

SECOND DIVISION

G.R. No. 220500 – CRISTINA AMPOSTA-MORTEL, Petitioner, v. PEOPLE OF THE PHILIPPINES, Respondent; G.R. No. 220504 – THERON VICTOR V. LACSON, Petitioner, v. PEOPLE OF THE PHILIPPINES, Respondent; G.R. No. 220505 – LEO V. PADILLA, Petitioner, v. PEOPLE OF THE PHILIPPINES, Respondent; G.R. No. 220532 – MANUEL BERIÑA, JR., JAIME R. MILLAN, BERNARDO T. VIRAY, and RAPHAEL POCHOLO A. ZORILLA, Petitioners, v. PEOPLE OF THE PHILIPPINES, Respondent; G.R. No. 220552 – DANIEL T. DAYAN, Petitioner, v. PEOPLE OF THE PHILIPPINES, Respondent; G.R. No. 220568 – FRISCO F. SAN JUAN, Petitioner, v. PEOPLE OF THE PHILIPPINES, Respondent; G.R. No. 220580 – ELPIDIO G. DAMASO, Petitioner, v. PEOPLE OF THE PHILIPPINES, Respondent; G.R. No. 220587 – JESUSITO LEGASPI, Petitioner, v. PEOPLE OF THE PHILIPPINES, Respondent; G.R. No. 220592 – CARMELITA D. CHAN, Petitioner, v. PEOPLE OF THE PHILIPPINES, Respondent.

Promulgated:

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DISSENTING OPINION

LEONEN, J.:

I dissent.

The public bidding process is imbued with public interest. Individuals involved in the bidding process have an important responsibility to ensure compliance with the relevant bidding rules and regulations. I disagree with the majority's decision to acquit petitioners and to remove their civil liability.

The Sandiganbayan convicted petitioners of violation of Republic Act No. 3019, Section 3(e). It found that, taking the totality of petitioners' conduct, the irregularities in the bidding process resulted in undue and unwarranted benefits or advantage to petitioner Jesusito Legaspi, with evident bad faith, manifest partiality, or gross inexcusable negligence.¹ According to the Sandiganbayan, the basis for their conviction are:

¹ *Rollo* (G.R. No. 220500), p. 242.

- a. Violating the simplified bidding rules because they shortlisted bidders not based on the PCAB master list.
- b. Conducting the bidding and recommending the award to Legaspi without [detailed] engineering in violation of P.D. 1594 and without the required appropriation and actual availability of funds for the total contract price.
- c. Creating and confirming the artificial phases in the Construction Agreement and dividing the contract into Phase I and Phase II just to enable PEA to circumvent the requirement under P.D. No. 1445 about funding requirements.
- d. In the case of Beriña and Millan, recommending the approval of Variation Order No. 2 and the contract price adjustment, and the payment thereof, without the required presidential approval and in violation of P.D. No. 1594.
- e. In the case of San Juan, Chan, Dayan, Malbarosa, Padilla and Damaso, for approving and confirming the Legaspi contract without sufficient funding and the Seaside Drive Extension without public bidding.
- f. In the case of Legaspi, for conspiring with Beriña and Millan in having the Seaside Drive Extension contract awarded to him under a negotiated contract.²

The President Diosdado Macapagal Boulevard was part of a flagship project (the Project) for the construction of a five-kilometer highway traversing the reclaimed area from Buendia Avenue to Pacific Avenue.³ Due to the project's importance, the then Chairperson of the Public Estates Authority (now Philippine Reclamation Authority) requested the Office of the President for authority to bid and award the project through simplified bidding. This request was approved through the Memorandum issued by then Executive Secretary Ronaldo Zamora.⁴

As noted by the Sandiganbayan, under a simplified bidding process, participation was limited to "*bona fide* contractors duly accredited and classified for the project category and size and who are included in a separate list to be prepared by the Philippine Contractors Accreditation Board."⁵ Thus, despite the simplified procedure, safeguards were still put in place with the involvement of the Philippine Contractors Accreditation Board, the agency which grants, suspends, and revokes licenses to contractors,⁶ to ensure the qualification of the contractors that were to bid in the projects.

² *Id.* at 242–243.

³ *Ponencia*, pp. 5–6.

⁴ *Id.* at 6.

⁵ *Rollo* (G.R. No. 220500), p. 92, citing Implementing Rules and Regulations of Presidential Decree No. 1594, as amended, IB 10.4.2.5, July 12, 1995.

