

**PEOPLE OF THE PHILIPPINES, AMELIA K. DEL ROSARIO AND
DIONISIO CERBO, PETITIONERS, VS. HON. NUMERIANO G. ESTENZO,
JUDGE, COURT OF FIRST INSTANCE OF ILOILO, AND GREGORIO
OJOY, RES...**

G.R. No. L-41166. August 25, 1976

Ponente: ANTONIO, J.

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ANTONIO, J.:

Certiorari and prohibition with prayer for preliminary injunction to nullify the Order of respondent Judge, dated July 30, 1975, sustaining the procedure proposed by defense counsel that, in lieu of the testimony of the witnesses for the accused on direct examination in open court, he was filing their affidavits, subject to cross-examination by the prosecution. Per Resolution dated August 22, 1975, this Court issued a temporary restraining order enjoining the respondent Judge from enforcing the questioned Order.

In Criminal Case No. 2891, entitled "People of the Philippines, plaintiff, versus Gregorio Ojoy, accused", of the Court of First Instance of Iloilo, Branch III, after the accused himself had testified in his defense, his counsel manifested that for his subsequent witnesses he was filing only their affidavits subject to cross-examination by the prosecution on matters stated in the affidavits and on all other matters pertinent and material to the case. Private prosecutor Atty. Amelia K. del Rosario, one of the petitioners here, objected to the proposed procedure but this notwithstanding, respondent Judge gave his conformity there-to and subsequently issued the questioned Order. Contending that respondent Judge gravely abused his discretion be-cause the aforesaid Order violates Sections 1 and 2 of Rule 132 of the Revised Rules of Court, which requires that the testimony of the witness should be given orally in open court, and there is no appeal nor any plain, speedy and adequate remedy in the ordinary course of law, petitioners instituted the present petition.

We grant the petition.

Sections 1 and 2, Rule 132 and Section 1, Rule 133 of the Revised Rules of Court clearly require that the testimony of a witness shall be given orally in open court. The afore-cited Sections 1 and 2 provide:

"SECTION 1. Testimony to be given in open court. — The testimony of witnesses shall be given orally in open court and under oath or affirmation.

"SEC. 2. Testimony in superior courts to be reduced to writing. ? In superior courts the testimony of each witness shall be taken in shorthand or stenotype, the name, residence, and occupation of the witness being stated, and all questions put to the witness and his answers thereto being included. If a question put is objected to and the objection is ruled on, the nature of the objection and the ground on which it was sustained or overruled must be stated, or if a witness declines to answer a question put, the fact and the proceedings taken thereon shall be entered in the record. A transcript of the record made by the official stenographer or stenotypist and certified as correct by him shall be prima facie a correct statement of such testimony and proceedings."

Sections 1 and 2 of Rule 132 of the Revised Rules of Court are reproductions, respectively, of Sections 77 and 78 of Rule 123, of the Old Rules of Court. Section 77 in turn was taken from Section 381 of Act No. 190,[1] while Section 78 from Section 32 of General Order No. 58.[2]

The main and essential purpose of requiring a witness to appear and testify orally at a trial is to secure for the adverse party the opportunity of cross-examination. "The opponent", according to an eminent authority,[3] "demands confrontation, not for the idle purpose of gazing upon the witness, or of being gazed upon by him, but for the purpose of cross-examination which cannot be had except by the direct and personal putting of questions and obtaining immediate answers." There is also the advantage to be obtained by the personal appearance of the witness before the judge, and it is this ? it enables the judge as the trier of facts "to obtain the elusive and incommunicable evidence of a witness' deportment while testifying, and a certain subjective moral effect is produced upon the witness." [4] It is only when the witness testifies orally that the judge may have a true idea of his countenance, manner and expression, which may confirm or detract from the weight of his testimony.[5] Certainly, the physical condition of the witness will reveal his capacity for accurate observation and memory, and his deportment and physiognomy will reveal clues to his character. These can only be observed by the judge if the witness testifies orally in court. In-deed, the great weight given the findings of fact of the trial judge in the appellate court is based upon his having had just that opportunity and the assumption that he took advantage of it to ascertain the credibility of the witnesses. This has been explained by Chief Justice Appleton, thus:

