Republic of the Philippines
SUPREME COURT
Manila

EN BANC

G.R. No. 96182 August 19, 1992

MARCELO FERNANDO, petitioner,
vs.
THE HONORABLE SANDIGANBAYAN, (First Division) and The Office of the Special Prosecutor,respondents.

G.R. No. 96183 August 19, 1992

SALVADOR M. MISON, petitioner,
vs.
SANDIGANBAYAN, OMBUDSMAN and OFFICE OF THE SPECIAL PPROSECUTOR, respondents.

Mario V. Andres for petitioner Fernando.

Bellaflor Angara-Castillo for petitioner Mison.

The Solicitor General for respondents.

GUTIERREZ, JR., *J.:*

These consolidated petitions question the two orders of the Sandiganbayan dated December 3, 1990 which denied the petitioners' motion to defer arraignment and set the date for the petitioners' arraignment.

The petitioners are charged with violation of Section 3(e) of the Anti-Graft and Corrupt Practices Act (Republic Act No. 3019, as amended) for allegedly having given, through manifest partiality, unwarranted benefits to J.F. Tabajonda Construction. The petitioners allegedly split a contract of over P5,000,000.00 into eight (8) smaller contracts for the repair and renovation of the Bureau of Customs Building to avoid a public bidding and to favor J.F. Tabajonda Construction which was awarded four (4) of the eight (8) contracts.

Sometime in September 1987, petitioner Mison, then Bureau of Customs Commissioner, asked President Aquino for authority to approve government contracts below P2,000,000.00 entered

into by the Bureau for urgent repairs and rehabilitation and to facilitate the implementation of projects envisioned to improve the machinery of the Bureau. The request was referred to the Secretary of Finance for comment. Upon advice of petitioner Fernando, then Undersecretary of Finance, who stated the requirements regarding authority to approve contracts, the Secretary by 1st Indorsement dated November 12, 1987 interposed no objection to the grant of the authority.

On November 6, 1987, petitioner Mison created the Committee on Bidding of the Bureau which was tasked to "pass upon all requests for supplies and materials, equipment, repairs, renovations and constructions; determine the reasonableness of the prices/costs thereof based on quotations submitted by the bidders/contractors and recommended to the Commissioner the approval of awards to bidders."

On December 3, 1987, Hilario Amotan, Acting Chief, Procurement Office of the Bureau sent out Request for Quotations to eight (8) contractors, one of which was J.F. Tabajonda Construction, to submit their respective quotations for labor and materials on eight (8) repair works to be done on the main Customs Building. Of the eight (8) repair works that were to be done, four (4) were awarded to J.F. Tabajonda Construction, one to Lodestone Construction, Inc., one to V.F. Labao Construction, one to F.S. Evangelista Construction and one to Pick and Shovel, Inc. as their bids were the lowest from among six (6) submitted quotations. Thereupon, on January 21, 1988, petitioner Mison executed the contracts with the winning bidders. The eight (8) contracts were forwarded to the Department of Finance for approval pursuant to Executive Order No. 301. The contracts were, however, returned to the Bureau, Undersecretary Katigbak calling the attention of the Bureau to Section 2 of Executive Order No. 301 stating that "negotiated contracts for public services and for furnishing supplies, materials or equipment may be entered into by the Department or agency head without need of prior approval of higher authorities, subject to availability of funds, compliance with the standards or guidelines prescribed in Section 1 hereof, and to the audit jurisdiction of COA."

On February 4, 1988, petitioner Mison wrote petitioner Fernando, stating that the Bureau's contract with J.F. Tabajonda Construction, subject of Mison's lst Indorsement of December 21, 1987 and approved by Fernando subject to existing rules and regulations, has the nature of a negotiated contract. Petitioner Mison requested that it be exempt from the provisions of Executive Order No. 164 requiring that a negotiated contract shall be resorted to only if public bidding would negate the objective for which the project is envisioned.

On February 5, 1988, in his lst Indorsement, petitioner Fernando approved the negotiated contract between the Bureau and J.F. Tabajonda Construction pursuant to Executive Order No. 301 subject to usual accounting and auditing requirements.

On February 23, 1988, petitioner Mison forwarded to the Secretary of Finance the eight (8) contracts between the Bureau and the contractors reiterating his request that the contracts, having the nature of a negotiated contract, be exempt from the provisions of Executive Order No. 164. Furthermore, he requested for immediate approval of said contracts as the need for

the repairs and renovation of the building was urgent as parts of the building have become a hazard to life.

Petitioner Fernando, in his memorandum, recommended the approval of petitioner Mison's request before sending it to the acting Secretary and the Undersecretary. On the face of the memorandum, Acting Secretary of Finance Victor Macalincag and Undersecretary E. del Fonso stamped their approval on March 4, 1988. By 2nd Indorsement, petitioner Fernando then returned the eight (8) contracts to the Bureau stating that the Department has approved them pursuant to Executive Order No. 301 with instructions that the same be subject to usual auditing and accounting requirements.