⁶ *See* Republic Act No. 4566 (1965), as amended by Presidential Decree No. 1746 (1980).

Despite this, the Public Estate Authority chose to limit its bidders to a shortlist of 10 contractors, provided not by the Philippine Contractors Accreditation Board as expressly required, but a list of 10 contractors given by the Department of Public Works and Highways.⁷

The *ponencia*, however, concludes that petitioners were left with no choice but to consult the list given by the Department of Public Works and Highways because the Philippine Contractors Accreditation Board list was not yet existent. In absolving petitioners, the *ponencia* asserts: “[a] negative fact, such as the absence of the masterlist, cannot serve as a basis for a wrongdoing, when the prosecution itself has not first presented proof of its existence.”⁸ I disagree.

The unavailability of the list by the Philippine Contractors Accreditation Board was not a reason to deviate from the standard procedure and get a separate list from the Department of Public Works and Highways. There is no substantial compliance, as the *ponencia* puts it,⁹ since there was no compliance at all. There is no mechanism or provision that authorizes the substitution of the Philippine Contractors Accreditation Board list by another list.

Moreover, as the Sandiganbayan has found, the entire project was divided into two separate packages for purposes of the simplified bidding without any rational basis.¹⁰ Package I included part of the Project that was eventually awarded to petitioner Legaspi, while Package II covered part of the Project where the Public Estates Authority had a prior joint venture agreement with SM, Inc. and R1 Consortium. This joint venture agreement allowed the two developers the option to construct that portion of the Project in exchange for lands or bonds. Thus, the continuation of Package II of the Project depended on the decision of SM, Inc. and R1 Consortium of whether they will pursue the Project themselves or not.¹¹ Petitioner Legaspi’s company was put in the list of contractors for Package I just because it was number two in the list by the Department of Public Works and Highways. The latter five of the 10 contractors were assigned as prequalified contractors for Package II, again without basis. This arbitrary decision led to unwarranted benefits in favor of petitioner Legaspi.¹² As explained by the graft court:

[T]hose contractors assigned for the Package II bidding were, from the start, disadvantaged because of the great possibility that Package II could not be bid out because of the option open to SM and R1 consortium. In turn, those contractors which were assigned for Package I, were favored

⁷ *Rollo* (G.R. No. 220500), pp. 192-193.

⁸ *Ponencia*, pp. 43-44.

⁹ *Id.* at 44.

¹⁰ *Rollo* (G.R. No. 220500), p. 194.

¹¹ *Id.* at 193.

¹² *Id.* at 192-194.

by PEA's arbitrary decision because, just by their being listed ahead in the DPWH list, they were certain to be able to bid and in the case of Legaspi, win the award for Package I. This alone gave undue advantage to the first set of contractors and prejudiced the second set. Had PEA included all ten (10) of the DPWH listed contractors for both Package I and II, no such advantage or prejudice would have resulted. Better still, if PEA followed P.D. 1594 by including ALL qualified contractors accredited by the PCAB in its master list in the simplified bidding, then no question of impropriety could arise.

JD Legaspi Construction, which was number 2 in the DPWH list, therefore, gained an advantage or benefit, as it was able to bid and win Package I, to the disadvantage of those contractors in the second set of the DPWH list and also those PCAB accredited contractors in the latter's master list, who were not included in the DPWH list.

Moreover, PEA's fear that a contractor could get both Package I and II of the Boulevard project was not completely averted because during the course of Legaspi's implementation of its contract, PEA approved Variation Order No. 2 in favor of Legaspi. This included the Inland Channel Bridge which was originally part of Package II but was later turned down to be built by R1 Consortium. Variation Order No. 2 also included the Seaside Drive Extension connecting PDMB to Roxas Boulevard... No additional bidding was done for the additional works under Variation Order No. 2. Legaspi, therefore, was given unwarranted benefits and/or advantage by PEA.¹³

Moreover, there were no detailed engineering plans when petitioner Raphael Pocholo Zorilla prepared the Approved Agency Estimate, and the Public Estates Authority bid out and awarded the Project. The *ponencia* makes the same observation that this clearly contravenes Section 2 of Presidential Decree No. 1594, which reads:

Section 2. Detailed Engineering. **No bidding and/or award of contract for a construction project shall be made unless the detailed engineering investigations, surveys, and designs for the project have been sufficiently carried out** in accordance with the standards and specifications to be established under the rules and regulations to be promulgated pursuant to Section 12 of this Decree so as to minimize quantity and cost overruns and underruns, change orders and extra work orders, **and unless the detailed engineering documents have been approved** by the Minister of Public Works, Transportation and Communications, the Minister of Public Highways, or the Minister of Energy, as the case may be. (Emphasis supplied)

However, the *ponencia* absolves petitioner for this violation because it finds that there was no clear showing of bad faith, malice, or gross negligence.¹⁴

¹³ *Id.* at 193-194.