"The witness present, the promptness and unpremeditatedness of his answers or the reverse, their distinctness and particularity or the want of these essentials, their incorrectness in generals or particulars, their directness or evasiveness, are soon detected. . . . The appearance and manner, the voice, the gestures, the readiness and promptness of the answers, the evasions, the reluctance, the silence, the contumacious silence, the contradictions, the explanations, the intelligence or the want of intelligence of the witness, the passions which more or less control — fear, love, hate, envy, or revenge — are all open to observation, noted and weighed by the jury." [6]

Thus, Section 1 of Rule 133 of the Rules [7] requires that in determining the superior weight of evidence on the issues involved, the court, aside from the other factors therein enumerated, may consider the "witness' manner of testifying" which can only be done if the witness gives his testimony "orally in open court". If a trial judge prepares his opinion immediately after the conclusion of the trial, with the evidence and his impressions of the witnesses fresh in his mind, it is obvious that he is much more likely to reach a correct result than if he simply reviews the evidence from a typewritten transcript, without having had the opportunity to see, hear and observe the actions and utterances of the witnesses.

There is an additional advantage to be obtained in requiring that the direct testimony of the witness be given orally in court. Rules governing the examination of witnesses are intended to protect the rights of litigants and to secure orderly dispatch of the business of the courts. Under the rules, only questions directed to the eliciting of testimony which, under the general rules of evidence, is relevant to, and competent to prove, the issue of the case, may be propounded to the witness. A witness may testify only on those facts which he knows of his own knowledge. Thus, on direct examination, leading questions are not allowed, except on preliminary matters, or when there is difficulty in getting direct and intelligible answer from the witness who is ignorant, a child of tender years, or feeble-minded, or a deaf-mute.[8] It is obvious that such purpose may be subverted, and the orderly dispatch of the business of the courts thwarted, if trial judges are allowed, as in the case at bar, to adopt any procedure in the presentation of evidence other than what is specifically authorized by the Rules of Court.

WHEREFORE, in view of the foregoing, the petition for certiorari is hereby granted and the Order of respondent Judge, dated July 30, 1975, in Criminal Case No. 2891 is hereby set aside, and the temporary restraining order

issued on August 22, 1975 is hereby made permanent, without any pronouncement as to costs.

Fernando, Acting C.J., Aquino, and Concepcion, Jr., JJ., concur.

Barredo, (Acting Chairman), J., concurs in a separate opinion.

[1] Section 381 of Act No. 190 provides:

"SEC. 381. Witnesses. ? The testimony of all witnesses, except such as has been taken in writing in the form of depositions as otherwise provided by law, shall be given on oath in open court or-ally, and each witness may be orally cross-examined by the adverse party or his counsel 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 is-sue. The courts shall be liberal in allowing cross-examinations, but shall have the power to restrict them so as to confine them to the purposes last above specified and to prevent irrelevant or insulting interrogatories."

[2] Section 32 of General Order No. 58 provides:

"SEC. 32. In courts of first instance or of similar jurisdiction each witness must be duly sworn and his testimony reduced to writing as a deposition by the court or under its direction. The deposition must state the name, residence and occupation of the witness. It must contain all questions put to the witness and his answers thereto. If a question put is objected to and the objection be either over-ruled or sustained, the fact of objection and its nature, toge-ther with the ground on which it shall have been sustained or over-ruled must be stated, or if a witness declines to answer a question put, the fact and the proceedings taken thereon shall be entered in the record. The deposition must be read to the witness and made to conform to what he declares to be the truth. He must sign the name, or, if he refuses, his reason for such refusal must be stated. It must also be signed by the magistrate and certified by the clerk. In cases where an official stenographer is engaged, the testimony and proceedings may be taken by him in shorthand, and it will not then be necessary to read the testimony to the witness nor for the latter to sign the same; but a transcript of the record made by the official stenographer and certified as correct by him shall be prima facie a correct statement of such testimony and proceedings."