On April 29, 1988, Leonardo Jose, among others, a former Bureau of Customs employee who was separated by Mison from the service as a result of the Bureau's reorganization pursuant to Executive Order No. 127, filed a complaint against the petitioners, among others, charging them with violation of the Anti-Graft and Corrupt Practices Act (Republic Act No. 3019, as amended) for their alleged acts of having split a multi-million peso contract for the repair and reconstruction of the main customs building into eight (8) smaller contracts to avoid a public bidding and to favor J.F. Tabajonda Construction.

Acting on said complaint, Teresita Diaz-Baldos, Special Investigation Officer (SIO) of the Office of the Special Prosecutor, conducted a preliminary investigation and subsequently issued a resolution recommending the prosecution of the petitioners, among others, for violation of Section 3(e) of Republic Act No. 3019, as amended which reads:

> Sec. 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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> xxx xxx xxx
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> (e) Causing any undue injury to any party, including the Government, or giving any private party any unwarranted benefits, advantage or preference in the discharge of his official, administrative or judicial functions through manifest partiality, evident bad faith or gross inexcusable negligence. This provision shall apply to officers and employees of offices or government corporations charged with the grant of licenses or permits or other concessions.

Special Prosecuting Officer (SPO) Carlos Montemayor affirmed the recommendation of SIO Diaz-Baldos after reviewing the resolution.

In the light of precedents that a head of office is not necessarily criminally liable if all he did was rely on the signature of subordinate officials, Deputy Special Prosecutor Jose de G. Ferrer assigned the case to Prosecutor Wilfredo A. Orencia for a more extended review.

SPO Orencia recommended the dismissal of the complaint on grounds of insufficiency of evidence. His recommendation was approved by Acting Special Prosecutor Jesus F. Guerrero. The recommendation of the Special Prosecutor was not approved by the Ombudsman who ordered the filing of the information against the petitioners, among others, with the Sandiganbayan. The case was docketed as Criminal Case No. 14461, to wit:

> That on or about the month of April, 1988 and immediately prior and subsequent thereto, in the City of Manila and within the jurisdiction of this Honorable Court, the above-named accused, all public officers, COMMISSIONER SALVADOR MISON being the Commissioner of the Bureau of Customs, UNDERSECRETARY MARCELO FERNANDO being the Undersecretary of the Department of Finance, FRANCISCO WENCESLAO, being the Special Assistant to Commissioner Salvador Mison, and HILARIO AMOTAN, being the Chief of the Supply Division and General Services of the Bureau of Customs, while in the performance of their official functions, did then and there wilfully, unlawfully, criminally, and with manifest partiality conspire to grant, as they did in fact conspire in granting unwarranted benefits, advantage or preference to J.F. Tabajonda Construction, a trading firm with a capitalization of P50,000.00, by awarding to it contracts involving the renovations and repair of the Bureau of Customs Building at Port Area, Manila costing P3,287,945.00 through four (4) negotiated contracts which were made possible by making four (4) separate job orders and splitting the total construction costs in the following manner, to wit:
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> a) Renovation of the fourth floor level for P585,000.00;
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> b) Repair of the roofing of the fourth, third and second floors and the Medical and Central Division and toilet for P755,445.00;
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> c) Renovation of the second floor level for P1,250,000.00; and
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> d) Painting of all exterior face of the wall of the main Customs Building from the second to the fourth floor for P697,500.00, thus avoiding the awarding of the contracts through public bidding as required by law; as consequence, the accused freely exercised their discretion in awarding the aforesaid four (4) negotiated contracts to J.F. Tabajonda Construction, an unqualified, unlicensed and unregistered construction firm, to the exclusion of other qualified, licensed and registered contractors who may have been interested in offering their bids had the award been coursed through a public bidding. (G.R. No. 96182, *Rollo*, pp. 60-62)

Petitioner Mison filed his motion for reconsideration and/or reinvestigation and for deferment of arraignment while petitioner Fernando filed his own motion for reconsideration.

The motions of the petitioners were heard jointly and the Sandiganbayan thereafter issued an order directing the following:

> [T]he Ombudsman look into the sequence of events and the documents in support thereof presented by accused Fernando, to determine the irregularity of approval by the Office of the Secretary of Finance of this transaction as a whole, as well as the presentation of documents basis for the resolution of Prosecutor Teresita V. Diaz-Baldos without knowledge of, or notice to, the accused. This is without prejudice to the determination by the Ombudsman of other items which, in his view, would also be deserving of his attention to make a final determination as to whether or not the above and other facts in the record indicate the existence or absence of probable cause against all or some of the accused. (G.R. No. 96182, *Rollo*, pp. 62-63)

As a result of the order of the Sandiganbayan, evidence was submitted by the petitioners and by the complainant.

After another investigation by SPO Tamayo, he ordered the dismissal of Criminal Case No. 14461 for lack of evidence. He, however, directed that a preliminary investigation be conducted against petitioner Mison and eight (8) other persons for falsification of public documents involving another matter.

Tamayo's order was subsequently disapproved by the Ombudsman in his order dated November 22, 1990.

Both petitioners moved for deferment of their arraignment. This was denied by the Sandiganbayan in their questioned December 3, 1990 order. The Sandiganbayan, thereafter issued its second questioned order setting the arraignment of the petitioners with the pre-trial and trial to follow.

