

**PRESIDENTIAL COMMISSION ON GOOD GOVERNMENT (PCGG),  
PETITIONER, VS. HON. ANIANO A. DESIERTO AS OMBUDSMAN,  
HERMINIO T. DISINI, PACIENCIA ESCOLIN-DISINI, ANGEL E. DISINI,  
LILIANA L...**

*G.R. No. 132120. February 10, 2003*

Ponente: PANGANIBAN, J.

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**PANGANIBAN, J.:**

The Office of the Ombudsman is endowed with a wide latitude of investigatory and prosecutory prerogatives in the exercise of its power to pass upon criminal complaints. However, such power is not absolute; it cannot be exercised arbitrarily or capriciously. Verily, when it is gravely abused through a gross misappreciation of evidence and a whimsical dismissal of a complaint, this Court has the constitutional duty to reverse the ombudsman. The present Petition is one such exception, involving serious allegations of multimillion-dollar bribes and unlawful commissions. At the center of all these is the non-performing, billion-dollar Bataan nuclear power plant -- a virtual white elephant -- which our impoverished people are still paying for, even if they have not benefited from it at all!

**The Case**

Before this Court is a Petition for Certiorari under Rule 65 of the Rules of Court, seeking to reverse the May 31, 1997 Resolution[1] and the October 24, 1997 Order[2] of then Ombudsman Aniano A. Desierto who, in OMB-0-91-0800, exonerated Herminio T. Disini of the crimes of corruption of public officials in relation to bribery and of violation of the Anti-Graft Law.[3] The assailed Resolution dismissed the charges against Disini “for lack of prima facie evidence,”[4] while the assailed Order denied petitioner’s Motion for Reconsideration.[5]

**The Antecedents[6]**

The Presidential Commission on Good Government (PCGG), herein petitioner, charged Disini with “bribing the late President Ferdinand E. Marcos as a means to induce him to assist and favor individuals and corporate entities.”[7] The charge pertained to the “negotiation, award, signing, amendment and implementation of the main and related contracts for the Philippine Nuclear Power Plant (PNPP) project of the National Power Corporation (NPC), as a result of which the afore-mentioned public official x x x accumulated and benefited from unlawful acquisition of income or profits.”[8]

The Petition alleges that sometime in August 1973, then President Marcos instructed the NPC to pursue, supervise and undertake the construction and the eventual operation of the nuclear power plant in Morong, Bataan. Because of its lack of expertise in designing and constructing commercial nuclear power plants, the NPC needed a qualified engineering firm to act as consultant to assist it in selecting a plant site, preparing equipment specifications, soliciting bids, and evaluating proposals from prospective contractors.

A number of companies, including Westinghouse Electric Corporation (hereinafter, “Westinghouse”) and Burns

& Roe, a New York-based company,[9] manifested their interest in the PNPP project. The former was interested in the construction of the main PNPP project; and the latter, in the architectural and engineering contract. Burns & Roe had initially offered its services to be NPC's consultant; once so appointed, it later used that position as a springboard to obtain the "more lucrative contracts" of the nuclear power plant project.

Petitioner further avers that in early 1974, a Westinghouse representative approached Disini to act as their go-between with Marcos. Disini was known to be the late President's close personal associate, whose wife was then First Lady Imelda R. Marcos' first cousin and the Marcos family's personal physician. Disini relayed his acceptance of the offer to Lea[10] Sabol, the resident agent of Westinghouse in the Philippines.

Meanwhile, NPC General Manager Ramon Ravanzo informed Ebasco Services, Inc. (hereinafter, "Ebasco") that it had been chosen by the NPC Board as consultant for the PNPP project.[11] This move prompted Westinghouse and Burns & Roe to send Marcos, through Disini, an Aide-Memoire strongly recommending that the consulting contract given to Ebasco be awarded instead to Burns & Roe.[12] Westinghouse wanted Burns & Roe to get the consultancy contract, in order to place the latter in a position to recommend that the main contract for the construction of the PNPP project be awarded to the former.

The Petition further alleges that the foregoing development was discussed by Samuel P. Hull Jr. and Kenneth E. Roe -- the international operations director, and the chairman and chief executive officer, respectively, of Burns and Roe. As a result, Hull enplaned for Manila and met with Disini at the Intercontinental Hotel in Makati. This time, Disini not only assured Hull that he could influence Marcos to cause the reversal of the Decision awarding the consulting contract to Ebasco, but he also made a commitment to Hull that the former would obtain for Westinghouse the prime contract for the entire nuclear power plant project on a turn-key basis; and for Burns & Roe, the award of the main architectural and engineering subcontract for the same project.[13]

Hull agreed to grant Disini a "commission" based on a percentage of the amounts paid to Burns & Roe under the architectural and engineering contract and to pay up front \$1 million dollars in four installments of \$250,000 each.[14]

Sent to Marcos was another Aide-Memoire[15] further stressing the need for awarding the consulting contract to Burns & Roe. On February 22, 1974, Mr. L. C. Saunders of Westinghouse also wrote him a letter offering to submit a "turn-key" proposal for the nuclear power plant project.[16] In a handwritten note, Marcos instructed then Executive Secretary Alejandro Melchor and Ravanzo to wait for Westinghouse's offer and, "in the meantime, enter into the contract for the consultant Burns and Roe." [17] Consequently, NPC was constrained to rescind the letter of intent issued to Ebasco and to award the consulting contract to Burns & Roe instead.[18]

Petitioner also states that in the early part of March 1974, Disini departed for San Francisco, California, USA, and met with six (6) officials of Westinghouse. Convinced that Disini could surely influence Marcos to award the PNPP prime contract to it, Westinghouse finally decided to retain him formally as its special sales representative (SSR).

On April 24, 1974, Westinghouse sent Marcos, through Disini, a letter containing its turn-key proposal.[19] Upon receipt of the letter, Marcos informed Melchor and Ravanzo of his preference for Westinghouse as shown by the following handwritten notation: "I am calling them, Westinghouse, to brief me on their offer." [20] Disini furnished Westinghouse a copy of the letter containing Marcos' marginal note as proof that he could effectively persuade the late President to directly intervene and to conform to its goal of finally getting the award of the prime construction contract for the PNPP project.

On May 7, 1974, a delegation sent by Westinghouse and headed by James M. Wallace, vice president and general

manager of its Power Systems Projects Division, briefed Marcos on its proposal.

On the same occasion, Burns & Roe also succeeded in obtaining the main architectural and engineering subcontract, when Marcos directed Westinghouse to hire it for such purpose. However, in view of the apparent conflict of interest, Burns & Roe gave up the consulting contract and retained only the architectural and engineering contract, which it considered to be far more lucrative. Thereafter, it worked for the termination of its consulting agreement with NPC and was subsequently replaced by Ebasco.[21]

In a cabinet meeting held on June 6, 1974, Marcos categorically stated his choice of Westinghouse.[22] On the following day, he formally authorized Ravanzo “to sign for and in behalf of the Republic of the Philippines, the letter of commitment with Westinghouse Electric Corporation to negotiate for and formulate a signed and effective contract between the two parties for the supply, installation, construction and start up of two 626-megawatt nuclear power plants.”[23]

In compliance with the Marcos directive, the NPC negotiated with Westinghouse. A draft of the turn-key contract was submitted by the latter sometime in November 1974. During the negotiations, Westinghouse was apparently annoyed at Ebasco’s consultancy role. Hence, John F. Doyle, its commercial manager for the PNPP project, prepared another Aide-Memoire, allegedly sent to Marcos through Disini, denouncing “the expansion of Ebasco’s influence and the possibility that the knowledge it gained during said negotiations could be used against Westinghouse to promote Ebasco’s own interest as a potential competitor and an ally of GE.”[24] Marcos took prompt action by directing Ravanzo, Melchor and NPC Chairman Manuel Barreto “to leave the whole construction (civil and erection) to Westinghouse since the concept is totally turn-key.”[25] Marcos also ordered them to “keep Ebasco strictly to its role as a consultant.”[26]

In a Memorandum Report dated May 5, 1975,[27] Ravanzo pointed out that many provisions in the Westinghouse contract were extremely onerous, unacceptable or inconsistent with the turn-key approach to project implementation. Melchor endorsed Ravanzo’s Report to Marcos, opining that the problems being encountered with Westinghouse “may be attributed to the absence of competitive pressure.”[28] Melchor thus proposed that alternative suppliers be considered.[29] But Marcos overruled their recommendations and directed the NPC to “finalize negotiations with Westinghouse and to submit to me for approval your recommendations.”[30]

By November 1975, the final draft of the Westinghouse contract was referred to then Solicitor General Estelito P. Mendoza for review. Noting that the proposed contract was extremely onerous and unfavorable to the government, he recommended that NPC should reject it.[31] However, notwithstanding the foregoing adverse observations and unfavorable recommendation, Marcos directed the NPC to sign the contract with Westinghouse. That contract was finally executed on February 9, 1976.

Aside from alleging that illegal commissions in terms of millions of dollars were remitted to Disini and Marcos, the Petition further avers that other material benefits from the two contractors were given to both men. Such benefits were allegedly in the form of subcontracts awarded to companies which Marcos and Disini owned, or in which they had beneficial interests.

One of these companies was Power Contractors Inc. (hereinafter, “PCI”), which had been organized by Disini to undertake the civil/structural construction work for the nuclear power plant.[32] Despite NPC’s strong objections to the hiring of a company that lacked a track record that would justify its selection, PCI was nonetheless retained as a subcontractor.

Similarly, against the advice of NPC, Westinghouse hired the services of the Engineering and Construction Company of Asia (hereinafter, “Ecco-Asia”) as mechanical and electrical subcontractor for the project.

Following the signing of the contract and the finalization of the project financing, NPC opened letters of credit in favor of Westinghouse to cover progress payments, pursuant to the contract.

After Mrs. Corazon C. Aquino took over the Presidency of the Republic, petitioner filed the previously mentioned charges against Disini before the Office of the Ombudsman which, as already stated, dismissed the charges. Hence, the instant Petition.[33]

#### Issue

The present Petition for Certiorari under Rule 65[34] contends that the Presidential Commission on Good Government has submitted sufficient evidence to engender a well-grounded belief that an offense has been committed and that Disini is probably guilty thereof, but that public respondent -- in grave abuse of discretion amounting to lack or excess of jurisdiction -- capriciously and arbitrarily dismissed the charges.

#### This Court's Ruling

The Petition is meritorious.

#### Main Issue

##### Sufficiency of Evidence

As a general rule, the Office of the Ombudsman is endowed with a wide latitude of investigatory and prosecutory prerogatives in the exercise of its power to pass upon criminal complaints. However, such authority is not absolute; it cannot be exercised arbitrarily or capriciously. Verily, the Constitution has tasked this Court "to determine whether or not there has been grave abuse of discretion amounting to lack or excess of jurisdiction on the part of any branch or instrumentality of the Government,"[35] including the Office of the Ombudsman. Specifically, this Court is mandated to review and reverse the ombudsman's evaluation of the existence of probable cause, if it has been made with grave abuse of discretion.[36]

More categorical was our ruling in *Nava v. Commission on Audit*,[37] in which we held:

"An aggrieved party is not left without any recourse. Where the findings of the Ombudsman as to the existence of probable cause [are] tainted with grave abuse of discretion amounting to lack or excess of jurisdiction, the aggrieved party may file a petition for certiorari under Rule 65 of the Rules of Court." [38]

Grave abuse of discretion refers not merely to palpable errors of jurisdiction; or to violations of the Constitution, the law and jurisprudence.[39] It refers also to cases in which, for various reasons, there has been a gross misapprehension of facts.[40] The present Petition is one such exception, involving serious allegations of multimillion-dollar bribes and unlawful commissions.

#### The Ombudsman's Grounds for Disini's Exoneration

The ombudsman decided in favor of Disini and ordered the dismissal of the Complaint against the latter, on the basis of the following:

- There was no testimonial evidence (a) that Disini was interested in the proposal of Westinghouse to be its special sales representative during negotiations for the award of the PNPP project, or (b) that he intervened for Burns and Roe to stop the hiring of Ebasco as NPC consultant for the project.
- There was neither documentary evidence nor corroborating affidavit showing how Disini had actually met with Hull to assure the latter that the former could influence Marcos to overturn the award of the consulting contract to Ebasco and to eventually award the PNPP contracts to Westinghouse and to Burns & Roe.

