

LUIS A. TABUENA, PETITIONER, VS. HONORABLE SANDIGANBAYAN, AND THE PEOPLE OF THE PHILIPPINES, RESPONDENTS.

G.R. Nos. 103501-03. February 17, 1997

Ponente: FRANCISCO, J.

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FRANCISCO, J.:

Through their separate petitions for review,[1] Luis A. Tabuena and Adolfo M. Peralta (Tabuena and Peralta, for short) appeal the Sandiganbayan decision dated October 12, 1990,[2] as well as the Resolution dated December 20, 1991[3] denying reconsideration, convicting them of malversation under Article 217 of the Revised Penal Code. Tabuena and Peralta were found guilty beyond reasonable doubt of having malversed the total amount of P55 Million of the Manila International Airport Authority (MIAA) funds during their incumbency as General Manager and Acting Finance Services Manager, respectively, of MIAA, and were thus meted the following sentence:

“(1) In Criminal Case No. 11758, accused Luis A. Tabuena is sentenced to suffer the penalty of imprisonment of seventeen (17) years and one (1) day of reclusion temporal as minimum to twenty (20) years of reclusion temporal as maximum, and to pay a fine of TWENTY-FIVE MILLION PESOS (P25,000,000.00), the amount malversed. He shall also reimburse the Manila International Airport Authority the sum of TWENTY-FIVE MILLION PESOS (P25,000,000.00).

In addition, he shall suffer the penalty of perpetual special disqualification from public office.

“(2) In Criminal Case No. 11759, accused Luis A. Tabuena is sentenced to suffer the penalty of imprisonment of seventeen (17) years and one (1) day of reclusion temporal as minimum, and twenty (20) years of reclusion temporal as maximum, and to pay a fine of TWENTY-FIVE MILLION PESOS (P25,000,000.00), the amount malversed. He shall also reimburse the Manila International Airport Authority the sum of TWENTY-FIVE MILLION PESOS (P25,000,000.00).

In addition, he shall suffer the penalty of perpetual special disqualification from public office.

“(3) In Criminal Case No. 11760, accused Luis A. Tabuena and Adolfo M. Peralta are each sentenced to suffer the penalty of imprisonment of seventeen (17) years and one (1) day of reclusion temporal as minimum and twenty (20) years of reclusion temporal as maximum and for each of them to pay separately a fine of FIVE MILLION PESOS (P5,000,000.00) the amount malversed. They shall also reimburse jointly and severally the Manila International Airport Authority the sum of FIVE MILLION PESOS (P5,000,000.00).

In addition, they shall both suffer the penalty of perpetual special disqualification from public office.

A co-accused of Tabuena and Peralta was Gerardo G. Dabao, then Assistant General Manager of MIAA, has remained at large.

There were three (3) criminal cases filed (nos. 11758, 11759 and 11760) since the total amount of P55 Million was taken on three (3) separate dates of January, 1986. Tabuena appears as the principal accused - he being charged in all three (3) cases. The amended informations in criminal case nos. 11758, 11759 and 11760

respectively read:

“That on or about the 10th day of January, 1986, and for sometime subsequent thereto, in the City of Pasay, Philippines, and within the jurisdiction of this Honorable Court, accused Luis A. Tabuena and Gerardo G. Dabao, both public officers, being then the General Manager and Assistant General Manager, respectively, of the Manila International Airport Authority (MIAA), and accountable for public funds belonging to the MIAA, they being the only ones authorized to make withdrawals against the cash accounts of MIAA pursuant to its board resolutions, conspiring, confederating and confabulating with each other, did then and there wilfully, unlawfully, feloniously, and with intent to defraud the government, take and misappropriate the amount of TWENTY FIVE MILLION PESOS (P25,000,000.00) from MIAA funds by applying for the issuance of a manager’s check for said amount in the name of accused Luis A. Tabuena chargeable against MIAA’s Savings Account No. 274-500-354-3 in the PNB Extension Office at the Manila International Airport in Pasay City, purportedly as partial payment to the Philippine National Construction Corporation (PNCC), the mechanics of which said accused Tabuena would personally take care of, when both accused well knew that there was no outstanding obligation of MIAA in favor of PNCC, and after the issuance of the above-mentioned manager’s check, accused Luis A. Tabuena encashed the same and thereafter both accused misappropriated and converted the proceeds thereof to their personal use and benefit, to the damage and prejudice of the government in the aforesaid amount.

