

*EN BANC*

**G.R. No. 195837 (REPUBLIC OF THE PHILIPPINES, Petitioner v. HONORABLE SANDIGANBAYAN, 5<sup>TH</sup> DIVISION, DON FERRY, and CESAR ZALAMEA, Respondents);**

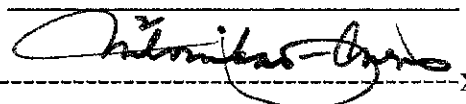
**G.R. No. 198221 (REPUBLIC OF THE PHILIPPINES, Petitioner v. SANDIGANBAYAN, 5<sup>TH</sup> DIVISION, LUCIO C. TAN, ESTATE OF FERDINAND E. MARCOS [REPRESENTED BY IMELDA R. MARCOS, IMEE M. MANOTOC, IRENE M. ARANETA, and FERDINAND R. MARCOS, JR.], IMELDA R. MARCOS, ET AL., Respondents);**

**G.R. No. 198974 (REPUBLIC OF THE PHILIPPINES, Petitioner v. SANDIGANBAYAN, 5<sup>TH</sup> DIVISION, LUCIO C. TAN, ESTATE OF FERDINAND E. MARCOS [REPRESENTED BY IMELDA R. MARCOS, IMEE M. MANOTOC, IRENE M. ARANETA, and FERDINAND R. MARCOS, JR.], IMELDA R. MARCOS, ET AL., Respondents); and**

**G.R. No. 203592 (REPUBLIC OF THE PHILIPPINES, Petitioner v. SANDIGANBAYAN, 5<sup>TH</sup> DIVISION, LUCIO C. TAN, ESTATE OF FERDINAND E. MARCOS [REPRESENTED BY IMELDA R. MARCOS, IMEE M. MANOTOC, IRENE M. ARANETA, AND FERDINAND R. MARCOS, JR.], IMELDA R. MARCOS, ET AL., Respondents).**

Promulgated:

October 3, 2023



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**SEPARATE CONCURRING OPINION**

**KHO, JR., J.:**

This case is a consolidation of four related Petitions,<sup>1</sup> all of which originated from the Complaint filed on July 17, 1987 by the Republic of the Philippines (petitioner), through the Presidential Commission on Good Government, for the recovery and reconveyance of ill-gotten wealth against Lucio C. Tan (Tan), the Estate of former President Ferdinand E. Marcos (Marcos), Imelda R. Marcos (Imelda), several of their business associates, and the corporations constituted to allegedly conceal their illegal schemes.

<sup>1</sup> See footnote 2, Main Decision penned by Associate Justice Rodil V. Zalameda. p. 6.

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In **G.R. No. 195837**, the *ponencia* **affirmed** the Sandiganbayan's ruling as valid the dismissal of the Complaint against respondents Don M. Ferry (Ferry) and Cesar C. Zalamea (Zalamea).<sup>2</sup>

In **G.R. No. 198221**, the *ponencia*: **(1) affirmed** the Sandiganbayan's denial of the Motion for Voluntary Inhibition filed by petitioner; and **(2) affirmed** the Sandiganbayan ruling that the testimony of Joselito and Aderito Yujico relative to the liquidation and acquisition of General Bank and Trust Company should be excluded from the evidence.<sup>3</sup>

In **G.R. No. 198974**, the *ponencia* **affirmed** the Sandiganbayan's denial of petitioner's Motion to Admit its Third Amended Complaint, which sought to implead PMFTC, Inc. and several other individuals as respondents to this case in relation to the merger between Fortune Tobacco Corporation and Northern Tobacco Redrying Co., Inc.<sup>4</sup>

In **G.R. No. 203592**, the *ponencia* **affirmed** the Sandiganbayan's dismissal of the Second Amended Complaint for reversion, reconveyance, restitution, accounting, and damages.<sup>5</sup>

**I concur in the disposition of the issues in G.R. Nos. 198221, 198974, and 203592; while I concur only in the result arrived at in G.R. No. 195837 that the dismissal of the Complaint against Ferry and Zalamea was valid.**

In **G.R. No. 195837**, the *ponencia* ruled that the dismissal of the aforementioned complaint was proper on the grounds of: (a) *res judicata* under the concept of conclusiveness of judgment;<sup>6</sup> and (b) insufficiency of evidence.<sup>7</sup> However, and as will be explained below, I respectfully digress from the finding that the first ground as above-described is applicable herein.

To recall, Ferry and Zalamea were officers of the Development Bank of the Philippines (DBP) at the time it sold its controlling interest in Century Park Sheraton Hotel (Century) to Tan's Sipalay Trading Corporation (Sipalay). Ferry was DBP's Vice-Chairman, while Zalamea was the Chairman of the DBP Board and Maranaw Hotel and Resorts Corporation which, at the time, was owner of Century. The two were impleaded because of their alleged

<sup>2</sup> See *id.* at 59.

<sup>3</sup> See *id.* at 11 and 59-60.

