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G.R. No. 207342 – GOVERNMENT OF HONG KONG SPECIAL ADMINISTRATIVE REGION, represented by the Philippine Department of Justice, Petitioner, **v. JUAN ANTONIO MUÑOZ,** Respondent.

Promulgated:

August 16, 2016

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DISSENTING OPINION

LEONEN, *J.*:

Respectfully, I dissent.

Under Presidential Decree No. 1069,[1] otherwise known as the Philippine Extradition Law, extradition may be granted only under a treaty or convention.[2] In this case, the relevant treaty is the Agreement Between the Government of the Republic of the Philippines and the Government of Hong Kong for the Surrender of Accused and Convicted Persons (RP-HK Agreement), which provides:

> ARTICLE 2
> OFFENCES
>
> (1) Surrender shall be granted for an offence coming within any of the following descriptions of offences insofar as it is according to the laws of both Parties punishable by imprisonment or other form of detention for more than one year, or by a more severe penalty;
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> . . . .
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> (3) For the purpose of this Article, in determining whether an offence is an offence punishable under the laws of both Parties, ***the totality of the acts or omissions alleged against the person whose surrender is sought shall be taken into account, without reference to the elements of the offence prescribed by the law of the requesting Party.***
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> (4) For the purpose of paragraph (1) of this Article, an offence shall be an offence according to the laws of both Parties if the conduct constituting the offence was an offence against the law of the requesting Party at the time it was committed and an offence against the law of the requested

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1 Prescribing the Procedure for the Extradition of Persons Who Have Committed Crimes in a Foreign Country (1977).

2 Pres. Decree No. 1069 (1977), sec. 3.

> Party at the time the request for surrender is received. (Emphasis supplied)

Thus, a request for extradition shall be granted for certain offenses, provided that according to the laws of both the Philippines and Hong Kong, the offense is punishable by imprisonment or other form of detention for the duration of more than one (1) year, or by a more severe penalty. Further, to determine whether the offense is punishable under the laws of the Philippines and Hong Kong, the RP-HK Agreement states that "the totality of the acts or omissions alleged against the person whose surrender is sought shall be taken into account without reference to the elements of the offence prescribed by the law of the requesting Party."[3]

In this case, respondent is wanted for three (3) counts of the offense of "accepting an advantage as an agent"[4] (punished by Section 9(1)(a) of the Prevention of Bribery Ordinance, Cap. 201) and for seven (7) counts of the offense of "conspiracy to defraud"[5] (contrary to the Common Law of Hong Kong).[6] The three (3) charges read substantially the same. The first charge reads:

> Statement of Offence
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> Accepting advantage as an agent, contrary to section 9(1)(a) of the Prevention of Bribery Ordinance, Cap. 201.
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> Particulars of Offence
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> Juan Antonio E. MUÑOZ, being an agent, namely an employee of the Bangko Sentral ng Pilipinas, on or about the 12th day of October 1993, in Hong Kong, without lawful authority or reasonable excuse, accepted from Ho CHI, also known as CHI Ho, an advantage, namely a gift, loan, fee, reward or commission consisting of a deposit of $1,020,000 United States currency into the Citiplus Account Number 89409787 with Citibank, N.A. held in the name of the said Juan Antonio E. MUÑOZ, as an inducement to or reward for or otherwise on account of the said Juan Antonio E. MUÑOZ doing or having done an act in relation to his principal's affairs or business, namely concealing the payments relating to gold or silver dealings which were otherwise payable to or on account of the said Bangko Sentral ng Pilipinas by Mocatta Hong Kong Limited.[7]

The RP-HK Agreement specifically mandates the consideration of the totality of the ***acts or omissions alleged against the person***, and further mandates not referring to the elements of the offense prescribed by the law of the requesting party. This is to create the greatest comity between the

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3 Pres. Decree No. 1069 (1977), art. 2.
4 *Rollo*, p. 11, Petition.
5 Id.
6 Id.
7 Id. at 15.

Philippines and Hong Kong, which, in turn, would allow for the RP-HK Agreement to be more effective.

The first charge against respondent alleges the following: *first*, that Juan Antonio Muñoz was an employee of the Bangko Sentral ng Pilipinas; *second*, that he accepted the amount of US$1,020,000.00 as a gift, loan, fee, reward, or commission; *third*, that the gift was an inducement or reward for doing or having done an act in relation to the Bangko Sentral ng Pilipinas' affairs or business; and *fourth*, that the act consisted of concealing payments relating to gold or silver dealings payable to or on account of the Bangko Sentral ng Pilipinas, by Mocatta Hong Kong Limited.[8]

The RP-HK Agreement requires us to ask, ***without reference to the elements of the offense prescribed by the law of the requesting party***, whether the totality of the acts or omissions alleged against respondent constitutes an offense against the laws of Hong Kong. It likewise requires us to ask whether the totality of the acts or omissions alleged against respondent constitutes an offense against the laws of the Philippines.

