

ALFREDO ROMULO A. BUSUEGO, PETITIONER, VS. OFFICE OF THE OMBUDSMAN (MINDANAO) [AND] ROSA S. BUSUEGO, RESPONDENTS.

G.R. No. 196842. October 09, 2013

Ponente: PEREZ, J.

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PEREZ, J.:

Before us is a petition for certiorari seeking to annul and set aside the Resolution of the Ombudsman dated 17 April 2009[1] and Order dated October 2010,[2] which directed the tiling of an Information for Concubinage under Article 334 of the Revised Penal Code against petitioner Alfredo Romulo A. Busuego (Alfredo).

We chronicle the facts thus.

Private respondent Rosa S. Busuego (Rosa) filed a complaint for: (1) Concubinage under Article 334 of the Revised Penal Code; (2) violation of Republic Act No. 9262 (Anti-Violence Against Women and Their Children); and (3) Grave Threats under Article 282 of the Revised Penal Code, before the Office of the Ombudsman against her husband, Alfredo, with designation Chief of Hospital, Davao Regional Hospital, Apokon, Tagum City.

In her complaint, Rosa painted a picture of a marriage in disarray.

She and Alfredo were married on 12 July 1975 at the Assumption Church, Davao City. Their union was blessed with two (2) sons, Alfred and Robert, born in 1976 and 1978, respectively. Sometime in 1983, their marriage turned sour. At this time, Rosa unearthed photographs of, and love letters addressed to Alfredo from, other women. Rosa confronted Alfredo who claimed ignorance of the existence of these letters and innocence of any wrongdoing.

Purportedly, Alfredo very rarely stayed at home to spend time with his family. He would come home late at night on weekdays and head early to work the next day; his weekends were spent with his friends, instead of with his family. Rosa considered herself lucky if their family was able to spend a solid hour with Alfredo.

Around this time, an opportunity to work as nurse in New York City, United States of America (US) opened up for Rosa. Rosa informed Alfredo, who vehemently opposed Rosa's plan to work abroad. Nonetheless, Rosa completed the necessary requirements to work in the US and was scheduled to depart the Philippines in March 1985.

Before leaving, Rosa took up the matter again with Alfredo, who remained opposed to her working abroad. Furious with Rosa's pressing, Alfredo took his loaded gun and pointed it at Rosa's right temple, threatening and taunting Rosa to attempt to leave him and their family. Alfredo was only staved off because Rosa's mother arrived at the couple's house. Alfredo left the house in a rage: Rosa and her mother heard gun shots fired outside.

Because of that incident, Rosa acted up to her plan and left for the US. While in the US, Rosa became homesick and was subsequently joined by her children who were brought to the US by Alfredo. Rosa singularly reared them: Alfred, from grade school to university, while Robert, upon finishing high school, went back to Davao City

to study medicine and lived with Alfredo.

During that time his entire family was in the US, Alfredo never sent financial support. In fact, it was Rosa who would remit money to Alfredo from time to time, believing that Alfredo had stopped womanizing. Rosa continued to spend her annual vacation in Davao City.

Sometime in 1997, Rosa learned that a certain Emy Sia (Sia) was living at their conjugal home. When Rosa asked Alfredo, the latter explained that Sia was a nurse working at the Regional Hospital in Tagum who was in a sorry plight as she was allegedly being raped by Rosa's brother-in-law. To get her out of the situation, Alfredo allowed Sia to live in their house and sleep in the maids' quarters. At that time, Rosa gave Alfredo the benefit of the doubt.

In October 2005, Rosa finally learned of Alfredo's extra-marital relationships. Robert, who was already living in Davao City, called Rosa to complain of Alfredo's illicit affairs and shabby treatment of him. Rosa then rang up Alfredo which, not surprisingly, resulted in an altercation. Robert executed an affidavit, corroborating his mother's story and confirming his father's illicit affairs:

- In varying dates from July 1997 to January 1998, Robert found it strange that Sia slept with his father in the conjugal bedroom.
- He did not inform his mother of that odd arrangement as he did not want to bring trouble to their family.
- Eventually, Sia herself confirmed to Robert that she was Alfredo's mistress.
- During this period of concubinage, Sia was hospitalized and upon her discharge, she and Alfredo resumed their cohabitation.
- The relationship between Alfredo and Sia ended only when the latter found another boyfriend.
- His father next took up an affair with Julie de Leon (de Leon) whom Robert met when de Leon fetched Alfredo on one occasion when their vehicle broke down in the middle of the road.
- Robert read various Short Message Service (SMS) exchanges between Julie and Alfredo on Alfredo's mobile phone.
- On 23, 24, 30 and 31 December 2004, de Leon stayed in Rosa's and Alfredo's conjugal dwelling and stayed in the conjugal room the entire nights thereof.

The househelpers, Melissa S. Diambangan and Liza S. Diambangan, likewise executed a joint affidavit in support of Rosa's allegations:

- They had seen Sia sleep and stay overnight with Alfredo in the conjugal bedroom.
- Sia herself, who called Alfredo "Papa," confirmed the two's sexual relationship.
- On 23, 24, 30 and 31 December 2004, de Leon stayed in the conjugal dwelling and slept overnight with Alfredo in the conjugal room.

