

BETTY GABIONZA AND ISABELITA TAN, PETITIONERS, VS. COURT OF APPEALS, LUKE ROXAS AND EVELYN NOLASCO, RESPONDENTS.

G.R. No. 161057. September 12, 2008

Ponente: TINGA, J.

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TINGA, J.:

On 21 August 2000, petitioners Betty Go Gabionza (Gabionza) and Isabelita Tan (Tan) filed their respective Complaints-affidavit[1] charging private respondents Luke Roxas (Roxas) and Evelyn Nolasco (Nolasco) with several criminal acts. Roxas was the president of ASB Holdings, Inc. (ASBHI) while Nolasco was the senior vice president and treasurer of the same corporation.

According to petitioners, ASBHI was incorporated in 1996 with its declared primary purpose to invest in any and all real and personal properties of every kind or otherwise acquire the stocks, bonds, and other securities or evidence of indebtedness of any other corporation, and to hold or own, use, sell, deal in, dispose of, and turn to account any such stocks.[2] ASBHI was organized with an authorized capital stock of P500,000.00, a fact reflected in the corporation's articles of incorporation, copies of which were appended as annexes to the complaint.[3]

Both petitioners had previously placed monetary investment with the Bank of Southeast Asia (BSA). They alleged that between 1996 and 1997, they were convinced by the officers of ASBHI to lend or deposit money with the corporation. They and other investors were urged to lend, invest or deposit money with ASBHI, and in return they would receive checks from ASBHI for the amount so lent, invested or deposited. At first, they were issued receipts reflecting the name "ASB Realty Development" which they were told was the same entity as BSA or was connected therewith, but beginning in March 1998, the receipts were issued in the name of ASBHI. They claimed that they were told that ASBHI was exactly the same institution that they had previously dealt with.[4]

ASBHI would issue two (2) postdated checks to its lenders, one representing the principal amount and the other covering the interest thereon. The checks were drawn against DBS Bank and would mature in 30 to 45 days. On the maturity of the checks, the individual lenders would renew the loans, either collecting only the interest earnings or rolling over the same with the principal amounts.[5]

In the first quarter of 2000, DBS Bank started to refuse to pay for the checks purportedly by virtue of "stop payment" orders from ASBHI. In May of 2000, ASBHI filed a petition for rehabilitation and receivership with the Securities and Exchange Commission (SEC), and it was able to obtain an order enjoining it from paying its outstanding liabilities.[6] This series of events led to the filing of the complaints by petitioners, together with Christine Chua, Elizabeth Chan, Ando Sy and Antonio Villareal, against ASBHI.[7] The complaints were for estafa under Article 315(2)(a) and (2)(d) of the Revised Penal Code, estafa under Presidential Decree No. 1689, violation of the Revised Securities Act and violation of the General Banking Act.

A special task force, the Task Force on Financial Fraud (Task Force), was created by the Department of Justice (DOJ) to investigate the several complaints that were lodged in relation to ASBHI.[8] The Task Force, dismissed

the complaint on 19 October 2000, and the dismissal was concurred in by the assistant chief state prosecutor and approved by the chief state prosecutor.[9] Petitioners filed a motion for reconsideration but this was denied in February 2001.[10] With respect to the charges of estafa under Article 315(2) of the Revised Penal Code and of violation of the Revised Securities Act (which form the crux of the issues before this Court), the Task Force concluded that the subject transactions were loans which gave rise only to civil liability; that petitioners were satisfied with the arrangement from 1996 to 2000; that petitioners never directly dealt with Nolasco and Roxas; and that a check was not a security as contemplated by the Revised Securities Act.

Petitioners then filed a joint petition for review with the Secretary of Justice. On 15 October 2001, then Secretary Hernando Perez issued a resolution which partially reversed the Task Force and instead directed the filing of five (5) Informations for estafa under Article 315(2)(a) of the Revised Penal Code on the complaints of Chan and petitioners Gabionza and Tan, and an Information for violation of Section 4 in relation to Section 56 of the Revised Securities Act.[11] Motions for reconsideration to this Resolution were denied by the Department of Justice in a Resolution dated 3 July 2002.[12]

Even as the Informations were filed before the Regional Trial Court of Makati City, private respondents assailed the DOJ Resolution by way of a certiorari petition with the Court of Appeals. In its assailed Decision[13] dated 18 July 2003, the Court of Appeals reversed the DOJ and ordered the dismissal of the criminal cases. The dismissal was sustained by the appellate court when it denied petitioners' motion for reconsideration in a Resolution dated 28 November 2003.[14] Hence this petition filed by Gabionza and Tan.

