

PAYAKAN G. TILENDO, PETITIONER, VS. OMBUDSMAN AND SANDIGANBAYAN, RESPONDENTS.

G.R. NO. 165975. September 13, 2007

Ponente: CARPIO, J.

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CARPIO, J.:

The Case

This petition for certiorari[1] with prayer for the issuance of a temporary restraining order assails the 13 January 2004 Resolution[2] and the 14 October 2004 Order[3] of the Office of the Ombudsman (Ombudsman) in Case No. OMB-M-C-02-0632-K. The Ombudsman found probable cause against Payakan G. Tilendo (Tilendo) for malversation under Article 217 of the Revised Penal Code (RPC) and violation of Section 3(e) of Republic Act No. 3019 (RA 3019) or the Anti- Graft and Corrupt Practices Act.

The Facts

In 1993, Tilendo was appointed as President of the Cotabato City State Polytechnic College (CCSPC).

In 1996, the CCSPC had an appropriation of P6 million for the construction of its Agriculture Building and Science Academic Building.[4] The Department of Budget and Management Regional Office in Cotabato City released P5.7 million to the CCSPC, after deducting the 5% reserve. Out of this amount, P3,496,797 was allocated for the construction of the Agriculture Building. The release of this amount to CCSPC was evidenced by the following Notices of Cash Allocation (NCA): (a) P237,500 per NCA dated 23 January 1996; (b) P702,640 per NCA dated 3 June 1996; (c) P763,477 per NCA dated 19 September 1996; and (d) P1,793,180 per NCA dated 4 October 1996.

In December 1998, the "Concerned Faculty Members" of the CCSPC filed before the Ombudsman a letter-complaint against Tilendo for violation of RA 3019.

The complaint basically alleged that Tilendo enriched himself and his family while he was President of the CCSPC, using government funds for personal purposes. The complaint likewise accused Tilendo of diverting and misusing the funds allocated for the construction of the CCSPC Agriculture Building. The complaint pertinently reads:

3. Sometime in the late part of 1995, the decades-old academic main building was demolished on instruction of Dr. Tilendo. Coincidentally, an allotment of P6,000,000.00 was released by the Department of Budget and Management for the construction of an agricultural building in the college satellite campus at Rebuken, Sultan Kudarat, Maguindanao. x x x There are no engineering designs, plans and bill of materials. The contractor, Mr. Mohammad Oliver Uka, who is his nephew was so obedient to Dr. Tilendo that he blindly obeyed his instructions.

Instead of utilizing the allotment for putting-up the agricultural building, he only instructed Mr. Uka to buy steel bars, cement, sand and gravel and hollow blocks. Other materials like lumber, G.I. sheets were taken from the scrap materials of the demolished academic school building. x x x This illegal act was in connivance with

his nephew-contractor MR. MOHAMMAD OLIVER "BOY" UKA who is subservient to all the wishes and decisions of his uncle Dr. Tilendo. We believe that only an actual inspection of the building can prove the truth. He and his Budget Officer MR. PASTOR T. TAGURA has (sic) many ways to conceal facts and justify their actions. Any document that will show an implementation of the project is a mere fabrication in cahoots with other government officials to cover-up his anomalous activities and enrich himself while in office.

The conversion of [Tilendo's] 2-door apartment into a 3-storey building took place while the agricultural building is being constructed. Truckloads of construction materials were delivered from the Pigcawayan Hardware in the Poblacion Pigcawayan, Cotabato and other hardware in Cotabato City to two (2) destinations — his house in Pigcawayan and the house of his 3rd wife, MS. SAMSIA IBRAHIM.[5]

On 2 February 1999, the Office of the Deputy Ombudsman for Mindanao (Deputy Ombudsman-Mindanao) forwarded the anonymous complaint, docketed as CPL-MIN-99-003, to the then Ministry of Education, Culture and Sports (Ministry of Education) for the conduct of a fact-finding investigation.

The Ministry of Education transmitted the complaint to the Chairman of the Board of Trustees of the CCSPC to decide on who should conduct the investigation.