As a result, Rosa and their other son Alfred forthwith flew to Davao City without informing Alfredo of their impending return. Upon Rosa's return, she gathered and consolidated information on her husband's sexual affairs.

Pursuant to her charges of violation of Republic Act No. 9262 and Grave Threats, Rosa averred that during the course of their marriage, apart from the marital infidelity, Alfredo physically and verbally abused her and her

family. On one occasion after Rosa confirmed the affairs, Alfredo threatened their family, including other members of their household that he will gun them down should he chance upon them in Tagum City. Lastly, on 22 March 2006, Alfredo purportedly dismissed house helper Liza Diambangan and threatened her.

As expected, Alfredo, in his counter-affidavit, denied all accusations against him and alleged that:

- Rosa, despite his pleas for them to remain and raise their family in the Philippines, chose to live in the US, separate from him.
- Rosa's allegations that he had kept photographs of, and love letters from, other women, were only made to create a cause of action for the suit for Legal Separation which Rosa filed sometime in 1998.
- It was highly improbable that he committed acts of concubinage with Sia and de Leon since from the time he became Chief of Hospital of the Davao Regional Hospital in Tagum City, he practically stayed all days of the work week in the hospital. The instances he went home were few and far between, only to check on the house and provide for household expenses.
- When Robert returned to Davao City and lived with him, it became more impossible for him to have shackled up with Sia and de Leon in the conjugal dwelling.
- With respect to his alleged relationship with Sia, without admitting to anything, that Sia, for a time, may have lived in his and Rosa's conjugal house, staying at the maids' quarters. However, at no instance did he keep Sia as his mistress in the conjugal dwelling.
- As regards the dates of December 23, 24, 30 and 31, 2004 when he supposedly stayed with de Leon in the conjugal room, Alfredo pointed out that said dates were busiest days of the year in the hospital where his presence as Chief of Hospital is most required.
- By Rosa's own admission, she first learned of Alfredo's alleged concubinage in 1997, and yet she still continued with her yearly visits to Alfredo in Davao City. Those instances ought to be construed as condonation of the concubinage.
- Significantly, the alleged concubines, Sia and de Leon, were not impleaded along with Alfredo as party-respondents in the complaint in violation of Article 344 of the Revised Penal Code.

Alfredo made short shrift of Rosa's charges of violation of Republic Act No. 9262 and Grave Threats. He claimed that, at no time, did he threaten, the lives or, to harm his wife, their family and members of their household. He only berated the help for perpetrating gossip about his behavior and conduct.

In their subsequent exchange of responsive pleadings, Rosa maintained Alfredo's culpability, and naturally, Alfredo claimed innocence.

In the course thereof, the procedural issue of Rosa's failure to implead Sia and de Leon as respondents cropped up. Alfredo insisted that Rosa's complaint ought to be dismissed for failure to implead his alleged concubines as respondents.

Specifically to dispose of that issue, the Ombudsman scheduled a clarificatory hearing where both Rosa and Alfredo were represented by their respective counsels:

x x x Rosa was apprised of the need to implead the two alleged mistresses in the complaint for Concubinage pursuant to Article 344 of the Revised Penal Code. Although Alfredo objected to the amendment of the complaint, at this point in time, due to the alleged procedural lapse committed by Rosa, this Office explained to the parties that the position of Alfredo would just prolong the conduct of the preliminary investigation since

Rosa can just re-file her complaint. The doctrine of *res judicata* does not apply in the preliminary investigation stage. Hence, the counsel for Rosa was directed to submit to this Office the addresses of the alleged mistresses so that they could be served with the Order directing them to file their counter-affidavits.

Rosa submitted an Ex-Parte Manifestation on the last known addresses of Julie de Leon and Emy Sia. x x x.[3]

On 24 June 2008, the Ombudsman issued a Joint Order[4] impleading Sia and de Leon as party-respondents in the complaint for Concubinage and directing them to submit their respective counter-affidavits within a period of time. Copies of the Joint Order were mailed to Sia's and de Leon's last known addresses, as provided by Rosa to the Ombudsman.

Sia and de Leon did not submit their respective counter-affidavits: a copy of the Joint Order sent to Sia's last known address was returned to the Ombudsman with the notation on the Registry Return Receipt No. 1624 "Return to Sender; removed," while a copy thereof to de Leon was received on 3 September 2008 by Ananias de Leon.[5]

Apparently still opposed to the Ombudsman's ruling to simply amend the complaint and implead therein Alfredo's alleged mistresses, Alfredo filed his Comment to the 24 June 2008 Order with Motion to Dismiss and/or Refer the charges to the Appropriate Provincial/City Prosecutor⁶ praying for dismissal of the complaint for: (1) failure to implead the two mistresses in violation of Article 344 of the Revised Penal Code; and in the alternative, (2) referral of the complaint to the Office of the City Prosecutor as provided in OMB-DOJ Circular No. 95-001.

Rosa filed a Reply to that latest pleading of Alfredo.

On 17 April 2009, the Ombudsman issued the herein assailed Resolution, disposing of the procedural issues:

Before dwelling into the merits of the case, this Office finds an urgent need to resolve the ancillary issues raised by petitioner Dr. Busuego on: 1.) the alleged legal infirmity of Rosas's initiatory pleading by resorting to a procedural short cut which would result to the delay in the disposition of this case; and 2.) the criminal charges imputed are not in relation to office, hence, the Office of the Provincial/City Prosecutor shall investigate and prosecute this case pursuant to OMB-DOJ Joint Circular No. 95-001, Series of 1995.