Hence, these, petitions.

From a careful reading of the records of this case, it is evident that there is substantial basis for this Court to rule that there is no *prima facie* case against petitioners Fernando and Mison to sustain the prosecution of charges brought against them. It is worthy to note that the Solicitor General, in his comment, agreed that there is no *prima facie* case in Criminal Case No. 14461.

We emphasize at this point that the Court has a policy of non-interference in the Ombudsman's exercise of his constitutionally mandated powers. The overwhelming number of petitions brought to us questioning the filing by the Ombudsman of charges against them are invariably denied due course. Occasionally, however, there are rare cases when, for various reasons there has been a misapprehension of facts, we step in with our review power. This is one such case.

It may also be stressed at this point that the approach of the Courts to the quashing of criminal charges necessarily differs from the way a prosecutor would handle exactly the same question. A court faced with a fifty-fifty proposition of guilt or innocence always decides in favor of innocence. A prosecutor, conscious that he represents the offended party, may decide to leave the problem to the discretion of the court.

In the *habeas corpus* case of *Juan Ponce Enrile v. Judge Salazar, et al.,* (186 SCRA 217 [1990]), the situation was more clear-cut, thus prompting the undersigned *ponente* to state:

> All courts should remember that they form part of an independent judicial system; they do not belong to the prosecution service. A court should never play into the hands of the prosecution and blindly comply with its erroneous manifestations. Faced with an information charging a manifestly non-existent crime, the *duty of a trial court is to throw it out*. Or, at the very least and where possible, make it conform to the law. (at p. 244)

Under Executive Order No. 301, Commissioner Mison had authority to approve negotiated contracts up to P1,999,999.00. Between P2,000,000.00 and P9,999,999.00, approval may be given by the Secretary and two Undersecretaries. For negotiated contracts P10,000,000.00 and above, Malacañang approval is required.

The November 22, 1990 order of the Ombudsman (G.R. No. 96182, *Rollo*, pp. 21-25) denying the petitioners' motion to withdraw the information filed against them shows that the primary basis for prosecution is the alleged absence of the necessary authority, to wit:

xxx xxx xxx

> While the eight (8) contracts have a combined price of over P5,000,000.00, the approval of which is required to be by the Department Head and two Undersecretaries, it was only Fernando who expressed his approval thereof in his aforementioned 2nd indorsement. In an apparent attempt to cure this deficiency, evidence was presented to show that the said contracts were approved by the then Acting Secretary of Finance and two Undersecretaries. This attempt is a recognition in itself by the accused that the said contracts needed the approval not only of the Department head alone. The evidence presented to prove compliance with the legal requirement is assailed by the complainant as being merely "curative", and this claim appears to be sustained by the facts that such document only resurfaced during the reinvestigation, and that the supposed approval of the contracts by the Department head and two undersecretaries is not even mentioned in the 2nd indorsement signed by accused Fernando alone. . . .

The records belie these findings. From the very inception of the plan to repair the decrepit and unsafe offices of the Bureau of Customs, petitioner Mison sought appropriate authority from

the Office of the President, no less, and later from the Department of Finance. The authority was given to him. Only then did he order the contractors to proceed with the construction.

The findings of Special Prosecutor Tamayo in his Comment dated May 4, 1990 state that:

> It is in the light of this procedural flow and documents relative to the administrative and supervision (*sic*) that the testimony of Mr. Ramon Malarde bears great significance. On *January 20, 1989, he presented certified xerox copies of all available documents relative to the renovation and repair of the Bureau of Customs building* and they *exclusively* included only the following which were marked as OPS exhibits, and xerox copies of which are not presented as annexes to this comment, namely:
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> xxx xxx xxx
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> Annex H Memorandum of Undersecretary Fernando to Acting Secretary Victor Macalincag, dated March 4, 1988 (OPS #5);
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> xxx xxx xxx
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> (Emphasis supplied, Order, pp. 9 and 10)

The February 5, 1988 indorsement of Undersecretary Fernando approving Commissioner Mison's request to go ahead with the proposed contracts pursuant to Executive Order No. 301 and subject to accounting and auditing rules is not the approval which is essential to its validity and, therefore, forming part of the entire contract.

What is material to this case is that on March 4, 1988, Acting secretary Macalincag, Undersecretary del Fonso and Undersecretary Fernando approved the negotiated contracts. Only then were the eight contracts returned to the Bureau. Only then could the execution of the contracts be deemed complete.

The complainants assert that the March 4, 1988 approval was only *curative*. In other words, was it only an afterthought to provide evidence during an investigation?

The complaints of disgruntled employees were filed on April 29, 1988. At that time, the authority had already been given.

The March 4, 1988 approval could not have been *curative* because the contracts were investigated only in 1989 and 1990. It is not correct that the document surfaced only during re-investigation. As early as January 20, 1989, or more than one year before the re-investigation, it already formed part of the records as Annex "H".

Furthermore, the history of the records show that the procedures and transactions involving the repair and renovations were regular and aboveboard. This is shown by the normal, if not bureaucratic, exchange of communications and indorsements between the Commissioner of Customs and the Department of Finance.