- Neither the Aides-Memoire allegedly sent to Marcos through Disini nor the telexes and the correspondences between the officials of Westinghouse and Burns & Roe indicated the author, the addressee, or the dates on which they were drafted or sent.
- All the negotiations for the unlawful commissions and the actual payments thereof were based on unauthenticated documents.
- There was no testimonial evidence that the bank transactions or the remittances questioned by the PCGG had actually been sourced from commission payments by Westinghouse and Burns & Roe.
- There was insufficient supporting evidence for the fact that certain corporations owned or headed by Disini -- like PPI and ECCO-Asia -- were organized specifically for the PNPP project, or that Marcos had business interests in those corporations.

To be sure, the nullity of a resolution may be shown not only by what patently appears on its face, but also by the documentary and the testimonial evidence found in the records of the case, upon which such ruling is based.[41] From these pieces of evidence on record, we will now show why the ombudsman gravely abused his discretion in dismissing the Complaint against Disini.

#### Testimonial Evidence Showing That Disini Intervened for Westinghouse

First. The ombudsman ruled that there was no testimonial evidence on record showing that Disini had actually intervened for Westinghouse as its special sales representative in negotiations for the PNPP project.

This finding is completely belied by the records of this case. Complainant PCGG, through its Security and Investigation Department, submitted Hull's Affidavit[42] dated September 28, 1988. This document detailed how Hull had met and communicated with Disini to discuss matters leading to (1) the revocation of the consulting contract with Ebasco and (2) the eventual award of the PNPP project to Westinghouse and Burns & Roe.

The 44-page Supplemental Affidavit[43] executed by Hull on November 28, 1988 was even more detailed and damning. It elaborated on his communications and negotiations with, and payments of commissions to, Disini in exchange for the selection of Westinghouse and Burns & Roe over other corporations vying for the PNPP project.

The communications between Hull and the other officials of Westinghouse and Burns & Roe clearly show that negotiations involving Disini and these two companies indeed took place. We do not see how the ombudsman could have simply closed his eyes to Hull's positive, direct and categorical statements to that effect:

"12. In the same conversation, Disini indicated that he could arrange award of the entire nuclear power plant contract to Westinghouse on a turnkey basis, in which case he would see to it that Burns & Roe was awarded the Architect/Engineer assignment as subcontractor to Westinghouse. I took notes of our conversation on an Intercontinental Hotel coffee shop placemat, which I took with me and saved.

"13. Following this meeting, Jesus Vergara assured me repeatedly that Disini would take the matter up with President Marcos and that everything would come out all right for Burns & Roe and Westinghouse. He said he was in constant touch with Disini, and knew that Disini would come through.

"14. I learned a day or two after my meeting with Disini that NPC's negotiations with Ebasco on the consulting contract had ceased, and NPC was ready to enter into a consulting contract with Burns & Roe. I learned of this decision in a telephone message from either Mr. Ravanzo or Mr. Del Rosario of NPC. Jesus Vergara later explained to me at a meeting in his office that Burns & Roe was replacing Ebasco because Herminio Disini had spoken to President Marcos, and Marcos had ordered NPC to hire Burns & Roe. To prove this, Vergara gave me a copy of a letter from Westinghouse to Marcos dated February 22, 1974 bearing a

handwritten notation in the margin, which I was told was written by Marcos, and which instructed NPC's general manager to 'enter into the contract for the consultants Burns & Roe.' A copy of the letter is attached to this Affidavit as Exhibit A. Vergara said he was giving me this letter as proof that Disini could 'deliver.'

"15. Len Sabol, Jesus Vergara, and others in Manila told me at that time that Westinghouse was in the process of negotiating a similar SSR agreement with Disini whereby he would secure the prime PNPP contract on a turnkey basis for Westinghouse. The replacement of Ebasco by Burns & Roe was also being used by Westinghouse as a test of Disini's influence with President Marcos. I understood that it was only after he passed this test that Westinghouse finalized its deal with him." [44]

x x x x x x x x

"20. I also subsequently learned, through documents received in my trip to the Philippines in February 1974, that Herminio Disini, Vergara and Sabol had been working behind the scenes to have the award of the Phase I contract to Ebasco vacated. Their intent then was not so much to benefit Burns & Roe, as to prevent Ebasco from receiving the contract. Ebasco was known to be close to General Electric Company ('GE'), a competitor of Westinghouse. Sabol, Vergara and Disini feared that selection of Ebasco would give GE an advantage over Westinghouse." [45]

In the face of the Affidavit and the Supplemental Affidavit, it is indeed strange how the ombudsman could have ruled that there was no testimonial evidence on the said matters. That he ruled thus clearly shows that he whimsically opted to disregard those pieces of evidence and thereby demonstrated his capricious and arbitrary exercise of judgment.

The complainant is required to file affidavits "as well as other supporting documents to establish probable cause," as stated in the Rules of Court:

"(a) The complaint shall state the address of the respondent and shall be accompanied by the affidavits of the complainant and his witnesses, as well as other supporting documents to establish probable cause." [46]

This requirement was fulfilled by the PCGG. The Supplemental Complaint [47] was accompanied by the Affidavits of witnesses as well as by a host of other supporting documents, all of which -- taken together -- established probable cause.

It should be noted that the Rules on Evidence recognizes different forms of evidence -- object, documentary or testimonial [48] -- without preference for any of them in particular. What should really matter are the weight and the sufficiency of the evidence presented.

#### Meetings with Disini

Second. As mentioned earlier, the ombudsman found no evidence that Disini had actually met with and assured Hull that the former could influence Marcos to overturn the award of the consulting contract to Ebasco and the eventual award of the PNPP project to Westinghouse and Burns & Roe. The aforesaid Affidavits completely controvert his finding. Hull's statements on the matter are clear, specific and categorical:

"10. x x x I met Disini at the Intercontinental Hotel. We discussed the basic terms of a Special Sales Representative (SSR) agreement between Disini and Burns & Roe, whereby he would assist us in obtaining PNPP business in return for commission payments. Disini flaunted his close relationship with President Marcos. He represented that he had the authority to arrange the entire nuclear power plant project in any way he wished. Specifically, Disini told me that he could get the Architect/Engineering contract to Burns & Roe. He stated that overturning the award of the consulting contract to Ebasco was 'no problem,' and in fact was only a small part of what he could do for Burns & Roe. In fact, he offered to stop the award of the consulting contract to Ebasco and have it awarded to Burns & Roe as a test of his ability to deliver.

“11. Disini asked for commission payments once the Architect/Engineer contract was awarded to Burns & Roe. He wanted the payments to be made up front, and I offered payment on a *pari passu* basis. We ended up compromising on an agreement under which Burns & Roe would pay Disini commissions based on a percentage of the payments for Burns & Roe’s services under the Architect/Engineer contract. One million dollars would be paid up front over a period of something like 18 months or two years, in four installments of \$250,000 each. Any remaining commissions would be paid over the life of the contract. The \$1 million dollar figure was based on our assumption that the Architect/Engineer contract would generate at least \$20 million in revenue to Burns & Roe.

“12. In the same conversation, Disini indicated that he could arrange award of the entire nuclear power plant contract to Westinghouse on a turnkey basis, in which case he would see to it that Burns & Roe was awarded the Architect/Engineer assignment as subcontractor to Westinghouse. I took notes of our conversation on an Intercontinental Hotel coffee shop placemat, which I took with me and saved.”[49]

x x x x x x x x

“16. In April 1974 Kenneth Roe visited Manila and met with Disini. Roe called me and another Burns & Roe executive, Lawton Hammett, from Manila on April 23 and explained that he had confirmed in his meeting with Disini the SSR relationship I had worked out in my February trip. Roe reported that Westinghouse also had a deal with Disini and that Westinghouse’s commissions were to be paid to President Marcos. Hammett took notes on this telephone call.

“17. The Burns & Roe SSR agreement with Disini was put in writing. I believe it was between Burns & Roe and one of Disini’s companies. While I do not recall the exact formula for the commissions to be paid under the contract, I believe that we were to pay at least \$1 million in four equal installments, plus additional amounts calculated under the formula, to be paid through the life of our Architect/Engineer subcontract. I know that the amount we agreed to pay Disini was far higher than would have been justified by the services Disini was to render pursuant to the SSR agreement (such as providing advice and counsel to us, secretarial help, or telex services). The real purpose of our agreement with Disini was simply for him to influence President Marcos to award Burns & Roe the Architect/Engineer subcontract on the PNPP project.”[50]

In later negotiations and communications, there were also references to this meeting between Hull and Disini. Hull absolutely had personal knowledge of the above statements. This meeting -- taken with the whole series of acts, transactions, correspondences, meetings and documents -- is sufficient ground to determine the existence of probable cause and to sustain a finding that Disini was probably guilty of the crime charged.

#### Aides-Memoire and Telexes

Third. The PCGG presented Aides-Memoire and telexes showing Disini’s complicity in the crimes charged. However, the ombudsman declared that these could not stand, because the authors and the addressees as well as the dates of drafting and sending had not been indicated.

Again, such findings cannot be sustained. The PCGG presented, as corroborative evidence of the questioned Aides-Memoire and telexes between the officials of Westinghouse and Burns and Roe, the Affidavits of Samuel Hull Jr.[51] and Angelo Manahan[52] -- the executive vice president of Herdis Management and Investment Corporation (HMIC),[53] of which Disini was chairman. The prosecution argued thus:

“The import of witness Manahan’s Affidavit dated January 26, 1989, attached as Annex ‘A’ to petitioner’s Motion for Reconsideration, is not to provide proof of commission payments to respondent Herminio T. Disini but to explain how the ‘Aide Memoires’ were used by private respondents to perpetrate the acts complained of constituting violation of the Revised Penal Code and the Anti-Graft and Corrupt Practices Act.”[54]

#### Declared Manahan:

“7. Aide memoires were confidential memoranda from Mr. Disini to President Marcos (who was addressed as ‘Sir’), in which Mr. Disini provided information to the President or requested that the President take specified actions in favor of HMIC/HGI, or of Disini personally. Typically, Mr. Federico E. Navera (HGI’s controller, and my direct subordinate) would provide any financial information that went into an aide memoire. Mr. Jacob would prepare an initial draft of the aide memoire, and Mr. Padre would provide the final drafting, editing and reorganization of the document. Mr. Disini would then approve and sign the document, and either he or his wife Paciencia Disini (President Marcos’ personal physician, who according to rumors visited the President daily) would deliver the aide memoire to President Marcos. Mr. Disini’s main contribution to HGI’s business was, in fact, preparing the aide memoires and influencing President Marcos to act favorably on the requests for action they contained. Mr. Disini was extremely successful in this; I estimate that 85% of the aide memoires he submitted to President Marcos resulted in the President taking the action solicited by Mr. Disini.”[55]

The Affidavits of Hull likewise confirmed the telexes between Westinghouse and Burns & Roe officials, including himself, in connection with the PNPP transactions. He specifically identified the existence of these documents, which positively linked Disini and Marcos to the dealings of these two corporations. In fact, Hull attested to their use of codes, which he sufficiently explained, in matters that they considered sensitive in relation to the PNPP project. He stressed this point in his Supplemental Affidavit as follows:

“37. On February 26, 1974, Ketterer and I travelled to Hongkong, he to return to his post and I on my way back to the U.S. That evening, as we reflected on the events of the prior two weeks, we decided it would be prudent to develop a secret code that would permit rapid communication by telex while maintaining confidentiality. We agreed on code names for key individuals (e.g., President Marcos was ‘Lester’, Ravanzo was ‘Bozo’), parties (e.g., Westinghouse was ‘Willy’, Ebasco was ‘Seagull’, Burns & Roe was ‘Home’, NPC was ‘Charlie’), and terms (e.g., contract was ‘lucky’, negotiation was ‘festival’, turnkey was ‘door’), etc. I marked up a copy of my February 20, 1974 telex (Exhibit 11) with the codes, as an example of how an encoded communication would be read. Exhibit 15 hereto is a copy of the marked up telex, with my handwritten notations identifying the various code names. Subsequently, we used some of these codes (or modifications to them) to communicate between the U.S. and Manila.”[56]

Given the foregoing clarification, the ombudsman’s cavalier disregard of the aforementioned documents and attestations was arbitrary, whimsical and capricious, to say the least.