In a letter dated 19 March 1999, Commission on Higher Education (CHED) Chairman Angel C. Alcala instructed CHED Region XII Director, Dr. Carmen V. Dormitorio (Dormitorio), to form and head a committee, together with two other members, which would investigate on the complaints against Tilendo, among others.

On 28 June 1999, the two investigating members of Dormitorio's committee reported that it was the Commission on Audit (COA) which could determine whether the government funds were properly used or misused. The CHED alleged that it had neither the authority to examine the CCSPC's records nor the technical knowledge of government accounting and auditing procedures.

The Deputy Ombudsman-Mindanao also endorsed the anonymous complaint to the National Bureau of Investigation (NBI), Region XII for the conduct of a fact-finding investigation.

Subsequently, the NBI subpoenaed Tilendo several times and informed him of the complaints against him.[6] Tilendo, through counsel, requested for several extensions of time to submit his counter-affidavit. It was only on 22 October 1999 that he filed his counter- affidavit.[7]

On 10 March 2000, the NBI filed a Report on the investigation confirming that, despite the P10,080,000 three-year allocation for the construction of the Agriculture Building, only P300,000 was actually used for this construction project. Further, only scrap materials from the old Administrative Building were used. The pertinent portions of the report read:

Investigation conducted disclosed that the construction of Agricultural Building a[t] Rebuken, Sultan Kudarat, Maguindanao has an appropriation of P10,800,000.00 in three years broken down as follows, i.e., in 1996 GAA P6,000,000.00, in 1997 GAA P1,080,000.00 and in 1998 GAA P3,000,000.00. Witnesses alleged that the project was constructed without the necessary Engineering Designs, Plans and Programs of Work. Most of the materials used were scrap materials of the demolished Old Administrative Building at CCSPC Campus, Cotabato City and the estimated amount spent for the said project did not exceed P300,000.00. The said allegations were corroborated by the COA Special Audit finding conducted on September 1996. The same COA report further states that the balance was used in the construction of the Science Building and the Makeshift Building at Main Campus. However, the realignment of such funds do not have the AUTHORITY from the DBM. Inspection conducted by the NBI Investigators disclosed that the project at Rebuken, Sultan Kudarat, Maguindanao was not completed and some of the materials used were indeed scrap.[8]

x x x x

COMMENTS AND OBSERVATIONS:

x x x

The alleged Program of Works prepared by ENGR. HASANADDIN S. MAMA, designated Project Engineer of CCSPC in 1996 per directive of [Tilendo] did not jibe or correspond to the P6 million appropriation of the said project without mentioning the additional budget of the project in 1997 and 1998, as what was prepared was only P1.05 million budget only.

The Counter-Affidavit of President Payakan G. Tilendo did not fully explain the P6 million budget of the Construction of Agricultural Building at Rebuken Sultan, Kudarat, Maguindanao which is the subject of this investigation, rather it pertains to the Construction of Extension (4th Floor) of Academic Building in the amount of P1,865,000.00. x x x

The admission of [Tilendo] in his Counter-Affidavit that the project had been completed in accordance with the funds duly allocated thereto, and in consonance with the government bidding procedures, Accounting and Auditing regulations and all other legal documents are devoid of merit considering that the documents submitted showed that it did not respond to the questioned project.

The attached publication of the Invitation to Bid dated February 27 to March 1, 1997 which is published one year after the project or the Construction of the Agricultural Building at Rebuken, Sultan Kudarat, Maguindanao was started sometime in April 1996. The alleged publication seems to be that of the Construction of the Extension of Academic Building. In the instant case, NO AUTHORITY FOR THE REALIGNMENT OF FUNDS FROM DBM was given to the CCSPC Management.[9]

On 26 April 2002, the Deputy Ombudsman-Mindanao received the NBI report charging Tilendo, Samaon A. Ebrahim, Wilhelmina B. Monte de Ramos, and Abdulla Oliver Uka with violation of Section 3(e) of RA 3019, and Articles 217, 218, and 219 of the RPC.

