

WILSON A. FUNG, PETITIONER, VS. ACTING SECRETARY OF JUSTICE AGNES VST DEVANADERA, PETER CHAN @ PETER TAN AND TONY CHAN, RESPONDENTS.

SP No. 111289, August 26, 2010

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Court of Appeals

The Case In a Petition for Certiorari[1] filed under Rule 65 of the 1997 Rules of Civil Procedure, petitioner Wilson A. Fung ("Fung") assails the September 2, 2009 Resolution[2] of acting Secretary Agnes VST Devanadera of the Department of Justice ("DOJ"), in I.S. Case No. V-05-809-32 for Estafa and Violation of Batas Pambansa Big. ("B.P.") 22 entitled Wilson A. Fung, Complainant-Appellee, versus Peter Chan @ Peter Tan and Tony Chan, Respondent-Appellants", the dispositive portion of which reads:

"Wherefore, the instant motion for reconsideration is hereby denied.

So ordered"[3] (emphasis supplied)

Said motion for reconsideration was filed by petitioner after then Secretary Raul M. Gonzalez ("Gonzalez") of the DOJ issued on November 23, 2006 a Resolution[4] directing the prosecutor of Valenzuela City to move for withdrawal of the informations, if any, filed against private respondents Peter Chan @ Peter Tan ("Peter") and Tony Chan ("Tony"), viz.:

"WHEREFORE, the assailed resolution is hereby REVERSED and SET ASIDE. The City Prosecutor of Valenzuela City is directed to move for the withdrawal of the separate informations for violation of Batas Pambansa Big. 22 against respondent Tony Chan and estafa against respondents Peter Chan @ Peter Tan and Tony Chan, if they have been filed against them, and report the action taken hereon within ten (10) days from receipt hereof.

So ordered."[5] (emphasis supplied)

The Facts

This case emanates from a Supplemental Complaint which Fung filed against Tony for Violation of B. P. 22, and, Estafa against both Peter and Tony. The facts of the case, as culled from the November 23, 2006 Resolution of the DOJ, are as follows:

"Complainant alleges that respondent Peter Chan @ Peter Tan is a businessman doing business under the name and style of TS Marketing. Said respondent is also engaged in the manufacture and sale of mosquito and plastic nets and is the owner of TS Marketing. Respondent Tony Chan is a nephew of respondent Peter Chan @ Peter Tan and an employee of the latter in the business operations of TS Marketing.

Complainant claims that for the period April 2003 to July 2003, respondents purchased from him various goods cited in the delivery receipts amounting to P2,058,265.00. The goods were delivered to respondents upon their presentation that they would pay for them. In payment thereof, respondent Tony Chan issued to him the following checks:

Complainant further claims that the checks were actually delivered by respondent Peter Chan @ Peter Tan with the knowledge that said checks had no funds to cover their respective amounts. Respondent Peter Chan @ Peter Tan used respondent Tony Chan as his conduit and tool to perpetrate fraud against him. Thus, when the checks were presented for payment at Allied Bank,

DATE

BANK

CHECK No.

