

SECOND DIVISION

[G.R. No. 128764, July 10, 1998]

**BIENVENIDO TAN, JR., PETITIONER, VS. THE HONORABLE
SANDIGANBAYAN (THIRD DIVISION), RESPONDENT.**

D E C I S I O N

MARTINEZ, J.:

Petitioner was among those charged before the Sandiganbayan with violations of Section 3 (e) and (g) of the Anti-graft law^[1] under the following information:^[2]

"That on or about December 22, 1988 and for sometime prior or subsequent thereto in Quezon City, Philippines, and within the jurisdiction of this Honorable Court, the above-named accused, BIENVENIDO A. TAN, JR., being then the Commissioner, Bureau of Internal Revenue, JUANITO P. URBI, Chief, Prosecution Division, BIR, JAIME MAZA, Asst. Commissioner, Legal Service Division, BIR, all public officers, while in the performance of their official functions, conspiring and confederating with the accused private individuals NAZARIO L. AVENDANO, Senior Vice-President/Comptroller San Miguel Corporation and JAIME G. DELA CRUZ, Asst. Vice-President, San Miguel Corporation, through evident bad faith and manifest partiality, did then and there willfully, unlawfully, and criminally cause undue injury to the Government by effecting a compromise of the tax liabilities of San Miguel Corporation in the total amount of THREE HUNDRED TWO MILLION NINE HUNDRED FIFTY ONE THOUSAND, FORTY EIGHT PESOS AND NINETY THREE CENTAVOS (P302,951,048.93), Philippine currency for TEN MILLION PESOS ONLY (P10,000,000.00), which compromise is grossly disadvantageous to the Government and thus giving unwarranted benefits to San Miguel Corporation in the amount of P292,951,048.93, to the damage and prejudice of the Government in the aforesaid amount.

CONTRARY TO LAW."^[3]

After arraignment, all the accused including petitioner, filed a motion for reinvestigation^[4] which was granted by the Sandiganbayan. Upon reinvestigation, the Special Prosecutor found no sufficient probable cause against petitioner's co-accused and moved to drop the charge against them with the exception of petitioner.^[5] In its resolution dated November 27, 1995, the Sandiganbayan granted the said motion.^[6]

Almost a year later, petitioner filed a motion to dismiss (should be motion to quash) the information arguing that there being no conspiracy as found by the Special Prosecutor, the charge against him of "conspiring and confederating" with others in

committing the crime as no more basis.^[7] It is petitioner's theory that there cannot be conspiracy if only one person remains charged under the same information. When the Sandiganbayan denied his motion^[8] and without filing a motion for reconsideration, petitioner elevated the case to this Court via certiorari under Rule 65 with prayer for preliminary injunction and/or issuance of a temporary restraining order.

The petition has no merit.

First, the special civil action of *certiorari* will not lie unless the aggrieved party has no other plain, speedy and adequate remedy in the ordinary course of law.^[9] One such remedy which petitioner did not avail is by filing a motion for reconsideration^[10] where it could have granted the lower court an opportunity to correct the alleged error.^[11] Immediate recourse to certiorari is not proper except if the case falls under the exceptions,^[12] none of which, however, concurs in this case. Second, certiorari is not the remedy where a motion to dismiss (quash) an Information is denied^[13] - the proper procedure for which has been consistently defined by the court, to wit:

"an order denying a motion to quash is interlocutory and therefore not appealable, nor can it be the subject of a petition for certiorari. Such order may only be reviewed in the ordinary course of law by an appeal from the judgment after trial. In other words, it cannot be the subject of appeal until the judgment or a final order is rendered. The ordinary procedure to be followed in that event is to enter a plea, go to trial, and if the decision is adverse, reiterate the issue on appeal from the final judgment."^[14]

The extraordinary remedy of *certiorari* can be availed of only if the denial of the motion constitutes grave abuse of discretion.^[15] In this case, that vitiating error cannot be imputed to respondent court for the following reasons:

Contrary to petitioner's argument, the information filed against him is valid. All the material facts and essential elements constituting the crimes defined in Section 3(e) and (g)^[16] for which petitioner was charged were alleged therein, i.e. as "public officer"- being then the "Commissioner of the BIR," petitioner committed a crime by entering into a tax "compromise" which was "grossly disadvantageous to the government".^[17] Conspiracy is not an element of those crimes and thus, need not even be alleged in the information. Its allegation therein was just to show how the accused incurred criminal liability. The subsequent dismissal of the charge against petitioner's co-accused premised on the non-existence of conspiracy did not render the information defective as to petitioner who remains charged therein and under which he may be tried and even convicted. Petitioner, therefore, cannot validly contend that he was not adequately informed of the nature and cause of the accusation against him in violation of his fundamental right.^[18] Moreover, the allegation of conspiracy in the information, if at all, merely became a surplusage as a consequence of the outcome of the reinvestigation. In any case, an information alleging conspiracy can stand even if only one person is charged except that the court cannot pass verdict on the co-conspirators who were not charged in the

information.

Petitioner also imputes grave abuse of discretion to the *Sandiganbayan* when it still granted their (with his co-accused) prayer for reinvestigation even if they were already arraigned. The Court is at a loss by such argument. It is ridiculous for petitioner to pray for reinvestigation and then cry grave abuse of discretion when his very prayer is granted. Furthermore, petitioner obviously knew that when they asked for reinvestigation, their arraignment was already finished. Thus, that earlier arraignment is not a valid reason to jettison the court's ruling on the motion for reinvestigation.

Next, petitioner assails the Sandiganbayan's refusal to amend the information by deleting the allegation of conspiracy and charging only petitioner. According to him, the lower court will not allow the amendment because it will be forced to dismiss the case since the amendment will allegedly placed petitioner in double jeopardy. This is a preposterous argument. First, the imputation of double jeopardy is premature because there was no amendment made. Second, assuming that there was an amendment, the original information is deemed superseded by the amended information and the proceedings under either information are not separate and distinct from each other but constitute one continuous trial involving only one offense. Third, the requisite of double jeopardy that the first jeopardy must have attached prior to the second is not present^[19] considering that petitioner was neither convicted, acquitted, nor the case against him dismissed or otherwise terminated without his express consent.^[20] The dismissal of the charge as to his co-accused is not the equivalent of, nor does it operate as petitioner's acquittal for the offense.^[21] Fourth, considering that only one information was filed against petitioner and there was as yet no trial on the merits, a second jeopardy cannot possibly arise. And last, following the logic of petitioner's argument, the court in not granting the prayer to amend the information precisely avoided placing him in double jeopardy.

As to petitioner's contention that his co-accused should also be charged, it should be noted that the discretion who to prosecute depends on the prosecution's sound assessment whether the evidence before it can justify a reasonable belief that a person has committed an offense.^[22] The rule on Criminal Procedure that all criminal actions must be commenced in the name of the People of the Philippines "against all persons who appear to be responsible for the offense involved"^[23] does not mean that the prosecuting officer shall have no discretion at all. "What the rule demands is that all persons who appear responsible shall be charged in the information, which conversely implies that those against whom no sufficient evidence exists are not required to be included."^[24] The Court cannot compel the prosecution who to charged because:

"(it) has consistently refrained from interfering with the exercise of the Ombudsman of his constitutionally mandated investigatory and prosecutory powers. It is beyond the ambit of the Court to review the exercise of discretion of the Ombudsman in prosecuting or dismissing a complaint filed before it."^[25]

The rationale for this is that,