Rule 43(a) of the Federal Rules of Procedure provides generally for oral testimony in open court. This is based upon the practice in equity under Equity Rule 46.

[3] 5 Wigmore on Evidence, Section 1395, p. 123.

[4] Ibid., pp. 125-126.

[5] As observed in *Blache v. Blache*, 233 P. 2d 547, 549-550:

"The seriousness of the trial court's error is apparent when we consider the reasons for the requirement that the witness, if available, take the stand. Not only can the credibility of the witness on the stand be tested by cross-examination; another purpose is served by the requirement of the witness' presence; the trier of fact can 'obtain the elusive and incommunicable evidence of a witness' deportment while testif-ying.' 5 Wigmore, op. cit., pp. 125-126.) Wigmore states that 'No one has ever doubted that the former testimony of a witness cannot be used if the witness is still available for the purpose of testifying at the present trial.' (5 Wigmore, op. cit., p. 191.)

"As was aptly stated by the District Court of Appeal after the first trial of this case, 'On appeal we cannot evaluate the truth of the testimony from the manner and demeanor of the witnesses. There appear enough contradictory and inconsistent statements in the transcript of the testimony of each of the three principal parties to justify this court in sustaining a finding contrary to the testimony of any one of the parties.' (*Blache v. Blache* [1945], supra, 69 Cal. App. 2d 616, 624-625, 160 P. 2d 136.) The judge who tried the case the second

time was no better qualified than was the appellate court to evaluate the truth of vague, evasive and self-contradictory testimony of a witness whom he had not observed."

[6] 5 Wigmore on Evidence, p. 126.

[7] Section 1 of Rule 133, Revised Rules of Court, provides:

"SEC. 1. – Preponderance of evidence, how determined. – In civil cases, the party having the burden of proof must establish his case by a preponderance of evidence. In determining where the preponderance or superior weight of evidence on the issues involved lies, the court may consider all the facts and circumstances of the case, the witnesses' manner of testifying, their intelligence, their means and opportunity of knowing the facts to which they are testifying, the nature of the facts to which they testify, the probability or improbability of their testimony, their interest or want of interest, and also their personal credibility so far as the same may legitimately appear upon the trial. The court may also consider the number of witnesses, though the preponderance is not necessarily with the greatest number."

This was reproduced from Section 94 of Rule 123, of the former Rules, which in turn was taken from Section 273 of Act No. 190.

[8] Section 5, Rule 132, of the Revised Rules of Court.

CONCURRING OPINION

BARREDO, J.:

I concur, with the qualifications herein set forth.

At the outset, I wish to make it clear that I find the innovative procedure sanctioned by respondent judge to be in line with the progressive tendency characterizing the new rules that have modified the system of preliminary investigation of criminal complaints by fiscals, where basically the determination of the existence or non-existence of probable cause is now supposed to be made on the basis of mere affidavits and counter-affidavits, as well as those now obtaining in practically all labor cases in the offices in the Department of Labor which have been vested with exclusive jurisdiction over the same pursuant to the policy of the government to dejudicialize them. And so, if the subject case herein were only a civil case instead of being a criminal one and it appearing that the counsel for the supposedly aggrieved party, the trial fiscal in this instance, who, under the law, has supervision and control of the prosecution, not the private prosecutor who alone filed the petition herein, and, at that, in her own name instead of her client, the alleged offended party,^[1] I would have voted to deny the petition. Indeed, I do not see anything fundamentally wrong with the basic procedure approved by His Honor of allowing the direct examination of a witness to be presented in the form of a previously prepared affidavit, provided that the same is reaffirmed over the oath of the affiant in open court when he testifies. But I am now voting to grant the petition because the procedure questioned here is a little short of what I feel ought to have been done, even on the hypothesis that We were dealing with a civil case.