¹⁴ *Ponencia*, p. 46.

Further, the Sandiganbayan also found that there was no appropriation and sufficient funds to finance the project at the time the Public Estates Authority approved the signed Construction Agreement with petitioner Legaspi.¹⁵ All it had was a Board Resolution identifying the source of funds—the PHP 1 billion loan facility from Land Bank of the Philippines and All Asia Capital Group—but the loan was not yet existent because it was still under negotiation at that time.¹⁶ By the time the Construction Agreement was signed, dated, and notarized, only PHP 300 Million was actually released as proceeds of the loan from the Land Bank of the Philippines; this was still below the actual contract cost of PHP 584,365,855.05.¹⁷

Additionally, the Sandiganbayan found that splitting the Project into two phases was only a ploy to circumvent this defect, but this defect remained as Phase II of the project since it “could be undertaken only if and when funds are made available again.”¹⁸ And indeed, the Public Estates Authority ran out of funds, and could not pursue the remaining works.¹⁹

The *ponencia*, however, maintains that the law only requires that project funding be viewed on a yearly basis, irrespective of whether the project is divided into several phases. As long as a portion of the project could be implemented by the end of the fiscal year with the corresponding amount to cover for that portion, there is no violation of the law.²⁰

As to the lack of presidential approval for contract price adjustments as required by the Memorandum by Executive Secretary Zamora, the *ponencia* finds that these were violations of directives from the Executive that do not necessarily amount to violations of the law. In any case, it claims that such infraction was not “proven to have been committed with manifest partiality, evident bad faith, or gross inexcusable negligence... [M]ere failure to comply with a directive of the president cannot be considered a violation of... criminal law.”²¹

However, as to the award of the Seaside Drive Extension under Variation Order No. 2 of the Construction Agreement, the *ponencia* agrees that presidential approval was required because this variation order constituted a change order or extra work order under the Implementing Rules of Republic Act No. 9184. This is because the construction of the Seaside Drive Extension did not fall within the general scope of the original project; nowhere was the Extension found in any of the bidding documents for the President Diosdado Macapagal Boulevard Project, nor was it even

¹⁵ *Rollo* (G.R. No. 220500), p. 199.

¹⁶ *Id.* at 198–199.

¹⁷ *Id.* at 199.

¹⁸ *Id.*

¹⁹ *Id.* at 200.

²⁰ *Ponencia*, p. 54–55.

²¹ *Id.* at 56.

located along the stretch of the Boulevard. Accordingly, a separate award for the Seaside Drive Extension should have been undertaken.²²

Despite this, the *ponencia* absolves petitioners, saying they had no participation in the award of Variation Order No. 2, specifically petitioners Cristina Amposta-Mortel and Zorilla.²³

The *ponencia* also finds there was no clear showing of bad faith, manifest partiality, or gross inexcusable negligence in the bid and award for Variation Order No. 2.²⁴ Particularly, the *ponencia* states that members of the old Board of Directors of the Public Estates Authority, particularly petitioners Daniel T. Dayan, Frisco F. San Juan, Elpidio G. Damaso, Legaspi, and Carmelita Chan, “had every right to rely on the report and recommendation of the *Ad Hoc* Committee” when it issued the Resolutions leading to the award of the Seaside Drive Extension under Variation Order No. 2.²⁵

As to the members of the *Ad Hoc* Committee, specifically petitioners Manuel Beriña Jr. and Jaime R. Millan, the *ponencia* holds that they “honestly believed that P.D. No. 1594 allows a negotiated contract where a variation order is adjacent or contiguous to an ongoing project and could be economically prosecuted by the same contractor.”²⁶ This also justified the lack of presidential approval.²⁷

I disagree with the *ponencia*'s finding of clearing petitioners of criminal and civil liability. The Sandiganbayan's decision should be affirmed.