The Court of Appeals deviated from the general rule that accords respect to the discretion of the DOJ in the determination of probable cause. This Court consistently adheres to its policy of non-interference in the conduct of preliminary investigations, and to leave to the investigating prosecutor sufficient latitude of discretion in the determination of what constitutes sufficient evidence to establish probable cause for the filing of an information against a supposed offender.[15]

At the outset, it is critical to set forth the key factual findings of the DOJ which led to the conclusion that probable cause existed against the respondents. The DOJ Resolution states, to wit:

The transactions in question appear to be mere renewals of the loans the complainant-petitioners earlier granted to BSA. However, just after they agreed to renew the loans, the ASB agents who dealt with them issued to them receipts indicating that the borrower was ASB Realty, with the representation that it was "the same entity as BSA or connected therewith." On the strength of this representation, along with other claims relating to the status of ASB and its supposed financial capacity to meet obligations, the complainant-petitioners acceded to lend the funds to ASB Realty instead. As it turned out, however, ASB had in fact no financial capacity to repay the loans as it had an authorized capital stock of only P500,000.00 and paid up capital of only P125,000.00. Clearly, the representations regarding its supposed financial capacity to meet its obligations to the complainant-petitioners were simply false. Had they known that ASB had in fact no such financial capacity, they would not have invested millions of pesos. Indeed, no person in his proper frame of mind would venture to lend millions of pesos to a business entity having such a meager capitalization. The fact that the complainant-petitioners might have benefited from its earlier dealings with ASB, through interest earnings on their previous loans, is of no moment, it appearing that they were not aware of the fraud at those times they renewed the loans.

The false representations made by the ASB agents who dealt with the complainant-petitioners and who inveigled them into investing their funds in ASB are properly imputable to respondents Roxas and Nolasco, because they, as ASB's president and senior vice president/treasurer, respectively, in charge of its operations, directed its agents to make the false representations to the public, including the complainant-petitioners, in order to convince them to invest their moneys in ASB. It is difficult to make a different conclusion, judging

from the fact that respondents Roxas and Nolasco authorized and accepted for ASB the fraud-induced loans. This makes them liable for estafa under Article 315 (paragraph 2 [a]) of the Revised Penal Code. They cannot escape criminal liability on the ground that they did not personally deal with the complainant-petitioners in regard to the transactions in question. Suffice it to state that to commit a crime, inducement is as sufficient and effective as direct participation.[16]

Notably, neither the Court of Appeals' decision nor the dissent raises any serious disputation as to the occurrence of the facts as narrated in the above passage. They take issue instead with the proposition that such facts should result in a prima facie case against either Roxas or Nolasco, especially given that neither of them engaged in any face-to-face dealings with petitioners. Leaving aside for the moment whether this assumed remoteness of private respondents sufficiently insulates them from criminal liability, let us first discern whether the above-stated findings do establish a prima facie case that petitioners were indeed the victims of the crimes of estafa under Article 315(2)(a) of the Revised Penal Code and of violation of the Revised Securities Act.

Article 315(2)(a) of the Revised Penal Code states:

ART. 315. Swindling (estafa). -- Any person who shall defraud another by any of the means mentioned herein below shall be punished by:

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(2) By means of any of the following false pretenses or fraudulent acts executed prior to or simultaneous with the commission of the fraud:

(a) By using a fictitious name, or falsely pretending to possess power, influence, qualifications, property, credit, agency, business or imaginary transactions, or by means of other similar deceits;

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The elements of estafa by means of deceit as defined under Article 315(2)(a) of the Revised Penal Code are as follows: (1) that there must be a false pretense, fraudulent act or fraudulent means; (2) that such false pretense, fraudulent act or fraudulent means must be made or executed prior to or simultaneously with the commission of the fraud; (3) that the offended party must have relied on the false pretense, fraudulent act or fraudulent means, that is, he was induced to part with his money or property because of the false pretense, fraudulent act or fraudulent means; and (4) that as a result thereof, the offended party suffered damage.[17]

Do the findings embodied in the DOJ Resolution align with the foregoing elements of estafa by means of deceit?

First. The DOJ Resolution explicitly identified the false pretense, fraudulent act or fraudulent means perpetrated upon the petitioners. It narrated that petitioners were made to believe that ASBHI had the financial capacity to repay the loans it enticed petitioners to extend, despite the fact that "it had an authorized capital stock of only P500,000.00 and paid up capital of only P125,000.00." [18] The deficient capitalization of ASBHI is evinced by its articles of incorporation, the treasurer's affidavit executed by Nolasco, the audited financial statements of the corporation for 1998 and the general information sheets for 1998 and 1999, all of which petitioners attached to their respective affidavits.[19]

The Court of Appeals conceded the fact of insufficient capitalization, yet discounted its impact by noting that ASBHI was able to make good its loans or borrowings from 1998 until the first quarter of 2000.[20] The short-lived ability of ASBHI, to repay its loans does not negate the fraudulent misrepresentation or inducement it has undertaken to obtain the loans in the first place. The material question is not whether ASBHI inspired exculpatory confidence in its investors by making good on its loans for a while, but whether such investors would have extended the loans in the first place had they known its true financial setup. The DOJ reasonably noted that

"no person in his proper frame of mind would venture to lend millions of pesos to a business entity having such a meager capitalization." In estafa under Article 315(2)(a), it is essential that such false statement or false representation constitute the very cause or the only motive which induces the complainant to part with the thing.[21]

Private respondents argue before this Court that the true capitalization of ASBHI has always been a matter of public record, reflected as it is in several documents which could be obtained by the petitioners from the SEC.[22] We are not convinced. The material misrepresentations have been made by the agents or employees of ASBHI to petitioners, to the effect that the corporation was structurally sound and financially able to undertake the series of loan transactions that it induced petitioners to enter into. Even if ASBHI's lack of financial and structural integrity is verifiable from the articles of incorporation or other publicly available SEC records, it does not follow that the crime of estafa through deceit would be beyond commission when precisely there are bending representations that the company would be able to meet its obligations. Moreover, respondents' argument assumes that there is legal obligation on the part of petitioners to undertake an investigation of ASBHI before agreeing to provide the loans. There is no such obligation. It is unfair to expect a person to procure every available public record concerning an applicant for credit to satisfy himself of the latter's financial standing. At least, that is not the way an average person takes care of his concerns.