While I would consider it a substantial compliance with the requirement of Sections 1 and 2 of Rule 132 about the testimony of a witness being given in open court and that the questions and answers be duly recorded by stenographic notes, that the direct examination be in the form of an affirmation by the witness under oath of a ready-made affidavit, particularly when the adverse party does not object, it is but in keeping with better practice and more protective of the rights of the adverse party, to require that the said affidavit be first pasturized or

sanitized so as to limit the same only to evidence that is material and competent. This preliminary step may be done either at the pre-trial, where the court may require all affidavits to be used for the purpose to be submitted, or at a preliminary stage of the trial proper before the witness takes the witness stand. Thus, the resulting direct testimony will not be polluted with inadmissible evidence and the cross-examination will be confined to what is material and competent. The only remaining possible objection then would be that the question asking for affirmation would be leading and that the answer would be in narrative form, but these are minor considerations. To start with, the affidavit may be made in question and answer form. Secondly, I have always considered the objection to a leading question as essentially relating to a mere matter of form, not of substance, hence re-latively unimportant. And as to answers in narrative form, the basic objection thereto is that it may include irrelevant and incompetent testimony, (Francisco on Evidence, The Revised Rules of Court, Vol. VII, Part II, 1973 ed., p. 211) but if the affidavit to be affirmed by a witness has already been purged of the objectionable portions as above indicated, the form of the answer should already be of no consequence.

Undoubtedly, this innovative procedure will advance greatly the march towards simplification and speed in the conduct of trials. As against possible shortcomings thereof in actual operation as above outlined, I am certain that the advantages to be derived by adopting it far outweigh the bases of the objections thereto. Of course, it goes without saying that for this procedure to be successfully employed and to attain the objective of speeding up the trial of cases, it is imperative that there should be intelligent cooperation between the court and contending counsels, who should try to avoid unnecessary and inconsequential objections, for every lawyer must know that the profession's first mission is to help the court in every way possible so that his case could be disposed of not only justly but with utmost dispatch, as long as with the expedient means employed no substantial prejudice is caused to the interests of his client.

In brief, my concurrence here is premised on the failure of respondent judge to first have the affidavits of the accused and his witnesses subjected to the possible legitimate objections of the prosecution to any portion thereof. It is not decisive, although significant, that it does not appear in the record that the fiscal who did not object to the procedure suggested by counsel for the accused took pains to require that the affidavits be first submitted for his examination, to give him the opportunity to make proper objections to portions thereof that might be incompetent or inadmissible. I take it that such omission could be due to the fiscal's unawareness of the exact import of the unorthodox procedure in question, hence he was unprepared to act accordingly. His Honor should nevertheless have seen to it, before giving his assent to the proposal of the defense, that the proper measures were taken to insure that all the matters contained in the affidavits offered by the defense are competent and admissible under the law.

I reiterate I see no fundamental objection to a direct testimony in the form I have discussed above. After all, according to the scholarly main opinion itself, "the main and essential purpose of requiring a witness to appear and testify orally at a trial is to secure for the adverse party the opportunity of cross-examination." No doubt, it is cross-examination in open court that is indispensable. The direct examination is secondary because, ordinarily, as is generally known, it can be fully rehearsed anyway, unlike cross-examination.

In closing, I wish to personally commend His Honor's obvious attitude of trying to improve upon existing procedures with an eye to making trials less burdened with time-consuming and complicated technical features that can anyway be done away with without sacrificing the essence of the judicial inquiry into the facts in dispute. Indeed, I have always tried to encourage all judges to look for ways and means of improving upon the beaten paths of existing practices and techniques, to the end that the trial and disposition of all kinds of cases before them may be simplified and abbreviated, if they have to be activists or revolutionaries in the process. Just a word of caution tho; for there are corners that cannot and must not be cut, and it is always best to occasionally seek

counsel from among the knowledgeable members of the bar, preferably in the open, before plunging into untrodden areas.

[1]The People of the Philippines was joined here only upon orders of the Court.

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