In January 2003, Tilendo filed his counter-affidavit,[10] alleging, among others, that the "dragging of the case for more than three years in preliminary investigation stage without his fault is violative of his right to speedy disposition of cases." Tilendo also denied the allegations against him, insisting that the complaint was aimed purely at harassing him. Tilendo claimed that the construction of the CCSPC Agriculture Building was completed using the funds allocated for it, and following government bidding procedures and auditing regulations.

In its Resolution dated 13 January 2004, the Deputy Ombudsman-Mindanao disposed of the complaint, as follows:

WHEREFORE, PREMISES CONSIDERED, this Office finds probable cause to believe that the crime of Malversation and Violation of Section 3(e) of RA 3019 were committed and that respondent DR. PAYAKAN G. TILENDO is probably guilty thereof. Consequently, let the herein attached Informations be filed with the proper court.

Further, the charges against respondents SAMAON A. EBRAHIM, WHILHELMINA B. MONTE DE RAMOS, ABDULLA OLIVER UKA, and NESTOR VILLARIN are hereby DISMISSED for insufficiency of evidence.

Lastly, the National Bureau of Investigation is hereby directed to forward to the Office of the Special Prosecutor the original copy of their report, subject matter of the instant case, together with its annexes.

SO RESOLVED.[11]

Tilendo moved for reconsideration which the Ombudsman denied in its Order dated 14 October 2004.

Hence, this petition.

The Ruling of the Ombudsman

The Ombudsman found probable cause against Tilendo for malversation under Article 217 of the RPC and violation of Section 3(e) of RA 3019.

The Ombudsman found that since Tilendo received the P3,496,797 appropriated and released to the CCSPC for the construction of the Agriculture Building, Tilendo, as head of the CCSPC, is accountable for this amount. Tilendo, however, failed to account for the fund.

The Ombudsman found several lapses in the disbursement of the funds making it impossible for Tilendo to liquidate the amount. First, the construction of the Agriculture Building was haphazardly done. Second, there was no bidding for the construction project as required by law. Third, scrap materials were used in the construction. Fourth, there was no showing when the construction was completed and whether the construction was according to the alleged plans. Finally, the funds for the construction of the Agriculture Building were used for another building within the CCSPC main campus. However, Tilendo failed to show the actual amount used for the construction of this other building.

The Ombudsman also found that Tilendo's acts caused undue injury to the government through bad faith. The amount released for the construction of the Agriculture Building could not be liquidated and was presumed to have been lost due to Tilendo's misappropriation. The use of scrap materials for the construction of a supposedly new building, while it might bring savings to the government, was actually hazardous to the lives of those who would use the building.

The Issues

Tilendo seeks the reversal of the assailed resolutions on the following grounds:

- The Ombudsman acted with grave abuse of discretion amounting to lack or excess of jurisdiction in disregarding his constitutional right to speedy disposition of cases.
- The Ombudsman acted with grave abuse of discretion in finding probable cause against him for malversation under Article 217 of the RPC and for violation of Section 3(e) of RA 3019, as amended.[12]

The Ruling of this Court

The petition has no merit.

On Tilendo's right to speedy disposition of cases

Tilendo contends that the cases against him dragged for more than three years in preliminary investigation phase without his fault. The anonymous letters addressed to the Ombudsman were dated 4 and 28 December 1998. The Ombudsman referred the matter to the NBI which required Tilendo to file his counter-affidavit, which he did only on 22 October 1999. Nothing was heard from the NBI or the Ombudsman until January 2003 when the Ombudsman directed Tilendo to submit his counter-affidavit to the various criminal charges against him. According to Tilendo, the inordinate delay in the termination of the preliminary investigation violates his right to speedy disposition of cases.