Second. The DOJ Resolution also made it clear that the false representations have been made to petitioners prior to or simultaneously with the commission of the fraud. The assurance given to them by ASBHI that it is a worthy credit partner occurred before they parted with their money. Relevantly, ASBHI is not the entity with whom petitioners initially transacted with, and they averred that they had to be convinced with such representations that Roxas and the same group behind BSA were also involved with ASBHI.

Third. As earlier stated, there was an explicit and reasonable conclusion drawn by the DOJ that it was the representation of ASBHI to petitioners that it was creditworthy and financially capable to pay that induced petitioners to extend the loans. Petitioners, in their respective complaint-affidavits, alleged that they were enticed to extend the loans upon the following representations: that ASBHI was into the very same activities of ASB Realty Corp., ASB Development Corp. and ASB Land, Inc., or otherwise held controlling interest therein; that ASB could legitimately solicit funds from the public for investment/borrowing purposes; that ASB, by itself, or through the corporations aforesaid, owned real and personal properties which would support and justify its borrowing program; that ASB was connected with and firmly backed by DBS Bank in which Roxas held a substantial stake; and ASB would, upon maturity of the checks it issued to its lenders, pay the same and that it had the necessary resources to do so.[23]

Fourth. The DOJ Resolution established that petitioners sustained damage as a result of the acts perpetrated against them. The damage is considerable as to petitioners. Gabionza lost P12,160,583.32 whereas Tan lost 16,411,238.57.[24] In addition, the DOJ Resolution noted that neither Roxas nor Nolasco disputed that ASBHI had borrowed funds from about 700 individual investors amounting to close to P4B.[25]

To the benefit of private respondents, the Court of Appeals ruled, citing *Sesbreno v. Court of Appeals*,[26] that the subject transactions "are akin to money market placements which partake the nature of a loan, the non-payment of which does not give rise to criminal liability for estafa." The citation is woefully misplaced. *Sesbreno* affirmed that "a money market transaction partakes the nature of a loan and therefore `nonpayment thereof would not give rise to criminal liability for estafa through misappropriation or conversion.'"[27] Estafa through misappropriation or conversion is punishable under Article 315(1)(b), while the case at bar involves Article 315 (2)(a), a mode of estafa by means of deceit. Indeed, *Sesbreno* explains: "In money market placement, the investor is a lender who loans his money to a borrower through a middleman or dealer. Petitioner here loaned

his money to a borrower through Philfinance. When the latter failed to deliver back petitioner's placement with the corresponding interest earned at the maturity date, the liability incurred by Philfinance was a civil one." [28] That rationale is wholly irrelevant to the complaint at bar, which centers not on the inability of ASBHI to repay petitioners but on the fraud and misrepresentation committed by ASBHI to induce petitioners to part with their money.

To be clear, it is possible to hold the borrower in a money market placement liable for estafa if the creditor was induced to extend a loan upon the false or fraudulent misrepresentations of the borrower. Such estafa is one by means of deceit. The borrower would not be generally liable for estafa through misappropriation if he or she fails to repay the loan, since the liability in such instance is ordinarily civil in nature.

We can thus conclude that the DOJ Resolution clearly supports a prima facie finding that the crime of estafa under Article 315 (2)(a) has been committed against petitioners. Does it also establish a prima facie finding that there has been a violation of the then-Revised Securities Act, specifically Section 4 in relation to Section 56 thereof?

Section 4 of Batas Pambansa Blg. 176, or the Revised Securities Act, generally requires the registration of securities and prohibits the sale or distribution of unregistered securities. [29] The DOJ extensively concluded that private respondents are liable for violating such prohibition against the sale of unregistered securities:

Respondents Roxas and Nolasco do not dispute that in 1998, ASB borrowed funds about 700 individual investors amounting to close to P4 billion, on recurring, short-term basis, usually 30 or 45 days, promising high interest yields, issuing therefore mere postdate checks. Under the circumstances, the checks assumed the character of "evidences of indebtedness," which are among the "securities" mentioned under the Revised Securities Act. The term "securities" embodies a flexible rather than static principle, one that is capable of adaptation to meet the countless and variable schemes devised by those who seek to use the money of others on the promise of profits (69 Am Jur 2d, p. 604). Thus, it has been held that checks of a debtor received and held by the lender also are evidences of indebtedness and therefore "securities" under the Act, where the debtor agreed to pay interest on a monthly basis so long as the principal checks remained uncashed, it being said that such principal extent as would have promissory notes payable on demand (*Id.*, p. 606, citing *United States v. Attaway* (DC La) 211 F Supp 682). In the instant case, the checks were issued by ASB in lieu of the securities enumerated under the Revised Securities Act in a clever attempt, or so they thought, to take the case out of the purview of the law, which requires prior license to sell or deal in securities and registration thereof. The scheme was to designed to circumvent the law. Checks constitute mere substitutes for cash if so issued in payment of obligations in the ordinary course of business transactions. But when they are issued in exchange for a big number of individual non-personalized loans solicited from the public, numbering about 700 in this case, the checks cease to be such. In such a circumstance, the checks assume the character of evidences of indebtedness. This is especially so where the individual loans were not evidenced by appropriate debt instruments, such as promissory notes, loan agreements, etc., as in this case. Purportedly, the postdated checks themselves serve as the evidences of the indebtedness. A different rule would open the floodgates for a similar scheme, whereby companies without prior license or authority from the SEC. This cannot be countenanced. The subsequent repeal of the Revised Securities Act does not spare respondents Roxas and Nolasco from prosecution thereunder, since the repealing law, Republic Act No. 8799 known as the "Securities Regulation Code," continues to punish the same offense (see Section 8 in relation to Section 73, R.A. No. 8799). [30]