Petitioner Amposta-Mortel's position as Manager of the Public Estates Authority's Legal Department requires her to review and recommend the legal instruments that involve her agency. Her signatures in these instruments precisely signifies her participation, because they are certifications that she had read and understood these documents. As head of the Legal Department, her signature therefore meant that she had reviewed the original Construction Agreement despite being aware of the lack of funds for the transaction. Her role is not simply to be a “rubber stamp” to the Agreement, as the Sandiganbayan puts it.²⁸ The Sandiganbayan also notes her admissions in her Memorandum, where she merely relied on the approval of the Office of the Government Corporate Counsel and the Public Estates Authority's Board of Directors without having an independent

²² *Id.* at 56-58.

²³ *Id.* at 59.

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.* at 60-61.

²⁷ *Id.* at 62.

²⁸ *Rollo* (G.R. No. 220500), p. 229.

assessment of the Agreement. “Even a cursory reading of the Construction Agreement against the Zamora Memorandum would yield a finding of inconsistency, which should have raised red flags in the mind of [Amposta-Mortel].”²⁹ Her argument that she merely reviews matters which are brought to her attention only further reveals her omission to act in instances where her participation was necessary. She should be found guilty of the charge.

The conviction of petitioner Zorilla, being the one who prepared the Approved Agency Estate for the Project despite lack of detailed engineering, should likewise be upheld. Preparing this despite the lack of a detailed engineering plan is not simple negligence; this is a crucial part in formulating an Approved Agency Estimate.³⁰

As to petitioners who were part of the old Board of Directors of the Public Estates Authority, namely petitioners Leo V. Padilla, Dayan, San Juan, Damaso, Legaspi, and Chan, they should be convicted for their acts of issuing Resolutions approving (1) the contract to Legaspi despite the absence of actual loan proceeds, (2) the Variation Order No. 2 despite lack of bidding, and (3) the increase on the cost of Variation Order No. 2. The Sandiganbayan also found that they failed to question the Public Estates Authority Management on why the contract was divided into two phases when what they approved was an “undivided” contract.³¹

Moreover, their reliance on the report and recommendation of the *Ad Hoc* Committee is misplaced. While *Arias v. Sandiganbayan*³² ruled that “[a]ll heads of offices have to rely to a reasonable extent on their subordinates and on good faith of those who prepare bids, purchase supplies, or enter into negotiations,” this is subject to a qualification. In *Abubakar v. People*³³:

The application of the doctrine is subject to the qualification that the public official has no foreknowledge of any facts or circumstances that would prompt him or her to investigate or exercise a greater degree of care. In a number of cases, this Court refused to apply the *Arias* doctrine considering that there were circumstances that should have prompted the government official to inquire further.³⁴ (Citations omitted)

The irregularities attending the bidding process for both the President Diosdado Macapagal Boulevard Project and the Seaside Drive Extension under Variation Order No. 2 should have prodded them, at the very least, to investigate further. Their conviction should be upheld.

²⁹ *Id.* at 229.

³⁰ *Id.* at 226.

³¹ *Id.* at 230.

³² 259 Phil. 794 (1989) [Per J. Gutierrez, Jr., *En Banc*].

³³ G.R. Nos. 202408, 202409 & 202412, June 27, 2018 [Per J. Leonen, First Division].

³⁴ *Id.*

Additionally, petitioners Lacson, Beriña, Viray, and Millan were the persons responsible for the supervision of the Project. They were directly involved in the planning and execution of the project.

Petitioners Lacson, Beriña, and Viray, as part of the *Ad Hoc Committee*, “prepare[d] the bid documents, evaluate[d] the bidders’ qualifications, evaluate[d] their submitted bids, and recommend[ed] plans, specifications, invitations to bid, pre-qualifications, and all pre-construction and construction activities to the Board for approval.”³⁵ Meanwhile, petitioner Millan, who acted as Assistant General Manager, was in charge of the “evaluation, processing, and approval of bids of contractors, progress billings, and payments.”³⁶ Having direct participation in the prohibited acts, their convictions should also be affirmed.