The right to "a speedy disposition of cases" is enshrined in the Constitution. Section 16 of Article III of the Constitution provides: "All persons shall have the right to a speedy disposition of their cases before all judicial, quasi-judicial or administrative bodies." This right, however, is considered violated only when the proceedings is attended by vexatious, capricious, and oppressive delays, which are absent in this case.[13]

The concept of speedy disposition of cases is relative or flexible.[14] A simple mathematical computation of the

time involved is insufficient. The facts and circumstances peculiar to each case must be examined.[15] In ascertaining whether the right to speedy disposition of cases has been violated, the following factors must be considered: (1) the length of delay; (2) the reasons for the delay; (3) the assertion or failure to assert such right by the accused; and (4) the prejudice caused by the delay.[16]

In this case, there was no unreasonable delay to speak of because the preliminary investigation stage officially began when the NBI filed before the Ombudsman a complaint against Tilendo for violation of the relevant provisions of RA 3019 and the RPC. Contrary to Tilendo's view, the preliminary investigation did not automatically commence upon the filing of the anonymous letters in the Ombudsman.[17]

Administrative Order No. 07 (AO 7), as amended, or the Rules of Procedure of the Office of the Ombudsman outlines the procedure applicable to all criminal and administrative complaints cognizable by the Ombudsman. Section 2, Rule II of AO 7 clearly states that "upon evaluating the complaint, the investigating officer shall recommend whether it may be: (a) dismissed outright for want of palpable merit; (b) referred to respondent for comment; (c) endorsed to the proper government office or agency which has jurisdiction over the case; (d) forwarded to the appropriate office or official for fact-finding investigation; or (e) referred for administrative adjudication; or (f) subjected to a preliminary investigation."

Significantly, the Court held in *Raro v. Sandiganbayan*,[18] that by referring the complaint to the NBI, the Ombudsman did not thereby delegate the conduct of the preliminary investigation of the case to the NBI. What was delegated was only the fact-finding function, preparatory to the preliminary investigation still to be conducted by the Ombudsman.

In this case, after the fact-finding investigation, the NBI reported its findings to the Ombudsman and consequently filed a complaint against Tilendo for various criminal charges. If we consider the fact-finding investigation conducted by the NBI as part of the preliminary investigation stage, then the NBI served a conflicting role. The NBI acted as the investigating body on the charges against Tilendo, and thereafter, acted as the complainant against Tilendo. This is absurd. What the NBI clearly did, in accordance with Section 2(d) of Rule II of AO 7, was to analyze the facts and gather evidence which could either exonerate or further implicate Tilendo in the offenses charged.

Further, the NBI is not among those authorized under Section 3, Rule II of AO 7 to conduct preliminary investigations for complaints cognizable by the Ombudsman, to wit:

- 1) Ombudsman Investigators;
- 2) Special Prosecuting Officers;
- 3) Deputized Prosecutors;
- 4) Investigating Officials authorized by law to conduct preliminary investigations; or
- 5) Lawyers in the government service, so designated by the Ombudsman.

Even assuming there was delay in the termination of the preliminary investigation, Tilendo is deemed to have slept on his right to a speedy disposition of cases. From 22 October 1999, when he submitted to the NBI his counter-affidavit, after asking for several extensions of time, Tilendo did nothing until December 2002. It seems that Tilendo was insensitive to the implications and contingencies of the projected criminal prosecution posed against him. He did not take any step whatsoever to accelerate the disposition of the matter. Tilendo's inaction gives the impression that he did not object to the supervening delay, and hence it was impliedly with his acquiescence.[19] He did not make any overt act like, for instance, filing a motion for early resolution. He asserted his right to a speedy disposition of cases only when the Deputy Ombudsman-Mindanao required him to file his counter-affidavit to the NBI complaint.

Tilendo's contention of violation of his right to speedy disposition of cases must fail. There was no unreasonable and unjustifiable delay which attended the resolution of the complaints against him in the preliminary investigation phase.

On the finding of probable cause for the offenses charged

The Ombudsman conducts preliminary investigations in accordance with Section 3, Rule 112 of the Rules of Court, subject to the provisions in Section 4, Rule II of AO 7.