CONTRARY TO LAW.”

x x x

“That on or about the 16th day of January, 1986, and for sometime subsequent thereto, in the City of Pasay, Philippines and within the jurisdiction of this Honorable Court, accused Luis A. Tabuena and Gerardo G. Dabao, both public officers, being then the General Manager and Assistant General Manager, respectively, of the Manila International Airport Authority (MIAA), and accountable for public funds belonging to the MIAA, they being the only ones authorized to make withdrawals against the cash accounts of MIAA pursuant to its board resolutions, conspiring, confederating and confabulating with each other, did then and there wilfully, unlawfully, feloniously, and with intent to defraud the government, take and misappropriate the amount of TWENTY FIVE MILLION PESOS (P25,000,000.00) from MIAA funds by applying for the issuance of a manager’s check for said amount in the name of accused Luis A. Tabuena chargeable against MIAA’s Savings Account No. 274-500-354-3 in the PNB Extension Office at the Manila International Airport in Pasay City, purportedly as partial payment to the Philippine National Construction Corporation (PNCC), the mechanics of which said accused Tabuena would personally take care of, when both accused well knew that there was no outstanding obligation of MIAA in favor of PNCC, and after the issuance of the above-mentioned manager’s check, accused Luis A. Tabuena encashed the same and thereafter both accused misappropriated and converted the proceeds thereof to their personal use and benefit, to the damage and prejudice of the government in the aforesaid amount.

CONTRARY TO LAW.”

x x x

“That on or about the 29th day of January, 1986, and for sometime subsequent thereto, in the City of Pasay, Philippines, and within the jurisdiction of this Honorable Court, accused Luis A. Tabuena and Adolfo M. Peralta, both public officers, being then the General Manager and Acting Manager, Financial Services Department, respectively, of the Manila International Airport Authority (MIAA), and accountable for public funds belonging to the MIAA, they being the only ones authorized to make withdrawals against the cash accounts of MIAA pursuant to its board resolutions, conspiring, confederating and confabulating with each other, did then and there wilfully, unlawfully, feloniously, and with intent to defraud the government, take and misappropriate the amount of FIVE MILLION PESOS (P5,000,000.00) from MIAA funds by applying for the issuance of a manager’s check for said amount in the name of accused Luis A. Tabuena chargeable against

MIAA's Savings Account No. 274-500-354-3 in the PNB Extension Office at the Manila International Airport in Pasay City, purportedly as partial payment to the Philippine National Construction Corporation (PNCC), the mechanics of which said accused Tabuena would personally take care of, when both accused well knew that there was no outstanding obligation of MIAA in favor of PNCC, and after the issuance of the above-mentioned manager's check, accused Luis A. Tabuena encashed the same and thereafter both accused misappropriated and converted the proceeds thereof to their personal use and benefit, to the damage and prejudice of the government in the aforesaid amount.

CONTRARY TO LAW.”

Gathered from the documentary and testimonial evidence are the following essential antecedents:

Then President Marcos instructed Tabuena over the phone to pay directly to the president's office and in cash what the MIAA owes the Philippine National Construction Corporation (PNCC), to which Tabuena replied, “Yes, sir, I will do it.” About a week later, Tabuena received from Mrs. Fe Roa-Gimenez, then private secretary of Marcos, a Presidential Memorandum dated January 8, 1986 (hereinafter referred to as MARCOS Memorandum) reiterating in black and white such verbal instruction, to wit:

“Office of the President
of the Philippines Malacañang

January 8, 1986

MEMO TO: The General Manager

Manila International Airport Authority

You are hereby directed to pay immediately the Philippine National Construction Corporation, thru this Office, the sum of FIFTY FIVE MILLION (P55,000,000.00) PESOS in cash as partial payment of MIAA's account with said Company mentioned in a Memorandum of Minister Roberto Ongpin to this Office dated January 7, 1985 and duly approved by this Office on February 4, 1985.

Your immediate compliance is appreciated.

(Sgd.) FERDINAND MARCOS.”[4]

The January 7, 1985 memorandum of then Minister of Trade and Industry Roberto Ongpin referred to in the MARCOS Memorandum, reads in full:

“MEMORANDUM

F o r : The President

F r o m : Minister Roberto V. Ongpin

D a t e : 7 January 1985

Subject : Approval of Supplemental Contracts and

Request for Partial Deferment of Repayment of PNCC's Advances for MIA Development Project

May I request your approval of the attached recommendations of Minister Jesus S. Hipolito for eight (8) supplemental contracts pertaining to the MIA Development Project (MIADP) between the Bureau of Air Transport (BAT) and Philippine National Construction Corporation (PNCC), formerly CDGP, as follows

1. Supplemental Contract No. 12

Package Contract No. 2

P11,106,600.95

2. Supplemental Contract No. 13

5,758,961.52

3. Supplemental Contract No. 14

Package Contract No.

4,586,610.80

4. Supplemental Contract No. 15

1,699,862.69

5. Supplemental Contract No. 16

Package Contract No. 2

233,561.22

6. Supplemental Contract No. 17

Package Contract No.