Further showing his grave abuse of discretion, the ombudsman even questioned how the PCGG could prove that the persons referred to in the said coded communications were Marcos and Disini, when the supposed senders and addressees had never signified their willingness to testify against respondents.

This fact reveals the faulty approach taken by public respondent. During the stage of preliminary investigation, he was vainly looking for evidence that was understandably not there yet, being suited to a trial proper; but was closing his eyes to evidence that was already there, sufficient to determine probable cause -- his task at hand.

Negotiations for and

Actual Payments of Commissions

Fourth. The ombudsman argued that none of the documents evidencing the negotiations for and the actual payment of commissions had been authenticated.

While it may be true that the documents were not signed (for telexes are not signed), they were nonetheless identified and their sources authenticated. Often have we ruled that the validity and the merits of a party’s defense or accusation, as well as the admissibility of testimonies and pieces of evidence, are better ventilated during the trial than during the preliminary investigation.[57] Neither can the ombudsman rule on the presence or the absence of the elements of the crime, for these are by nature evidentiary and defense matters, the truth of which

can be best passed upon after a full-blown trial on the merits.[58]

It must here be stressed that a preliminary investigation is essentially inquisitorial. It is often the only means of discovering the identities of the persons who may be reasonably charged with a crime, in order to enable the prosecutor to prepare the complaint or information.[59] Such investigation is not part of the trial of the case on the merits and has no purpose other than to determine whether a crime has been committed, and whether there is probable cause to believe that the accused is guilty thereof. Furthermore, a preliminary investigation does not place in jeopardy the persons who are subjected to it.[60] It is not the occasion for the full and exhaustive display of both parties' evidence, but for the presentation only of such evidence as may engender a well-grounded belief that an offense has been committed and that the accused is probably guilty thereof.[61]

Nonetheless, corroborative proof of the negotiations for and the actual payment of commissions was also provided by the Affidavit of Hull:

“18. I understand the first payment of \$250,000 to Disini was made through an advance from Westinghouse, because Burns & Roe had not done enough work on the project to generate this amount. The first check for \$250,000 was cut by the Treasurer of the Burns & Roe and made out to a Disini bank account in Switzerland. I was asked to carry this check with me on a trip I was planning to make to Europe. When my trip was cancelled, the payment to Disini was made through a wire transfer. I am not certain how many payments were made to Disini in all, but I believe that at least two payments of \$250,000 were made.”[62]

Such arrangements were expounded in Hull's Supplemental Affidavit, which we quote:

“70. Once the arrangement between Burns & Roe and Disini was formalized in April 1974, we began to discuss with Disini the mechanism for the transfer of the SSR payments to him from Burns & Roe. Disini insisted that the funds be secretly conveyed to a bank account in Switzerland. Starting with my May 16, 1974 telex to Disini, we worked on the details of the transfer (Exhibit 22).”[63]

#### Commission Payments Through Bank Transactions and Remittances

Fifth. The ombudsman also faulted the PCGG for failing to present testimonial evidence from a responsible officer or a duly authorized representative of the concerned local and foreign banks. Such evidence could have attested to the fact that the bank remittances questioned by the PCGG had actually been sourced from the commissions paid to Disini by Westinghouse and Burns & Roe. The ombudsman held that the documents presented to prove commission payments were mere scraps of paper.

Again, such finding wantonly disregarded the Affidavits of Hull, who confirmed that Disini had actually received commission payments from Westinghouse and Burns & Roe.

The ombudsman should have followed through with clarificatory questions on the information given by Manahan. According to this information, although the latter was the chief financial officer of Herdis Group, Inc. (HGI) -- a Disini company -- he was not informed of the details of the commission payments made to that company by Westinghouse. He declared thus:

“16. Exhibit 9 (Document 00727) is a one-page tabulation of nuclear power plant commissions, typed in Mr. Disini's stationery. Although I was HGI's chief financial officer, I was not informed of the details of the arrangement under which HGI rec[e]ived commissions from Westinghouse Electric Corporation ('Westinghouse') in connection with the Philippine Nuclear Power Plant ('PNPP'). Anything that related to PNPP was treated as secret by Mr. Disini and his close advisors. The Westinghouse commission payments were handled by Mr. Jerry Orlina, who was Mr. Disini's personal finance officer. The Westinghouse commission payments were never received by HGI in the Philippines, and my understanding is that they were

paid directly into foreign bank accounts. The funds from the commissions never entered HGI's treasury.

"17. The only payments received by HGI in the Philippines relating to PNPP were a number of checks amounting to millions of pesos that were remitted by Power Contractors, Inc. ('PCI'), the civil construction contractor for the job, in the nature of dividends. HGI was 40% owner of PCI and shared in whatever profits PCI realized from its role on the plant's construction." [64]

Hull, on the other hand, confirmed in his Affidavit that Burns & Roe was to pay at least \$1 million in four equal installments plus additional amounts calculated under the formula, to be paid throughout the life of their architectural and engineering subcontract. [65]

Besides, the ombudsman was grievously mistaken in insisting on testimonial evidence from bank representatives to show conclusively that commissions had indeed been paid. The PCGG had already presented numerous documents; coupled with Affidavits evidencing agreements on commission payments, correspondences, and the flow of commission payments from Westinghouse to Disini's Interbank Foreign Currency Deposit (FCD) and on to Swiss bank accounts.

In requiring testimonial evidence, the public respondent brushed aside all the other forms of evidence presented by the prosecution. In short, he disregarded them capriciously without passing upon their weight and sufficiency. It seems that he was preoccupied with requiring the presentation of evidence that was not there, while closing his eyes to evidence actually presented by the PCGG for his consideration.

#### The Disini Corporations and the PNPP Projects

Sixth. The ombudsman opined that the evidence of the PCGG failed to substantiate its claim that the corporations owned or headed by Disini had been organized mainly to benefit from the PNPP project. Further, the ombudsman found no proof that Marcos had business interests in the said corporations, such that any commission paid to them would redound to the latter's benefit.

A painstaking examination of the documents submitted by the PCGG sufficiently contradicts these findings. Disini's control over Power Contractors, Inc. is evidenced by an Assignment of Shares Without Stock Certificates [66] dated March 6, 1975. Unquestionably, this company was organized [67] to undertake for Westinghouse subcontracts for the PNPP project.

#### Argued the PCGG:

"Aside from the commissions in terms of millions of dollars remitted to them by Westinghouse and Burns and Roe, it is further averred that H. Disini and Marcos also received other material benefits from these two contractors in the course of the implementation of said project. As part of the overall plan to plunder the nuclear project funds, subcontracts pertaining to the project were awarded to companies in which Marcos and H. Disini held ownership or beneficial interests.

"One of these companies is the Power Contractors, Inc. organized by H. Disini to undertake the civil/structural construction work for the nuclear power plant. Despite strong objections by the NPC against hiring of PCI's services due to its lack of previous track record that would justify its selection, said company was retained as a subcontractor due to Marcos' direct intervention.

"Similarly, Westinghouse hired the services of the Engineering and Construction Company of Asia (Ecco-Asia) as the mechanical and electrical subcontractor for the project against the advice of NPC because of Ecco-Asia's lack of technical competence. Although not qualified, Westinghouse awarded the subcontract to Ecco-Asia, known to be a subsidiary of the Meralco conglomerate, which was then controlled by Marcos

through Benjamin Romualdez, the brother of Imelda Marcos.”[68] (Citations omitted)

In addition, Hull stated:

“19. I was informed that Disini received many millions of dollars in connection with this project. It is inconceivable that an amount in the millions of dollars would not have been shared with President Marcos. In those days, Marcos received a share in virtually every major profitable enterprise in the Philippines. My understanding was that Marcos gave Disini the ‘hunting license’ on the PNPP project - that is, the authorization to strike deals generating the largest possible commissions. Disini struck these deals, for the benefit of himself and Marcos, with Westinghouse and Burns & Roe.”[69]

He further expounded on the benefits obtained by the Disini corporations as follows:

“86. Another demand coming from Disini was that we pay additional commissions to Asia Industries, Inc., which had been acquired by Disini. Disini was essentially asking for a \$200,000 gratuity to be paid to Asia Industries, Inc. for ‘services rendered.’ We did not feel it was fair or necessary for us to pay this additional commission.

“87. Our strategy in response to these new demands was to delay giving a direct answer to Disini until the prime contract was signed, in order to avoid antagonizing Vergara and Disini. We would, however, promise to give Asia Industries, Inc. a commission of ½% of the total contract price of any additional work that Burns & Roe was awarded. This strategy was summarized in my handwritten notes on a March 20, 1975 telex we received from Ketterer, a copy of which is included as Exhibit 32 hereto.

“88. Disini was not pleased with the deferral in receiving his commission payments. As the signing of the prime contract into 1976, I began to exchange increasingly terse telexes with Rodolfo (‘Jake’) Jacob, one of Disini’s subordinates, regarding the ‘shipments’ (commission payments). The mechanics of the payments had been easily worked out: we would issue Citicorp bank drafts in dollars in favor of Technosphere, and would send them by registered mail to Mr. Disini’s designated contact in Switzerland (Mr. Rene Pasche in Lausanne). However, the initial ‘shipment’ continued to be postponed, since it was due only when Westinghouse received acknowledgment from NPC that the contract commencement date had occurred. Disini pressed us, nonetheless, for payment of his commissions. On April 19, 1976, I telexed Disini and indicated that neither Westinghouse nor Burns & Roe had any funds to initiate the scheduled payments until the first letter of credit making funds available to Westinghouse was opened. I emphasized to Disini that Burns & Roe’s subcontract with Westinghouse had made full provision for a schedule of commission payments to Disini, but the schedule could only be implemented upon activation of the prime contract.

“89. Disini took matters up directly with Mr. Roe. Exhibit 33 hereto contains a copy of an April 26, 1976 telex from Disini to Mr. Roe, in which Disini quoted from my previous exchanges with Jacob on the schedule of commission payments. Disini demanded that Burns & Roe make the initial commission payment during April 1976, either by actually issuing a bank draft or by giving Disini a promissory note. Exhibit 33 also includes Mr. Roe’s April 28, 1976 response telex to Disini. In his response, Mr. Roe reaffirmed our position that we could not pay the Phase II commissions to Disini until the prime contract officially commenced. Mr. Roe also declined to issue a promissory note, since it would leave Burns & Roe open to liability for the note without recourse if the contract was terminated without having officially commenced. Mr. Roe ended his telex to Disini as follows (Exhibit 33):

‘It is complicated, confusing and unfortunate to all parties that delay in project implementation thru opening of true LC has delayed shipments by both PC [Westinghouse] and ourselves. We have discussed this situation at highest levels of prime contractor and have no other course of action open to us.’”[70]

### Allegations of Hearsay

In a final attempt to shoot down the evidence of the PCGG, the ombudsman also capriciously dismissed some

statements in the Affidavits of Hull as mere hearsay and conjecture. We do not agree. Hull made clear and categorical statements in his Affidavits regarding the communications and negotiations, of which he absolutely had personal knowledge. He positively identified the exchanges of communication between himself and the other officials of Westinghouse and Burns & Roe, the main beneficiaries in this case. Such evidence cannot be hearsay. As clarified earlier, a preliminary investigation is not the occasion for the full and exhaustive display of the parties' respective sets of evidence.[71] Thus, the relative validity and merits of the defense and the accusation, as well as the admissibility of testimonies and pieces of evidence, are better ventilated during the trial than during the preliminary investigation.[72]

Other statements or documents alleged to be hearsay were testified to by Hull as independently relevant statements. Hull was competent to testify on those matters, because he had heard them or seen the execution of the pertinent documents. These were therefore matters of fact derived from his own perception.[73] The purpose of such testimony was merely to prove either that the statement or the tenor thereof was made.[74] Also, granting that there were other statements that could be considered hearsay, these were on minor and incidental matters. What should be significant is the fact that Hull attested to the actual negotiations with Disini to show the latter's involvement in the crimes charged by the PCGG. The former's testimony was further strengthened by a multitude of other documents that validated the questionable transactions.

Neither does this Court subscribe to the contention that Hull's statements in his Affidavit are based on conjectures and speculations, simply because they were prefaced with words like "I understand" and "I believe."