Finally, as to petitioner Legaspi, who is a private individual, the Sandiganbayan found that there was no evidence to show that he conspired with the other petitioners during the start of the Project. It was the Public Estates Authority’s management, specifically the *Ad Hoc Committee*, that designed the splitting of the Project into two phases. Nevertheless, petitioner Legaspi pushed for the recommendation and approval of Variation Order No. 2, so that his company could be awarded the construction of the Seaside Drive Extension. He also claimed for “overruns which made the final bill for the project 43% higher than that of the original contract price.”³⁷ It was his prompting that led the Public Estates Authority’s management to present Variation Order No. 2 for the Seaside Drive Extension to the Board as a simple change order to the original contract, thereby violating the rules on public bidding.³⁸

Moreover, petitioner Legaspi proceeded with the construction of the Seaside Extension Drive despite the lack of a Notice to Proceed and presidential approval, in contradiction to the requirement under the original Construction Agreement. These “surrounding circumstances and legal provisions all yield to the same conclusion that there was implied conspiracy between [petitioner] Legaspi and the [Public Estates Authority’s] management.”³⁹

Despite these, the *ponencia* rules that the prosecution failed to prove they acted with manifest partiality, evident bad faith, or gross inexcusable negligence, and acquits petitioners.

For a conviction of violation of Section 3(e), the following elements must be present:

³⁵ *Rollo* (G.R. No. 220500), p. 224.

³⁶ *Id.* at 224.

³⁷ *Id.* at 239.

³⁸ *Id.*

³⁹ *Id.* at 239–241.

1. The accused must be a public officer discharging administrative, judicial or official functions;
2. He [or she] must have acted with manifest partiality, evident bad faith or [gross] inexcusable negligence;
3. That his [or her] action caused any undue injury to any party, including the government, or giving any private party unwarranted benefits, advantage or preference in the discharge of his functions.⁴⁰

The *ponencia* found that the prosecution failed to show corrupt motives in the irregularities committed during bidding and award of the President Diosdado Macapagal Boulevard Project, as well as the Seaside Drive Extension under Variation Order No 2. It assessed this element as against petitioners' individual acts. I disagree.

In *Abubakar*⁴¹:

The second element provides the modalities by which a violation of Section 3(e) of Republic Act No. 3019 may be committed. "Manifest partiality," "evident bad faith," or "gross inexcusable negligence" are not separate offenses, and proof of the existence of any of these three (3) "in connection with the prohibited acts . . . is enough to convict."⁴²

Thus, independent proof of the second element is not necessary. Manifest partiality, evident bad faith, or gross inexcusable negligence can be proven through the manner by which the prohibited acts are committed. In other words, these "merely describe the mode by which the offense penalized in Section 3(e) of the statute may be committed."⁴³

The Sandiganbayan was correct in looking at the totality of petitioners' conducts to find the presence of manifest partiality, evident bad faith, or gross inexcusable negligence. After all, corrupt practices are often done through a series of discrete acts that, when taken together, reveal ill motives.

The construction of the President Diosdado Macapagal Boulevard was a flagship infrastructure project, and this huge undertaking by the national government involved large sums of money. "The rules on competitive bidding and those concerning the disbursement of public funds are imbued with public interest. Government officials whose work relates to these

⁴⁰ Id. at 242.

⁴¹ G.R. No. 202408, 202409 & 202412, June 27, 2018 [Per J. Leonen, First Division].

⁴² Id. citing *Gallego v. Sandiganbayan*, 201 Phil. 379, 383 (1982) [Per J. Relova, *En Banc*] and *Sison v. People*, 628 Phil. 573, 583 (2010) [Per J. Corona, Third Division].

⁴³ See *Gallego v. Sandiganbayan*, 201 Phil. 379, 383 (1982) [Per J. Relova, *En Banc*].

matters are expected to exercise greater responsibility in ensuring compliance with the pertinent rules and regulations.”⁴⁴

ACCORDINGLY, I vote to **DENY** the Petitions. The Sandiganbayan Decision and Joint Resolution dated February 5, 2015 and September 16, 2015 finding petitioners Cristina Amposta-Mortel, Theron Victor V. Lacson, Leo V. Padilla, Manuel Beriña, Jr., Jaime R. Millan, Bernardo T. Viray, Raphael Pocholo A. Zorilla, Daniel T. Dayan, Frisco F. San Juan, Elpidio G. Damaso, Carmelita D. Chan, and Jesusito Legaspi guilty of violation of Republic Act No. 3019 should be **AFFIRMED**.



MARVIC M.V.F. LEONEN
Senior Associate Justice

⁴⁴ *Abubakar v. People*, G.R. No. 202408, 202409 & 202412, June 27, 2018 [Per J. Leonen, First Division].