8,821,731.08

7. Supplemental Contract No. 18

Package Contract No. 2

6,110,115.75

8. Supplemental Contract No. 3

Package Contract No. II

16,617,655.49

(xerox copies only; original memo was submitted to the Office of the President on May 28, 1984)

In this connection, please be informed that Philippine National Construction Corporation (PNCC), formerly CDCP, has accomplishment billings on the MIA Development Project aggregating P98.4 million, inclusive of accomplishments for the aforecited contracts. In accordance with contract provisions, outstanding advances totalling P93.9 million are to be deducted from said billings which will leave a net amount due to PNCC of only P4.5 million.

At the same time, PNCC has potential escalation claims amounting to P99 million in the following stages of approval/evaluation:

Approved by Price Escalation Committee (PEC) but pended for lack of funds P 1.9 million

Endorsed by project consultants and currently being evaluated by PEC 30.7 million

Submitted by PNCC directly to PEC and currently under evaluation 66.5 million

T o t a l P99.1 million

There has been no funding allocation for any of the above escalation claims due to budgetary constraints.

The MIA Project has been completed and operational as far back as 1982 and yet residual amounts due to PNCC have not been paid, resulting in undue burden to PNCC due to additional cost of money to service its obligations for this contract.

To allow PNCC to collect partially its billings, and in consideration of its pending escalation billings, may we request for His Excellency's approval for a deferment of the repayment of PNCC's advances to the extent of P30 million corresponding to about 30% of P99.1 million in escalation claims of PNCC, of which P32.5 million has been officially recognized by MIADP consultants but could not be paid due to lack of funding.Korte

Our proposal will allow BAT to pay PNCC the amount of P34.5 million out of existing MIA Project funds. This amount represents the excess of the gross billings of PNCC of P98.4 million over the undeferred portion of the repayment of advances of P63.9 million.

(Sgd.) ROBERTO V. ONGPIN

Minister"[5]

In obedience to President Marcos' verbal instruction and memorandum, Tabuena, with the help of Dabao and Peralta, caused the release of P55 Million of MIAA funds by means of three (3) withdrawals.

The first withdrawal was made on January 10, 1986 for P25 Million, following a letter of even date signed by Tabuena and Dabao requesting the PNB extension office at the MIAA - the depository branch of MIAA funds, to issue a manager's check for said amount payable to Tabuena. The check was encashed, however, at the PNB Villamor Branch. Dabao and the cashier of the PNB Villamor branch counted the money after which, Tabuena took delivery thereof. The P25 Million in cash were then placed in peerless boxes and duffle bags, loaded on a PNB armored car and delivered on the same day to the office of Mrs. Gimenez located at Aguado Street fronting Malacañang. Mrs. Gimenez did not issue any receipt for the money received.

Similar circumstances surrounded the second withdrawal/encashment and delivery of another P25 Million, made on January 16, 1986.

The third and last withdrawal was made on January 31, 1986 for P5 Million. Peralta was Tabuena's co-signatory to the letter- request for a manager's check for this amount. Peralta accompanied Tabuena to the PNB Villamor branch as Tabuena requested him to do the counting of the P5 Million. After the counting, the money was placed in two (2) peerless boxes which were loaded in the trunk of Tabuena's car. Peralta did not go with Tabuena to deliver the money to Mrs. Gimenez' office at Aguado Street. It was only upon delivery of the P5 Million that Mrs. Gimenez issued a receipt for all the amounts she received from Tabuena. The receipt, dated January 30, 1986, reads:

"Malacañang Manila

January 30, 1986

RECEIVED FROM LOUIE TABUENA THE TOTAL AMOUNT OF FIFTY FIVE MILLION PESOS (P55,000,000.00) as of the following dates:

Jan. 10 - P25,000,000.00

Jan. 16 - 25,000,000.00

Jan. 30 - 5,000,000.00

(Sgd.) Fe Roa-Gimenez”

The disbursement of the P55 Million was, as described by Tabuena and Peralta themselves, “out of the ordinary” and “not based on the normal procedure”. Not only were there no vouchers prepared to support the disbursement, the P55 Million was paid in cold cash. Also, no PNCC receipt for the P55 Million was presented. Defense witness Francis Monera, then Senior Assistant Vice President and Corporate Comptroller of PNCC, even affirmed in court that there were no payments made to PNCC by MIAA for the months of January to June of 1986.

The position of the prosecution was that there were no outstanding obligations in favor of PNCC at the time of the disbursement of the P55 Million. On the other hand, the defense of Tabuena and Peralta, in short, was that they acted in good faith. Tabuena claimed that he was merely complying with the MARCOS Memorandum which ordered him to forward immediately to the Office of the President P55 Million in cash as partial payment of MIAA’s obligations to PNCC, and that he (Tabuena) was of the belief that MIAA indeed had liabilities to PNCC. Peralta for his part shared the same belief and so he heeded the request of Tabuena, his superior, for him (Peralta) to help in the release of P5 Million.