Respondent's acts are corrupt practices under Section 3(b) of Republic Act No. 3019:[9]

> ***Section 3. Corrupt practices of public officers.*** — In addition to acts or omissions of public officers already penalized by existing law, the following shall constitute corrupt practices of any public officer and are hereby declared to be unlawful:
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> . . . .
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> *(b)* Directly or indirectly requesting or receiving any gift, present, share, percentage, or benefit, for himself or for any other person, in connection with any contract or transaction between the Government and any other party, wherein the public officer in his official capacity has to intervene under the law.

They also appear to be an offense under Section 3(h):

> ***Section 3. Corrupt practices of public officers.***
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> . . . .
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> *(h)* Directly or indirectly having financial or pecuniary interest in any business, contract or transaction in connection with which he intervenes or takes part in his official capacity, or in which he is prohibited by the Constitution or by any law from having any interest.

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8 Id. at 11.

9 Anti-Graft and Corrupt Practices Act (1960).

Thus, the totality of the acts or omissions alleged against respondent constitutes an offense against Philippine laws.

Respondent's acts likewise constitute an offense under Section 9(1)(a) of the Prevention of Bribery Ordinance, Cap. 201, which punishes:

> (1) Any agent who, without lawful authority or reasonable excuse, solicits or accepts any advantage as an inducement to or reward for or otherwise on account of his –
>
> (a) doing or forbearing to do, or having done or forborne to do, any act in relation to his principal's affairs or business[.]

The intent of both statutes is the same. Corruption is accepted as a bane to good governance. Its eradication is not merely desirable; it is a necessity. Corruption undermines the totality of government. The fair but decisive prosecution of those responsible for the acts contributes to its effective deterrence.

Every act of corruption involves both a public officer and a private individual or entity. The private individual may have actively participated in conspiracy or as the principal by inducement. It may likewise be the beneficiary of decisions made by public officers, and may be done primarily or solely for motives that do not redound to the public's welfare.

The treaty clearly commands both jurisdictions not to frustrate the ends of justice by unnecessarily truncating the acts being punished through resort to conjectural technical possibilities. The letter and intent of both the treaty and our criminal laws should be respected.

Thus, as the totality of the acts alleged against respondent is punishable under the laws of both the Philippines and Hong Kong and is punishable by imprisonment of more than one (1) year, surrender should be granted under Article 2 of the RP-HK Agreement.

When the Court of Appeals dropped the charge of *accepting an advantage as an agent* instead of looking at the totality of the acts alleged, it delved into the provisions of Hong Kong law, as well as the intent behind it:

> Clive Stephen Grossman, Senior Counsel of the Hong Kong Bar Association, in behalf of respondent-appellant, explains the legislative intent behind the enactment of the Prevention of Bribery (POB) Ordinance, which defines the aforesaid offense, to wit:
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> 1. The POB (Prevention of Bribery Ordinance) was

> promulgated in 1971 in Hong Kong to combat corruption which was then rife in the territory. Unlike many other statutes at the time, this was not borrowed or copied from an English statute but was created specifically to deal with problems that then existed locally.
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> 2. It is essentially a two-part statute, concerned not only with corruption by public officials but also with corruption in the private sector. Both forms of corruption attract severe penalties which were intended to eliminate, or at least reduce, endemic corruption in Hong Kong. For that reason, many new offences were created, including Section 9(1)(a) but, I emphasize, that this was a peculiarly home-grown statute designed for Hong Kong conditions.
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> . . . .
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> 6. The essential elements of the offence can be gleaned from the above. In short they are that an advantage (as defined) must have been accepted, without lawful authority or reasonable excuse, and it must have been solicited or accepted as an inducement or reward for doing any of the matters in sub-section (a) of 9(1). The offence hits both the asker of the bribe and the giver of the bribe. . . .
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> . . . .
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> 8. I believe some countries have enacted statutes based on our POB but apart from those, I am unaware of any countries which have statutory provisions which mirror Section 9(1)(a).

Speaking for petitioner-appellee, on the other hand, Ian Charles McWalters, Senior Assistant Director of Public Prosecutions in the Department of Justice of the HKSAR, explains the nature of the offenses enumerated in Section 9 of the POB, viz:

> 8. A person can be guilty of a POBO bribery offence if he offers an advantage to an agent, or being an agent, he solicits or accepts an advantage. However there is no mention[ ]of the word corruption, or variants of it, in these offences. Proof of corruption comes from establishing that the advantage was offered, solicited or accepted "as an inducement to, reward for or otherwise on account of" the agent doing inter alia "an act in his capacity as a public servant" (public sector bribery) or "an act in relation to his principal's affairs or business" (private sector bribery). The private sector bribery offence is section 9 of the POBO and its language is derived from section 1 of the United Kingdom's Prevention of Corruption Act of 1906.

Clearly then, both parties are in congruence that the crime of

> *accepting an advantage as an agent* in Section 9 of HKSAR's POB penalizes the unauthorized giving and receiving of bribes or other benefits as a result of acting in behalf of one's principal. In our jurisdiction, when such happens in the private sector as is alleged in the instant case, the same is not a crime as no law defines and punishes such act. *Nullum crimen nulla poena sine lege*. There is no crime where there is no law punishing it. Hence, this crime does not satisfy the double criminality requirement in extradition proceedings.[10] (Emphasis in the original)

However, there is no question that Hong Kong law punishes the acts alleged against respondent. Consequently, under the RP-HK Agreement, the legislative intent behind the enactment of the Prevention of Bribery Ordinance is irrelevant in determining whether the offense is extraditable.