As earlier stated, Mison asked the President on September 24, 1987 for authority. The President referred the request to the Secretary of Finance. On November 3, 1987 Undersecretary Fernando prepared a memorandum informing the Secretary of the requirements for approval of contracts entered into by Mison. The Secretary approved the procedure in the memorandum and then replied to the President's referral.

Another Undersecretary, R.K. Katigbak, advised the Bureau of Customs that the eight (8) contracts are covered by Section 2 of Executive Order 301. Petitioner Mison answered that what he needed was authority to enter into negotiated contracts.

Considering the urgency and need for repairs, Undersecretary Fernando approved the Bureau's entering into the contracts in his February 5, 1988 indorsement but "subject to the usual accounting and auditing requirement." On March 4, 1988, the needed signing authority was given by the Secretary and another Undersecretary which, added to Fernando's own signature, constituted the authorization required by the Executive Order. There is no basis to warrant prosecution under an Executive Order which was never violated.

The challenged November 22, 1990 order likewise states that there was evidence "to confirm the scheme to grant unwarranted benefits due to partiality in favor of J.F. Tabajonda Construction."

Again, this is not supported by the records.

Quoting from the order of Special Prosecutor Tamayo dated October 19, 1990, "For a benefit to be unwarranted, it should be unjustified. It is devoid of any consideration. In this regard, it suffices to state that the Commission on Audit certified that all the transactions were post-audited and it found no ground for suspension/disallowance of the disbursements."

There was no manifest partiality granted to J.F. Tabajonda Construction. Mr. Mison could have validly awarded all eight (8) contracts to Tabajonda. Instead, he awarded four (4) contracts to other contractors who gave lower bids for specific projects. This, in itself, negates partiality. Not one of the other construction firms who submitted their respective quotations or bids protested or complained of any partiality in awarding the four (4) contracts to J.F. Tabajonda Construction or that the contracts should not have been awarded to it but to anyone of the other participating bidders. It is clear from the determination made by the Customs Committee on Bidding that J.F. Tabajonda Construction offered the lowest bid price. The Committee based its decision on a finding that the procedures adopted were regular and fair. (Order of Special Prosecutor Tamayo dated October 19, 1990, pp. 23-24, G.R. No. 96183, *Rollo*, pp. 30-56)

As regards petitioner Fernando, there is no finding by the Ombudsman himself of any special relationship between Fernando and J.F. Tabajonda Construction. He is completely clear on this count.

Moreover, the absence of any partiality on the part of Mison is further shown by the fact that the complainant was not a losing bidder, a disinterested party, or a crusading citizen.. Rather, the complainant was a dismissed employee of the Bureau of Customs, bitterly angry because of his summary dismissal.

The petitioners are charged with violation of Section 3(e) of Republic Act No. 3019, as amended. We held in*Alejandro v. People* (170 SCRA 400, 405, 407 [1989]);

> In order that one may be held criminally liable under said section, the act of the accused *which caused undue injury must have been done with evident bad faith or with gross inexcusable negligence.* Gross negligence has been defined as negligence characterized by the want of even slight care, acting or omitting to act in a situation where there is a duty to act, not inadvertently but wilfully and intentionally with a conscious indifference to consequences in so far as other persons may be affected. (Ballentine's Law Dictionary, 3rd Edition, p. 537) It is the omission of that care which even inattentive and thoughtless men never fail to take on their own property. (Bouvier's Law Dictionary, Vol. I, 3rd Revision, p. 1383)
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> xxx xxx xxx
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> Moreover, one of the elements of the crime described in Sec. 3(e) of the Anti-Graft and Corrupt Practices Act is that there should be undue injury caused to any party. However, in the 30 July 1987 decision of the respondent Sandiganbayan, it is recognized that there was no proof of damage caused to the employees of the hospital since they were in fact paid on 27 October 1982 their salaries for the entire third quarter of 1982. (Emphasis supplied)

There is no evidence whatsoever to show that the acts of the petitioners were done with evident bad faith or gross negligence. Neither is there proof that there was undue injury caused to any party. Who is the party injured? There is nothing in the records to show injury to any party, least of all the government. The urgent repairs were completed. The Bureau of Customs personnel and the public dealing with them were benefited but nobody was injured. But most of all, there was no evident partiality.

It appears, therefore, that the questioned orders overlook what this Court enunciated in *Salonga v. Cruz Paño*(134 SCRA 438, 461-462 [1985]):

> xxx xxx xxx

> The purpose of a preliminary investigation is to secure the innocent against hasty, malicious and oppressive prosecution, and to protect him from an open and public accusation of crime, from the trouble, expense and anxiety of a public trial, and also to protect the state from useless and expensive trials.
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> xxx xxx xxx
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> A preliminary investigation serves not only the purposes of the State. More important, it is a part of the guarantees of freedom and fair play which are birthrights of all who live in our country. It is, therefore, imperative upon the fiscal or the judge as the case may be, to relieve the accused from the pain of going through a trial once it is ascertained that the evidence is insufficient to sustain a *prima facie* case or that no probable cause exists to form a sufficient belief as to the guilt of the accused. Although there is no general formula or fixed rule for the determination of probable cause since the same must be decided in the light of the conditions obtaining in given situations and its existence depends to a large degree upon the finding or opinion of the judge conducting the examination, such a finding should not disregard the facts before the judge nor run counter to the clear dictates of reason (See La Chemise Lacoste, S.A. v. Fernandez, 129 SCRA 391).

