, Ebus and Sangki are finally apprehended and brought before the jurisdiction of the court, their discharge as state witnesses is not proper.[36] (Underscoring supplied)

Absolute necessity means that only the accused whose discharge is sought has knowledge of the crime and not when his testimony would simply corroborate or otherwise strengthen the evidence in the hands of the prosecution.[37]

We are not convinced that respondent judge committed grave abuse of discretion in denying the first motion to discharge on the ground that there was no absolute necessity for the testimonies of the three accused. The judicial action is neither whimsical nor arbitrary but is anchored on testimonial evidence on record. Thus, respondent judge ruled that the testimonies of the three accused are substantially similar to those of earlier witnesses Rasul Sangki, Mauyag, Esmael and Saliao. The OSG does not refute this finding. We also find reasonable the observation of respondent judge that any number of the prosecution witnesses yet to be presented would be able to testify on the commission of the crimes and the participation of the accused mentioned by the three accused. We agree that it is only after the prosecution has presented all its witnesses would the trial court be able to determine the absolute necessity of the testimonies of the three accused against their co-accused. By its nature, the requirement of absolute necessity must be determined in light of the entire evidence of the prosecution.[38] At this stage of the proceedings, it would be precipitate for respondent judge to rule that only the three accused have knowledge of the crime and the identities of the conspirators.

Finally, the motion to cite the DOJ Panel in contempt of this Court is premised on the ground of forum shopping.

Forum shopping is an act of a party, against whom an adverse judgment or order has been rendered in one forum, of seeking and possibly getting a favorable opinion in another forum, other than by appeal or special civil action for certiorari.[39] It may also be the institution of two or more actions or proceedings grounded on the same cause on the supposition that one or the other court would make a favorable disposition.[40] The established rule is that for forum shopping to exist, both actions must involve the same transactions, same essential facts and circumstances and must raise identical causes of actions, subject matter, and issues.[41] A violation of the rule against forum shopping warrants prosecution for contempt of court and constitutes a ground for summary dismissal of the actions involved without prejudice to appropriate administrative action against the counsel.[42]

Forum shopping exists where the elements of *litis pendentia* are present and where a final judgment in one case will amount to *res judicata* in the other.[43] The elements of forum shopping are: (a) identity of parties, or at least such parties as would represent the same interest in both actions; (b) identity of rights asserted and relief prayed for, the relief being founded on the same facts; and (c) identity of the two preceding particulars such that any

judgment rendered in the other action will, regardless of which party is successful, amount to res judicata in the action under consideration.[44]

There is no no forum shopping in this case. Although the second motion to discharge is to some extent a reiteration of the first motion, the two motions are not identical. As correctly argued by the OSG, the second motion to discharge refers to testimony against a different set of accused, meaning, those who were not yet arrested when the first motion was filed, particularly, the police officers of the 1507[th] and 1508[th] Provincial Police Mobile Group.[45] Obviously, in filing the second motion, the DOJ Panel acted pursuant to the ruling of respondent judge in her Omnibus Order denying the first motion that the discharge would not benefit the State because the accused against whom the accused sought to be discharged would testify have not yet been arrested and brought under the jurisdiction of the trial court. On the other hand, this petition concerns the discharge of the three accused in order that they may testify against those already arrested when the first motion was filed. Clearly, the second motion concerns a different set of accused, rights asserted, and reliefs prayed for. Moreover, the presentation of the testimonies of the three accused in support of the second motion, together with the testimonies of other prosecution witnesses, would afford the respondent judge the opportunity to assess the weight and probative value of the testimonies of the three accused and determine the absolute necessity of said evidence pursuant to Section 17, Rule 119 of the Rules.

WHEREFORE, the petition is hereby DISMISSED. The Omnibus Orders dated July 29, 2011 and November 10, 2011 are AFFIRMED. Respondent judge is ordered to proceed with the presentation of evidence in connection with the second motion to discharge and to resolve the same with dispatch. The Motion for Show Cause Order praying that the Department of Justice Panel of Prosecutors be declared in contempt of this Court is DENIED for lack of merit.

SO ORDERED.

Diamante, (Acting Chairperson), and [*] Cruz, JJ., concur.

[*] Vice Justice Celia C. Librea-Leagogo who voluntarily inhibited herself (per Raffle dated July 31, 2013).

[1] Rollo, pp. 87-94.

[2] Id., pp. 95-99.

[3] Id. p. 12

[4] Id p. 107

[5] Id. pp. 350-358

[6] Id., pp. 100-106

[7] Id. p. 18

[8] Supra at note 1.

[9] Id., pp. 108-129.

[10] Supra at note 2.

[11] Id., pp. 2-86.

[12] Id., pp. 1646-1651.

[13] Id., pp. 1652-1657.

[14] Supra at note 1.

[15] Rollo, pp. 1698-1704.

[16] Should be Yu v. Presiding Judge, RTC of Tagaytay City, Branch 18, 494 SCRA 101 (2006)

[17] Rollo, pp. 1411

[18] Now restated in Section 17, Rule 119 of the Revised Rules of Criminal Procedure

[19] Id.

[20] Soberano v. People, 472 SCRA 125 (2005)

[21] Id.at p. 139

[22] Id at p. 140

[23] Id .

[24] Id at p. 141

[25] Should be Yu v. Presiding Judge, RTC of Tagaytay City, Branch 18, 494 sCRA 101 (2006)

[26] See time line provided by the OSG in its Petition; Rollo, p. 29.

[27] Soberano v. People, supra note 20, at p. 141

[28] Webb v. De Leon 247 SCRA 652; Guingona, Jr. v. Court of Appeals, 292 SCRA 402

[29] Id, at p. 137

[30] Section 12. Effect of Admission of a State Witness into the Program. - The certification of admission into the Program by the Department shall be given full faith and credence by the provincial and city prosecutor who is required not to include the Witness in the criminal complaint or information and if included therein, to petition the court for his discharge in order that he may be utilized as a State Witness. The Court shall order the discharge and exclusion of the said accused from the Information x x x

[31] 151 SCRA 462 (1987), cited in Soberano v. People, 472 SCRA 125

[32] Section 11, R.A. 6981

[33] Balba v. Peak Development, Inc., 466 SCRA 604 (2005).

[34] Rimbunan Hijau Group of Companies v. Oriental Wood Processing Corporation, 470 SCRA 650 (2005).

[35] Id.

[36] Supra at note 5.

[37] Agpalo, Handbook of Criminal Procedure, 2001 Edition citing People v. Binsol, 100 Phil. 713 (1957).

[38] People v. Court of Appeals, 124 SCRA 338 (1983)

[39] Government Service Insurance System v. Bengson Commercial Buildings, Inc., 375 SCRA 431 (2002).

[40] Id.

[41] Valencia v. Court of Appeals, 331 Phil. 590, 604-605 (1996), citing International Container Terminal Services, Inc. v. Court of Appeals, 319 Phil. 510, 515-516 (1995).

[42] Ortigas & Company Limited Partnership v. Velasco, 234 SCRA 455 (1994).

[43] Saura v. Saura, Jr., 313 SCRA 465 (1999).

[44] Cruz v. Caraos, 521 SCRA 510

[45] Comment, Rollo pp. 1689-1697.

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