A preliminary investigation is an inquiry or proceeding to determine whether there is sufficient ground to engender a well-founded belief that a crime has been committed and the respondent is probably guilty thereof, and should be held for trial.[20] Stated differently, during the preliminary investigation, the prosecutor, or the Ombudsman in this case, determines whether there is probable cause to hold the respondent for trial.

Probable cause is the "existence of such facts and circumstances as would excite the belief in a reasonable mind, acting on the facts within the knowledge of the prosecutor, that the person charged was guilty of the crime for which he was prosecuted." [21]

In this case, the Ombudsman found probable cause against Tilendo for malversation under Article 217 of the RPC and for violation of Section 3(e) of RA 3019.

Article 217 of the RPC states:

Art. 217. Malversation of public funds or property. — Presumption of malversation. Any public officer who, by reason of the duties of his office, is accountable for public funds or property, shall appropriate the same, or shall take or misappropriate or shall consent, or through abandonment or negligence, shall permit any other person to take such public funds or property, wholly or partially, or shall otherwise be guilty of the misappropriation or malversation of such funds or property, shall suffer: x x x

Section 3(e) of RA 3019 provides:

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:

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.

This Court, as a rule, does not interfere with the Ombudsman's determination of probable cause to accord respect to the discretion granted to the Ombudsman and for reasons of practicality. Otherwise, courts would be swamped with petitions to review the Ombudsman's findings in preliminary investigations.[22] An exception to this rule is where the Ombudsman abused his discretion by ignoring clear insufficiency of evidence to support a finding of probable cause, thus denying the accused his right to substantive and procedural due process.[23] Here, no such conduct can be imputed on the Ombudsman. Thus, we apply the rule.

The Ombudsman found that Tilendo failed to account for the subject funds. According to the Ombudsman, it would even be an impossibility to account for the funds due to the various lapses in its disbursement. The Ombudsman cited the haphazard construction of the Agriculture Building, the absence of any bidding required by

law, the usage of scrap materials, the failure to show the completion date of the building, and the failure to show the actual amount spent for the construction of another building within the CCSPC main campus.

Tilendo's claims of non-receipt of the subject funds, as well as his good faith in the transfer of the Agriculture Building to the main campus, constitute evidentiary matters that must be ventilated in a full-blown trial and not during the preliminary investigation. The presence or absence of the elements of the crimes, which are by their nature evidentiary and defense matters, can be best passed upon after a trial on the merits. A preliminary investigation is not the occasion for the full and exhaustive display of the parties' evidence. What is presented is evidence only as may engender a well-founded belief that an offense has been committed and that the accused is probably guilty thereof.[24]

Whether Tilendo, as a public officer, had custody or control of the funds allocated for the construction of the CCSPC Agriculture Building, and whether he misappropriated the same are matters requiring an examination of the parties' evidence, which are not found in the case records and which can be properly threshed out during the trial.

Based on the records, Tilendo, as President of the CCSPC, after being asked to liquidate the amount released to the CCSPC for the construction of the Agriculture Building, failed to account for the funds. Thus, the presumption that he misused or misappropriated the funds arises, resulting to the finding of probable cause for malversation under Article 217 of the RPC. On the other hand, the haphazard construction of the Agriculture Building, the absence of any bidding for its construction, the usage of scrap materials for the construction of a school building in CCSPC, and the lack of engineering plans clearly demonstrate undue injury to the government. These circumstances support the finding of probable cause for violation of Section 3(e) of RA 3019. Whether there was bad faith on Tilendo's part is a different matter which necessarily is subject to proof.