Whether the contract was awarded as a single P5,000,000.00 award or broken up into smaller awards for bidders who could give better services for specific portions of the project is of no moment. Proper authority for up to P9,999,999.00 was given.

The records, therefore, do not bear out the Information's charge that the breaking up of the construction costs was a deliberate attempt to avoid awards through public bidding. This is the main thrust of the prosecution. It is not partiality which resulted in unwarranted benefits to any private party. This is only an incidental result from the main thrust. There is also no charge of over-pricing, poor construction, kickbacks, or any form of anomaly of this nature. And there is no *prima facie* showing that one of the several contractors was given unwarranted benefits over the others.

WHEREFORE, the two petitions for *certiorari* are hereby GRANTED. The petitioners are dropped from the information in Criminal Case No. 14461 for lack of probable cause.

SO ORDERED.

Narvasa, C.J., Feliciano, Bidin, Medialdea, Regalado, Davide, Jr., Romero, Nocon and Bellosillo, JJ., concur.

Cruz, J., took no part.

Melo, J., is on leave.

Separate Opinions

GRIÑO-AQUINO, *J.,* concurring and dissenting:

This is a case where the Ombudsman and the Office of the Special Prosecutor could not see eye to eye on whether there exists probable cause to warrant the filing of an information against the petitioners. Undersecretary Marcelo Fernando and former Customs Commissioner Salvador M. Mison, for allegedly having conspired to favor the J.F. Tabajonda Construction Company in the awarding of contracts for the repair and renovation of the customs building in violation of the Anti-Graft and Corrupt Practices Law.

After the Office of the Ombudsman had filed an information against them in the Sandiganbayan, separate motions for reinvestigation or to quash were filed by the petitioners in the Sandiganbayan which ordered a reinvestigation of the case by the Ombudsman whom it directed to:

> . . . look into the sequence of events and the documents in support thereof presented by accused Fernando, to determine the irregularity of approval by the Office of the Secretary of Finance of this transaction as a whole, as well as the presentation of documents basis for the resolution of Prosecutor Teresita V. Diaz-Baldos without knowledge of, or notice to, the accused. This is without prejudice to the determination by the Ombudsman of other items which, in his view, would also be deserving of this attention to make a final determination as to whether or not the above and other facts in the record indicate the existence or absence of probable cause against all or some of the accused. (p. 9, *Rollo* of G.R. No. 96183.)

Additional evidence was submitted by the parties before Special Prosecution Officer Leonardo Tamayo who subpoenaed "all records of J.F. Tabajonda Construction contracts with the Bureau of Customs in his possession" (p. 10. *Rollo* of G.R. No. 96183). Tamayo recommended the withdrawal of the information for insufficiency of evidence, but he directed that a preliminary investigation be conducted against Mison and eight (8) other customs employees for falsification of public documents concerning another matter. The Acting Special Prosecutor, Jesus Guerrero, approved Tamayo's order but, as happened after the first preliminary investigation, the Ombudsman disapproved Tamayo's recommendation (pp. 21-25, *Rollo* of G.R. No. 96182).

The petitioners again asked for a deferment of their arraignment in the Sandiganbayan so they may file a motion for reconsideration but their motion was denied by the Ombudsman who was upheld by the Sandiganbayan on the ground that their intended motion for reconsideration would be, in effect, a *second* motion for reconsideration which is not allowed under the rules.

Undersecretary Fernando and Commissioner Mison filed separate petitions for *certiorari* in this Court (docketed as G.R. Nos. 96182 and 96183, respectively), assailing the two Orders dated December 3, 1990 of the Sandiganbayan, on the ground that they curtail the legal rights of the accused and deprive them of due process.

The Solicitor General manifested "that he is not opposing the petitions for the nullification of the two (2) Orders issued by the Sandiganbayan on December 3 1990 in Criminal Case No. 14461" (p. 82, *Rollo* of G.R. No. 96182).

After carefully perusing the petitions and the comments thereon, I think the Sandiganbayan properly denied the petitioners' motion to defer their arraignment, pre-trial and trial to enable them to file a motion for reconsideration of the Ombudsman's Order dated November 22, 1990, for such a motion would indeed be a *second* motion for reconsideration which is banned by the Rules.

Neither did the Sandiganbayan gravely abuse its discretion and deprive the petitioners of due process when it reset their arraignment, pre-trial, and trial on December 5, 1990 at 2:00 p.m. giving them only two days to prepare therefor. Its order simply followed Section 1, Rule 119 of the Revised Rules on Criminal Procedure which provides that "the parties shall be notified of the date of trial at least *two (2) days before such date*."