The Court of Appeals however ruled that the postdated checks issued by ASBHI did not constitute a security under the Revised Securities Act. To support this conclusion, it cited the general definition of a check as "a bill of exchange drawn on a bank and payable on demand," and took cognizance of the fact that "the issuance of checks for the purpose of securing a loan to finance the activities of the corporation is well within the ambit of a valid corporate act" to note that a corporation does not need prior registration with the SEC in order to be able to issue a

check, which is a corporate prerogative.

This analysis is highly myopic and ignorant of the bigger picture. It is one thing for a corporation to issue checks to satisfy isolated individual obligations, and another for a corporation to execute an elaborate scheme where it would comport itself to the public as a pseudo-investment house and issue postdated checks instead of stocks or traditional securities to evidence the investments of its patrons. The Revised Securities Act was geared towards maintaining the stability of the national investment market against activities such as those apparently engaged in by ASBHI. As the DOJ Resolution noted, ASBHI adopted this scheme in an attempt to circumvent the Revised Securities Act, which requires a prior license to sell or deal in securities. After all, if ASBHI's activities were actually regulated by the SEC, it is hardly likely that the design it chose to employ would have been permitted at all.

But was ASBHI able to successfully evade the requirements under the Revised Securities Act? As found by the DOJ, there is ultimately a prima facie case that can at the very least sustain prosecution of private respondents under that law. The DOJ Resolution is persuasive in citing American authorities which countenance a flexible definition of securities. Moreover, it bears pointing out that the definition of "securities" set forth in Section 2 of the Revised Securities Act includes "commercial papers evidencing indebtedness of any person, financial or non-financial entity, irrespective of maturity, issued, endorsed, sold, transferred or in any manner conveyed to another."^[31] A check is a commercial paper evidencing indebtedness of any person, financial or non-financial entity. Since the checks in this case were generally rolled over to augment the creditor's existing investment with ASBHI, they most definitely take on the attributes of traditional stocks.

We should be clear that the question of whether the subject checks fall within the classification of securities under the Revised Securities Act may still be the subject of debate, but at the very least, the DOJ Resolution has established a prima facie case for prosecuting private respondents for such offense. The thorough determination of such issue is best left to a full-blown trial of the merits, where private respondents are free to dispute the theories set forth in the DOJ Resolution. It is clear error on the part of the Court of Appeals to dismiss such finding so perfunctorily and on such flimsy grounds that do not consider the grave consequences. After all, as the DOJ Resolution correctly pointed out: "[T]he postdated checks themselves serve as the evidences of the indebtedness. A different rule would open the floodgates for a similar scheme, whereby companies without prior license or authority from the SEC. This cannot be countenanced."^[32]

This conclusion quells the stance of the Court of Appeals that the unfortunate events befalling petitioners were ultimately benign, not malevolent, a consequence of the economic crisis that beset the Philippines during that era.^[33] That conclusion would be agreeable only if it were undisputed that the activities of ASBHI are legal in the first place, but the DOJ puts forth a legitimate theory that the entire modus operandi of ASBHI is illegal under the Revised Securities Act and if that were so, the impact of the Asian economic crisis would not obviate the criminal liability of private respondents.

Private respondents cannot make capital of the fact that when the DOJ Resolution was issued, the Revised Securities Act had already been repealed by the Securities Regulation Code of 2000.^[34] As noted by the DOJ, the new Code does punish the same offense alleged of petitioners, particularly Section 8 in relation to Section 73 thereof. The complained acts occurred during the effectivity of the Revised Securities Act. Certainly, the enactment of the new Code in lieu of the Revised Securities Act could not have extinguished all criminal acts committed under the old law.

In 1909-1910, the Philippine and United States Supreme Courts affirmed the principle that when the repealing act reenacts substantially the former law, and does not increase the punishment of the accused, "the right still exists to

punish the accused for an offense of which they were convicted and sentenced before the passage of the later act." [35] This doctrine was reaffirmed as recently as 2001, where the Court, through Justice Quisumbing, held in *Benedicto v. Court of Appeals* [36] that an exception to the rule that the absolute repeal of a penal law deprives the court of authority to punish a person charged with violating the old law prior to its repeal is "where the repealing act reenacts the former statute and punishes the act previously penalized under the old law." [37] It is worth noting that both the Revised Securities Act and the Securities Regulation Code of 2000 provide for exactly the same penalty: "a fine of not less than five thousand (P5,000.00) pesos nor more than five hundred thousand (P500,000.00) pesos or imprisonment of not less than seven (7) years nor more than twenty one (21) years, or both, in the discretion of the court." [38]

It is ineluctable that the DOJ Resolution established a *prima facie* case for violation of Article 315 (2)(a) of the Revised Penal Code and Sections 4 in relation to 56 of the Revised Securities Act. We now turn to the critical question of whether the same charges can be pinned against Roxas and Nolasco likewise.