<sup>4</sup> See *id.* at 60

<sup>5</sup> See *Id.*

<sup>6</sup> *Id.* at 28-30.

<sup>7</sup> *Id.* at 30-32.

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participation in the anomalous sale, which purportedly caused losses of millions to DBP.

In 2010, Ferry and Zalamea separately filed their Motions to Dismiss on demurrer to evidence. Zalamea claimed that the evidence presented by petitioner did not sufficiently establish his participation in amassing ill-gotten wealth. Ferry, meanwhile, argued that his acts were done in his official capacity as Vice-Chairman of DBP, and that in *Republic of the Philippines v. Desierto*,<sup>8</sup> in which he was also a respondent, the Court has already ruled that the DBP officers acted in good faith and soundly exercised judgment in the sale of DBP's controlling shares in Century to Tan's Sipalay.<sup>9</sup>

In December 2010, the Sandiganbayan granted the Motions to Dismiss on demurrer to evidence, holding that no evidence was presented showing that they participated in the illegal acquisition of the assets and properties subject of the complaint.<sup>10</sup>

As mentioned, the *ponencia* affirmed this ruling of the Sandiganbayan. Significantly, the *ponencia* held, *inter alia*, that "the complaint against respondents Ferry and Zalamea is already barred by *res judicata* by conclusiveness of judgment."<sup>11</sup> It found that "[n]otably, all the elements of *res judicata* by conclusiveness of judgment are present,"<sup>12</sup> explaining that:

*First, Desierto* attained finality in 2006. *Second*, the decision was rendered by a tribunal of competent jurisdiction, the Ombudsman, as affirmed by this Court. *Third*, the disposition of *Desierto* was a judgment on the merits. *Finally*, there is identity of parties or their privies and issues between *Desierto* and the present case. The parties in the *Desierto* case and the present case are the same, the Republic representing the PCGG and the DBP officials, including respondent Ferry, who participated in the Sipalay Deal. While respondent Zalamea was not impleaded in *Desierto*, he is being indicted in the present case as a former officer of DBP and Maranaw Hotels. As to the identity of the issue, "bad faith" was discussed in *Desierto* because it is an element of the offense of Section 3(e) of RA No. 3019. The same issue of bad faith was again raised by the Republic in the present case. Therefore, the existence of bad faith in the Sipalay Deal is barred by *res judicata* by conclusiveness of judgment.<sup>13</sup> (Italics in the original)

<sup>8</sup> 516 Phil. 509 (2006) [Per J. Sandoval-Gutierrez, Second Division].

<sup>9</sup> See Main Decision, p. 10.

<sup>10</sup> *Id.*

<sup>11</sup> *Id.* at 28.

<sup>12</sup> *Id.* at 30.

<sup>13</sup> *Id.*

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Curiously, the *ponencia* did discuss the nature of the case in *Desierto*, which it said involved petitioner's *criminal complaint* for violation of Section 3(e) of Republic Act No. (RA) 3019 against several respondents, which included Ferry.<sup>14</sup> The Court went on to rule in *Desierto* as follows:

As a general rule, this Court will not interfere with the investigatory and prosecutorial powers of the Ombudsman without any compelling reason. However, this non-interference does not apply when there is grave abuse of discretion in the exercise of its discretion. By grave abuse of discretion is meant "such capricious and whimsical exercise of judgment which is equivalent to an excess or lack of jurisdiction. The abuse of discretion must be so patent and so 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 power is exercised in an arbitrary and despotic manner by reason of passion or hostility."

In the case at bar, we hold that the Ombudsman committed no grave abuse of discretion in finding that there was no probable cause against the private respondents to hold them liable for violation of Section 3(e), R.A. No. 3019. Probable cause signifies a reasonable ground of suspicion supported by circumstances sufficiently strong in themselves to warrant a cautious man's belief that the person accused is guilty of the offense with which he is charged. The grounds for suspicion must be reasonable and supported by sufficiently strong circumstances. As previously discussed, the Ombudsman correctly found that some of the essential elements of the offense charged are not present. Verily, we cannot attribute any arbitrariness or despotism to him.

WHEREFORE, the petition is DISMISSED. The Resolution of the Ombudsman dated September 5, 1997 dismissing petitioner's complaint against private respondents in OMB Case No. 0-91-0382 is **AFFIRMED**. No costs.

**SO ORDERED.**<sup>15</sup> (Emphases and underscoring supplied; citations omitted)

From this summation, it is at once clear that *Desierto* was not a ruling on the merits as to whether respondents therein were guilty of Section 3 (e) of RA 3019. Rather, *Desierto* was but an affirmation of the dismissal of a criminal complaint filed with the Ombudsman.

In *Levi Strauss & Co. v. Sevilla*,<sup>16</sup> citing *Imingan v. Office of the Ombudsman*,<sup>17</sup> the Court, speaking through Senior Associate Justice Estela M. Perlas-Bernabe, reiterated the definite instruction that the results of preliminary investigations cannot rise to the level of final and executory judgments of regular courts and hence, are not proper subjects of res

<sup>14</sup> *Id.* at 29–30.