With the rejection by the Sandiganbayan of their claim of good faith which ultimately led to their conviction, Tabuena and Peralta now set forth a total of ten (10) errors[6] committed by the Sandiganbayan for this Court’s consideration. It appears, however, that at the core of their plea that we acquit them are the following:

- 1) the Sandiganbayan convicted them of a crime not charged in the amended informations, and
- 2) they acted in good faith

Anent the first proposition, Tabuena and Peralta stress that they were being charged with intentional malversation, as the amended informations commonly allege that:

“x x x accused x x x conspiring, confederating and confabulating with each other, did then and there wilfully, unlawfully, feloniously, and with intent to defraud the government, take and misappropriated the amount of x x x.”

But it would appear that they were convicted of malversation by negligence. In this connection, the Court’s attention is directed to p. 17 of the December 20, 1991 Resolution (denying Tabuena’s and Peralta’s motion for reconsideration) wherein the Sandiganbayan said:

“x x x x x x x x x x

On the contrary, what the evidence shows is that accused Tabuena delivered the P55 Million to people who were not entitled thereto, either as representatives of MIAA or of the PNCC. Sclaw

It proves that Tabuena had deliberately consented or permitted through negligence or abandonment, some other person to take such public funds. Having done so, Tabuena, by his own narration, has categorically demonstrated that he is guilty of the misappropriation or malversation of P55 Million of public funds.” (Underscoring supplied.)

To support their theory that such variance is a reversible flaw, Tabuena and Peralta argue that:

- 1) While malversation may be committed intentionally or by negligence, both modes cannot be committed at the same time.
- 2) The Sandiganbayan was without jurisdiction to convict them of malversation of negligence where the amended informations charged them with intentional malversation.[7]

3) Their conviction of a crime different from that charged violated their constitutional right to be informed of the accusation.[8]

We do not agree with Tabuena and Peralta on this point. Illuminative and controlling is “Cabello v. Sandiganbayan”[9] where the Court passed upon similar protestations raised by therein accused-petitioner Cabello whose conviction for the same crime of malversation was affirmed, in this wise:

“x x x even on the putative assumption that the evidence against petitioner yielded a case of malversation by negligence but the information was for intentional malversation, under the circumstances of this case his conviction under the first mode of misappropriation would still be in order. Malversation is committed either intentionally or by negligence. The *dolo* or the *culpa* present in the offense is only a modality in the perpetration of the felony. Even if the mode charged differs from the mode proved, the same offense of malversation is involved and conviction thereof is proper. x x x.

In *Samson vs. Court of Appeals, et. al.*, we held that an accused charged with willful or intentional falsification can validly be convicted of falsification through negligence, thus:

‘While a criminal negligent act is not a simple modality of a willful crime, as we held in *Quizon vs. Justice of the Peace of Bacolor*, G.R. No. L-6641, July 28, 1995, but a distinct crime in our Penal Code, designated as a quasi offense in our Penal Code, it may however be said that a conviction for the former can be had under an information exclusively charging the commission of a willful offense, upon the theory that the greater includes the lesser offense. This is the situation that obtains in the present case. Appellant was charged with willful falsification but from the evidence submitted by the parties, the Court of Appeals found that in effecting the falsification which made possible the cashing of the checks in question, appellant did not act with criminal intent but merely failed to take proper and adequate means to assure himself of the identity of the real claimants as an ordinary prudent man would do. In other words, the information alleges acts which charge willful falsification but which turned out to be not willful but negligent. This is a case covered by the rule when there is a variance between the allegation and proof, and is similar to some of the cases decided by this Tribunal.

x x x

‘Moreover, Section 5, Rule 116, of the Rules of Court does not require that all the essential elements of the offense charged in the information be proved, it being sufficient that some of said essential elements or ingredients thereof be established to constitute the crime proved.

x x x.

‘The fact that the information does not allege that the falsification was committed with imprudence is of no moment for here this deficiency appears supplied by the evidence submitted by appellant himself and the result has proven beneficial to him. Certainly, having alleged that the falsification has been willful, it would be incongruous to allege at the same time that it was committed with imprudence for a charge of criminal intent is incompatible with the concept of negligence.’

“Subsequently, we ruled in *People vs. Consigna, et. al.*, that the aforestated rationale and arguments also apply to the felony of malversation, that is, that an accused charged with willful malversation, in an information containing allegations similar to those involved in the present case, can be validly convicted of the same offense of malversation through negligence where the evidence sustains the latter mode of perpetrating the offense.”