AMOUNT

April 30, 2004

Limcoma Rural Bank - Cainta Branch

0058452

P125,000.00

May 20, 2004

Limcoma Rural Bank - Cainta Branch

0058453

P125,000.00

June 30, 2004

Limcoma Rural Bank - Cainta Branch

0058454

P125,000.00

June 30, 2004

Limcoma Rural Bank - Cainta Branch

0058473

P40,000.00

July 31, 2004

Limcoma Rural Bank - Cainta Branch

0058455

P125,000.00

August 31, 2004

Limcoma Rural Bank - Cainta Branch

0058457

P125,000.00

September 30, 2004

Limcoma Rural Bank - Cainta Branch

0058459

P125,000.00

October 30, 2004

Limcoma Rural Bank - Cainta Branch

0058460

P125,000.00

November 30, 2004

Limcoma Rural Bank - Cainta Branch

0058472

P125,000.00

December 31, 2004

Limcoma Rural Bank - Cainta Branch

0058470

P125,000.00

January 30, 2005

Limcoma Rural Bank - Cainta Branch

0058468

P125,000.00

February 27, 2005

Limcoma Rural Bank - Cainta Branch

0058469

P125,000.00

March 30, 2005

Limcoma Rural Bank - Cainta Branch

0058471

P157,120.00

Valenzuela City branch, they were all dishonored for the reason that the accounts against which they were drawn have already been closed. He sent several reminders to respondents to fund their dishonored checks but to no avail. Respondents had failed and refused to pay him or fund the checks, and still fail and refuse to pay up to the present.

Pancho Rivera Hinohino, Reynaldo M. San Jose and Irene Limhiya corroborate the material averments of complainant.

In his counter-affidavit, respondent Peter [Chan] @ Peter [Tan] denies that he knows complainant. He also denies that he is 'Peter Tan'. He avers that the checks in question are not his own checks. Complainant has not issued any official receipt to acknowledge his receipt of the subject checks. The delivery receipts submitted by complainant in support of his allegations are spurious. In sum, he denies that any transaction took place between him and complainant.

In a motion to dismiss, respondents claim that Peter Tan is not Peter Chan. Peter Chan is not a respondent in this case and there is no Peter Tan in TS Marketing. TS Marketing is not registered in the name of Peter Chan. Peter Chan has never use[d] the alias 'Peter Tan' and he had not transacted with complainant. The demand letters were sent to Peter Tan and they were written in behalf o[f] Bulacan Polynet, Inc. which ceased operations four (4) years ago. The delivery receipts submitted by complainant are that of Marulas Industrial Corporation and there are no signatures therein of Peter Chan or any of his representative[s] or employee[s]. There is thus no evidence of the receipt of the goods by respondents. The subject checks are not the checks of respondents whose signatures therein do not appear. They have not issued or paid the same to complainant.

Respondents maintain that the City Prosecutor of Valenzuela City has no jurisdiction over the instant case. The complaint in this case is perjured and a forgery and in violation of the rule on forum shopping."^[6] (emphasis Ours)

On December 7, 2005, the City Prosecutor of Valenzuela City issued a Resolution^[7] recommending the filing of the corresponding information for 13 counts of Violation of B.P. 22 against Tony, and Estafa under Article 315 paragraph 2(a) against private respondents Tony and Peter. Consequently, separate informations were filed against them with the Courts in Valenzuela City.

Subsequently, Tony filed a Petition for Review^[8] dated January 11, 2006 with the DOJ questioning the validity of the resolution against him. Peter likewise filed a petition for review with the DOJ.

On November 23, 2006, Secretary Gonzalez issued a Resolution reversing the December 7, 2005 resolution of the City Prosecutor on grounds that Tony was not afforded his right to preliminary investigation, and no probable cause existed to warrant the filing of charges against private respondents.

Petitioner filed a motion for reconsideration^[9] but the same was denied in the now assailed resolution.

The Ruling of the Department

In arriving at the disputed resolution, the DOJ held:

"The petition has merit.

* * * * *

In his petition, respondent Tony Chan claims that he was not informed of the complaint against him, much less the preliminary investigation thereon. He claims that he was not sent ant notice of the proceedings against him, or furnished with a copy of the complaint and its annexes.

Section 1 of Rule 112 of the Revised Rules on Criminal Procedure requires the conduct of a preliminary investigation of a complaint for an offense where the penalty prescribed by law is at least four (4) years, two (2) months and one (1) day without regard to the fine. The supplemental complaint charges both respondents with estafa and violation of Batas Pambansa Big. 22. Undoubtedly, a complaint for these offenses must undergo preliminary investigation in the manner prescribed by Rule 112 of the Revised Rules on Criminal

Procedure.

