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[G.R. NO. 166038, December 04, 2007]

WILFREDO M. TRINIDAD, PETITIONER, VS. OFFICE OF THE OMBUDSMAN THRU THE OMBUDSMAN SIMEON V. MARCELO AND DEPUTY OMBUDSMAN VICTOR C. FERNANDEZ, ASIA'S EMERGING DRAGON CORPORATION, AND THE SANDIGANBAYAN PEOPLE OF THE PHILIPPINES, RESPONDENTS.

D E C I S I O N

CARPIO MORALES, J.:

Challenged via petition for certiorari and prohibition are the Resolution of September 16, 2004 and Order of November 9, 2004 of the Office of the Ombudsman in OMB L-C-03-0786-F[1] which found probable cause to hale into court petitioner Wilfredo M. Trinidad, *inter alia*, for violation of Section 3(j) and Section 3(e) of the Anti-Graft and Corrupt Practices Act[2] in connection with the Ninoy Aquino International Airport International Passenger Terminal III Project (NAIA IPT III Project) of the Department of Transportation and Communication (DOTC).

The Office of the Ombudsman in fact filed two Informations against petitioner with the Sandiganbayan, docketed as Criminal Case Nos. 28089 and 28093.

In Criminal Case No. 28089, petitioner, as DOTC Assistant Secretary and member of the DOTC Pre-qualifications, Bids and Awards Committee for the NAIA IPT III Project (PBAC), was charged with knowingly pre-qualifying Paircargo Consortium[3] (later incorporated into Philippine International Air Terminals Co., Inc. or PIATCO) on September 24, 1996 despite its failure to meet the financial capability standards set by law.

In Criminal Case No. 28093, petitioner, as DOTC Secretary in an officer-in-charge capacity, was charged with having granted PIATCO undue benefit and advantage through the execution of the June 22, 2001 Third Supplement to the Amended and Restated Concession Agreement[4] covering the NAIA IPT III Project.

In compliance with this Court's Resolution of December 14, 2004, private respondent Asia's Emerging Dragon Corporation (AEDC), and the Office of the Solicitor General (OSG) on behalf of public respondents, respectively filed on February 24, 2005 and April 20, 2005 their comments[5] on the petition, to which petitioner filed a reply.[6]

During the pendency of the petition, the Sandiganbayan found no probable cause to proceed with the trial in, and thus dismissed Criminal Case No. 28093 by Resolution of September 7, 2006, and denied the prosecution's motion for reconsideration by Resolution of February 28, 2007.[7] The petition insofar as it concerns Criminal Case

No. 28093 is thus effectively mooted, the issues raised therein having ceased to present a justiciable controversy such that a determination thereof would be of no practical use and value.

What is thus left for resolution is only that part of the petition affecting Criminal Case No. 28089 which this Court finds to be bereft of merit.

In Criminal Case No. 28089, petitioner is charged with violation of Section 3(j) of the Anti-Graft and Corrupt Practices Act which punishes the act of "[k]nowingly approving or granting any license, permit, privilege or benefit in favor of any person not qualified for or not legally entitled to such license, permit, privilege or advantage x x x." In finding that probable cause lies against petitioner, the Office of the Ombudsman discoursed:

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> The benefit granted to PIATCO is its pre-qualification as bidder and the subsequent award, in its favor, of the contract to build the NAIA IPT III.
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> Respondent PBAC Chairman Primitivo Cal, Vice-Chairman Francisco Atayde, and **Member Wilfredo Trinidad** and Technical Committee Chairman Pantaleon Alvarez knowingly pre-qualified PAIRCARGO despite its obvious failure to meet the financial capability standards set by Paragraph c, Section 5.4 of the 1994 Implementing Rules of the BOT Law in relation to PBAC Bulletin No. 3, as they relate to other applicable laws and rules.
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> Succinctly, Paragraph c, Section 5.4 of the Implementing Rules mandates that the project proponent must have the financial capability to sustain the project which capability is measured in terms of, among others, proof of the ability of the project proponent and/or the consortium to provide a minimum amount of equity to the project. Pursuant thereto, PBAC Bulletin No. 3 dated 16 August 1996 was issued, defining such minimum amount of equity as thirty percent (30%) of the project cost, which percentage is consistent with the required debt-to-equity ratio of 70:30 in Section 2.01 (a) of the Draft Concession Agreement.
>
> Translated in figures, the project proponent must show to the satisfaction of the PBAC that it had the ability to provide minimum equity for the project in the amount of at least Php 2,755,095,000.00.
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> In the PBAC Bulletin No. 5, Undersecretary Cal stated that the total financial capability of all the members companies of the PAIRCARGO Consortium, to be established by submitting the respective companies' audited financial statements, would be acceptable.
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> Thus, in assessing the financial capability of the PAIRCARGO Consortium, and in declaring such as pre-qualified, the PBAC used the entire net worth of companies comprising the PAIRCARGO Consortium, including Security Bank. In so doing, the PBAC deliberately closed its eyes on, and consciously disregarded, the provisions of the General Banking Act and the Manual of Regulations for Banks which set a limitation on the amount