Going now to the defense of good faith, it is settled that this is a valid defense in a prosecution for malversation for it would negate criminal intent on the part of the accused. Thus, in the two (2) vintage, but significant malversation cases of “*US v. Catolico*”[10] and “*US v. Elviña*,”[11] the Court stressed that:

“To constitute a crime, the act must, except in certain crimes made such by statute, be accompanied by a criminal intent, or by such negligence or indifference to duty or to consequences as, in law, is equivalent to criminal intent. The maxim is *actus non facit reum, nisi mens sit rea* - a crime is not committed if the mind of the person performing the act complained of is innocent.

The rule was reiterated in “*People v. Pacana*,”[12] although this case involved falsification of public documents and estafa:

“Ordinarily, evil intent must unite with an unlawful act for there to be a crime. *Actus non facit reum, nisi mens sit rea*. There can be no crime when the criminal mind is wanting.”

American jurisprudence echoes the same principle. It adheres to the view that criminal intent in embezzlement is not based on technical mistakes as to the legal effect of a transaction honestly entered into, and there can be no embezzlement if the mind of the person doing the act is innocent or if there is no wrongful purpose.[13] The accused may thus always introduce evidence to show he acted in good faith and that he had no intention to convert.[14] And this, to our mind, Tabuena and Peralta had meritoriously shown.

In so far as Tabuena is concerned, with the due presentation in evidence of the MARCOS Memorandum, we are swayed to give credit to his claim of having caused the disbursement of the P55 Million solely by reason of such memorandum. From this premise flows the following reasons and/or considerations that would buttress his innocence of the crime of malversation.

First. Tabuena had no other choice but to make the withdrawals, for that was what the MARCOS Memorandum required him to do. He could not be faulted if he had to obey and strictly comply with the presidential directive, and to argue otherwise is something easier said than done. Marcos was undeniably Tabuena’s superior – the former being then the President of the Republic who unquestionably exercised control over government agencies such as the MIAA and PNCC.[15] In other words, Marcos had a say in matters involving inter-government agency affairs and transactions, such as for instance, directing payment of liability of one entity to another and the manner in which it should be carried out. And as a recipient of such kind of a directive coming from the highest official of the land no less, good faith should be read on Tabuena’s compliance, without hesitation nor any question, with the MARCOS Memorandum. Tabuena therefore is entitled to the justifying circumstance of “Any person who acts in obedience to an order issued by a superior for some lawful purpose.”[16] The subordinate-superior relationship between Tabuena and Marcos is clear. And so too, is the lawfulness of the order contained in the MARCOS Memorandum, as it has for its purpose partial payment of the liability of one government agency (MIAA) to another (PNCC). However, the unlawfulness of the MARCOS Memorandum was being argued, on the observation, for instance, that the Ongpin Memo referred to in the presidential directive reveals a liability of only about P34.5 Million. The Sandiganbayan in this connection said:

“Exhibits “2” and “2-a” (pages 1 and 2 of the memorandum of Min. Ongpin to the President dated January 7, 1985) were mainly:

- a.) for the approval of eight Supplemental Contracts; and
- b.) a request for partial deferment of payment by PNCC for advances made for the MIAA Development Project, while at the same time recognizing some of the PNCC’s escalation billings which would result in making payable to PNCC the amount of P34.5 million out of existing MIAA Project funds.

Thus:

‘xxx

To allow PNCC to collect partially its billings, and in consideration of its pending escalation billings, may we

request for His Excellency's approval for a deferment of repayment of PNCC's advances to the extent of P30 million corresponding to about 30% of P99.1 million in escalation claims of PNCC, of which P32.6 million has been officially recognized by MIADP consultants but could not be paid due to lack of funding.

Our proposal will allow BAT to pay PNCC the amount of P34.5 million out of existing MIA Project funds. This amount represents the excess of the gross billings of PNCC of P98.4 million over the undeferred portion of the repayment of advances of P63.9 million.'

While Min. Ongpin may have, therefore recognized the escalation claims of the PNCC to MIAA to the extent of P99.1 million (Exhibit 2a), a substantial portion thereof was still in the stages of evaluation and approval, with only P32.6 million having been officially recognized by the MIADP consultants.

If any payments were, therefore, due under this memo for Min. Ongpin (upon which President Marcos' Memo was based) they would only be for a sum of up to P34.5 million.”[17]

“V. Pres. Marcos' order to Tabuena dated January 8, 1986 baseless.

Not only was Pres. Marcos' Memo (Exhibit “1”) for Tabuena to pay P55 million irrelevant, but it was actually baseless.

This is easy to see.