The ombudsman's finding seems to oversimplify the weight and the sufficiency of the statements attested to in the Affidavit. We do not peremptorily dismiss as incompetent statements attested to in a sworn affidavit, simply because of such introductory phrases. We cannot fault Hull for using them, if he felt that they would appropriately convey what he was to testify to. Besides, he was expressing only his own involvement in the chain of transactions in this case. His testimony should thus be evaluated based on its merit. In fact, such phraseology only strengthens the veracity and cogency of the Affidavits, for it shows that they were spontaneous and unrehearsed.

All told, to arrive at the conclusion that there was no sufficient ground to engender a well-founded belief that a crime has been committed, it would be erroneous to take each piece of evidence or sentence in a long affidavit singly or independently. It is clear that the totality of the evidence presented in this case was more than enough to sustain a finding that Disini was probably guilty of the crime charged.

#### Finding of Probable Cause

Indeed, during the preliminary investigation, the PCGG was not obliged to prove its cause beyond reasonable doubt. It would be unfair to expect the Commission to present the entire evidence needed to secure the conviction of the accused prior to the filing of the information.[75] The reason lies in the nature and the purpose of a preliminary investigation. At this stage, the prosecutor does not decide whether the guilt of the person charged is backed by evidence beyond reasonable doubt. The former merely determines whether there is sufficient basis to believe that a crime has been committed, and whether the latter is guilty of it and should be held for trial.[76]

The established rule is that a preliminary investigation is not the occasion for the full and exhaustive display of the parties' respective sets of evidence. It is for the presentation only of such evidence as may engender a well-grounded belief that an offense has been committed, and that the accused is probably guilty thereof.[77]

During the preliminary investigation, the main function of the government prosecutor -- the ombudsman in this case -- is merely to determine the existence of probable cause and, if it does exist, to file the corresponding

information. Probable cause has been defined as the existence of such facts and circumstances as would excite in a reasonable mind -- acting on the facts within the prosecutor's knowledge -- the belief that the person charged is probably guilty of the crime for which he or she is being prosecuted.[78]

Probable cause is a reasonable ground for presuming that a matter is or may be well-founded on such state of facts in the prosecutor's mind as would lead a person of ordinary caution and prudence to believe -- or entertain an honest or strong suspicion -- that it is so.[79] The term does not mean "actual and positive cause"; neither does it import absolute certainty. It is based merely on opinion and reasonable belief. Thus, a finding of probable cause does not require an inquiry into whether there is sufficient evidence to secure a conviction. It is enough that the act or the omission complained of is believed to constitute the offense charged. Precisely, there is a trial to allow the reception of evidence for the prosecution in support of the charge.[80]

It ought to be emphasized that in determining probable cause, the average person weighs facts and circumstances without resorting to the calibrations of technical rules of evidence, of which such person's knowledge is nil. Rather, the lay person usually relies on the calculus of common sense, of which all reasonable persons have an abundance.[81]

#### Effect on the Principal of the Dismissal of Charges Against Accomplices and Accessories

Finally, we are not unmindful of our prior ruling in *Republic v. Vasquez*.<sup>[82]</sup> In that case, we agreed with the ombudsman's Resolution dismissing, for lack of evidence, the criminal charges against Respondents Paciencia E. Disini, Angel E. Disini, Liliana L. Disini and Lea E. Disini.

There should be no disagreement with the Court's Resolution in *Vasquez*. As we have stressed at the beginning of this Decision, the present Petition should be granted as an exception to the doctrine of non-interference in the ombudsman's investigatory and prosecutory powers. In the previous Resolution in GR No. 114377, no grave abuse of discretion was found in the dismissal of the indictment against Disini's relatives. In the case before us, however, it is clear that the ombudsman gravely abused his discretion in disregarding the evidence on record, as well as some settled principles and rulings laid down by this Court.

Verily, there should be a divergence of results between the present Petition and the previous one, which distinguished the charge against the other respondents. They were classified therein as mere accomplices or accessories. In the present case, Herminio T. Disini is being charged as the principal. Because respondents have been charged with different degrees of participation, the evidence needed to sustain an indictment for each of them would necessarily also differ. In turn, this evidentiary difference would translate to one of degree, sufficiency and appreciation thereof. Not finding any grave abuse of discretion in the preceding Petition will not ipso facto lead to the same conclusion in this Petition.

While the dismissal of a charge against the principal accused would carry the charges against the accomplices and the accessories, the discharge of the latter would not necessarily benefit the former. The responsibility of an accessory or an accomplice is subordinate to that of the principal.<sup>[83]</sup> Indeed, an accessory or an accomplice is like a shadow that follows the principal,<sup>[84]</sup> not the other way around.

#### PCGG Evidence Against Disini

In sum, the PCGG presented sufficient evidence to engender a well-founded belief that at least one crime had been committed, and that Disini was probably guilty thereof and should be held for trial. An inventory of the

evidence offered would include:

- The twelve-page Affidavit of Angelo V. Manahan
- The ten-page Affidavit of Samuel P. Hull Jr.
- The more extensive 90-paragraph, 44-page Supplemental Affidavit of Samuel P. Hull Jr.
- At least six telexes dated November 1973 to April 1975, which were exchanged amongst Ketterer, Hull, Disini and other Westinghouse and Burns & Roe officials, detailing the negotiations for the PNPP project, including all the transactions leading to the payment of bribes and the unlawful commissions received by Disini and/or his representatives
- At least three Aides-Memoire demonstrating how Westinghouse and Burns & Roe were “preferred” and given special treatment at the expense of other corporations involved in or competing for the PNPP project
- The handwritten notations of Marcos expressing his preference for Westinghouse and Burns & Roe
- A number of letters, correspondences and notes between Westinghouse and Burns & Roe officials -- specifically Ketterer, Hull and Hammett -- narrating their transactions involving the PNPP project and the corresponding commission payments to Disini
- Three separate documents showing that at least three members of the Marcos administration -- NPC General Manager Ravanzo, Executive Secretary Alejandro Melchor and Solicitor General Estelito P. Mendoza -- disapproved the Westinghouse and Burns & Roe proposals and objected to the government’s PNPP contract with Westinghouse for being highly onerous and disadvantageous to the government
- A host of documents showing Disini’s Interbank Foreign Currency Deposit Account with a corresponding flow of commission payments into and out of Swiss bank accounts
- Documents detailing the formation and the financial transactions of Disini’s corporations including Power Contractors, Inc.; Herdis Group, Inc.; and Vulcan Industrial & Mining Corporation.

To our mind, the whole gamut of evidence presented is more than sufficient to support a criminal complaint for the crimes of corruption of public officials in relation to bribery, and violation of the Anti-Graft Law. The evidence on record has engendered the reasonable belief that Disini had offered, promised or actually given to a public officer (Marcos) gifts or presents that made the latter liable for bribery.

Also, the PCGG has sufficiently established probable cause to show that Disini had capitalized, exploited and taken advantage of his close personal relations with the former President, who was to decide ultimately which corporation would undertake the PNPP project. In so doing, Disini requested and received pecuniary considerations from Westinghouse and Burns & Roe, which were endeavoring to close the PNPP contract with the Philippine government. All these things happened in violation of the Revised Penal Code and/or the Anti-Graft and Corrupt Practices Act.

Should the appropriate information(s) be filed, nothing should prevent the ombudsman from presenting other pieces of evidence to buttress the prosecution’s case and to prove beyond reasonable doubt the offense(s) charged.

Parenthetically, the Republic of the Philippines and the NPC brought action against Westinghouse and Burns & Roe before the US District Court of New Jersey. Ironically, after evaluating the foregoing documents, District Judge Dickinson R. Debevoise concluded in his Decision dated September 19, 1991,[85] that “there [was] sufficient evidence of bribery.” It behooves the Philippine government, especially the respondent ombudsman as

the directly affected authority, to review the facts carefully and to let the ax fall where it should.

Judge Debevoise rendered the Decision when the defendants therein moved for summary judgment. They alleged, among others, that no genuine issue as to the charge of bribery was shown by the plaintiff's pleadings, depositions, answers to interrogatories, admissions or affidavits on record.

Indeed, the Bataan nuclear power plant is a monumental, billion-dollar, non-performing white elephant, which our impoverished people are still paying for even if they have not benefited from it at all. Justice is long overdue. Let those who appear to be responsible for this humongous mess be brought to account for their participation. Let justice be done!

WHEREFORE, the Petition is GRANTED. The Resolution and the Order of the Office of the Ombudsman dismissing the charges against Herminio T. Disini are SET ASIDE and the ombudsman is DIRECTED to file in the proper court the appropriate criminal charge(s) against him. No costs.

**SO ORDERED.**

Puno, (Chairman), Corona, and Carpio-Morales, JJ., concur.

Sandoval-Gutierrez, J., please see dissenting opinion.

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[1] Originally dated April 29, 1997, the Resolution was recommended by an OMB panel composed of Eladia C. Reyes (panel head), Evelyn A. Baliton and Aleu A. Amante and was approved by Ombudsman Desierto on May 31, 1997.

[2] The Order, originally dated October 6, 1997, was recommended by an OMB panel composed of Eladia C. Reyes (panel head), Aleu A. Amante and Evelyn A. Baliton; it was approved by Ombudsman Desierto on October 24, 1997.

[3] Specifically, Disini was accused of violating Article 212 in relation to Article 210 of the Revised Penal Code and Sec. 4(a) and (b) in relation to Sec. 3 (a), (b), (c), (e), (g), (h) and (j) of RA 3019.

“ART. 212. Corruption of public officials. – The same penalties imposed upon the officer corrupted, except those of disqualification and suspension, shall be imposed upon any person who shall have made the offers or promises or given the gifts or presents as described in the preceding articles.”

“ART. 210. Direct bribery. – Any public officer who shall agree to perform an act constituting a crime, in connection with the performance of his official duties, in consideration of any offer, promise, gift or present received by such officer, personally or through, the mediation of another, shall suffer the penalty of prision mayor in its medium and minimum periods and a fine not less than three times the value of the gift, in addition to the penalty corresponding to the crime agreed upon, if the same shall have been committed.

If the gift was accepted by the officer in consideration of the execution of an act which does not constitute a crime, and the officer executed said act, he shall suffer the same penalty provided in the preceding paragraph; and if said act shall not have been accomplished, the officer shall suffer the penalties of prision correccional, in its medium period and a fine of not less than twice the value of such gift.

If the object for which the gift was received or promised was to make the public officer refrain from doing something which it was his official duty to do, he shall suffer the penalties of prision correccional in its maximum period to prision mayor in its minimum period and a fine not less than three times the value of such gift.

In addition to the penalties provided in the preceding paragraphs, the culprit shall suffer the penalty of special

temporary disqualification.

The provisions contained in the preceding paragraphs shall be made applicable to assessors, arbitrators, appraisal and claim commissioners, experts or any other persons performing public duties. (As amended by B.P. Blg. 871, May 29, 1985.)”

“SEC. 4. Prohibition of private individuals. – (a) It shall be unlawful for any person having family or close personal relation with any public official to capitalize or exploit or take advantage of such family or close personal relation by directly or indirectly requesting or receiving any present, gift or material or pecuniary advantage from any other person having some business, transaction, application, request or contract with the government, in which such public official has to intervene. Family relation shall include the spouse or relatives by consanguinity or affinity in the third civil degree. The word ‘close personal relation’ shall include close personal relationship, social and fraternal connections, and professional employment all giving rise to intimacy which assures free access to such public officer.

(b) It shall be unlawful for any person knowingly to induce or cause any public official to commit any of the offenses defined in Section 3 hereof.”

“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:

(a) Persuading, inducing or influencing another public officer to perform an act constituting a violation of rules and regulations duly promulgated by competent authority or an offense in connection with the official duties of the latter, or allowing himself to be persuaded, induced, or influenced to commit such violation or offense.

(b) Directly or indirectly requesting or receiving any gift, present, share, percentage, or benefit, for himself or for any other person, in connection with any contract or transaction between the Government and any other party, wherein the public officer in his official capacity has to intervene under the law.