With respect to the Ombudsman's Order dated November 22, 1990 denying the petitioners' motion to withdraw the Information against them, I am not persuaded that this Court should interfere with the Ombudsman's exercise of his investigatory and prosecutory powers by ordering him to withdraw the information against Commissioner Mison, as distinguished from Undersecretary Fernando.

Whether there was bad faith in splitting up the P5 million project into eight (8) smaller contracts, whether there was manifest partiality in awarding four of them to J.F. Tabajonda without a public bidding, and whether that manner of awarding the contracts caused indirect injury to any party and/or conferred unwarranted benefits and advantage to J.F. Tabajonda, are matters for the Ombudsman, not the Undersecretary of Finance, to investigate and ascertain. Several prosecution officers in the Office of the Ombudsman conducted the preliminary investigation of this case and assessed the evidence. Special Prosecution Officers Teresita D. Baldos and Carlos Montemayor recommended prosecution, but Special Prosecution Officers Wilfredo Orencia and Leonardo Tamayo, with the concurrence of Acting Special Prosecutor Jesus Guerrero, were for withdrawing the information. The Ombudsman sustained Baldos and Montemayor. He found probable cause that there was partiality and favoritism for J.F. Tabajonda Construction in view of previous dealings and special relations, not denied, between the Customs Commissioner and J.F. Tabajonda. Since it is the Ombudsman's duty and prerogative, not the Special Prosecutor's, to decide whether or not to prosecute, the Court should respect his decision.

> Under the 1987 Constitution, the Ombudsman (as distinguished from the incumbent Tanodbayan) is charged with the duty to: Investigate on its own, or on complaint by any person, any act or omission of any public official, employee, office or agency, when such act or omission appears to be illegal, unjust, improper, or inefficient.
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> Now then, inasmuch as the aforementioned duty is given to the Ombudsman, the incumbent Tanodbayan (called Special Prosecutor under the 1987 Constitution and who is supposed to retain powers and duties NOT GIVEN to the Ombudsman) is clearly without authority to conduct preliminary investigations and to direct the filing of criminal cases with the Sandiganbayan, except upon orders of the Ombudsman. This right to do so was lost effective February 2, 1987. From that time, he bas been divested of such authority. (Zaldivar vs. Sandiganbayan, 160 SCRA 843).
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> In the light of the foregoing pronouncements, there is no doubt that the power of the present Special Prosecutor to conduct preliminary investigation and to prosecute is subject to the following limitations: (a) it extends only to criminal cases within the jurisdiction of the Sandiganbayan; and (b) the same may be exercised only by authority of the Ombudsman. (Republic vs. Sandiganbayan, 200 SCRA 667.)

We should not, at this stage, prejudge the prosecution and predict that the evidence against Commissioner Mison will not stand up in the Sandiganbayan. The justifications for splitting the repair and renovation project into eight (8) smaller contracts and for doing away with public bidding are matters of defense at the trial of the case. If, besides the complainant, Leonardo A. Jose, no other witnesses have come forward to assail the awarding of four (4) contracts to J.F. Tabajonda, it is because the case has not yet gone to trial. The presentation of the prosecution evidence has not even commenced. The Ombudsman has not been allowed to perform his prosecutory function as provided by law, without interference from this Court.

It would not be sound practice to depart from this Court's previously articulated policy of non-interference in the Ombudsman's exercise of his discretion to determine whether or not to file an information against the accused. We refer to our rulings in the following cases.

> The Ombudsman may himself dismiss the complaint in the first instance if in his judgment the acts or omissions complained of are not illegal, unjust, improper or inefficient. The Constitution grants him such power and *the courts should not interfere in the exercise thereof.* The rule is based not only upon respect for the investigatory and prosecutory powers granted by the Constitution to the Office of the Ombudsman but upon practicality as well. Otherwise, the functions of the courts will be grievously hampered by innumerable petitions assailing the dismissal of investigatory proceedings conducted by the Office of the Ombudsman with regard to complaints filed before it, in much the same way

> that the courts would be absolutely swamped if they could be compelled to review the exercise of discretion on the part of the fiscals or prosecuting attorneys each time they decided to file an information in court or dismissed a complaint by a private complainant. (Sesbreño vs. Deputy Ombudsman, G.R. No. 97289, March 21, 1991.)
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> *Applications to the Supreme Court for the nullification and setting aside of the findings and conclusions of the Office of the Ombudsman in a criminal case, arrived at after a preliminary investigation, are inappropriate*. In any event, the resolution by the Ombudsman of the basic question of whether or not under the admitted facts, the Executive Director of the Office of Muslim Affairs had properly withheld the salaries of the petitioner does not appear to be tainted by any grave abuse of discretion. (Tabao-Caudang vs. Vasquez, G.R. No. 97127, March 12, 1991.)
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> . . . *The Ombudsman having authorized the Special Prosecutor to investigate the charges,* and we cannot assume that the former acted without any justifiable cause, the *latter is and should, at this stage, be the proper adjudicator of the question as to the existence of a case warranting the filing of an information in court.* To deny said functionary of the opportunity to discharge such duty through this prohibitory recourse, under the obtaining circumstances hereinbefore explained, would be violative of settled rules of criminal procedure and would, in effect, grant an immunity, against even an investigative proceeding. (G.R. No. 87912, Tabujara vs. Office of Special Prosecutor and Bentain.)