On the first issue, this Office observed that Busuego had already pointed out in his counter-Affidavit the alleged deficiency in the complaint. Rosa also explained in her Reply that the names of the mistresses were categorically mentioned in the complaint. She averred that this Office is empowered to investigate and prosecute any act or omission of a public official or employee to the exclusion of non-government employees. She stated that the inclusion of the alleged concubines in the Information to be filed in court is a matter of procedure, within the competence of the investigating prosecutor.

In order to clarify some matters, including the said issue, with the parties, the clarificatory hearing was conducted. It was explained in the said hearing the need to implead the alleged concubines in this case pursuant to Article 344 of the Revised Penal Code and to obviate the proceedings, Rosa was directed to submit the addresses of the alleged concubines. Busuego's position that the said short cut procedure would delay the proceedings is misplaced. If the case will be dismissed based on procedural infirmity, Rosa could still amend her complaint and re-file this case since the doctrine of *res judicata* does not apply in the preliminary investigation stage of the proceedings.

On the second issue, the motion of Busuego to refer this case to the Office of the City Prosecutor was belatedly filed. Record would show that the motion praying for the referral of this case to the Office of the City Prosecutor was filed on 17 July 2008, after the parties have already filed all their pleadings and the case is now ripe for resolution. Further, referral to the said office is not mandatory as cited in the said Joint Circular.[6]

In the same Resolution, the Ombudsman, ultimately, found probable cause to indict only Alfredo and Sia of Concubinage and directed the filing of an Information against them in the appropriate court:

WHEREFORE, in view of the foregoing, this Office finds a prima facie case for violation of Article 334 of the Revised Penal Code (concubinage) and that petitioner ALFREDO ROMULO BUSUEGO y ABRIO, and EMY SIA, are probably guilty thereof.

Let the herewith Information be filed in the appropriate court.

The charges for: 1.) Concubinage against Alfredo Romulo Busuego y Abrio and Julie de Leon; 2.) Grave Threats against Alfredo Romulo y Abrio; and 3.) violation of RA 9262 (Anti-Violence Against Women and Children Act), are hereby DISMISSED for lack of merit.[7]

Alfredo filed a Partial Motion for Reconsideration excepting to the Ombudsman's ruling on the automatic inclusion of Sia as respondent in the complaint and their indictment for the crime of Concubinage. Alfredo is adamant that Rosa's complaint should have, at the outset, impleaded his alleged concubines. Failing such, the Ombudsman cannot resort to automatic inclusion of party-respondents, erroneously finding him and Sia prima facie culpable for Concubinage. For good measure, Alfredo pointed out that from Rosa's own allegations, she had condoned or pardoned Alfredo's supposed concubinage. Alfredo likewise submitted Liza S. Diambangan's affidavit, recanting her previous affidavit corroborating Rosa's charges.

Nonetheless, the Ombudsman stood pat on its ruling, declared that the Partial Motion for Reconsideration was filed out of time, and gave scant attention to Liza S. Diambangan's affidavit of recantation:

WHEREFORE, all the foregoing considered, this instant Motion for Reconsideration is hereby DENIED. The findings in the questioned Resolution hereby remains undisturbed. Let the Information for Concubinage be filed in the proper court against herein Busuego.[8]

Alfredo now comes to us on petition for certiorari alleging grave abuse of discretion in the Ombudsman's finding of probable cause to indict him and Sia for Concubinage. Alfredo's badges of grave abuse of discretion are the following:

- The Ombudsman railroaded the inclusion of Sia and de Leon as party-respondents in the complaint;
- The Ombudsman did not refer the complaint to the Department of Justice, considering that the offense of Concubinage is not committed in relation to his office as Chief of Hospital;
- The Ombudsman glossed over Rosa's condonation of Alfredo's supposed Concubinage when she alleged in the complaint that she had known of Alfredo's womanizing and believed him to have changed his ways;
- The Ombudsman did not take into consideration the affidavit of recantation of Liza Diambangan; and
- The Ombudsman found probable cause to indict Alfredo and Sia for Concubinage.

We sustain the Ombudsman.

The Ombudsman has full discretionary authority in the determination of probable cause during a preliminary investigation.[10] This is the reason why judicial review of the resolution of the Ombudsman in the exercise of its power and duty to investigate and prosecute felonies and/or offenses of public officers is limited to a determination of whether there has been a grave abuse of discretion amounting to lack or excess of jurisdiction. Courts are not empowered to substitute their judgment for that of the Ombudsman.[11]

By grave abuse of discretion is meant such capricious and whimsical exercise of judgment tantamount to lack of jurisdiction.[12] The abuse of discretion must be so patent and gross as to amount to an evasion of a positive duty

or a virtual refusal to perform a duty enjoined by law, or to act at all in contemplation of law, as where the power is exercised in an arbitrary and despotic manner by reason of passion or hostility.[13] In this regard, petitioner failed to demonstrate the Ombudsman's abuse, much less grave abuse, of discretion.