There is no gainsaying that in this instant case, respondent Tony Chan was denied of his statutory right to preliminary investigation. The records do not show that he was afforded one. Verily, a preliminary investigation is a substantive right and not a mere technical or formal right. To deny respondent of his claim to a preliminary investigation would be to deprive him of the full measure of his right to due process (The Revised Rules on Criminal Procedure, Pineda, 2003 ed., p. 100, citing Rolito Go vs. CA, 206 SCRA 138; Mondia, Jr. vs. Deputy Ombudsman, 346 SCRA 365; and Larranaga vs. CA, 281 SCRA 254). And the constitution guarantees that no person shall be deprived of his liberty and property without due process of law.

Thus, the assailed resolution, insofar as it found probable cause against respondent Tony Chan for estafa and violation of Batas Pambansa Big. 22, is legally and constitutionally infirmed as it was rendered in violation of his rights to a preliminary investigation; to be informed of the nature and causes of the accusation against him; and [to] confront the witnesses against him.

The foregoing nonetheless, we are not likewise in accord with the finding of the assailed resolution that there is probable cause for estafa against respondents Peter Chan @ Peter Tan and Tony Chan. The transactions between complainant and respondents Peter Chan @ Peter Tan and Tony Chan were evidently a sale of goods undertaken over a considerable period of time from April 2003 to July 2003. Thus, it could not be gainsaid that the issuance of the subject checks was the efficient cause for complainant to part with his property. On the contrary, he did so pursuant to the contracts of sale he entered into with respondents. When the transaction is one of sale, estafa does not arise. When there is a breach of the terms of the sale, the party responsible therefor is not criminally liable as his liability is merely civil in nature enforceable in an action for specific performance or sum of money and damages.

Moreover, we find the dismissal of the complaint against respondent Peter Chan @ Peter Tan warranted. It indubitably appears on record that complainant had filed a motion to withdraw his complaint against said respondent which was granted by the City Prosecutor of Valenzuela City in her resolution dated July 4, 2005."^[10] (emphasis Ours)

Hence, this petition.

Issues:

Petitioner Fung argues in this petition that:

"THE HONORABLE PUBLIC RESPONDENT ACTED WITH GRAVE ABUSE OF DISCRETION AMOUNTING TO LACK OR EXCESS OF JURISDICTION IN ISSUING THE ASSAILED RESOLUTION WITHOUT CLOSELY EXAMINING THE ARGUMENTS SET FORTH IN THE MOTION FOR RECONSIDERATION WHICH SHOW CLEAR EVIDENCE OF A VIOLATION BY PRIVATE RESPONDENT OF BP 22 AND THE RPC WHICH NEGATE THE PROPRIETY OF DISMISSING THE CHARGE."^[11]

Such is the issue which We shall resolve in this case.

OUR RULING

In assailing the September 2, 2009 Resolution of the DOJ, petitioner Fung avers that the Acting Secretary of Justice committed grave abuse of discretion when she failed to address the arguments in his motion for reconsideration, to wit: (1) the right to preliminary investigation may be waived; (2) Tony was afforded due process through his petition for review; and (3) the defenses stated by Tony in his petition are unmeritorious.

We are not persuaded.

Section 1, Rule 112 of the 1997 Revised Rules of Criminal Procedure provides that preliminary investigation must determine "whether there is sufficient ground to engender a well-founded belief that a crime has been committed and the respondent is probably guilty thereof, and should be held for trial." [12] It is essentially an inquiry to determine whether (a) a crime has been committed; and (b) whether, there is probable cause that the accused is guilty thereof. [13]

It is the public prosecutor who determines during the preliminary investigation whether or not there exists probable cause to hold the respondent for trial on the crime complained of. [14] If the investigating prosecutor finds cause to hold the respondent for trial, he shall prepare the resolution and information. [15] Otherwise, he shall recommend dismissal of the same. The decision of whether or not to dismiss the criminal complaint depends on the sound discretion of the investigating prosecutor and ultimately, the Secretary of Justice. [16]