The DOJ Resolution did not consider it exculpatory that Roxas and Nolasco had not themselves dealt directly with petitioners, observing that "to commit a crime, inducement is as sufficient and effective as direct participation." [39] This conclusion finds textual support in Article 17 [40] of the Revised Penal Code. The Court of Appeals was unable to point to any definitive evidence that Roxas or Nolasco did not instruct or induce the agents of ASBHI to make the false or misleading representations to the investors, including petitioners. Instead, it sought to acquit Roxas and Nolasco of any liability on the ground that the traders or employees of ASBHI who directly made the dubious representations to petitioners were never identified or impleaded as respondents.

It appears that the Court of Appeals was, without saying so, applying the rule in civil cases that all indispensable parties must be impleaded in a civil action. [41] There is no equivalent rule in criminal procedure, and certainly the Court of Appeals' decision failed to cite any statute, procedural rule or jurisprudence to support its position that the failure to implead the traders who directly dealt with petitioners is indeed fatal to the complaint. [42]

Assuming that the traders could be tagged as principals by direct participation in tandem with Roxas and Nolasco - the principals by inducement - does it make sense to compel that they be jointly charged in the same complaint to the extent that the exclusion of one leads to the dismissal of the complaint? It does not. Unlike in civil cases, where indispensable parties are required to be impleaded in order to allow for complete relief once the case is adjudicated, the determination of criminal liability is individual to each of the defendants. Even if the criminal court fails to acquire jurisdiction over one or some participants to a crime, it still is able to try those accused over whom it acquired jurisdiction. The criminal court will still be able to ascertain the individual liability of those accused whom it could try, and hand down penalties based on the degree of their participation in the crime. The absence of one or some of the accused may bear impact on the available evidence for the prosecution or defense, but it does not deprive the trial court to accordingly try the case based on the evidence that is actually available.

At bar, if it is established after trial that Roxas and Nolasco instructed all the employees, agents and traders of ASBHI to represent the corporation as financially able to engage in the challenged transactions and repay its investors, despite their knowledge that ASBHI was not established to be in a position to do so, and that representatives of ASBHI accordingly made such representations to petitioners, then private respondents could be held liable for estafa. The failure to implead or try the employees, agents or traders will not negate such potential criminal liability of Roxas and Nolasco. It is possible that the non-participation of such traders or agents in the trial will affect the ability of both petitioners and private respondents to adduce evidence during the trial, but it cannot quell the existence of the crime even before trial is had. At the very least, the non-identification or non-impleading of such traders or agents cannot negatively impact the finding of probable cause.

The assailed ruling unfortunately creates a wide loophole, especially in this age of call centers, that would create a nearly fool-proof scheme whereby well-organized criminally-minded enterprises can evade prosecution for criminal fraud. Behind the veil of the anonymous call center agent, such enterprises could induce the investing public to invest in fictional or incapacitated corporations with fraudulent impossible promises of definite returns on investment. The rule, as set forth by the Court of Appeals' ruling, will allow the masterminds and profiteers from the scheme to take the money and run without fear of the law simply because the defrauded investor would be hard-pressed to identify the anonymous call center agents who, reading aloud the script prepared for them in mellifluous tones, directly enticed the investor to part with his or her money.

Is there sufficient basis then to establish probable cause against Roxas and Nolasco? Taking into account the relative remoteness of private respondents to petitioners, the DOJ still concluded that there was. To repeat:

The false representations made by the ASB agents who dealt with the complainant-petitioners and who inveigled them into investing their funds in ASB are properly imputable to respondents Roxas and Nolasco, because they, as ASB's president and senior vice president/treasurer, respectively, respectively, in charge of its operations, directed its agents to make the false representations to the public, including the complainant-petitioners, in order to convince them to invest their moneys in ASB. It is difficult to make a different conclusion, judging from the fact that respondents Roxas and Nolasco authorized and accepted for ASB the fraud-induced loans.[43]

Indeed, the facts as thus established cannot lead to a definite, exculpatory conclusion that Roxas and Nolasco did not instruct, much less forbid, their agents from making the misrepresentations to petitioners. They could of course pose that defense, but such claim can only be established following a trial on the merits considering that nothing in the record proves without doubt such law-abiding prudence on their part. There is also the fact that ABSHI, their corporation, actually received the alleged amounts of money from petitioners. It is especially curious that according to the ASBHI balance sheets dated 31 December 1999, which petitioners attached to their affidavit-complaints,[44] over five billion pesos were booked as "advances to stockholder" when, according to the general information sheet for 1999, Roxas owned 124,996 of the 125,000 subscribed shares of ASBHI.[45] Considering that ASBHI had an authorized capital stock of only P500,000 and a subscribed capital of P125,000, it can be reasonably deduced that such large amounts booked as "advances to stockholder" could have only come from the loans extended by over 700 investors to ASBHI.

It is true that there are exceptions that may warrant departure from the general rule of non-interference with the determination of probable cause by the DOJ, yet such exceptions do not lie in this case, and the justifications actually cited in the Court of Appeals' decision are exceptionally weak and ultimately erroneous. Worse, it too hastily condoned the apparent evasion of liability by persons who seemingly profited at the expense of investors who lost millions of pesos. The Court's conclusion is that the DOJ'S decision to prosecute private respondents is founded on sufficient probable cause, and the ultimate determination of guilt or acquittal is best made through a full trial on the merits. Indeed, many of the points raised by private respondents before this Court, related as they are to the factual context surrounding the subject transactions, deserve the full assessment and verification only a trial on the merits can accord.