Exhibit “1” purports to refer itself to the Ongpin Memorandum (Exhibit “2”, “2-a”); Exhibit “1”, however, speaks of P55 million to be paid to the PNCC while Exhibit “2” authorized only P34.5 million. The order to withdraw the amount of P55 million exceeded the approved payment of P34.5 million by P20.5 million. Min. Ongpin's Memo of January 7, 1985 could not therefore serve as a basis for the President's order to withdraw P55 million.”[18]

Granting this to be true, it will not nevertheless affect Tabuena's good faith so as to make him criminally liable. What is more significant to consider is that the MARCOS Memorandum is patently legal (for on its face it directs payment of an outstanding liability) and that Tabuena acted under the honest belief that the P55 million was a due and demandable debt and that it was just a portion of a bigger liability to PNCC. This belief is supported by defense witness Francis Monera who, on direct examination, testified that:

“ATTY ANDRES

Q Can you please show us in this Exhibit “7” and “7-a” where it is indicated the receivables from MIA as of December 31, 1985?

A As of December 31, 1985, the receivables from MIA is shown on page 2, marked as Exhibit “7-a”, sir, P102,475,392.35.

x x x x x x x x.”[19]

ATTY. ANDRES

WITNESS

Q Can you tell us, Mr. Witness, what these obligations represent?

A These obligations represent receivables on the basis of our billings to MIA as contract-owner of the project that the Philippine National Construction Corporation constructed. These are billings for escalation mostly, sir.

Q What do you mean by escalation?

A Escalation is the component of our revenue billings to the contract-owner that are supposed to take care of price

increases, sir.”

x x x x x x x x.”[20]

ATTY ANDRES

Q When you said these are accounts receivable, do I understand from you that these are due and demandable?

A Yes, sir.”[21]

Thus, even if the order is illegal if it is patently legal and the subordinate is not aware of its illegality, the subordinate is not liable, for then there would only be a mistake of fact committed in good faith.[22] Such is the ruling in “Nassif v. People”[23] the facts of which, in brief, are as follows:

“Accused was charged with falsification of commercial document. A mere employee of R.J. Campos, he inserted in the commercial document alleged to have been falsified the word “sold” by order of his principal. Had he known or suspected that his principal was committing an improper act of falsification, he would be liable either as a co-principal or as an accomplice. However, there being no malice on his part, he was exempted from criminal liability as he was a mere employee following the orders of his principal.”[24]

Second. There is no denying that the disbursement, which Tabuena admitted as “out of the ordinary”, did not comply with certain auditing rules and regulations such as those pointed out by the Sandiganbayan, to wit:

a) [except for salaries and wages and for commutation of leaves] all disbursements above P1,000.00 should be made by check (Basic Guidelines for Internal Control dated January 31, 1977 issued by COA)

b) payment of all claims against the government had to be supported with complete documentation (Sec. 4, P.D. 1445, “State Auditing Code of the Philippines). In this connection, the Sandiganbayan observed that:

“There were no vouchers to authorize the disbursements in question. There were no bills to support the disbursement. There were no certifications as to the availability of funds for an unquestionably staggering sum of P55 Million.”[25]

c) failure to protest (Sec. 106, P.D. 1445)

But this deviation was inevitable under the circumstances Tabuena was in. He did not have the luxury of time to observe all auditing procedures of disbursement considering the fact that the MARCOS Memorandum enjoined his “immediate compliance” with the directive that he forward to the President’s Office the P55 Million in cash. Be that as it may, Tabuena surely cannot escape responsibility for such omission. But since he was acting in good faith, his liability should only be administrative or civil in nature, and not criminal. This follows the decision in “Villacorta v. People”[26] where the Court, in acquitting therein accused municipal treasurer of Pandan, Catanduanes of malversation after finding that he incurred a shortage in his cash accountability by reason of his payment in good faith to certain government personnel of their legitimate wages, leave allowances, etc., held that:

“Nor can negligence approximating malice or fraud be attributed to petitioner. If he made wrong payments, they were in good faith mainly to government personnel, some of them working at the provincial auditor’s and the provincial treasurer’s offices. And if those payments ran counter to auditing rules and regulations, they did not amount to a criminal offense and he should only be held administratively or civilly liable.”

Likewise controlling is “US v. Elviña”[27] where it was held that payments in good faith do not amount to criminal appropriation, although they were made with insufficient vouchers or improper evidence. In fact, the Dissenting Opinion’s reference to certain provisions in the revised Manual on Certificate of Settlement and Balances - apparently made to underscore Tabuena’s personal accountability, as agency head, for MIAA funds - would all the more support the view that Tabuena is vulnerable to civil sanctions only. Sections 29.2 and 29.5

expressly and solely speak of “civilly liable” to describe the kind of sanction imposable on a superior officer who performs his duties with “bad faith, malice or gross negligence” and on a subordinate officer or employee who commits “willful or negligent acts x x x which are contrary to law, morals, public policy and good customs even if he acted under order or instructions of his superiors.”