(c) Directly or indirectly requesting or receiving any gift, present or other pecuniary or material benefit for himself or for another, from any person for whom the public officer, in any manner or capacity, has secured or obtained, or will secure or obtain, any Government permit or license, in consideration for the help given or to be given, without prejudice to Section thirteen of this Act.

x x x x x x x x

(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.

x x x x x x x x

(g) Entering, on behalf of the Government, into any contract or transaction manifestly and grossly disadvantageous to the same, whether or not the public officer profited or will profit thereby.

(h) Directly or indirectly having financial or pecuniary interest in any business, contract or transaction in connection with which he intervenes or takes part in his official capacity, or in which he is prohibited by the Constitution or by any law from having any interest.

x x x x x x x x

(j) Knowingly approving or granting any license, permit, privilege or benefit in favor of any person not

qualified for or not legally entitled to such license, permit, privilege or advantage, or of a mere representative or dummy of one who is not so qualified or entitled.”

[4] Assailed Resolution, p. 11; rollo, p. 643.

[5] Annex “B” of the Petition; rollo, pp. 36-46.

[6] Because the facts of this case are themselves the bone of contention, the Court deemed it proper to give this section of the Decision the heading “Antecedents” rather than “Facts.” The Antecedents are being presented to provide a springboard for the discussion of the case.

[7] Petition for Certiorari, p. 3; rollo, p. 8.

[8] Id., pp. 4 & 9.

[9] The Petition alleges that Burns & Roe is a New York-based company however, the Affidavit of Samuel P. Hull, Jr. states that the company is based in Oradell, New Jersey.

[10] This is the name alleged in the Petition, but in the Affidavit of Samuel P. Hull, Jr., the name is written as “Len Sabol.”

[11] Letter addressed to Ebasco Services, Inc., dated February 8, 1974; Annex “E,” Folder I-B, p. 25.

[12] Annex “C,” Folder I-B, p. 20.

[13] Petition, p. 7; rollo, p. 12.

[14] Id.

[15] Annex “H,” Folder I-B, p. 28.

[16] Annex “I,” Folder I-B, pp. 29-30.

[17] Id., p. 29.

[18] Minutes of the 993[rd] regular meeting of the National Power Board, p. 6; Annex “J,” Folder I-B, p. 42.

[19] Annex “M,” Folder I-B, pp. 51-55.

[20] Id., p. 52.

[21] Letter addressed to Ebasco Services, Inc., dated July 3, 1974; Annex “O,” Folder I-B, pp. 64-65.

[22] Excerpts from the minutes of the Cabinet Meeting on June 6, 1974; Annex “R,” Folder I-B, pp. 72-81.

[23] Annex “S,” Folder I-B, p. 82.

[24] Annex “T,” p. 3, Folder I-B, p. 88.

[25] Annex “T-1,” p. 1, Folder I-B, p. 86.

[26] Ibid.

[27] Annex “V,” Folder I-B, pp. 92-115.

[28] Annex “W,” p. 3; Folder I-B, p. 118.

[29] Id., pp. 4 & 119.

[30] Annex “W-1,” Folder I-B, p. 120.

[31] Annex “Y,” Folder I-B, pp. 123-131.

[32] Agreement dated January 28, 1975, Annex “Z,” Folder I-B, pp. 132-143.

[33] The writing of this Decision was assigned to the herein ponente on January 29, 2003, after his Dissenting Opinion was upheld by the majority of the members of the Third Division.

[34] SECTION 1. Petition for Certiorari – When any tribunal, board or officer exercising judicial or quasi-judicial functions has acted without or in excess of its or his jurisdiction, or with grave abuse of discretion amounting to lack or excess of jurisdiction, and there is no appeal, nor any plain, speedy, and adequate remedy in the ordinary course of law, a person aggrieved thereby may file a verified petition in the proper court, alleging the facts with certainty and praying that judgment be rendered annulling or modifying the proceedings of such tribunal, board or officer, and granting such incidental reliefs as law and justice may require.

[35] 1987 Constitution, Art. VIII, §1, par. 2.

[36] *Layus v. Sandiganbayan*, 320 SCRA 233, December 8, 1999.

[37] GR No. 136470, October 16, 2001.

[38] *Id.*, p. 9, per Buena, J.

[39] *Republic v. COCOFED et al.*, GR Nos. 147062-64, December 14, 2001; *Bayan Muna v. Comelec*, GR No. 147613, June 26, 2001; *Cuison v. Court of Appeals*, 289 SCRA 161, April 15, 1998; *Tañada v. Angara*, 272 SCRA 18, May 2, 1997.

[40] *Fernando v. Sandiganbayan*, 212 SCRA 680, August 19, 1992.

[41] *Lim v. CA*, 333 SCRA 135, June 8, 2000; *Arcelona v. CA*, 280 SCRA 20, October 2, 1997.

[42] Annex “B,” Complainant’s Motion for Reconsideration; rollo, pp. 59-68.

[43] Supplemental Affidavit of Samuel P. Hull Jr.; rollo, pp. 79-122.

[44] Annex “B,” Complainant’s Motion for Reconsideration, pp. 5-6; rollo, pp. 63-64.

[45] Supplemental Affidavit of Samuel P. Hull Jr., pp. 9-10; rollo, pp. 87-88.

[46] Rule 112, §3(a), Revised Rules of Criminal Procedure.

[47] Supplemental Complaint, Folder I-A, pp. 2-27.

[48] Rules on Evidence, Rule 130, §§1, 2 and 20.

[49] Annex “B,” Complainant’s Motion for Reconsideration, pp. 4-5; rollo, pp. 62-63.

[50] *Id.*, pp. 7 & 65.

[51] Annex “B,” Complainant’s Motion for Reconsideration; rollo, pp. 59-68.

[52] Annex “A,” Complainant’s Motion for Reconsideration; rollo, pp. 47-58.

[53] HMIC later changed its name to Herdis Group, Inc. (HGI).

[54] Petition, p. 17; rollo, p. 22.

- [55] Annex “A,” Complainant’s Motion for Reconsideration, pp. 3-4; rollo, pp. 49-50.
- [56] Supplemental Affidavit of Samuel P. Hull Jr., pp. 17-18; rollo, pp. 95-96.
- [57] Layus v. Sandiganbayan, supra; Webb v. De Leon, 247 SCRA 652, August 23, 1995.
- [58] People v. CA, 301 SCRA 475, January 21, 1999; Pilapil v. Sandiganbayan, 221 SCRA 349, April 7, 1993.
- [59] Antiporda Jr. v. Garchitorena, 321 SCRA 551, December 23, 1999; Garcia-Rueda v. Pascasio, 278 SCRA 769, September 5, 1997.
- [60] Raro v. Sandiganbayan, 335 SCRA 581, July 14, 2000; Gozos v. Tac-an, 300 SCRA 265, December 17, 1998; Cruz Jr. v. People, 233 SCRA 439, June 27, 1994.
- [61] Nava v. COA, GR No. 136470, October 16, 2001; Metropolitan Bank & Trust Co. v. Tonda, 338 SCRA 254, August 16, 2000; Antiporda Jr. v. Garchitorena, supra; Layus v. Sandiganbayan, supra; Drilon v. CA, 258 SCRA 280, July 5, 1996.
- [62] Annex “B,” Complainant’s Motion for Reconsideration, pp. 7-8; rollo, pp. 65-66.
- [63] Supplemental Affidavit of Samuel P. Hull Jr., p. 33; rollo, p. 111.
- [64] Annex “A,” Complainant’s Motion for Reconsideration, p. 7; rollo, p. 53.
- [65] Annex “B,” Complainant’s Motion for Reconsideration, p. 7; rollo, p. 65.
- [66] Assignment of Shares Without Stock Certificate, March 6, 1975, Folder I-B.
- [67] Agreement dated January 28, 1975, Annex “Z,” Folder I-B, pp. 132-143.
- [68] Petition, p. 13; rollo, p. 18.
- [69] Annex “A,” Complainant’s Motion for Reconsideration, p. 8; rollo, p. 66.
- [70] Supplemental Affidavit of Samuel P. Hull Jr., pp. 42-44; rollo, pp. 120-122.
- [71] Nava v. COA, supra; Raro v. Sandiganbayan, supra; Antiporda Jr. v. Garchitorena, supra.
- [72] Layus v. Sandiganbayan, supra; Drilon v. CA, 258 SCRA 280, July 5, 1996; Webb v. De Leon, supra.
- [73] Regalado, Remedial Law Compendium, Vol. II, 1995 7[th] revised ed., p. 604.
- [74] Ibid.
- [75] People v. CA, supra.
- [76] Rule 112, §1, 2000 Rules of Criminal Procedure.
- [77] Cruz Jr., v. People, supra.
- [78] Yu v. Sandiganbayan, 358 SCRA 353, May 31, 2001; Raro v. Sandiganbayan, supra.; People v. CA, supra.; Pilapil v. Sandiganbayan, supra.
- [79] Pilapil v. Sandiganbayan, supra.
- [80] Garcia-Rueda v. Pascasio, supra; Pilapil v. Sandiganbayan, supra.
- [81] Webb v. De Leon, supra.

[82] GR No. 114377, August 5, 1996.

[83] Aquino, *The Revised Penal Code*, Vol. I, 1987 ed., p. 553.

[84] *Id.*, p. 555.

[85] Rollo, pp. 230-298.

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## DISSENTING OPINION

### SANDOVAL-GUTIERREZ, J.:

With due respect, I dissent from the ponencia of Mr. Justice Artemio V. Panganiban. I vote to dismiss the instant petition.

#### I

The central issue posed by the PCGG in its present petition necessitates a review by this Court of the finding of facts of the Ombudsman. In effect, this Court is constrained to calibrate the evidence presented by the prosecution. This procedure is not within the realm of the instant petition for certiorari under Rule 65 of the 1997 Rules of Civil Procedure, as amended. Where, as here, the petition assails the Ombudsman's appreciation of facts, the instant recourse is impermissible.[1] As this Court ruled in *Cruz, Jr. vs. People*: [2]

"Furthermore, the Ombudsman's findings are essentially factual in nature. Accordingly, in assailing said findings on the contention that the Ombudsman committed a grave abuse of discretion in holding that petitioner is liable for estafa through falsification of public documents, petitioner is clearly raising questions of fact here (Cf. *Sesbreno vs. Ala, et al.*, G.R. No. 95393, May 5, 1992, 208 SCRA 359). His arguments are anchored on the propriety of or error in the Ombudsman's appreciation of facts. Petitioner cannot be unaware that the Supreme Court is not a trier of facts, more so in the consideration of the extraordinary writ of certiorari where neither questions of fact nor even of law are entertained, but only questions of lack or excess of jurisdiction or grave abuse of discretion (*Commission of Audit vs. Tanodbayan, et al.*, G.R. No. 81476, July 26, 1991, 199 SCRA 622). x x x." (emphasis supplied)

It was mainly on this ground that this Court, in its Resolution dated August 5, 1996 in G.R. No. 114377 (*Republic vs. Vasquez, et al.*), dismissed with finality [3] the PCGG petition involving the same complaint against the co-respondents of Herminio T. Disini. The said Resolution, which I quote in full, reads:

"After deliberating on the averments and arguments raised in the petition for certiorari which prays for the nullification and setting aside of the Ombudsman's Resolution dated June 29, 1993, and the Order dated November 29, 1993, the Court resolved to dismiss the petition for lack of merit. The bottomline issue which petitioner asks of this Court is to review the Ombudsman's ruling that dismissed, for lack of prima facie evidence, the criminal charges against respondents Paciencia E. Disini, Angel E. Disini, Liliana L. Disini and Lea E. Disini. Such a review cannot be done in the proceeding at bar for it challenges the Ombudsman's FACTUAL findings and CALIBRATION OF EVIDENCE – matters not ordinarily within the realm of the instant petition as the Court is not a trier of facts. Moreover, the Court, recognizing the investigatory and prosecutory powers granted by the 1987 Constitution to the Office of the Ombudsman and for reasons of practicality, will neither interfere with the findings of the Office of the Ombudsman nor review the exercise of its discretion in filing an information in court or dismissing a complaint to avoid its being hampered by innumerable petitions, as in this case (See: *Gulpo, et al. vs. Ombudsman*, G.R. No. 119355, May 24, 1995; *Pontinela vs. Rosales*, G.R. No. 119189, April 19, 1995; *Labita vs. Office of the Ombudsman and Sariago*, G.R. No. 116161, August 8, 1994, 235 SCRA xi; *Ocampo IV vs. Ombudsman*, 225 SCRA 725 (1993).