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With respect to Undersecretary Marcelo Fernando, the Ombudsman's finding that he (the Undersecretary) singlehandedly authorized contracts which required the approval of the Secretary of Finance and two Undersecretaries, and that the proof of compliance with this legal requirement was "merely curative" (p. 23, *Rollo*of G.R. No. 96182) appears to be clearly

erroneous for the authority of Commissioner Mison to enter into said contracts was signed by the Secretary of Finance and two Undersecretaries *on March 4, 1988* yet, or one year before the investigation of the transactions was initiated in 1989.

Another circumstance which aroused the Ombudsman's suspicion that Undersecretary Fernando was in cahoots with J.F. Tabajonda Construction was: "that everytime the contracts were submitted to the Department of Finance for approval, accused Fernando lost no time in approving the same either on the same date or at the latest, the day following" (Ombudsman's Order dated November 22, 1990; p. 24, *Rollo* of G.R. No. 96182). I think, however, that the Undersecretary's efficiency in disposing of official business should commend, instead of condemn, him.

Unlike Commissioner Mison, there is no cloud over Secretary Fernando. The Ombudsman found no previous dealings or special relationship or closeness between him and J.F. Tabajonda. There is no hint that his actuation was anything but his normal way of discharging the functions and responsibilities of his office as Undersecretary of Finance.

Furthermore, his approval of the Tabajonda contracts was subject to compliance with Section 1 of Executive Order No. 301 and to a review and audit by the Commission on Audit.

I therefore concur with the majority's decision to set aside the proceedings against Undersecretary Fernando.

However, I vote to DISMISS the petition for *certiorari* filed by former Commissioner Salvador Mison in G.R. No. 96183, for in his case there exist facts which warrant a finding of probable cause.

Padilla, J., concurs.

Separate Opinions

GRIÑO-AQUINO, *J.,* concurring and dissenting:

This is a case where the Ombudsman and the Office of the Special Prosecutor could not see eye to eye on whether there exists probable cause to warrant the filing of an information against the petitioners. Undersecretary Marcelo Fernando and former Customs Commissioner Salvador M. Mison, for allegedly having conspired to favor the J.F. Tabajonda Construction Company in the awarding of contracts for the repair and renovation of the customs building in violation of the Anti-Graft and Corrupt Practices Law.

After the Office of the Ombudsman had filed an information against them in the Sandiganbayan, separate motions for reinvestigation or to quash were filed by the petitioners in the Sandiganbayan which ordered a reinvestigation of the case by the Ombudsman whom it directed to:

> . . . look into the sequence of events and the documents in support thereof presented by accused Fernando, to determine the irregularity of approval by the Office of the Secretary of Finance of this transaction as a whole, as well as the presentation of documents basis for the resolution of Prosecutor Teresita V. Diaz-Baldos without knowledge of, or notice to, the accused. This is without prejudice to the determination by the Ombudsman of other items which, in his view, would also be deserving of this attention to make a final determination as to whether or not the above and other facts in the record indicate the existence or absence of probable cause against all or some of the accused. (p. 9, *Rollo* of G.R. No. 96183.)

Additional evidence was submitted by the parties before Special Prosecution Officer Leonardo Tamayo who subpoenaed "all records of J.F. Tabajonda Construction contracts with the Bureau of Customs in his possession" (p. 10. *Rollo* of G.R. No. 96183). Tamayo recommended the withdrawal of the information for insufficiency of evidence, but he directed that a preliminary investigation be conducted against Mison and eight (8) other customs employees for falsification of public documents concerning another matter. The Acting Special Prosecutor, Jesus Guerrero, approved Tamayo's order but, as happened after the first preliminary investigation, the Ombudsman disapproved Tamayo's recommendation (pp. 21-25, *Rollo* of G.R. No. 96182).

The petitioners again asked for a deferment of their arraignment in the Sandiganbayan so they may file a motion for reconsideration but their motion was denied by the Ombudsman who was upheld by the Sandiganbayan on the ground that their intended motion for reconsideration would be, in effect, a *second* motion for reconsideration which is not allowed under the rules.

Undersecretary Fernando and Commissioner Mison filed separate petitions for *certiorari* in this Court (docketed as G.R. Nos. 96182 and 96183, respectively), assailing the two Orders dated

December 3, 1990 of the Sandiganbayan, on the ground that they curtail the legal rights of the accused and deprive them of due process.

The Solicitor General manifested "that he is not opposing the petitions for the nullification of the two (2) Orders issued by the Sandiganbayan on December 3 1990 in Criminal Case No. 14461" (p. 82, *Rollo* of G.R. No. 96182).

After carefully perusing the petitions and the comments thereon, I think the Sandiganbayan properly denied the petitioners' motion to defer their arraignment, pre-trial and trial to enable them to file a motion for reconsideration of the Ombudsman's Order dated November 22, 1990, for such a motion would indeed be a *second* motion for reconsideration which is banned by the Rules.