First, Alfredo insists that the Ombudsman's automatic inclusion, over his vehement objections of Sia and de Leon as party-respondents, violates Article 344 of the Revised Penal Code and Section 5, Rule 110 of the Rules of Court, which respectively provide:

Art. 344. Prosecution of the crimes of adultery, concubinage, seduction, abduction, rape and acts of lasciviousness. — The crimes of adultery and concubinage shall not be prosecuted except upon a complaint filed by the offended spouse.

The offended party cannot institute criminal prosecution without including both the guilty parties, if they are both alive, nor, in any case, if he shall have consented or pardoned the offenders.

Section 5. Who must prosecute criminal action. – x x x.

The crimes of adultery and concubinage shall not be prosecuted except upon a complaint filed by the offended spouse. The offended party cannot institute criminal prosecution without including the guilty parties, if both are alive, nor, in any case, if the offended party has consented to the offense or pardoned the offenders.

We do not agree.

The submission of Alfredo is belied by the fact that the Ombudsman merely followed the provisions of its Rules of Procedure. Thus:

Rule II
PROCEDURE IN CRIMINAL CASES

x x x x

Section 2. Evaluation – Upon evaluating the complaint, the investigating officer shall recommend whether it may be:

- a)
dismissed outright for want of palpable merit;
- b)
referred to respondent for comment;
- c)
indorsed to the proper government office or agency which has jurisdiction over the case;
- d)
forwarded to the appropriate office or official for fact-finding investigation;
- e)
referred for administrative adjudication; or
- f)
subjected to a preliminary investigation.

x x x x

Section 4. Procedure – The preliminary investigation of cases falling under the jurisdiction of the Sandiganbayan and Regional Trial Courts shall be conducted in the manner prescribed in Section 3, Rule 112 of the Rules of Court, subject to the following provisions:

a) x x x

b) After such affidavits have been secured, the investigating officer shall issue an order, attaching thereto a copy of the affidavits and other supporting documents, directing the respondents to submit, within ten (10) days from receipt thereof, his counter-affidavits and controverting evidence with proof of service thereof on the complainant. The complainant may file reply affidavits within ten (10) days after service of the counter-affidavits.

c) If the respondents does not file a counter-affidavit, the investigating officer may consider the comment filed by him, if any, as his answer to the complaint. In any event, the respondent shall have access to the evidence on record.

d) No motion to dismiss shall be allowed except for lack of jurisdiction. Neither may a motion for a bill of particulars be entertained. If respondent desires any matter in the complainant's affidavit to be clarified, the particularization thereof may be done at the time of the clarificatory questioning in the manner provided in paragraph (f) of this section.

e) If the respondents cannot be served with the order mentioned in paragraph 6 hereof, or having been served, does not comply therewith, the complaint shall be deemed submitted for resolution on the basis of the evidence on the record.

f) If, after the filing of the requisite affidavits and their supporting evidences, there are facts material to the case which the investigating officer may need to be clarified on, he may conduct a clarificatory hearing during which the parties shall be afforded the opportunity to be present but without the right to examine or cross-examine the witness being questioned. Where the appearance of the parties or witnesses is impracticable, the clarificatory questioning may be conducted in writing, whereby the questions desired to be asked by the investigating officer or a party shall be reduced into writing and served on the witness concerned who shall be required to answer the same in writing and under oath.

g) Upon the termination of the preliminary investigation, the investigating officer shall forward the records of the case together with his resolution to the designated authorities for their appropriate action thereon.

No information may be filed and no complaint may be dismissed without the written authority or approval of the ombudsman in cases falling within the jurisdiction of the Sandiganbyan, or of the proper Deputy Ombudsman in all other cases. (Emphasis supplied).

Notably, Rosa's complaint contained not just the Concubinage charge, but other charges: violation of Republic Act No. 9262 and Grave Threats. Upon the Ombudsman's perusal, the complaint was supported by affidavits corroborating Rosa's accusations. Thus, at that stage, the Ombudsman properly referred the complaint to Alfredo for comment. Nonetheless, while the Ombudsman found no reason for outright dismissal, it deemed it fit to hold a clarificatory hearing to discuss the applicability of Article 344 of the Revised Penal Code, the issue having been insisted upon by Alfredo.

Surely the procedural sequence of referral of the complaint to respondent for comment and thereafter the holding of a clarificatory hearing is provided for in paragraph b, Section 2 and paragraphs d and f, Section 4 of Rule II, which we have at the outset underscored. Thus did the Ombudsman rule:

In order to clarify some matters, including the said issue, with the parties, the clarificatory hearing was

conducted. It was explained in the said hearing the need to implead the alleged concubines in this case pursuant to Article 344 of the Revised Penal Code and to obviate the proceedings, Rosa was directed to submit the addresses of the alleged concubines. Busuego's position that the said short cut procedure would delay the proceedings is misplaced. If the case will be dismissed based on procedural infirmity, Rosa could still amend her complaint and re-file this case since the doctrine of res judicata does not apply in the preliminary investigation stage of the proceedings.[13]

The Ombudsman merely facilitated the amendment of the complaint to cure the defect pointed out by Alfredo. We agree with the Ombudsman that it would be superfluous to dismiss the complaint when amendment thereof is allowed by its Rules of Procedure[14] and the Rules of Court.[15]

Second, Alfredo claims that the Ombudsman should have referred Rosa's complaint to the Department of Justice (DOJ), since the crime of Concubinage is not committed in relation to his being a public officer. This is not a new argument.