Accordingly, the petition should be at it is hereby DISMISSED." (emphasis supplied)

This Court's ruling in G.R. No. 114377 is squarely apropos to the instant case. Since the ponente concedes that "(t)here should be no disagreement with the Court's Resolution in Vasquez,"[4] then the instant petition should likewise be dismissed.

In refusing to apply the Vasquez ruling to the present case, the ponente made a distinction between the two cases, thus: "In that case (Vasquez), we agreed with the ombudsman's Resolution dismissing, for lack of evidence, the criminal charges against (Disini's co-respondents). x x x. In the previous Resolution in GR No. 114377, no grave abuse of discretion was found in the dismissal of the indictment against Disini's relatives. In the case before us, however, it is clear that the ombudsman gravely abused his discretion in disregarding the evidence on record, as well as some settled principles and rulings laid down by this Court. Verily, there should be a divergence of results between the present Petition and the previous one, which distinguished the charge against the other respondents. They were classified therein as mere accomplices or accessories. In the present case, Herminio T. Disini is being charged as the principal."[5]

The ponente misread the August 5, 1996 Resolution in G.R. No. 114377. The reasons he cited as bases for the dismissal of the PCGG's petition are not the grounds upon which the Vasquez ruling was anchored. To recall, in Vasquez, this Court dismissed outright the petition of PCGG because it challenges the factual findings of the Ombudsman which cannot be done through a petition for certiorari. Also, that the complaint against Disini's co-respondents was "dismissed for lack of evidence" as they were merely charged as accomplices or accessories, was not even taken into account by this Court when it dismissed PCGG's petition in Vasquez.

## II

At any rate, I am constrained to make a determination whether indeed there is a prima facie case against Disini, although in doing so, I shall reexamine the factual findings of the Ombudsman.

Contrary to the findings by the ponente, the Ombudsman did not act with grave abuse of discretion amounting to lack or excess of jurisdiction in dismissing the complaint against respondent Herminio Disini for lack of a prima facie case. Utilizing the very same portions of the affidavits of Samuel P. Hull, Jr.[6] and Angelo V. Manahan[7] cited in support of the ponencia, let me refute point-by-point the arguments raised therein.

First. The ponente finds that the affidavit of Hull dated November 28, 1988[8] "detailed how he met and communicated with Disini to discuss matters leading to (1) the revocation of the consulting contract with Ebasco and (2) the eventual award of the PNPP project to Westinghouse and Burns & Roe;"[9] and that Hull's supplemental affidavit[10] "was even more detailed and damning (as) it elaborated on his communications and negotiations with, and payments of commissions to Disini in exchange for the selection of Westinghouse and Burns & Roe over other corporations vying for the PNPP project."[11] The Ombudsman, says the ponente, "opted to disregard these pieces of evidence and thereby demonstrated his capricious and arbitrary exercise of judgment."[12]

Section 3(a), Rule 112 of the Revised Rules on Criminal Procedure requires, among others, that the complaint subject of a preliminary investigation, "shall be accompanied by the affidavits of the complainant AND his witnesses, as well as other supporting documents, to establish probable cause."

Section 1 of the same Rule likewise directs that the investigating or prosecuting officer's determination of probable cause must be based on "SUFFICIENT ground (which) engender(s) a WELL-FOUNDED belief that a crime has been committed and the respondent is probably guilty thereof, and should be held for trial."

Just recently, this Court, in *Sales vs. Sandiganbayan, et al.*,<sup>[13]</sup> expounded on the nature and function of a preliminary investigation and the duties of the investigating officer, thus:

“Although a preliminary investigation is not a trial and is not intended to usurp the function of the trial court, it is not a casual affair. The officer conducting the same investigates or inquires into the facts concerning the commission of the crime with the end in view of determining whether or not an information may be prepared against the accused. Indeed, a preliminary investigation is in effect a **REALISTIC JUDICIAL APPRAISAL** of the **MERITS** of the case. Sufficient proof of the guilt of the accused must be adduced so that when the case is tried, the trial court may not be bound as a matter of law to order an acquittal. A preliminary investigation has been called a judicial inquiry. It is a judicial proceeding. An act becomes a judicial proceeding when there is an opportunity to be heard and for the production of and weighing of evidence, and a decision is rendered thereon (*Cojuangco vs. PCGG*, 190 SCRA 226 [1990]).

“The authority of a prosecutor or investigating officer duly empowered to preside or to conduct a preliminary investigation is no less than a municipal judge or even a regional trial court judge. While the investigating officer, strictly speaking, is not a ‘judge’ by the nature of his functions, he is and must be considered to be a quasi-judicial officer because a preliminary investigation is considered a judicial proceeding (*Cruz vs. People*, 237 SCRA 439 [1994]). A preliminary investigation should therefore be **SCRUPULOUSLY** conducted **SO THAT THE CONSTITUTIONAL RIGHT TO LIBERTY OF A POTENTIAL ACCUSED CAN BE PROTECTED FROM ANY MATERIAL DAMAGE** (*Webb vs. De Leon*, 247 SCRA 652 [1995]).

“Indeed, since a preliminary investigation is designed to **SCREEN** cases for trial, **ONLY EVIDENCE MAY BE CONSIDERED**. While even raw information may justify the initiation of an investigation, the stage of preliminary investigation can be held only after sufficient evidence has been gathered and evaluated warranting the eventual prosecution of the case in court (*Olivas vs. Office of the Ombudsman*, 239 SCRA 283 [1994]). In other words – ‘...it is not enough that the preliminary investigation is conducted in the sense of making sure that a transgressor shall not escape with impunity. A preliminary investigation serves not only the purposes of the State. More important, it is a part of the guarantee of freedom and fair play which are the 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 (*Justice Oscar M. Herrera, Remedial Law, Vol. IV, 2001 ed., p. 231, citing La Chemise Lacoste S.A. vs. Fernandez*, 129 SCRA 391 [1984] and *Ortis vs. Palaypon*, 234 SCRA 391 [1994]).’” (emphasis supplied)

Measured vis-à-vis the foregoing legal yardsticks, I find that the Ombudsman followed the proper procedure in conducting the preliminary investigation. Therefore, he did not commit any grave abuse of discretion in dismissing PCGG’s complaint against Disini.

Let us now examine Hull’s declarations quoted in the ponencia:

“12. In the same conversation, Disini indicated that he could arrange award of the entire nuclear power plant contract to Westinghouse on a turnkey basis, in which case he would see to it that Burns & Roe was awarded the Architect/Engineer assignment as subcontractor to Westinghouse. I took notes of our conversation on an Intercontinental Hotel coffee shop placemat, which I took with me and saved.

“13. Following this meeting, Jesus Vergara assured me repeatedly that Disini would take the matter up with President Marcos and that everything would come out all right for Burns & Roe and Westinghouse. He said he was in constant touch with Disini, and knew that Disini would come through.

“14. I learned a day or two after my meeting with Disini that NPC’S negotiations with Ebasco on the consulting contract had ceased, and NPC was ready to enter into a consulting contract with Burns & Roe. I learned of this decision in a telephone message from either Mr. Ravanzo or Mr. Del Rosario of NPC. Jesus Vergara later explained to me at a meeting in his office that Burns & Roe was replacing Ebasco because Herminio Disini had spoken to President Marcos, and Marcos had ordered NPC to hire Burns & Roe. To prove this, Vergara gave me a copy of a letter from Westinghouse to Marcos dated February 22, 1974 bearing a handwritten notation in the margin, which I was told was written by Marcos, and which instructed NPC’s general manager to ‘enter into the contract for the consultants Burns & Roe.’ A copy of the letter is attached to this Affidavit as Exhibit A. Vergara said he was giving me this letter as proof that Disini could ‘deliver.’”

“15. Len Sabol, Jesus Vergara, and others in Manila told me at that time that Westinghouse was in the process of negotiating a similar SSR agreement with Disini whereby he would secure the prime PNPP contract on a turnkey basis for Westinghouse. The replacement of Ebasco by Burns & Roe was also being used by Westinghouse as a test of Disini’s influence with President Marcos. I understood that it was only after he passed this test that Westinghouse finalized its deal with him.”[14] (emphasis supplied)

In paragraph 12 initially reproduced above, Hull said that he had conversation with Disini to discuss how the latter could arrange the award of the nuclear power plant contract to Westinghouse and the architect/engineer subcontract to Burns & Roe. Note that the conversation was merely an initial discussion of a plan or transaction. Thus, such incident, by itself, does not as yet provide a “sufficient ground to engender a well-founded belief that a crime has been committed” by Disini. Specifically, it does not support the charge in PCGG’s complaint that Disini “brib(ed) the late President E. Marcos as a means to induce him to assist and favor individuals and corporate entities” in connection with the “negotiation, award, signing, amendment and implementation of the main and related contracts for the Philippine Power Plant (PNPP) project of the National Power Corporation (NPC) in Bataan.”

Paragraphs 13 and 14 above, which narrate the alleged implementation by Disini of the plan to award the PNPP project to Westinghouse are plain hearsay. Hull stated matters merely relayed to him by “Jesus Vergara,” “Mr. Ravanzo or Mr. Del Rosario” that “Burns & Roe was replacing Ebasco because Disini had spoken to President Marcos, and Marcos had ordered NPC to hire Burns & Roe.” Hull said that Vergara gave him a copy of Westinghouse’s letter to Marcos with a handwritten notation on its margin (Exhibit A) instructing NPC’s general manager to negotiate a contract for the consultants Burns & Roe, which, Hull honestly admitted, “I was told was written by Marcos.”

Clearly, Hull has absolutely no personal knowledge that Disini talked to former President Marcos and influenced him to award the PNPP project to Westinghouse and Burns & Roe.

Similarly, in paragraph 15, Hull stated that it was “Len Sabol, Jesus Vergara, and others in Manila” who “told me” that “Westinghouse was in the process of negotiating a similar SSR agreement with Disini whereby he would secure the prime PNPP contract on a turnkey basis for Westinghouse.”

The Ombudsman, therefore, correctly found that Hull’s statements are hearsay, conjectures and speculations. They are worthless since they have no probative value.[15] The persons named by Hull – Jesus Vergara, Mr. Ravanzo, Mr. Del Rosario and Len Sabol – never executed any affidavit on what they knew about Disini’s participation or role in the award of the PNPP project to Westinghouse and Burns & Roe. It is elementary that “(a)ny evidence, whether oral or documentary, is hearsay if its probative value is not based on the personal knowledge of the witness but on the knowledge of some other persons.”[16]

Second. The ponente likewise argues that “the ombudsman found no evidence that Disini had actually met with and assured Hull that the former could influence Marcos to overturn the award of the consulting contract to

Ebasco and the eventual award of the PNPP project to Westinghouse and Burns & Roe. The aforesaid Affidavits completely controvert his finding. Hull's statements on the matter are clear, specific and categorical:

"10. x x x I met Disini at the Intercontinental Hotel. We discussed the basic terms of a Special Sales Representative (SSR) agreement between Disini and Burns & Roe, whereby he would assist us in obtaining PNPP business in return for commission payments. Disini flaunted his close relationship with President Marcos. He represented that he had the authority to arrange the entire nuclear power plant project in any way he wished. Specifically, Disini told me that he could get the Architect/Engineering contract to Burns & Roe. He stated that overturning the award of the consulting contract to Ebasco was 'no problem,' and in fact was only a small part of what he could do for Burns and Roe. In fact, he offered to stop the award of the consulting contract to Ebasco and have it awarded to Burns & Roe as a test of his ability to deliver.[17]

"x x x

"16. In April 1974 Kenneth Roe visited Manila and met with Disini. Roe called me and another Burns & Roe executive, Lawton Hammett, from Manila on April 23 and explained that he had confirmed in his meeting with Disini the SSR relationship I had worked out in my February trip. Roe reported that Westinghouse also had a deal with Disini and that Westinghouse's commissions were to be paid to President Marcos. Hammett took notes on this telephone call.