Further, nowhere in the records did Tilendo sufficiently rebut the Ombudsman's findings or clearly explain what actually happened to the construction project. Tilendo admits that there was no construction of the Agriculture Building in Rebuken in 1996. Instead, a school building was constructed using funds from the CCSPC's MOOE, which construction project used scrap materials taken from the demolished main building.[25] He also claims that the construction of the Agriculture Building had to be transferred due to the peace and order problem in the original site. During the fact-finding investigation, Tilendo submitted an "Invitation to Bid" which was published in the 23 February-1 March 1997 issue of The Mindanao Newscast,[26] but there was no evidence that a bidding was held on the scheduled dates. He also presented documents pertaining to the construction of the Academic Building and a make-shift building, not the Agriculture Building, such as (1) a "Notice of Award" to Esperanza Gold Construction for the extension (4th floor) of the Academic Building in the amount of P1,865,000;[27] (2) a list of materials and labor requirements with their corresponding value;[28] and (3) floor plans.[29] Instead of showing completion of the Agriculture Building, Tilendo introduced an "Inspection/Evaluation Report" dated 30 April 1999 referring to the 54.71% accomplishment of the construction of a two-storey Main Library Building inside the CCSPC Campus worth more than P5.2 million and whose contractor was "FFJJ Construction." [30]

Tilendo insists that he merely exercised administrative supervision and points to the CCSPC treasury as the recipient of the funds and to the foreman, engineers, and workers as the ones who made the expenses for the construction. Apparently, Tilendo is suggesting that these personnel were responsible for the misuse or misappropriation of the funds. However, Tilendo miserably failed to substantiate his allegations. He did not even attempt to mention names to clear his own name. Tilendo seems contented with alleging that these personnel "made the liquidations of the amounts they spent for the construction." [31] Aside from this bare allegation, Tilendo did not introduce any convincing evidence that he had no participation whatsoever with the unsatisfactory construction of the Agriculture Building and the apparent wastage or diversion of the public funds.

Thus, we sustain the finding of probable cause against Tilendo for malversation under Article 217 of the RPC and for violation of Section 3(e) of RA 3019.

WHEREFORE, we DISMISS the petition.

SO ORDERED.

Quisumbing, (Chairperson), Carpio-Morales, Tinga, and Velasco, Jr., JJ., concur.

[1] Under Rule 65 of the Rules of Court.

[2] Rollo, pp. 17-40. Penned by Graft Investigation and Prosecution Officer II Joy C. Rubillar-Arao. Reviewed by Director Corazon A. Arancon with Deputy Ombudsman for Mindanao Antonio E. Valenzuela recommending approval.

[3] Id. at 41-45.

[4] Id. at 23.

[5] Id. at 47-48.

[6] Id. at 129.

[7] Id.

[8] Id. at 128.

[9] Id. at 131-132.

[10] Id. at 83.

[11] Id. at 39.

[12] Id. at 6.

[13] Dela Peña v. Sandiganbayan, 412 Phil. 921, 929 (2001) citing Cojuangco, Jr. v. Sandiganbayan, 360 Phil. 559, 587 (1998); Blanco v. Sandiganbayan, 399 Phil. 674, 682 (2000).

[14] Dela Peña v. Sandiganbayan, 412 Phil. 921, 929 (2001).

[15] Id.

[16] Id.

[17] See Blanco v. Sandiganbayan, *supra*.

[18] 390 Phil. 917, 944 (2000).

[19] *Supra* note 14.

[20] Section 1, Rule 112 of the Rules of Court.

[21] *Ladlad v. Velasco*, G.R. Nos. 172070-72, 1 June 2007 citing *Cruz, Jr. v. People*, G.R. No. 110436, 27 June 1994, 233 SCRA 439.

[22] See *Ladlad v. Velasco*, G.R. Nos. 172070-72, 1 June 2007; *Osorio v. Desierto*, G.R. No. 156652, 13 October 2005, 472 SCRA 559.

[23] See *Ladlad v. Velasco*, G.R. Nos. 172070-72, 1 June 2007 citing *Allado v. Diokno*, G.R. No. 113630, 5 May 1994, 232 SCRA 192 and *Salonga v. Cruz-Paño*, No. L-59524, 18 February 1985, 134 SCRA 438.

[24] *Osorio v. Desierto*, *supra* note 22.

[25] *Rollo*, p. 230.

[26] *Id.* at 60.

[27] *Id.* at 62.

[28] *Id.* at 64-66, 68-70.

[29] *Id.* at 67 and 71.

[30] *Id.* at 81.

[31] *Id.* at 8.

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