The Ombudsman's primary jurisdiction, albeit concurrent with the DOJ, to conduct preliminary investigation of crimes involving public officers, without regard to its commission in relation to office, had long been settled in *Sen. Honasan II v. The Panel of Investigating Prosecutors of DOJ*,[16] and affirmed in subsequent cases:

The Constitution, Section 15 of the Ombudsman Act of 1989 and Section 4 of the Sandiganbayan Law, as amended, do not give to the Ombudsman exclusive jurisdiction to investigate offenses committed by public officers or employees. The authority of the Ombudsman to investigate offenses involving public officers or employees is concurrent with other government investigating agencies such as provincial, city and state prosecutors. However, the Ombudsman, in the exercise of its primary jurisdiction over cases cognizable by the Sandiganbayan, may take over, at any stage, from any investigating agency of the government, the investigation of such cases.

In other words, respondent DOJ Panel is not precluded from conducting any investigation of cases against public officers involving violations of penal laws but if the cases fall under the exclusive jurisdiction of the Sandiganbayan, the respondent Ombudsman may, in the exercise of its primary jurisdiction take over at any stage.

Thus, with the jurisprudential declarations that the Ombudsman and the DOJ have concurrent jurisdiction to conduct preliminary investigation, the respective heads of said offices came up with OMB-DOJ Joint Circular No. 95-001 for the proper guidelines of their respective prosecutors in the conduct of their investigations, to wit:

OMB-DOJ JOINT CIRCULAR NO. 95-001
Series of 1995

ALL GRAFT INVESTIGATION/SPECIAL PROSECUTION OFFICERS OF THE OFFICE OF THE OMBUDSMAN

TO:

ALL REGIONAL STATE PROSECUTORS AND THEIR ASSISTANTS, PROVINCIAL/CITY PROSECUTORS AND THEIR ASSISTANTS, STATE PROSECUTORS AND PROSECUTING ATTORNEYS OF THE DEPARTMENT OF JUSTICE.

SUBJECT:

HANDLING COMPLAINTS FILED AGAINST PUBLIC OFFICERS AND EMPLOYEES, THE CONDUCT OF PRELIMINARY INVESTIGATION, PREPARATION OF RESOLUTIONS AND INFORMATIONS AND PROSECUTION OF CASES BY PROVINCIAL AND CITY PROSECUTORS AND THEIR ASSISTANTS.

X-----X

In a recent dialogue between the OFFICE OF THE OMBUDSMAN and the DEPARTMENT OF JUSTICE, discussion centered around the latest pronouncement of the SUPREME COURT on the extent to which the OMBUDSMAN may call upon the government prosecutors for assistance in the investigation and prosecution of criminal cases cognizable by his office and the conditions under which he may do so. Also discussed was Republic Act No. 7975 otherwise known as "AN ACT TO STRENGTHEN THE FUNCTIONAL AND STRUCTURAL ORGANIZATION OF THE SANDIGANBAYAN, AMENDING FOR THE PURPOSE PRESIDENTIAL DECREE NO. 1606, AS AMENDED" and its implications on the jurisdiction of the office of the Ombudsman on criminal offenses committed by public officers and employees.

Concerns were expressed on unnecessary delays that could be caused by discussions on jurisdiction between the OFFICE OF THE OMBUDSMAN and the DEPARTMENT OF JUSTICE, and by procedural conflicts in the filing of complaints against public officers and employees, the conduct of preliminary investigations, the preparation of resolutions and informations, and the prosecution of cases by provincial and city prosecutors and their assistants as DEPUTIZED PROSECUTORS OF THE OMBUDSMAN.

Recognizing the concerns, the OFFICE OF THE OMBUDSMAN and the DEPARTMENT OF JUSTICE, in a series of consultations, have agreed on the following guidelines to be observed in the investigation and prosecution of cases against public officers and employees:

1. Preliminary investigation and prosecution of offenses committed by public officers and employees IN RELATION TO OFFICE whether cognizable by the SANDIGANBAYAN or the REGULAR COURTS, and whether filed with the OFFICE OF THE OMBUDSMAN or with the OFFICE OF THE PROVINCIAL/CITY PROSECUTOR shall be under the control and supervision of the office of the OMBUDSMAN.
2. Unless the Ombudsman under its Constitutional mandate finds reason to believe otherwise, offenses NOT IN RELATION TO OFFICE and cognizable by the REGULAR COURTS shall be investigated and prosecuted by the OFFICE OF THE PROVINCIAL/CITY PROSECUTOR, which shall rule thereon with finality.
3. Preparation of criminal information shall be the responsibility of the investigating officer who conducted the preliminary investigation. Resolutions recommending prosecution together with the duly accomplished criminal informations shall be forwarded to the appropriate approving authority.
4. Considering that the OFFICE OF THE OMBUDSMAN has jurisdiction over public officers and employees and for effective monitoring of all investigations and prosecutions of cases involving public officers and employees, the OFFICE OF THE PROVINCIAL/CITY PROSECUTOR shall submit to the OFFICE OF THE OMBUDSMAN a monthly list of complaints filed with their respective offices against public officers and employees.

x x x x

A close examination of the circular supports the view of the respondent Ombudsman that it is just an internal agreement between the Ombudsman and the DOJ.