Third. The Sandiganbayan made the finding that Tabuena had already converted and misappropriated the P55 Million when he delivered the same to Mrs. Gimenez and not to the PNCC, proceeding from the following definitions/concepts of “conversion”:

“‘Conversion’, as necessary element of offense of embezzlement, being the fraudulent ‘appropriation to one’s own use’ of another’s property which does not necessarily mean to one’s personal advantage but every attempt by one person to dispose of the goods of another without right as if they were his own is ‘conversion to his own use.’ (Terry v. Water Improvement Dist. No. 5 of Tulsa County, 64 p. 2d 904, 906, 179 Okl. 106)

- At p. 207, Words and Phrases,

Permanent Edition 9A.

Conversion is any interference subversive of the right of the owner of personal property to enjoy and control it. The gist of conversion is the usurpation of the owner’s right of property, and not the actual damages inflicted. Honesty of purpose is not a defense. (Ferrera v. Parks, 23 p. 883, 885 19 Or. 141)

- At page 168, id.

x x x x x x x x

The words ‘convert’ and ‘misappropriate’ connote an act of using or disposing of another’s property as if it were one’s own. They presuppose that the thing has been devoted to a purpose or use different from that agreed upon. To appropriate to one’s own use includes not only conversion to one’s personal advantage but every attempt to dispose of the property of another without right.

People vs. Webber, 57 O.G.

p. 2933, 2937

By placing them at the disposal of private persons without due authorization or legal justification, he became as guilty of malversation as if he had personally taken them and converted them to his own use.

People vs. Luntao, 50 O.G.

p. 1182, 1183”[28]

We do not agree. It must be stressed that the MARCOS Memorandum directed Tabuena “to pay immediately the Philippine National Construction Corporation, thru this office, the sum of FIFTY FIVE MILLION....”, and that was what Tabuena precisely did when he delivered the money to Mrs. Gimenez. Such delivery, no doubt, is in effect delivery to the Office of the President inasmuch as Mrs. Gimenez was Marcos’ secretary then. Furthermore, Tabuena had reasonable ground to believe that the President was entitled to receive the P55 Million since he was certainly aware that Marcos, as Chief Executive, exercised supervision and control over government agencies. And the good faith of Tabuena in having delivered the money to the President’s office (thru Mrs. Gimenez), in strict compliance with the MARCOS Memorandum, was not at all affected even if it later turned out that PNCC never received the money. Thus, it has been said that:

“Good faith in the payment of public funds relieves a public officer from the crime of malversation.

x x x x x x x x

Not every unauthorized payment of public funds is malversation. There is malversation only if the public officer who has custody of public funds should 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. Where the payment of public funds has been made in good faith, and there is reasonable ground to believe that the public officer to whom the fund had been paid was entitled thereto, he is deemed to have acted in good faith, there is no criminal intent, and the payment, if it turns out that it is unauthorized, renders him only civilly but not criminally liable.”[29]

Fourth. Even assuming that the real and sole purpose behind the MARCOS Memorandum was to siphon-out public money for the personal benefit of those then in power, still, no criminal liability can be imputed to Tabuena. There is no showing that Tabuena had anything to do whatsoever with the execution of the MARCOS Memorandum. Nor is there proof that he profited from the felonious scheme. In short, no conspiracy was established between Tabuena and the real embezzler/s of the P55 Million. In the cases of “US v. Acebedo”[30] and “Ang v. Sandiganbayan”,[31] both also involving the crime of malversation, the accused therein were acquitted after the Court arrived at a similar finding of non-proof of conspiracy. In “Acebedo”, therein accused, as municipal president of Palo, Leyte, was prosecuted for and found guilty by the lower court of malversation after being unable to turn over certain amounts to the then justice of the peace. It appeared, however, that said amounts were actually collected by his secretary Crisanto Urbina. The Court reversed Acebedo’s conviction after finding that the sums were converted by his secretary Urbina without the knowledge and participation of Acebedo. The Court said, which we herein adopt:

“No conspiracy between the appellant and his secretary has been shown in this case, nor did such conspiracy appear in the case against Urbina. No guilty knowledge of the theft committed by the secretary was shown on the part of the appellant in this case, nor does it appear that he in any way participated in the fruits of the crime. If the secretary stole the money in question without the knowledge or consent of the appellant and without negligence on his part, then certainly the latter can not be convicted of embezzling the same money or any part thereof.”[32]