WHEREFORE, the petition is GRANTED. The assailed Decision and Resolution of the Court of Appeals dated 18 July 2003 and 28 November 2003 are REVERSED and SET ASIDE. The Resolutions of the Department of Justice in I.S. Nos. 2000-1418 to 1422 dated 15 October 2001 and 3 July 2002 are REINSTATED. Costs against private respondents.

Quisumbing, (Chairperson), Carpio Morales, and Brion, JJ., concur.
Velasco, Jr., JJ., Pls. see dissenting opinion.

[1] See rollo, pp. 466-558.

[2] Id. at 466, 515.

[3] Id.

[4] Id. at 467-468, 516-517.

[5] Id. at 83.

[6] Id. See also MBTC v. ASB Holdings, Inc., et.al, G.R. No. 166197, 27 February 2007.

[7] Id.

[8] Id. at 22.

[9] Through a Joint-Resolution dated 19 October 2000. See rollo, pp. 96-106.

[10] Rollo, pp. 108-110.

[11] Id. at 81-88.

[12] Id. at 89-92. In said Resolution, the DOJ also directed that two additional informations for estafa under Article 315(2)(a) be filed corresponding to the complaints filed by Ando Sy and Antonio Villareal, whose names "were inadvertently omitted in the dispositive portion of [the DOJ] resolution of October 15, 2001". Id., at 91.

[13] Id. at 52-62. Penned by Associate Justice R. De Guia-Salvador, concurred in by Associate Justice Marina L. Buzon and Jose C. Mendoza of the Court of Appeals Special Fifteenth Division.

[14] Id. at 76-77.

[15] Andres v. Cuevas, G.R. No. 150869, 9 June 2005, 460 SCRA 38, 52.

[16] Rollo, pp. 85-86.

[17] Aricheta v. People, G.R. No. 172500, 21 September 2007; citing Cosme Jr. v. People, G.R. No. 149753, 27 November 2006, 508 SCRA 190, 203-204.

[18] Rollo, p. 85.

[19] See e.g., id. at 480-501.

[20] Id. at 60-61.

[21] L. Reyes, II The Revised Criminal Code (2001 ed.) at 767; citing People v. Gines, et al. C.A., 61 O.G. 1365.

[22] Rollo, pp. 332-333.

[23] See id. at 467, 516.

[24] Id. at 84.

[25] Id. at 86.

[26] 310 Phil. 671 (1995).

[27] Id. at 681.

[28] Id. at 682.

[29] The provision reads in full:

SECTION 4. Requirement of registration of securities. -- (a) No securities, except of a class exempt under any of the provisions of Section five hereof or unless sold in any transaction exempt under any of the provisions of Section six hereof, shall be sold or offered for sale or distribution to the public within the Philippine unless such securities shall have been registered and permitted to be sold as hereinafter provided.

(b) Notwithstanding the provisions of paragraph (a) of this Section and the succeeding Sections regarding exemptions, no commercial paper as defined in Section two hereof shall be issued, endorsed, sold, transferred or in any other manner conveyed to the public, unless registered in accordance with the rules and regulations that shall be promulgated in the public interest and for the protection of investors by the Commission. The Commission, however, with due regard to the public interest and the protection of investors, may, by rules and regulations, exempt from registration any commercial paper that may otherwise be covered by this paragraph. In either case, the rules and regulations promulgated by the Commission shall be subject to the approval of the Monetary Board of the Central Bank of the Philippines. The Monetary Board shall, however, have the power to promulgate its own rules on the monetary and credit aspects of commercial paper issues, which may include the imposition of ceilings on issues by any single borrower, and the authority to supervise the enforcement of such rules and to require issues of commercial papers to submit their financial statements and such periodic reports as may be necessary for such enforcement. As far as practicable, such financial statements and periodic reports, when required by both the Commission and the Monetary Board, shall be uniform.

(c) A record of the registration of securities shall be kept in a Register of Securities in which shall be recorded orders entered by the Commission with respect to such securities. Such register and all documents or information with respect to the securities registered therein shall be open to the public inspection at reasonable hours on business days.

[30] Rollo, pp. 86-87.

[31] See Section 2, Revised Securities Act.

[32] Rollo, p. 87.

[33] Id. at 61.

[34] Dissenting Opinion, *infra*.

[35] *Ong Chang Wing v. U.S.*, 40 Phil. 1046, 1050 (1910).

[36] 416 Phil. 722 (2001).

[37] Id. at 744.

[38] See Section 56, Revised Securities Act and Section 73, Securities Regulation Code.

[39] Rollo, p. 86.

[40] Principals. - The following are considered principals:

- those who take a direct part in the execution of the act;
- Those who directly force or induce others to commit it;
- Those who cooperate in the commission of the offense by another act without which it would not have been accomplished.

[41] See 1997 Rules of Civil Procedure, Rule 3, Sec. 7.

[42] See rollo, p. 60.

[43] Id. at 86.

[44] Id. at 479, 525.

[45] See id. at 496, 540.