Sections 2 and 4, Rule 112 of the Revised Rules on Criminal Procedure on Preliminary Investigation, effective December 1, 2000, to wit:

SEC. 2. Officers authorized to conduct preliminary investigations –

The following may conduct preliminary investigations:

(a)

Provincial or City Prosecutors and their assistants;

(b)

Judges of the Municipal Trial Courts and Municipal Circuit Trial Courts;

(c)

National and Regional State Prosecutors; and

(d)

Other officers as may be authorized by law.

Their authority to conduct preliminary investigation shall include all crimes cognizable by the proper court in their respective territorial jurisdictions.

SEC. 4. Resolution of investigating prosecutor and its review. - If the investigating prosecutor finds cause to hold the respondent for trial, he shall prepare the resolution and information. He shall certify under oath in the information that he, or as shown by the record, an authorized officer, has personally examined the complainant and his witnesses; that there is reasonable ground to believe that a crime has been committed and that the accused is probably guilty thereof; that the accused was informed of the complaint and of the evidence submitted against him; and that he was given an opportunity to submit controverting evidence. Otherwise, he shall recommend the dismissal of the complaint.

Within five (5) days from his resolution, he shall forward the record of the case to the provincial or city prosecutor or chief state prosecutor, or to the Ombudsman or his deputy in cases of offenses cognizable by the Sandiganbayan in the exercise of its original jurisdiction. They shall act on the resolution within ten (10) days from their receipt thereof and shall immediately inform the parties of such action.

No complaint or information may be filed or dismissed by an investigating prosecutor without the prior written authority or approval of the provincial or city prosecutor or chief state prosecutor or the Ombudsman or his deputy.

Where the investigating prosecutor recommends the dismissal of the complaint but his recommendation is disapproved by the provincial or city prosecutor or chief state prosecutor or the Ombudsman or his deputy on the ground that a probable cause exists, the latter may, by himself file the information against the respondent, or direct another assistant prosecutor or state prosecutor to do so without conducting another preliminary investigation.

If upon petition by a proper party under such rules as the Department of Justice may prescribe or *motu proprio*, the Secretary of Justice reverses or modifies the resolution of the provincial or city prosecutor or chief state prosecutor, he shall direct the prosecutor concerned either to file the corresponding information without conducting another preliminary investigation, or to dismiss or move for dismissal of the complaint or information with notice to the parties. The same Rule shall apply in preliminary investigations conducted by the officers of the Office of the Ombudsman.

confirm the authority of the DOJ prosecutors to conduct preliminary investigation of criminal complaints filed with them for offenses cognizable by the proper court within their respective territorial jurisdictions, including those offenses which come within the original jurisdiction of the Sandiganbayan; but with the qualification that in offenses falling within the original jurisdiction of the Sandiganbayan, the prosecutor shall, after their investigation, transmit the records and their resolutions to the Ombudsman or his deputy for appropriate action. Also, the prosecutor cannot dismiss the complaint without the prior written authority of the Ombudsman or his deputy, nor can the prosecutor file an Information with the Sandiganbayan without being deputized by, and without prior written authority of the Ombudsman or his deputy.

X X X X

To reiterate for emphasis, the power to investigate or conduct preliminary investigation on charges against any public officers or employees may be exercised by an investigator or by any provincial or city prosecutor or their assistants, either in their regular capacities or as deputized Ombudsman prosecutors. The fact that all prosecutors are in effect deputized Ombudsman prosecutors under the OMB-DOJ circular is a mere superfluity. The DOJ Panel need not be authorized nor deputized by the Ombudsman to conduct the preliminary investigation for complaints filed with it because the DOJ's authority to act as the principal law agency of the government and investigate the commission of crimes under the Revised Penal Code is derived from the Revised Administrative Code which had been held in the *Natividad* case citation omitted as not being contrary to the Constitution. Thus, there is not even a need to delegate the conduct of the preliminary investigation to an agency which has the jurisdiction to do so in the first place. However, the Ombudsman may assert its primary jurisdiction at any stage of the investigation. (Emphasis supplied).

In *Honasan II*, although Senator Gregorio "Gringo" Honasan was a public officer who was charged with coup d'état for the occupation of Oakwood on 27 July 2003, the preliminary investigation therefor was conducted by the DOJ. Honasan questioned the jurisdiction of the DOJ to do so, proffering that it was the Ombudsman which had jurisdiction since the imputed acts were committed in relation to his public office. We clarified that the DOJ and the Ombudsman have concurrent jurisdiction to investigate offenses involving public officers or employees. Nonetheless, we pointed out that the Ombudsman, in the exercise of its primary jurisdiction over cases cognizable by the Sandiganbayan, may take over, at any stage, from any investigating agency of the government, the investigation of such cases. Plainly, applying that ruling in this case, the Ombudsman has primary jurisdiction, albeit concurrent with the DOJ, over Rosa's complaint, and after choosing to exercise such jurisdiction, need not defer to the dictates of a respondent in a complaint, such as Alfredo. In other words, the Ombudsman may exercise jurisdiction to the exclusion of the DOJ.