"17. The Burns & Roe SSR agreement with Disini was put in writing. I believe it was between Burns & Roe and one of Disini's companies. While I do not recall the exact formula for the commissions to be paid under the contract, I believe that we were to pay at least \$1 million in four equal installments, plus additional amounts calculated under the formula, to be paid through the life of our Architect/Engineer subcontract. I know that the amount we agreed to pay Disini was far higher than would have been justified by the services Disini was to render pursuant to the SSR agreement (such as providing advice and counsel to us, secretarial help, or telex services). The real purpose of our agreement with Disini was simply for him to influence President Marcos to award Burns & Roe the Architect/Engineer subcontract on the PNPP project."[18] (emphasis supplied)

Paragraph 10 narrates Hull's meeting with Disini to discuss "the basic terms of a Special Sales Representative Agreement (SSR) between (the latter) and Burns & Roe, whereby he (Disini) would assist us in obtaining PNPP business in return for commission payments." According to Hull, Disini "flaunted his close relationship with President Marcos," suggesting that the latter can "deliver". However, to repeat, such incident was merely a discussion of their transaction which, by itself, is hardly a criminal offense.

Paragraph 16 is hearsay. Hull stated that it was "Kenneth Roe" and "Lawton Hammett" who told him (Hull) through telephone that "Westinghouse also had a deal with Disini and that Westinghouse's commissions were to be paid to President Marcos."

Hull, in paragraph 17, even contradicted himself when he said that the SSR agreement "was between Burns & Roe and one of Disini's companies," meaning, Disini was not personally involved in the SSR transaction. As to the payment of commissions under the "agreement," Hull is not also certain about "the exact formula for commissions." He merely conjectured or speculated that he "believe(s) ... we were to pay at least \$1 million in four equal installments, plus additional amounts calculated under the formula, ...." Being a mere hearsay or speculation, Hull's declarations in paragraphs 16 and 17 have no evidentiary value.

Third. The ponente contends that the "aide memoires and telexes show Disini's complicity in the crimes charged." [19] In support of his posture, he cited Manahan's statements in his affidavit, thus:

"7. Aide memoires were confidential memoranda from Mr. Disini to President Marcos (who was addressed as 'Sir'), in which Mr. Disini provided information to the President or requested that the President take specified

actions in favor of HMIC/HFI, or of Disini personally. Typically, Mr. Federico E. Navera (HGI's controller, and my direct subordinate) would provide any financial information that went into an aide memoire. Mr. Jacob would prepare an initial draft of the aide memoire, and Mr. Padre would provide the final drafting, editing and reorganization of the document. Mr. Disini would then approve and sign the document, and either he or his wife Paciencia Disini (President Marcos' personal physician, who according to rumors visited the President daily) would deliver the aide memoire to President Marcos. Mr. Disini's main contribution to HGI's business was, in fact, preparing the aide memoires and influencing President Marcos to act favorably on the requests for action they contained. Mr. Disini was extremely successful in this; I estimate that 85% of the aide memoires he submitted to President Marcos resulted in the President taking the action solicited by Mr. Disini.”[20] (emphasis supplied)

Manahan, in his statements above, admitted that the aide memoires “were confidential memoranda” prepared by “Mr. Federico E. Navera” (who “provided any financial information”), “Mr. Jacob” (who “prepared an initial draft”), “Mr. Padre” (who “provided the final drafting, editing and reorganization”), and “Mr. Disini” (who “would approve and sign the document”). Having no hand in the preparation of those confidential documents, Manahan, therefore, has no personal knowledge of the aide memoires. Surprisingly, the persons who prepared them did not execute any affidavit concerning the same.

Thus, as correctly found by the Ombudsman:

“It is likewise noted that the Aide Memoirs for Marcos purportedly sent by Westinghouse and Burns & Roe thru H. Disini (Annex ‘C,’ Folder of Exhibits) to show the alleged favorable recommendation that the consultancy contract be awarded to Burns & Roe, cannot by itself stand in court. In the first place, the said document does not so indicate the author and the addressee thereof nor the date it was drafted or sent.

“Similarly, the other Aide Memoires (Annexes ‘H’ and ‘J,’ Folder of Exhibits) which are alleged to have been prepared by Westinghouse cannot be authenticated considering that all these documents were unsigned and the supposed author thereof is the only person who can identify or attest to the real addressees of said Memoires.”[21] (emphasis supplied)

Moreover, Manahan is not even certain as to the identity of the person or persons who delivered the aide memoires to Marcos. He simply speculated that “either he or his wife Paciencia Disini (President Marcos' personal physician, who according to rumors visited the President daily)” delivered them to Marcos. Incidentally, as earlier mentioned, the case against Paciencia Disini, who was charged together with herein respondent Herminio Disini in this case, had long been dismissed by the Ombudsman. Such dismissal was affirmed with finality by this Court in G.R. No. 114377.

Hull's declaration in his supplemental affidavit that –

“37. On February 26, 1974, Ketterer and I traveled to Hongkong, he to return to his post and I on my way back to the U.S. That evening, as we reflected on the events of the prior two weeks, we decided it would be prudent to develop a secret code that would permit rapid communication by telex while maintaining confidentiality. We agreed on code names for key individuals (e.g., President Marcos was ‘Lester’, Ravanzo was ‘Bozo’), parties (e.g., Westinghouse was ‘Willy’, Ebasco was ‘Seagull’, Burns & Roe was ‘Home’, NPC was ‘Charlie’), and terms (e.g., contract was ‘lucky’, negotiation was ‘festival’, turnkey was ‘door’), etc. I marked up a copy of my February 20, 1974 telex (Exhibit 11) with the codes, as an example of how an encoded communication would be read. Exhibit 15 hereto is a copy of the marked up telex, with my handwritten notations identifying the various code names. Subsequently, we used some of these codes (or modifications to them) to communicate between the U.S. and Manila.”[22]

is not sufficient to “positively (link) Disini and Marcos to the dealings” between Westinghouse and Burns & Roe. Disini's name, who was supposed to be one of the “key individuals” in the transaction, is not even mentioned by

Hull. Moreover, Ketterer did not execute any affidavit about Hull's statement on this matter. Section 3(a), Rule 112 of the Revised Rules on Criminal Procedure requires that the complaint "shall be accompanied" not only by the "affidavits of the complainant" but also "his witnesses, as well as other supporting documents, to establish probable cause." Significantly, we note the Ombudsman's statement in its assailed Resolution of May 31, 1997 that Ketterer and Hull are not willing to testify against the respondents. The Ombudsman stated:

"On the alleged use of secret codes for sensitive communications as precautionary measure to avoid disclosure of the identities and participation of Marcos/Disini, in the absence of the testimonies of Ketterer and/or Hull who never signified their willingness to testify against respondents, how will prosecution prove that the persons referred to in said coded communications are Marcos/Disini?

"In the same vein, the telexes (Annexes G, K, and N) do not divulge the identities of the sender and the addressee." [23] (emphasis supplied)

Fourth. The ponente further states that "corroborative proof of the negotiations for commissions and the actual payment thereof was also provided by the Affidavit of Hull:" [24]

"18. I understand the first payment of \$250,000 to Disini was made through an advance from Westinghouse, because Burns & Roe had not done enough work on the project to generate this amount. The first check for \$250,000 was cut by the Treasurer of the Burns & Roe and made out to a Disini bank account in Switzerland. I was asked to carry this check with me on a trip I was planning to make to Europe. When my trip was cancelled, the payment to Disini was made through a wire transfer. I am not certain how many payments were made to Disini in all, but I believe that at least two payments of \$250,000 were made." [25]

"70. Once the arrangement between Burns & Roe and Disini was formalized in April 1974, we began to discuss with Disini the mechanism for the transfer of the SSR payments to him from Burns & Roe. Disini insisted that the funds be secretly conveyed to a bank account in Switzerland. Starting with my May 16, 1974 telex to Disini, we worked on the details of the transfer (Exhibit 22)." [26]

Again, Hull's statements in paragraph 18 are based on conjectures and speculations, as clearly indicated by his words, "I understand the first payment ...," "I am not certain how many payments were made...," and "I believe that at least two payments...."

Paragraph 70 simply shows that Burns & Roe officials "began to discuss with Disini the mechanism for the transfer of the SSR payments to him from Burns & Roe." This is still part of the alleged SSR negotiation between Burns & Roe and Disini. But, to repeat, this alone does not prove the charge against Disini that he bribed Marcos in connection with the PNPP project.

Fifth. I cannot also agree with the ponente's statement that the Ombudsman wantonly disregarded the Affidavits of Manahan and Hull, who both categorically confirmed that Disini had actually received commission payments from Westinghouse and Burns & Roe.

Manahan declared:

"16. Exhibit 9 (Document 00727) is a one-page tabulation of nuclear power plant commission, typed in Mr. Disini's stationery. Although I was HGI's chief financial officer, I was not informed of the details of the arrangement under which HGI rec[e]ived commissions from Westinghouse Electric Corporation ('Westinghouse') in connection with the Philippine Nuclear Power Plant ('PNPP'). Anything that related to PNPP was treated as secret by Mr. Disini's personal finance officer. The Westinghouse commission payments were never received by HGI in the Philippines, and my understanding is that they were paid directly into foreign bank accounts. The funds from the commissions never entered HGI's treasury.

"17. The only payments received by HGI in the Philippines relating to PNPP were a number of checks

amounting to millions of pesos that were remitted by Power Contractors, Inc. ('PCI'), the civil construction contractor for the job, in the nature of dividends. HGI was 40% owner of PCI and shared in whatever profits PCI realized from its role on the plant's construction." [27]

Manahan himself admitted in paragraph 16 that he has no personal knowledge about the commission payments since he "was not informed" about it. In fact, he categorically stated that he does not know "anything that related to PNPP" because it was treated as "secret." Considering that no competent witness could testify on Exhibit 9 (Document 00727) and on other documentary proofs of the alleged commissions, the Ombudsman properly found that the said documents "remain to be mere scraps of paper." [28]

What Manahan was certain, though, was that "(t)he Westinghouse commission payments were never received by HGI in the Philippines" and "never entered HGI's treasury."

Manahan's statement in paragraph 17 that "(t)he only payments received by HGI in the Philippines relating to PNPP were a number of checks amounting to millions of pesos," does not certainly refer to the alleged SSR commission payments. He clarified that the said checks were "in the nature of dividends" remitted by Power Contractors, Inc. Said dividends were in pesos, as distinguished from the alleged SSR commissions from Westinghouse or Burns & Roe which were in dollars. Besides, no documentary proof of such payments in checks were mentioned by Manahan to confirm his statement.

Sixth. Contrary to the ponente's contention, the Ombudsman correctly found that the evidence of the PCGG failed to substantiate its claim that Herdis Management and Investment Corporation (HMIC) and Herdis Group, Inc. (HGI), which are corporations owned or headed by Disini, were organized mainly to benefit from the PNPP project. There is likewise no proof that former President Marcos had business interests in the said corporations, such that any commission paid to them would redound to the late President's benefit.

In fact, Hull himself declared that Westinghouse and Burns & Roe refused to give Disini commission payments, thus:

"86. Another demand coming from Disini was that we pay additional commissions to Asia Industries, Inc., which had been acquired by Disini. Disini was essentially asking for a \$200,000 gratuity to be paid to Asia Industries, Inc. for 'services rendered.' We did not feel it was fair or necessary for us to pay this additional commission.

"87. Our strategy in response to these new demands was to delay giving a direct answer to Disini until the prime contract was signed, in order to avoid antagonizing Vergara and Disini. We would, however, promise to give Asia Industries, Inc. a commission of ½% of the total contract price of any additional work that Burns & Roe was awarded. This strategy was summarized in my handwritten notes on a March 20, 1975 telex we received from Ketterer, a copy of which is included as Exhibit 32 hereto.

"88. Disini was not pleased with the deferral in receiving his commission payments. As the signing of the prime contract into 1976, I began to exchange increasingly terse telexes with Rodolfo ('Jake') Jacob, one of Disini's subordinates, regarding the 'shipments (commission payments). The mechanics of the payments had been easily worked out: we would issue Citicorp bank drafts in dollars in favor of Technosphere, and would send them by registered mail to Mr. Disini's designated contact in Switzerland (Mr. Rene Pasche in Lausanne). However, the initial 'shipment' continued to be postponed, since it was due only when Westinghouse received acknowledgment from NPC that the contract commencement date had occurred. Disini pressed us, nonetheless, for payment of his commissions. On April 19, 1976, I telexed Disini and indicated that neither Westinghouse nor Burns & Roe had any funds to initiate the scheduled payments until the first letter of credit making funds available to Westinghouse was opened. I emphasized to Disini that Burns & Roe's subcontract with Westinghouse had made full provision for a schedule of commission payment to Disini, but

the schedule could only be implemented upon activation of the prime contract.