DISSENTING OPINION

VELASCO, JR., J.:

With all due respect, I dissent. The majority opinion, I respectfully submit, would be setting a highly dangerous precedent if it were to rule that there is a prima facie case for estafa under Article 315(2)(a) of the Revised Penal Code despite the undisputed fact that petitioners never directly dealt with private respondents, much less did the latter induce them to invest their money in their corporation, and without further proof or evidence presented for the alleged fraudulent scheme. Moreover, to hold that checks, as commercial instruments, when issued evidencing indebtedness to many persons, take the attributes of traditional stocks, i.e., they become "securities" under the then Revised Securities Act (RSA) which requires prior registration, is equally questionable; for the issuance and usage of checks in the normal course of business, even if they are for payment of an existing debt and issued post-dated, certainly do not need registration.

No Factual and Legal Basis of Probable Cause for Estafa

The undersigned finds no factual nor legal basis for a finding of probable cause for estafa for the following reasons:

First. Persuasive is the finding of the State Prosecutors who conducted the preliminary investigations of seven criminal complaints filed by petitioners and other investors of ASB Holdings, Inc. (ASBHI) against private respondents. The State Prosecutors found lack of probable cause to hale private respondents to court for the crimes alleged by petitioners. This finding has been affirmed by the Court of Appeals (CA) through the assailed decision setting aside the Resolution of the Secretary of Justice.

In gist, the State Prosecutors are one in concluding the absence of the key element of deceit imputable against private respondents; that ASBHI was not formed for illegal purposes; that the checks issued by ASBHI are not "securities" within the ambit of the law requiring Securities and Exchange Commission (SEC) registration of securities offered for sale to the public; that the short term loans extended by the individual investors in general and by the petitioners in particular created mere civil obligations; that there is no showing that ASBHI was engaged in quasi-banking activities; and that there is no scintilla of evidence tending to show that respondent Roxas misappropriated the money lent by the individual investors.

Second. It is likewise clear that there is no prima facie case for the crime of estafa under Art. 315(2)(a). As aptly put by the CA, private respondents had no direct dealing with the petitioners, thus effectively negating criminal responsibility imputed against them. For liability for estafa under said article to attach, it is indispensable that deceit or fraudulent misrepresentation made prior to or at least simultaneously with the delivery of the thing be employed on the offended party who parted with his property on account of such misrepresentation. This particular scenario did not occur in the instant case.

It must be noted that the criminal complaints, i.e., affidavit-complaints of petitioners, alleged that the fraudulent scheme was perpetrated personally by private respondents and through their agents. Private respondents vehemently denied this allegation. The Public Prosecutors who conducted the preliminary investigations found no direct dealing by private respondents with the petitioners.

Third. There was no false pretense, fraudulent act or fraudulent means perpetrated by private respondents prior to or simultaneous with the commission of the fraud. The fraudulent acts as alleged by petitioners and other complainants consisted of the following: that ASBHI was into the very same activities of ASB Realty, Corp., ASB Development Corp., and ASB Land, Inc. or otherwise held controlling interests in these corporations; that ASBHI could legitimately solicit funds from the public for investment/borrowing purposes; that ASBHI, by itself, or through the corporations aforesaid, owned real and personal properties which would support and justify its borrowing program; that ASBHI was connected with, and firmly backed by, DBS Bank in which Roxas held a substantial stake; and that ASBHI would, upon maturity of its checks it had issued to its lenders, pay the same and that it had necessary resources to do so.

The above enumerated acts or circumstances had been passed upon and duly scrutinized by the investigating State Prosecutors and were found unsupported by any evidence, or, at the very least, were not fraudulent. A perusal of the foregoing allegations would show that they remain to be mere allegations; they cannot and ought not to be used to support a finding of probable cause.

Fourth. The non-inclusion of the alleged agents of private respondents who allegedly inveigled petitioners, through the fraudulent scheme, to invest in ASB, is fatal to the criminal complaints. The ponencia belabored to make a distinction between criminal and civil cases, observing that each accused is personally answerable for the criminal act regardless of the inclusion of other accused or perpetrators. While there is indeed a difference between criminal and civil cases, yet the non-inclusion of the agent or agents who allegedly enticed the petitioners to part with their money is a clear indicium that no fraud was committed by the agents of private respondents. Proof is also absent that these alleged acts induced and perpetrated by private respondents.

While the issue on whether fraudulent pretenses or misrepresentations were employed to lure the petitioners and other investors to part with their money is evidentiary, no evidence whatsoever on said issue was presented at the summary proceedings of the preliminary investigation to show reasonable probability of private respondents' guilt. In the instant case, there is even no allegation as to the identity of the scheming agents who were allegedly acting under the direction of private respondents.

In a criminal prosecution, the State's resources are arrayed against an accused. Be this as it may, mere theories or allegations cannot and should not be taken as sufficient to overcome the presumption of innocence. In the instant case, the mere allegation and theory of a fraudulent scheme perpetrated against petitioners by private respondents through inducement should not be and cannot be a basis either for probable cause.

Fifth. Considering that ASBHI forms part of the ASB Group of Companies, its alleged undercapitalization is of no moment insofar as the advisability of petitioners' investing thereat is concerned. Evidently, ASBHI was taking loans from banks and investments from individual investors to finance the various real estate projects of the ASB Group of Companies. Before suffering business reverses, the ASB Group of Companies made good its commitment in terms of returns of the investments and paying its loan obligation to banks and other lending institutions.