Third. Alfredo next argues that Rosa had pardoned his concubinage, having admitted to knowing of his womanizing and yet continuing with their relationship as demonstrated in Rosa's annual visits to him in Davao City.

We are not convinced.

Old jurisprudence has held that the cynosure in the question of whether the wife condoned the concubinage lies in the wife's "line of conduct under the assumption that she really believed [her husband] guilty of concubinage:"

Condonation is the forgiveness of a marital offense constituting a ground for legal separation or, as stated in *I Bouver's Law Dictionary*, p. 585, condonation is the 'conditional forgiveness or remission, by a husband or wife of a matrimonial offense which the latter has committed.'

X X X X

A detailed examination of the testimony of the plaintiff-husband, especially those portions quoted above, clearly shows that there was a condonation on the part of the husband for the supposed 'acts of rank infidelity amounting to adultery' committed by defendant-wife. Admitting for the sake of argument that the infidelities amounting to adultery were committed by the defendant, a reconciliation was effected between her and the plaintiff. The act of the latter in persuading her to come along with him, and the fact that she went with him and consented to be brought to the house of his cousin Pedro Bugayong and together they slept there as husband and wife for one day and one night, and the further fact that in the second night they again slept together in their house likewise as husband and wife — all these facts have no other meaning in the opinion of this court than that a reconciliation between them was effected and that there was a condonation of the wife by the husband. The reconciliation occurred almost ten months after he came to know of the acts of infidelity

amounting to adultery.

In *Shackleton vs. Shackleton*, 48 N. J. Eq. 364; 21 Atl. 935, it has been held that 'condonation is implied from sexual intercourse after knowledge of the other infidelity. Such acts necessarily implied forgiveness. It is entirely consonant with reason and justice that if the wife freely consents to sexual intercourse after she has full knowledge of the husband's guilt, her consent should operate as a pardon of his wrong.'

In *Tiffany's Domestic and Family Relations*, section 107 says:

'Condonation. Is the forgiveness of a marital offense constituting a ground for divorce and bars the right to a divorce. But it is on the condition, implied by the law when not express, that the wrongdoer shall not again commit the offense; and also that he shall thereafter treat the other spouse with conjugal kindness. A breach of the condition will revive the original offense as a ground for divorce. Condonation may be express or implied.'

It has been held in a long line of decisions of the various supreme courts of the different states of the U. S. that 'a single voluntary act of sexual intercourse by the innocent spouse after discovery of the offense is ordinarily sufficient to constitute condonation, especially as against the husband'. (27 *Corpus Juris Secundum*, section 61 and cases cited therein).

In the lights of the facts testified to by the plaintiff-husband, of the legal provisions above quoted, and of the various decisions above-cited, the inevitable conclusion is that the present action is untenable.

Although no acts of infidelity might have been committed by the wife, We agree with the trial judge that the conduct of the plaintiff-husband above narrated despite his belief that his wife was unfaithful, deprives him, as alleged the offended spouse, of any action for legal separation against the offending wife, because his said conduct comes within the restriction of Article 100 of the Civil Code.

The only general rule in American jurisprudence is that any cohabitation with the guilty party, after the commission of the offense, and with the knowledge or belief on the part of the injured party of its commission, will amount to conclusive evidence of condonation; but this presumption may be rebutted by evidence (60 L. J. Prob. 73).[17]

Although the foregoing speaks of condonation of concubinage as a ground for legal separation, the holding therein applies with equal force in a prosecution for concubinage as a felony. Indeed, Rosa's admission was that she believed her husband had stopped womanizing, not that she had knowledge of Alfredo's specific acts of concubinage with Sia and de Leon, specifically keeping them in the conjugal dwelling. This admission set against the specific acts of concubinage listed in Article 334[18] of the Revised Penal Code does not amount to condonation. Their continued cohabitation as husband and wife construed from Rosa's annual visits to Davao City is not acquiescence to Alfredo's relations with his concubines. On that score, we have succinctly held:

We can find nothing in the record which can be construed as pardon or condonation. It is true that the offended party has to a considerable extent been patient with her husband's shortcomings, but that seems to have been due to his promises of improvement; nowhere does it appear that she has consented to her husband's immorality or that she has acquiesced in his relations with his concubine.[19]

Fourth. Alfredo next grasps at Liza S. Diambangan's affidavit of recantation to eliminate his probable culpability for concubinage.

Again, we are not swayed by Alfredo's asseverations.

We have generally looked with disfavor upon retraction of testimonies previously given in court. Affidavits of recantation are unreliable and deserve scant consideration. The asserted motives for the repudiation are commonly held suspect, and the veracity of the statements made in the affidavit of repudiation are frequently and deservedly

subject to serious doubt.[20]

In *Firaza v. People*, we intoned:

Merely because a witness says that what he had declared is false and that what he now says is true, is not sufficient ground for concluding that the previous testimony is false. No such reasoning has ever crystallized into a rule of credibility. The rule is that a witness may be impeached by a previous contradictory statement x x x not that a previous statement is presumed to be false merely because a witness now says that the same is not true. The jurisprudence of this Court has always been otherwise, i.e., that contradictory testimony given subsequently does not necessarily discredit the previous testimony if the contradictions are satisfactorily explained. [Citations omitted].