Neither did the Sandiganbayan gravely abuse its discretion and deprive the petitioners of due process when it reset their arraignment, pre-trial, and trial on December 5, 1990 at 2:00 p.m. giving them only two days to prepare therefor. Its order simply followed Section 1, Rule 119 of the Revised Rules on Criminal Procedure which provides that "the parties shall be notified of the date of trial at least *two (2) days before such date*."

With respect to the Ombudsman's Order dated November 22, 1990 denying the petitioners' motion to withdraw the Information against them, I am not persuaded that this Court should interfere with the Ombudsman's exercise of his investigatory and prosecutory powers by ordering him to withdraw the information against Commissioner Mison, as distinguished from Undersecretary Fernando.

Whether there was bad faith in splitting up the P5 million project into eight (8) smaller contracts, whether there was manifest partiality in awarding four of them to J.F. Tabajonda without a public bidding, and whether that manner of awarding the contracts caused indirect injury to any party and/or conferred unwarranted benefits and advantage to J.F. Tabajonda, are matters for the Ombudsman, not the Undersecretary of Finance, to investigate and ascertain. Several prosecution officers in the Office of the Ombudsman conducted the preliminary investigation of this case and assessed the evidence. Special Prosecution Officers Teresita D. Baldos and Carlos Montemayor recommended prosecution, but Special Prosecution Officers Wilfredo Orencia and Leonardo Tamayo, with the concurrence of Acting Special Prosecutor Jesus Guerrero, were for withdrawing the information. The Ombudsman sustained Baldos and Montemayor. He found probable cause that there was partiality and favoritism for J.F. Tabajonda Construction in view of previous dealings and special relations, not denied, between the Customs Commissioner and J.F. Tabajonda. Since it is the Ombudsman's duty and prerogative, not the Special Prosecutor's, to decide whether or not to prosecute, the Court should respect his decision.

> Under the 1987 Constitution, the Ombudsman (as distinguished from the incumbent Tanodbayan) is charged with the duty to: Investigate on its own, or on complaint by any person, any act or omission of any public official, employee,

> office or agency, when such act or omission appears to be illegal, unjust, improper, or inefficient.
>
> Now then, inasmuch as the aforementioned duty is given to the Ombudsman, the incumbent Tanodbayan (called Special Prosecutor under the 1987 Constitution and who is supposed to retain powers and duties NOT GIVEN to the Ombudsman) is clearly without authority to conduct preliminary investigations and to direct the filing of criminal cases with the Sandiganbayan, except upon orders of the Ombudsman. This right to do so was lost effective February 2, 1987. From that time, he bas been divested of such authority. (Zaldivar vs. Sandiganbayan, 160 SCRA 843).
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> In the light of the foregoing pronouncements, there is no doubt that the power of the present Special Prosecutor to conduct preliminary investigation and to prosecute is subject to the following limitations: (a) it extends only to criminal cases within the jurisdiction of the Sandiganbayan; and (b) the same may be exercised only by authority of the Ombudsman. (Republic vs. Sandiganbayan, 200 SCRA 667.)

We should not, at this stage, prejudge the prosecution and predict that the evidence against Commissioner Mison will not stand up in the Sandiganbayan. The justifications for splitting the repair and renovation project into eight (8) smaller contracts and for doing away with public bidding are matters of defense at the trial of the case. If, besides the complainant, Leonardo A. Jose, no other witnesses have come forward to assail the awarding of four (4) contracts to J.F. Tabajonda, it is because the case has not yet gone to trial. The presentation of the prosecution evidence has not even commenced. The Ombudsman has not been allowed to perform his prosecutory function as provided by law, without interference from this Court.

It would not be sound practice to depart from this Court's previously articulated policy of non-interference in the Ombudsman's exercise of his discretion to determine whether or not to file an information against the accused. We refer to our rulings in the following cases.

> The Ombudsman may himself dismiss the complaint in the first instance if in his judgment the acts or omissions complained of are not illegal, unjust, improper or inefficient. The Constitution grants him such power and *the courts should not interfere in the exercise thereof.* The rule is based not only upon respect for the investigatory and prosecutory powers granted by the Constitution to the Office of the Ombudsman but upon practicality as well. Otherwise, the functions of the courts will be grievously hampered by innumerable petitions assailing the dismissal of investigatory proceedings conducted by the Office of the Ombudsman with regard to complaints filed before it, in much the same way that the courts would be absolutely swamped if they could be compelled to review the exercise of discretion on the part of the fiscals or prosecuting attorneys each time they decided to file an information in court or dismissed a

complaint by a private complainant. (Sesbreño vs. Deputy Ombudsman, G.R. No. 97289, March 21, 1991.)

Applications to the Supreme Court for the nullification and setting aside of the findings and conclusions of the Office of the Ombudsman in a criminal case, arrived at after a preliminary investigation, are inappropriate. In any event, the resolution by the Ombudsman of the basic question of whether or not under the admitted facts, the Executive Director of the Office of Muslim Affairs had properly withheld the salaries of the petitioner does not appear to be tainted by any grave abuse of discretion. (Tabao-Caudang vs. Vasquez, G.R. No. 97127, March 12, 1991.)

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