"89. Disini took matters up directly with Mr. Roe. Exhibit 33 hereto contains a copy of an April 26, 1976 telex from Disini to Mr. Roe, in which Disini quoted from my previous exchanges with Jacob on the schedule of commission payments. Disini demanded that Burns & Roe make the initial commission payment during April 1976, either by actually issuing a bank draft or by giving Disini a promissory note. Exhibit 33 also includes Mr. Roe's April 28, 1976 response telex to Disini. In his response, Mr. Roe reaffirmed our position that we could not pay the Phase II commissions to Disini until the prime contract officially commenced. Mr. Roe also declined to issue a promissory note, since it would leave Burns & Roe open to liability for the note without recourse if the contract was terminated without having officially commenced. Mr. Roe ended his telex to Disini as follows (Exhibit 33): 'It is complicated, confusing and unfortunate to all parties that delay in project implementation thru opening of true LC has delayed shipments by both PC [Westinghouse] and ourselves. We have discussed this situation at highest levels of prime contractor and have no other course of action open to us.'"[29] (emphasis supplied)

But the following admission by Hull has completely shattered PCGG's charges against Disini:

"19. I was informed that Disini received many millions of dollars in connection with this project. It is inconceivable that an amount in the millions of dollars would not have been shared with President Marcos. In those days, Marcos received a share in virtually every major profitable enterprise in the Philippines. My understanding was that Marcos gave Disini the 'hunting license' on the PNPP project – that is, the authorization to strike deals generating the largest possible commissions. Disini struck these deals, for the benefit of himself and Marcos, with Westinghouse and Burns & Roe."[30]

It is crystal-clear that Hull's statements on the multi-million dollar commission payments allegedly received by Disini, who in turn, "shared" them with Marcos, are glaringly hearsay, wild conjectures and surmises. Hull stated that he was merely "informed that Disini received many millions of dollars in connection with this (PNPP) project." His suspicion that such huge amount of money must "have been shared with President Marcos" arose out of his thinking that "In those days, Marcos received a share in virtually every major profitable enterprise in the Philippines." Hull further surmised: "My understanding was that Marcos gave Disini the 'hunting license' on the PNPP project – that is, the authorization to strike deals generating the largest possible commissions. Disini struck these deals for the benefit of himself and Marcos, with Westinghouse and Burns & Roe."

Hull's suspicion, no matter how strong, remains a suspicion. It is no proof at all; it cannot take the place of evidence. As has been eloquently said, "The sea of suspicion has no shore, and the court that embarks upon it is without rudder or compass." [31] Thus, as correctly found by the Ombudsman:

"Of significance, too, is the lack of sufficient supporting evidence to substantiate the claim that the Power Contractors, Inc., a consortium was actually organized by Disini to participate in the Philippine Nuclear Power Project.

"Neither were documents presented to prove that Marcos indeed had a business interest in the said Power Contractors, Inc. or that the ECCO-Asia was actually a subsidiary of Meralco which was allegedly controlled by Marcos thru Benjamin Romualdez.

"While the efforts of the PCGG in filing this complaint is commendable, however, the host of evidence gathered to substantiate the same leaves much to be desired."[32] (emphasis supplied)

In this regard, I find appropriate to quote the Ombudsman's statement in his comment on the instant petition:

"1. History will inevitably pass its judgment on whether the administration of the late President Ferdinand E. Marcos was actually a poor excuse for a family-run kleptocracy; but in this jurisdiction, conjectures, inferences and historical judgments may not take the place of evidence as basis of indictments for very serious crimes.

x x x

“7. With the April 29, 1997 Resolution,[33] petitioner was therefore placed on notice that the evidence it presented was unquestionably insufficient. At that point, it could have presented appreciable evidence to bolster its case, with emphasis on those points which weakened the case.

“8. Petitioner, in its Motion for Reconsideration, lamely responded to the need for evidence by submitting the written statement of Angelo V. Manahan and a copy of Samuel P. Hull’s statement made in another forum which, however, essentially only contain expressions of their belief/opinion(s) that Herminio Disini received/accepted commissions in connection with the nuclear power plant project.

“9. Predictably, the motion for reconsideration was likewise denied as the evidence fell short of establishing sufficient proof regarding the alleged payment of commissions to respondent Hermini Disini.

“10. Thus, despite ample opportunity to shore up with evidence its very serious allegations, petitioner did not reconfigure its poor state of evidence.

“In regard to the need for supporting evidence, it must be emphasized that the Office of the Ombudsman, while acting as a quasi-judicial officer in the conduct of the preliminary investigation, could not have assumed petitioner’s responsibility of procuring and submitting the necessary evidence. Fundamental due process bars the Office of the Ombudsman from simultaneously discharging the distinct functions of conducting fact-finding/case-building and preliminary investigation in a singular criminal case. After all, petitioner is the specialized agency particularly mandated and equipped to perform the function of case-building in cases of the given nature.”[34]

The ponente faults the Ombudsman for merely “taking each piece of evidence or sentence in a long affidavit singly or independently,” and not considering the “totality of the evidence” presented by the PCGG to arrive at the conclusion that there was no sufficient ground to engender a well-founded belief that a crime has been committed.[35]

I submit, however, that it is the duty of the Ombudsman or any investigating officer to winnow out the facts from hearsay, precisely because the affiant, normally a layman, may include both facts and hearsay in his affidavit. As shown earlier, the affidavits of Hull and Manahan are riddled with hearsay, conjectures, suspicions and surmises. Also, the “host of other supporting documents” were prepared by other persons named in the two affidavits. The matters allegedly showing Disini’s culpability, as narrated in Hull’s and Manahan’s affidavits, were merely relayed to them by these other persons. It must be stressed that only facts, not hearsay, are admissible in evidence to establish probable cause. As the recent case of *Sales vs. Sandiganbayan, et al.* (supra) teaches, “since a preliminary investigation is designed to screen cases for trial, only evidence (not hearsay, suspicions, conjectures or surmises) may be considered.”

The ponente also opines that “a finding of probable cause does not require an inquiry into whether there is sufficient evidence to secure a conviction....”[36] I disagree. Again, this Court, in *Sales* (supra), held that “Indeed, a preliminary investigation is in effect a realistic judicial appraisal of the merits of the case. Sufficient proof of the guilt of the accused must be adduced so that when the case is tried, the trial court may not be bound as a matter of law to order an acquittal. A preliminary investigation has been called a judicial inquiry. It is a judicial proceeding.”

The ponente further stresses that “(s)hould the appropriate information(s) be filed, nothing should prevent the ombudsman from presenting other pieces of evidence to buttress the prosecution’s case and to prove beyond reasonable doubt the offense(s) charged.”[37]

This is precisely what *Salonga vs. Cruz Paño*[38] proscribes. In said case, this Court En Banc declared in no

uncertain terms that when there is no prima facie case against a person sought to be charged with a crime, “the judge or fiscal, therefore, SHOULD NOT GO ON WITH THE PROSECUTION IN THE HOPE THAT SOME CREDIBLE EVIDENCE MIGHT LATER TURN UP DURING TRIAL, for this would be a flagrant violation of a basic right which the courts are created to uphold. It bears repeating that the judiciary lives up to its mission by vitalizing and not denigrating constitutional rights. So it has been before. It should continue to be so (Mercado vs. Court of First Instance of Rizal, 116 SCRA 93).” This En Banc ruling, which has been reiterated in a number of cases, cannot be disregarded by a ruling of any Division of this Court. To do so is to violate the Constitution.

Parenthetically, the ponencia mentions the Decision dated September 19, 1991 of the District Judge of New Jersey, USA involving the civil action brought by the Republic of the Philippines and the National Power Corporation against Westinghouse and Burns & Roe. The said Decision denied the motion for summary judgment filed by the defendants therein, on the ground that there was sufficient evidence of bribery. The ponencia states that “(i)t behooves the...respondent ombudsman ...to review the facts carefully and to let the ax fall where it should.”[39] Suffice it to state that the said case is civil in nature involving the Republic and Westinghouse and Burns & Roe. Disini is not even a party therein. That case, therefore, has no bearing to the instant petition.

In sum, I find that the dismissal by the Ombudsman of the complaint against Disini for lack of probable cause is far from being whimsical or capricious. His findings in his assailed Resolution and Order are clearly based on substantial evidence. Section 27 of Republic Act No. 6770 (the Ombudsman Act of 1989) provides that the “(f)indings of fact by the Office of the Ombudsman when supported by substantial evidence are conclusive,”[40] and its decision “will not be overturned.”[41]

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[1] *Odin Security Agency Inc. vs. Sandiganbayan, et al.*, G.R. No. 135912, September 17, 2001, citing *Cruz, Jr. vs. People*, 233 SCRA 439 (1994) and *Commission on Audit vs. Tanodbayan, et al.*, 199 SCRA 622 (1991).

**[2] 233 SCRA 439, 459 (1994).**

[3] In a Resolution dated October 7, 1996, this Court denied with finality PCGG’s motion for reconsideration. On October 25, 1996, the dismissal of the PCGG petition became final and executory.

[4] Ponencia, at 44.

[5] *Id.*, at 45.

[6] Then Director for International Operations of Burns & Roe.

[7] Then Vice President for Finance of Herdis Management and Investment Corporation (HMIC), and later the Executive Vice President and Chief Operating Officer of Herdis Group, Inc. (HGI).

[8] Annex “B” of Complainant’s Motion for Reconsideration; rollo, at 59-68.

[9] Ponencia, at 20.

[10] Supplemental Affidavit of Samuel P. Hull, Jr., rollo, at 79-122.

[11] Ponencia, at 20-21.

[12] *Id.*, at 22.

[13] G.R. No. 143802, November 16, 2001.

[14] Annex “B,” Complainant’s Motion for Reconsideration, at 5-6; *id.*, at 63-64.

[15] Section 36, Rule 130, Revised Rules on Evidence; Regalado, Remedial Law Compendium, Vol. Two, seventh revised edition, at 603.

[16] Id.

[17] Annex “B,” Complainant’s Motion for Reconsideration, at 4; rollo, at 62.

[18] Ponencia, at 24-25.

[19] Id., at 13.

[20] Annex “A,” Complainant’s Motion for Reconsideration, at 3-4; id., at 49-50.

[21] Rollo, at 308.

[22] Supplemental Affidavit of Samuel P. Hull, Jr., at 17-18; rollo, at 95-96.

[23] Rollo, at 309.

[24] Ponencia, at 31.

[25] Annex “B,” Complainant’s Motion for Reconsideration, at 7-8; rollo, at 65-66.

[26] Supplemental Affidavit of Samuel P. Hull, Jr., at 33; rollo, at 111.

[27] Annex “A,” Complainant’s Motion for Reconsideration, at 7; rollo, at 53.

[28] Rollo, at 309.

[29] Supplemental Affidavit of Samuel P. Hull, Jr., at 42-44; rollo, at 120-122.

[30] Annex “A,” Complainant’s Motion for Reconsideration, at 8; rollo, at 66.

[31] 1 Moore on Facts, 61-63; cited in Francisco, V.J., VII The Revised Rules of Court, Part II, Rules 131-134, at 570; People vs. Ganan, Jr., 265 SCRA 260, 290 (1996).

[32] Rollo, at 309.

[33] This is the assailed Resolution dismissing PCGG’s complaint against Disini, which was approved by then Ombudsman Aniano A. Desierto on May 31, 1997.

[34] Rollo, at 685, 687-688.

[35] Ponencia, at 41.

[36] Id., at 43.

[37] Id., at 49.

**[38] 134 SCRA 438, 462 (1985).**

[39] Ponencia, at 49-50.

[40] Morong Water District vs. Office of the Deputy Ombudsman, 328 SCRA 363, 369 (2000).

[41] Presidential Ad Hoc Fact-Finding Committee on Behest Loans vs. Desierto (En Banc), 362 SCRA 721, 729 (2001), citing Morong Water District vs. Office of the Deputy Ombudsman, supra; Tan vs. Office of the Ombudsman, 295 SCRA 315, 323 (1998).

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