which certain types of banks can invest in any one enterprise.

In particular, per [sic] Section 21-B of R.A. No. 337, otherwise known as The General Banking Act and Section X 383 of the 1993 Manual of Regulations for Banks set a limitation on the amount which certain types of banks may invest, that is, the equity investment in any one enterprise whether allied or non-allied shall not exceed fifteen percent (15%) of the net worth of the bank.

Thus, the Supreme Court in the Agan cases, noted that the total net worth of the PAIRCARGO Consortium, after considering only the maximum amounts that may be validly invested by each of its members, is only Php 558,3[84],871.55 of the project cost, or only 6[.0]8% of the project cost which falls short of the Php 2,755,095,000-prescribed minimum equity investment required for the NAIA IPT III Project.[8]

x x x x (Emphasis and Underscoring supplied)

The Office of the Ombudsman is vested with the sole power to investigate and prosecute, *motu proprio* or on complaint of any person, any act or omission of any public officer or employee, office or agency when such act or omission appears to be illegal, unjust, improper or inefficient.[9] In discharging its responsibility, it may request any government agency for assistance and information, and examine, if necessary, pertinent records and documents.[10]

In the absence of grave abuse of discretion the Court has, generally adopted a policy of non-interference with the Ombudsman's exercise of its investigatory and prosecutory powers, not only out of respect for these constitutionally mandated powers but also upon considerations of practicality owing to the myriad functions of the courts.[11] A review of the records of the case does not yield any compelling reasons[12] to deviate from this policy.

Petitioner's arguments – that *res judicata* applies since the Office of the Ombudsman twice found no sufficient basis to indict him in similar cases[13] earlier filed against him, and that the *Agan* cases[14] cannot be a supervening event or evidence *per se* to warrant a reinvestigation on the same set of facts and circumstances – do not lie.

Res judicata is a doctrine of civil law and thus has no bearing on criminal proceedings.[15]

But even if petitioner's argument were to be expanded to contemplate "*res judicata* in prison grey"[16] or the criminal law concept of double jeopardy, this Court still finds it inapplicable to bar the reinvestigation conducted by the Office of the Ombudsman. For the dismissal of a case during preliminary investigation does not constitute double jeopardy, preliminary investigation not being part of the trial.[17]

Insisting that the case should be barred by the prior Joint Resolution of the Ombudsman, petitioner posits that repeated investigations are oppressive since he as respondent and other respondents would be made to suffer interminable

prosecution since resolutions dismissing complaints would perpetually be subject to reopening at any time and by any party. Petitioner particularly points out that no new evidence was presented at the reinvestigation.

Petitioner's position fails to impress.

The Ombudsman is not precluded from ordering another review of a complaint, for he or she may revoke, repeal or abrogate the acts or previous rulings of a predecessor in office.[18] And *Roxas v. Hon. Vasquez*[19] teaches that new matters or evidence are not prerequisites for a reinvestigation, which is simply a chance for the prosecutor, or in this case the Office of the Ombudsman, to review and re-evaluate its findings and the evidence already submitted.[20]

This Court, in *MIAA-NAIA Association of Service Operators v. Ombudsman*[21] which is also an offshoot of *Agan*, found the Office of the Ombudsman to have gravely abused its discretion when, by the therein assailed resolution, it dismissed the therein petitioner's complaint and effectively ruled that the PIATCO contracts are valid, despite this Court's ruling in *Agan*. The Ombudsman was thus directed to conduct anew a preliminary investigation of the case.