Further, although the Court of Appeals maintained that the unauthorized giving and receiving of bribes was "alleged" to have happened in the private sector, a close reading of the acts alleged in the first charge reveals no mention of the private sector. Thus, the Court of Appeals went inappropriately beyond the allegations in the charges and proceeded to go into the merits of the case filed in Hong Kong. In essence, it predicted the evidence, weighed it as a conjecture, and rendered a judgment of fact for Hong Kong.

This violates the basic principles of international comity and due process. Therefore, the Court of Appeals gravely abused its discretion.

However, the ponencia, in light of the testimony of the Senior Assistant Director of Public Prosecutions of the Hong Kong Department of Justice, ruled that the law used to charge respondent only applies to private sector bribery. It expressly declared that Section 9 of the Prevention of Bribery Ordinance of Hong Kong applies solely to private sector bribery, thus:

> It cannot be argued that Section 9(1)(a) of the [Prevention of Bribery Ordinance] encompasses both private individuals and public servants. A Section 9(1)(a) offense has a parallel [Prevention of Bribery Ordinance] provision applicable to public servants, to wit:
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> . . . .
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> Considering that the transactions were entered into by and in behalf of the Central Bank of the Philippines, an instrumentality of the Philippine Government, Muñoz should be charged for the offenses not as a regular agent or one representing a private entity but as a public servant or employee of the Philippine Government. Yet, because the offense of accepting an advantage as an agent charged against him in HKSAR is one that deals with private sector bribery, the conditions for the application of

[10] *Rollo*, pp. 23–25, Court of Appeals Decision.

> the double criminality rule are obviously not met[.][11]

To repeat, under treaty, this Court should not analyze the elements of the offense prescribed by Hong Kong law. It is enough that the acts alleged against respondent constitute an offense against the laws of the Philippines and the laws of Hong Kong. Nonetheless, in light of the ponencia, we point out that the Hong Kong Court of Final Appeal has already settled that the term "agent" in Section 9 of the Prevention of Bribery Ordinance also covers public servants in another jurisdiction. In *B v. The Commissioner of the Independent Commission Against Corruption,*[12] the Hong Kong court explains:

> 2. This appeal is concerned with what the legal position would be if a bribe is offered in Hong Kong to a public official of a place outside Hong Kong. Before turning to the questions of law which arise, it is necessary to note the terms of the relevant statutory provisions, mainly of the Prevention of Bribery Ordinance, Cap. 201 ("the POBO").
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> . . . .
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> 5. Then one turns to what it is provided that the expressions "public body" and "public servant" mean. And it will be seen that they are confined to Hong Kong public bodies and Hong Kong public servants. It is to be noted, however, that s.2(1) does not say what the words "agent" and "principal" mean. Rather does it say what they include. So their definitions are inclusive and not exhaustive.
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> . . . .
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> 8. Three questions of law arise. They may be stated thus:
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> > (1) Where an advantage is offered in Hong Kong, does s.9(2) of the POBO apply even if the offeree is a public official of a place outside Hong Kong and the act or forbearance concerned is in relation to his public duties in that place outside Hong Kong?
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> . . . .
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> *First question answered in the affirmative*
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> . . . .
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> 19. On an ordinary reading, a public official of a place outside Hong Kong comes within the phrase "any person employed by or acting for another" in the definition of "agent" provided by s.2(1) of the POBO. Also on an ordinary reading, his public duties in that place come within the phrase "in relation to his principal's affairs" to be found in s.9(2) of the POBO. So on an ordinary reading of the relevant statutory provisions, the answer to the first question of law is "Yes". In other words, where an

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[11] Ponencia, p. 14.

[12] *B v Comm. Of the Independent Commission Against Corruption*, [2010] 13H.K.C.F.A.R. 1 <http://legalref.judiciary.gov.hk/lrs/common/search/search_result_detail_frame.jsp?DIS=69505&QS=%2B&TP=JU> (visited April 1, 2016).

> advantage is offered in Hong Kong, s.9(2) of the POBO does apply even if the offeree is a public official of a place outside Hong Kong and the act or forbearance concerned is in relation to his public duties in that place outside Hong Kong.
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> . . . .
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> 22. So I answer the first question in the affirmative. In other words, I hold where an advantage is offered in Hong Kong, s.9(2) of the POBO applies even if the offeree is a public official of a place outside Hong Kong and the act or forbearance concerned is in relation to his public duties in that place outside Hong Kong.[13]

Another reason why an extradition treaty requires that courts take into consideration the totality of circumstances, and not the elements of the offense, is that courts cannot be expected to be experts in the other jurisdiction's jurisprudence. A misinterpretation of Hong Kong's laws by a Philippine court will, indeed, be fraught with danger that could have been avoided.

ACCORDINGLY, I vote to **GRANT** the Petition.

MARVIC M.V.F. LEONEN
Associate Justice

[13] Id.