Indeed, it is a dangerous rule to set aside a testimony which has been solemnly taken before a court of justice in an open and free trial and under conditions precisely sought to discourage and forestall falsehood simply because one of the witnesses who had given the testimony later on changed his mind. Such a rule will make solemn trials a mockery and place the investigation of the truth at the mercy of unscrupulous witnesses. Unless there be special circumstances which, coupled with the retraction of the witness, really raise doubt as to the truth of the testimony given by him at the trial and accepted by the trial judge, and only if such testimony is essential to the judgment of conviction, or its elimination would lead the trial judge to a different conclusion, an acquittal of the accused based on such a retraction would not be justified.[21]

In this case, Liza S. Diambangan's testimony merely corroborates the still standing story of Robert and Melissa Diambangan, the other helper in the Busuego household. Clearly, the two's consistent story may still be the basis of the Ombudsman's finding of a prima facie case of concubinage against Alfredo and Sia.

Finally. Despite his vigorous arguments, Alfredo claims that there is simply no basis for indicting him and Sia for concubinage.

Article 334 of the Revised Penal Code lists three (3) specific acts of concubinage by a husband:

(1) keeping a mistress in the conjugal dwelling; (2) sexual intercourse, under scandalous circumstances, with a woman who is not his wife; and (3) cohabiting with a woman who is not his wife in any other place.

The Ombudsman found a prima facie case against Alfredo and Sia based on the testimony of Robert, Melissa S. Diambangan and Liza S. Diambangan that Alfredo had kept Sia in the conjugal dwelling where Sia even stayed at the conjugal room. We completely agree with the Ombudsman's disquisition:

x x x. It is ingrained in human behavior that a child has love, respect and loyalty to his family and [would] strive to keep the family harmonious and united. This is the very reason why [Robert] did not inform his mother about his father's infidelities during the time when his father was keeping his mistress at the conjugal dwelling. A son would never turn against his father by fabricating such a serious story which will cause his home to crumble, if such is not true. His natural instinct is to protect his home, which he did when he kept silent for a long time. What broke the camel's back was the abusive treatment he allegedly suffered and the thought that things would change for the better if his mom would intervene.

The story of [Robert] in his Affidavit was reinforced by the two house helpers Melissa S. Diambangan and Liza S. Diambangan, who were employed by the family. Melissa was with the Busuego family in their conjugal home in 1997. She left the family in 2005 but returned in 2006. Liza started working with the family in 2002. Melissa revealed that it was Emy Sia who recruited her to work with the Busuego family. They both attested to the fact that [Alfredo] and Emy Sia slept together in the bedroom of [Alfredo] but Emy Sia would sleep in the maid's quarter when [Rosa and Alfred] came home for a visit in 1997. They recalled that Emy Sia calls [Alfredo] "papa". They narrated that Emy Sia would even confide to them some private matters relating to [her] sexual [proclivities with Alfredo].[22]

We further note that the presence of Sia at the Busuego household and her interim residence thereat was not disputed nor explained. Alfredo just cavalierly declares that Sia may have stayed in the conjugal dwelling, but never as his mistress, and Sia supposedly slept in the maids' quarters.

While such a claim is not necessarily preposterous we hold that such is a matter of defense which Alfredo should raise in court given that Rosa's complaint and its accompanying affidavits have created a prima facie case for Concubinage against Alfredo and Sia.

WHEREFORE the petition is DISMISSED The Resolutions of the Ombudsman dated 17 April 2009 and 11 October 2010 are AFFIRMED.

SO ORDERED.

Carpio, (Chairperson), Brion, Del Castillo, and Perlas-Bernabe, JJ., concur.

[1] Rollo, pp. 242-272.

[2] Id. at 317-321.

[3] Id. at 255-256.

[4] Id. at 233-236.

[5] Id. at 256.

[6] Id. at 237-241.

[7] Id. at 258-259.

[8] Id. at 270-271.

[9] Id. at 320.

[10] *Kalalo v. Office of the Ombudsman*, G.R. No. 158189, 23 April 2010, 619 SCRA 141, 148.

[11] *Asetre v. Asetre*, G.R. No. 171536, 7 April 2009, 584 SCRA 471, 483.

[12] *Casing v. Ombudsman*, G.R. No. 192334, 13 June 2012, 672 SCRA 500, 508.

[13] Id.

[13] Rollo, pp. 258-259.

[14] Rule V, Section 3. Rules of Court, application. In all matters not provided in these rules, the Rules of Court shall apply in a suppletory character, or by analogy whenever practicable and convenient.

[15] Rule 110, Section 14. 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.

[16] G.R. No. 159747, 13 April 2004, 427 SCRA 46, 70-75.

[17] *Bugayong v. Ginez*, 100 Phil. 616, 620-623 (1956).

[18] Art. 334. Concubinage. — Any husband who shall keep a mistress in the conjugal dwelling, or, shall have

sexual intercourse, under scandalous circumstances, with a woman who is not his wife, or shall cohabit with her in any other place, shall be punished by prision correccional in its minimum and medium periods.

The concubine shall suffer the penalty of destierro.

[19] *People v. Francisco*, 55 Phil. 1008, 1011 (1930).

[20] *Firaza v. People*, 547 Phil. 572, 584 (2007).

[21] *Id.* at 584-585.

[22] *Rollo*, pp. 262-263.

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