<sup>15</sup> *Republic v. Desierto*, 516 Phil. 509, 516–517 (2006) [Per J. Sandoval-Gutierrez, Second Division].

<sup>16</sup> *See* G.R. No. 219744, March 1, 2021 [Per J. Perlas-Bernabe, Second Division].

<sup>17</sup> *See* G.R. No. 226420, March 4, 2020 [Per J. Inting, Second Division].

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***judicata***. This is because an “[i]nvestigation for the purpose of determining whether an actual charge shall subsequently be filed against the person subject of the investigation is a purely administrative, rather than a judicial or quasi-judicial, function” and as such “is not an exercise in adjudication.”<sup>18</sup> On this score, a dismissal of a case during preliminary investigation cannot be considered a ***valid and final*** judgment for *res judicata* to apply. Pertinent portions of *Levi Strauss & Co.* read:

“*Res judicata* means ‘a matter adjudged; a thing judicially acted upon or decided; a thing or matter settled by judgment.’ It lays the rule that an existing final judgment or decree ***rendered on the merits***, without fraud or collusion, ***by a court of competent jurisdiction***, upon any matter within its jurisdiction, is conclusive of the rights of the parties or their privies, in all other actions or suits in the same or any other judicial tribunal of concurrent jurisdiction on the points and matters in issue in the first suit.” Thus, for *res judicata* to apply — whether the same is in the concept of bar by prior judgment or by conclusiveness of judgment — it is imperative that, *inter alia*, the disposition of the case must be a judgment on the merits rendered by a court of competent jurisdiction.

At this juncture, it is important for the Court to point out that **G.R. No. 162311** was not a criminal case that was decided on the merits by a court of competent jurisdiction. Rather, the case emanated from mere preliminary investigation proceedings which was elevated to the regular courts on the issue of whether or not the Department of Justice (DOJ) committed grave abuse of discretion when it found no probable cause to indict therein respondent for unfair competition. ...

**Jurisprudence has long settled that preliminary investigation does not form part of trial.** Investigation for the purpose of determining whether an actual charge shall subsequently be filed against the person subject of the investigation is **a purely administrative, rather than a judicial or quasi-judicial, function. It is not an exercise in adjudication:** no ruling is made on the rights and obligations of the parties, but merely evidentiary appraisal to determine if it is worth going into actual adjudication.

**The dismissal of a complaint on preliminary investigation by a prosecutor “cannot be considered a valid and final judgment.”** As there is no former final judgment or order on the merits rendered by the court having jurisdiction over both the subject matter and the parties, **there could not have been *res judicata* ...**

Furthermore, in *Encinas v. Agustin, Jr.*, the Court further expounded that *res judicata* applies only to judicial or quasi-judicial proceedings. In this regard, while there is case law stating that a prosecutor conducting a preliminary investigation performs a quasi-judicial function, the Court, in *Bautista v. CA*, clarified that “this statement holds true only in the sense that, like quasi-judicial bodies, the prosecutor is an office in the executive department exercising powers akin to those of a court”; and the similarity ends there. It further expounded that unlike proceedings in quasi-judicial

<sup>18</sup> See *Levi Strauss & Co. v. Sevilla*, *supra*, citing *Imingan v. Office of the Ombudsman*, *id.*

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agencies whose awards determine the rights of the parties, and hence, their decisions have the same effect as judgments of a court, a preliminary investigation, which is merely inquisitorial, does not determine the guilt or innocence of the accused. ***It is not a trial on the merits*** and its purpose is only to determine whether a crime has been committed and whether there is probable cause to believe that the accused is guilty thereof. While it is the prosecutor that makes such determination, he cannot be said to be exercising a quasi-judicial function, as it is the courts that ultimately pass judgment on the accused.<sup>19</sup> (emphases, italics, and underscoring in the original; citations omitted)

Following *Levi Strauss & Co.* and several other antecedent cases,<sup>20</sup> it is therefore humbly opined that the dismissal of the complaints against Ferry and Zalamea should not be anchored on *res judicata* by conclusiveness of judgment. It is enough, as the *ponencia* itself affirmed, for the dismissal of their case to be based on petitioner's failure to substantiate its claim that Ferry and Zalamea participated in the acquisition of ill-gotten wealth.<sup>21</sup>

**ACCORDINGLY, I VOTE to DENY** the consolidated petitions docketed as **G.R. Nos. 195837, 198221, 198974, and 203592.**



**ANTONIO T. KHO, JR.**

Associate Justice

<sup>19</sup> See *Levi Strauss & Co. v. Sevilla*, *id.*

<sup>20</sup> See *Imingan v. Office of the Ombudsman*, *supra*; *Pavlow v. Mendenilla*, 809 Phil. 24 (2017) [Per J. Leonen, Second Division]; *Encinas v. Agustin, Jr.*, 709 Phil. 236 (2013) [Per C.J. Sereno, *En Banc*], *inter alia*.

<sup>21</sup> See Main Decision, pp. 31–32.

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