And while the findings of the Justice Secretary may not be absolute and are subject to judicial review, Courts are however obliged to generally adhere to the policy of non-interference in the conduct of preliminary investigations, particularly when said findings are well-supported by facts as established by the evidence on record. Absent any showing of arbitrariness on the part of the prosecutor or any other officer authorized to conduct preliminary investigation, Courts as a rule must defer to said officer's finding and determination of probable cause. Especially so that determination of the existence of probable cause is the function of the prosecutor. Simply put, findings of the Secretary of Justice are not subject to review, unless made with grave abuse of discretion. [17] In *Sanrio Company, Ltd. vs. Lim* [18], the Supreme Court aptly ruled:

"As a general rule, a public prosecutor is afforded a wide latitude of discretion in the conduct of a preliminary investigation. For this reason, courts generally do not interfere with the results of such proceedings. A prosecutor alone determines the sufficiency of evidence that will establish probable cause justifying the filing of a criminal information against the respondent. By way of exception, however, judicial review is allowed where respondent has clearly established that the prosecutor committed grave abuse of discretion. Otherwise stated, such review is appropriate only when the prosecutor has exercised his discretion in an arbitrary, capricious, whimsical or despotic manner by reason of passion or personal hostility, patent and gross enough as to amount to an evasion of a positive duty or virtual refusal to perform a duty enjoined by law." (emphasis Ours)

It is on account of the foregoing that this Court consistently adheres to its policy of non-interference in the conduct of preliminary investigations, and to leave to the investigating prosecutor sufficient latitude of discretion in the determination of what constitutes sufficient evidence as will establish probable cause for the filing of an information against a supposed offender. [19]

Here, Secretary Gonzalez dismissed petitioner Fung's complaint against Peter and Tony on grounds of denial of Tony's right to preliminary investigation and the lack of probable cause to warrant the filing of estafa because the transaction involved was one of sale. In his Resolution, Secretary Gonzales ratiocinated, thus:

"There is no gainsaying that in this instant case, respondent Tony Chan was denied of his statutory right to preliminary investigation. The records do not show that he was afforded one. Verily, a preliminary investigation is a substantive right and not a mere technical or formal right. To deny respondent of his claim to a preliminary investigation would be to deprive him of the full measure of his right to due process (The Revised Rules on Criminal Procedure, Pineda, 2003 ed., p. 100, citing *Rolito Go vs. CA*, 206 SCRA 138; *Mondia, Jr. vs. Deputy Ombudsman*, 346 SCRA 365; and *Larranaga vs. CA*, 281 SCRA 254). And the constitution guarantees that no person shall be deprived of his liberty and property without due process of law.

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his rights to a preliminary investigation; to be informed of the nature and causes of the accusation against him; and [to] confront the witnesses against him.

The foregoing nonetheless, we are not likewise in accord with the finding of the assailed resolution that there is probable cause for estafa against respondents Peter Chan @ Peter Tan and Tony Chan. The transactions between complainant and respondents Peter Chan @ Peter Tan and Tony Chan were evidently a sale of goods undertaken over a considerable period of time from April 2003 to July 2003. Thus, it could not be gainsaid that the issuance of the subject checks was the efficient cause for complainant to part with his property. On the contrary, he did so pursuant to the contracts of sale he entered into with respondents. When the transaction is one of sale, estafa does not arise. When there is a breach of the terms of the sale, the party responsible therefor is not criminally liable as his liability is merely civil in nature enforceable in an action for specific performance or sum of money and damages.[20] (emphasis Ours)

We do not find grave abuse of discretion on the part of the Acting Secretary of Justice in affirming the finding that Tony was deprived of his right to preliminary investigation and no probable cause existed to warrant the filing of informations against private respondents. There is no showing that the DOJ, in the exercise of its power to review on appeal the findings of the investigating prosecutor, acted in an arbitrary and despotic manner, so patent or gross as to amount to an evasion or unilateral refusal to perform its legally-mandated duty.