As aptly found by the State Prosecutors, ASBHI was not formed for illegal purposes and that the short term loans extended by the individual investors in general and by the petitioners in particular were civil obligations but certainly not criminal in nature.

Check Not a Security

The majority agrees with the finding by the Secretary of Justice that the checks issued by ASBHI partake of the nature of "securities" under the RSA. With due respect, such a contention is erroneous. The theory that the checks issued by ASBHI to the general public, i.e., 700 individual investors, evidencing indebtedness, take the attributes of traditional stocks since they were generally rolled-over to augment the individual creditors' existing investment with ASBHI, has no legal basis and much less constitute a prima facie case for prosecuting private respondents for violation of the RSA.

First, checks cannot constitute securities, much less in the case at bar. Securities under Section 2 of the RSA has a definite meaning, thus:

(a) "Securities" shall include bonds, debentures, notes, evidences of indebtedness, shares in a company, pre-organization certificates or subscriptions, investment contracts, certificates of interest or participation in a profit sharing agreement, collateral trust certificates, equipment trust certificates (including condition sale contracts or similar interests or instruments serving the same purpose), voting trust certificates, certificates of deposit for a security, x x x or, in general, interests or instruments commonly considered to be "securities", or certificates of interest or participation in, temporary or interim certificates for, receipts for, guarantees of, or warrants or rights to subscribe to or buy or sell any of the foregoing; or commercial papers evidencing indebtedness of any person, financial or non-financial entity, irrespective of maturity, issued, endorsed, sold, transferred or in any manner conveyed to another, with or without recourse, such as promissory notes, repurchase agreements, certificates of assignments x x x, joint venture contracts, and similar contracts and investments where there is no tangible return on investments plus profits but an appreciation of capital as well as enjoyment of particular privileges and services.

From the foregoing, it is apparent that a check which is a form of a demand draft is not a security. If the legislature intended to include checks under the above definition of "securities," it could easily have done so but it did not. Besides, there is no jurisprudential authority defining and determining a check as a security. Thus, it is erroneous to conclude that a check is a security or to characterize it as a commercial instrument evidencing indebtedness.

Second, it is undisputed that the checks issued to petitioners were for the payment of their principal investment and interests thereof. The checks were not intended to be or to constitute promissory notes or to evidence indebtedness. They were issued to pay petitioners what ASBHI owed them. The individual investors were free to encash or deposit the checks, at their preference, either both for their principal investment and interest or only for the interest.

Third, the investments of the individual investors, either both principal and accrued interest or the principal alone, are what are commonly called in financial and business parlance as "rolled-over." The checks issued for the payment of their principal investment and the interest thereof are not "rolled-over," as mistakenly asserted by the majority Decision. In case the investors rolled-over their investments, i.e., the individual investors plow back their principal investment and/or interest, they surrender their matured checks and new post-dated checks representing their new principal investment--if they earned or accrued interests were likewise rolled-over--and the interest due at the end of the 30- or 45-day agreed term.

Fourth, the issuance by and the eventual inability of ASBHI to pay the maturing checks cannot constitute a prima facie case for violation of the RSA or the Securities Regulation Code of 2000, for it would open the floodgates for undue prosecution under either law by payees of bouncing checks. The American jurisprudence cited by the Secretary of Justice giving a more flexible interpretation of a check to bring it within the purview of being a security is misplaced in the instant case. By no stretch of imagination can a check constitute a security that can be

traded, and thus the necessity for its registration. A check is a check, a means of payment used in business in lieu of money for convenience in business transactions. It cannot be traded like securities.

Finally, the ponencia made much of the theories set forth in the resolution of the Secretary of Justice which, I believe, are clearly without factual or legal basis. They remain to be theories, no more, no less.

In fine, an ill-advised criminal prosecution will only entail wasted money, resources and effort by the government and both parties aside from the public humiliation and undue suffering respondents will undergo in a needless trial, bearing in mind what this Court held in *Ledesma v. Court of Appeals*[1] and in *Crespo v. Mogul*.^[2] The lethal repercussions of the majority opinion in the present case cannot and should not be ignored.

WHEREFORE, I vote to DISMISS the petition. I maintain that there is no prima facie case to hold private respondents criminally liable for either estafa or violation of the RSA, as duly found by State Prosecutors Rosario Rodrigo-Larracas and Lagrimas T. Agaran, who conducted the preliminary investigations of the seven criminal complaints filed by petitioners and others, which was likewise affirmed by the appellate court.

[1] G.R. No. 113216, September 5, 1997, 278 SCRA 657. The Court held:

The primary objective of a preliminary investigation is to free respondent from the inconvenience, expense, ignominy and stress of defending himself/herself in the course of a formal trial, until the reasonable probability of his or her guilt in a more or less summary proceeding by a competent office designated by law for that purpose. Secondly, such summary proceeding also protects the state from the burden of the unnecessary expense and effort in prosecuting alleged offenses and in holding trials arising from false, frivolous or groundless charges.

[2] No. L-53373, June 30, 1987, 151 SCRA 462. The Court likewise held that:

Prosecuting officers under the power vested in them by law, not only have the authority but also the duty of prosecuting persons who, according to the evidence received from the complainant, are shown to be guilty of a crime committed within the jurisdiction of their office. They have equally the duty not to prosecute when the evidence adduced is not sufficient to establish a prima facie case.

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