That the discretionary power of the Ombudsman has been exercised in a capricious, whimsical, arbitrary or despotic manner by reason of passion or personal hostility, petitioner has not shown.

Reyes v. Court of Appeals[22] cited by petitioner wherein this Court accorded finality to an erroneous resolution of the Secretary of Justice is unavailing because it was therein emphasized that its pronouncement applied only *pro hac vice*. In that case, the Court found the therein petitioner guilty of laches to bar her from seeking relief. Estoppel does not, however, apply as against the People in criminal prosecutions.

Violations of the Anti-Graft and Corrupt Practices Act, like attempted murder, is a public offense. Social and public interests demand the punishment of the offender, hence, criminal actions for public offenses can not be waived or condoned, much less barred by the rules of estoppel.[23]

Petitioner contends, however, that AEDC is barred from filing a criminal complaint against him due to the dismissal on April 30, 1999 by the Regional Trial Court of Pasig City, Branch 261 of Civil Case No. 66213, a case filed by the AEDC for declaration of nullity of proceedings, mandamus, and injunction which sought to disqualify the Paircargo Consortium and to award the NAIA IPT III Project to AEDC. The case was dismissed upon the parties' joint motion with a mutual quitclaim and waiver.[24]

It is a firmly recognized rule, however, that criminal liability cannot be the subject of a compromise.[25] For a criminal case is committed against the People, and the offended party may not waive or extinguish the criminal liability that the law imposes for its commission. And that explains why a compromise is not one of the grounds prescribed by the Revised Penal Code for the extinction of criminal liability. [26]

Even a complaint for misconduct, malfeasance or misfeasance against a public officer or employee cannot just be withdrawn at any time by the complainant. This is because there is a need to maintain the faith and confidence of the people in the government and its agencies and instrumentalities.[27]

The ineluctable conclusion, therefore, is that the order dismissing the above-mentioned civil case does not bar petitioner's criminal prosecution.

Petitioner's reliance on *Republic v. Sandiganbayan*[28] is misplaced. In that case, the Court dismissed the criminal case following the forging of a compromise agreement by the accused and the Presidential Commission on Good Government (PCGG) which gave the accused absolute immunity from criminal and civil prosecutions. As correctly distinguished by the OSG, that case involved the PCGG which, unlike AEDC, is a government agency *expressly authorized by law* to grant civil and criminal immunity.[29]

As for petitioner's objection to the admissibility of documents culled from various proceedings like the legislative hearings before the Senate Blue Ribbon Committee and the arbitration proceedings before the International Chamber of Commerce (ICC) International Court of Arbitration in ICC Case No. 12610/TE/MW, it is premature to raise the same.

First, there is no showing from the above-quoted pertinent portion of its assailed Resolution that the Office of the Ombudsman relied on those documents in support of its findings. At the preliminary investigation, determination of probable cause merely entails weighing of facts and circumstances, relying on the calculus of common sense, without resorting to the calibrations of technical rules of evidence. [30] It is not the proper forum to determine the alleged breach by the OSG of the rule on confidentiality of arbitration proceedings as provided under the ICC Internal Rules and Republic Act No. 9285 (Alternative Dispute Resolution Act of 2004).

As for the issue of prejudicial question, the Court finds nothing that warrants the suspension of the criminal action.

The essential elements of a prejudicial question are: (a) the previously instituted *civil* action involves an issue similar or intimately related to the issue raised in the subsequent criminal action, and (b) the resolution of such issue determines whether or not the *criminal* action may proceed.[31] A prejudicial question arises in a case the resolution of which is a logical antecedent to the issue involved in said case and the cognizance of which pertains to another tribunal.[32] In other words, the jurisdiction to try and resolve the prejudicial question must be lodged in another court or tribunal.[33]

As reflected in the elements of a prejudicial question, the concept involves a civil and a criminal case.[34] There is here no prejudicial question to speak of for, technically, no civil case pends.

Petitioner cites, however, *Quiambao v. Osorio*.[35] In that case, this Court held that the more prudent course for the trial court to have taken was to hold the ejectment proceedings in abeyance until after a determination was made by the Land Authority