The right to preliminary investigation is waived when the accused fails to invoke it before or at the time of entering a plea at arraignment.[21] But a waiver, whether express or implied, must be made in clear and unequivocal manner.[22] In this case, no such waiver may be inferred. In fact, Tony unequivocally lamented in his Petition for Review before the DOJ that "[h]ad he been inform[ed] or notified of the preliminary investigation being conducted by the City Prosecutor[,] said office should have knowledge of [his] position ***. If ever someone received for him the Notice of hearing, this was not actually delivered to him." [23] It is therefore not true that Tony never asserted his right to procedural due process.

The assertion that the Acting Secretary did not consider petitioner's argument, particularly that Tony's defenses are weak, is without basis. The ratiocinations of the DOJ in the November 23, 2006 Resolution concerning the existence of probable cause took into consideration the merits of the parties' respective claims and defenses. That the Acting Secretary found no compelling reason to alter the findings therein, the same is a lawful exercise of her duty. Absent a showing that she acted in an arbitrary manner amounting to an evasion to perform her duty, the same must be respected.

A prosecutor is under no compulsion to file a particular criminal information where he is convinced that the evidence at hand, to his mind, necessarily leads to a different conclusion.[24] And when his findings are supported by the facts extant on the records, as in the case at bench, this Court has no reason to disturb the same.

Incidentally, petitioner manifests in his Compliance and Manifestation[25] dated July 6, 2010 that the instant case is moot because private respondents were arraigned on April 23, 2010 before the Regional Trial Court, Branch 172, of Valenzuela City. A perusal of the records, however, reveals that said trial court handles only the estafa case filed against private respondents; [26] hence, there is still that information filed against Tony for violation of B.P. 22 in another court. For this reason alone, the instant petition can no longer be considered moot.

In sum, it is Our view that the Acting Secretary of Justice did not commit grave abuse of discretion in dismissing the complaints against private respondents.

Wherefore, the petition is dismissed for lack of merit.

SO ORDERED.

Acosta and Lantion[*], JJ., concur.

- [1] Rollo, pages 3-15.
- [2] Ibid., pages 16-18.
- [3] Rollo, pages 16.
- [4] Ibid., pages 19-24.
- [5] Ibid., page 23.
- [6] Rollo, pages 19-21.
- [7] Ibid., pages 77-78.
- [8] Ibid., pages 72-76.
- [9] Rollo, pages 83-88.
- [10] Rollo, pages 21-23.
- [11] Rollo, pages 8.
- [12] *Monfort III vs. Salvatierra*, 517 SCRA 447 (2007).
- [13] *Baviera vs. Paglinawan*, 515 SCRA 171 (2007).
- [14] Ibid.
- [15] Section 4, Rule 112, Revised Rules of Criminal Procedure.
- [16] *Alcaraz vs. Gonzalez*, G.R. No. 164715, September 20, 2006.
- [17] *Chan vs. Secretary of Justice*, G.R. No. 147065, March 14, 2008.
- [18] G.R. No. 168662, February 19, 2008, citing *Glaxosmithkline Phils., Inc. vs. Malik* 499 SCRA 268.
- [19] *R.R. Paredes vs. Calilung*, 517 SCRA 369, citing *Andres vs. Cuevas*, 460 SCRA 38.
- [20] Rollo, pages 22-23.
- [21] *Larranaga vs. Court of Appeals*, 287 SCRA 581, 591-592 (1998).
- [22] Ibid., page 591.
- [23] Rollo, pages 74.
- [24] *Ilusorio vs. Ilusorio*, 540 SCRA 182.
- [25] Rollo, pages 118-120.
- [26] Rollo, pages 126-129.
- [*] Acting Junior Member; Per Office Order No. 236-10-RSF dated August 20, 2010

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