In “Ang”, accused-petitioner, as MWSS bill collector, allowed part of his collection to be converted into checks drawn in the name of one Marshall Lu, a non-customer of MWSS, but the checks were subsequently dishonored. Ang was acquitted by this Court after giving credence to his assertion that the conversion of his collections into checks were thru the machinations of one Lazaro Guinto, another MWSS collector more senior to him. And we also adopt the Court’s observation therein, that:

“The petitioner’s alleged negligence in allowing the senior collector to convert cash collections into checks may be proof of poor judgment or too trusting a nature insofar as a superior officer is concerned but there must be stronger evidence to show fraud, malice, or other indicia of deliberateness in the conspiracy cooked up with Marshall Lu. The prosecution failed to show that the petitioner was privy to the conspirational scheme. Much less is there any proof that he profited from the questioned acts. Any suspicions of conspiracy, no matter how sincerely and strongly felt by the MWSS, must be converted into evidence before conviction beyond reasonable doubt may be imposed.”[33]

The principles underlying all that has been said above in exculpation of Tabuena equally apply to Peralta in relation to the P5 Million for which he is being held accountable, i.e., he acted in good faith when he, upon the directive of Tabuena, helped facilitate the withdrawal of P5 Million of the P55 Million of the MIAA funds.

This is not a sheer case of blind and misguided obedience, but obedience in good faith of a duly executed order. Indeed, compliance to a patently lawful order is rectitude far better than contumacious disobedience. In the case at bench, the order emanated from the Office of the President and bears the signature of the President himself, the highest official of the land. It carries with it the presumption that it was regularly issued. And on its face, the

memorandum is patently lawful for no law makes the payment of an obligation illegal. This fact, coupled with the urgent tenor for its execution constrains one to act swiftly without question. Obedientia est legis essentia. Besides, the case could not be detached from the realities then prevailing. As aptly observed by Mr. Justice Cruz in his dissenting opinion:

“We reject history in arbitrarily assuming that the people were free during the era and that the judiciary was independent and fearless. We know it was not; even the Supreme Court at that time was not free. This is an undeniable fact that we can not just blink away. Insisting on the contrary would only make our sincerity suspect and even provoke scorn for what can only be described as our incredible credulity.”[34]

But what appears to be a more compelling reason for their acquittal is the violation of the accused’s basic constitutional right to due process. “Respect for the Constitution”, to borrow once again Mr. Justice Cruz’s words, “is more important than securing a conviction based on a violation of the rights of the accused.”[35] While going over the records, we were struck by the way the Sandiganbayan actively took part in the questioning of a defense witness and of the accused themselves. Tabuena and Peralta may not have raised this as an error, there is nevertheless no impediment for us to consider such matter as additional basis for a reversal since the settled doctrine is that an appeal throws the whole case open to review, and it becomes the duty of the appellate court to correct such errors as may be found in the judgment appealed from whether they are made the subject of assignments of error or not.[36]

Simply consider the volume of questions hurled by the Sandiganbayan. At the taking of the testimony of Francis Monera, then Senior Assistant Vice President and Corporate Comptroller of PNCC, Atty. Andres asked sixteen (16) questions on direct examination. Prosecutor Viernes only asked six (6) questions on cross-examination in the course of which the court interjected a total of twenty-seven (27) questions (more than four times Prosecutor Viernes’ questions and even more than the combined total of direct and cross-examination questions asked by the counsels). After the defense opted not to conduct any re-direct examination, the court further asked a total of ten (10) questions.[37] The trend intensified during Tabuena’s turn on the witness stand. Questions from the court after Tabuena’s cross-examination totalled sixty-seven (67).[38] This is more than five times Prosecutor Viernes’ questions on cross-examination (14), and more than double the total of direct examination and cross-examination questions which is thirty-one (31) [17 direct examination questions by Atty. Andres plus 14 cross-examination questions by Prosecutor Viernes]. In Peralta’s case, the Justices, after his cross-examination, propounded a total of forty-one (41) questions.[39]

But more importantly, we note that the questions of the court were in the nature of cross examinations characteristic of confrontation, probing and insinuation.[40] (The insinuating type was best exemplified in one question addressed to Peralta, which will be underscored.) Thus we beg to quote in length from the transcripts pertaining to witness Monera, Tabuena and Peralta. (Questions from the Court are marked with asterisks and italicized for emphasis.)

(MONERA)

(As a background, what was elicited from his direct examination is that the PNCC had receivables from MIAA totalling P102,475,392.35, and although such receivables were largely billings for escalation, they were nonetheless all due and demandable. What follows are the cross-examination of Prosecutor Viernes and the court questions).

“CROSS-EXAMINATION BY PROS. VIERNES

Q You admit that as shown by these Exhibits “7” and “7-a”, the items here represent mostly escalation billings. Were those escalation billings properly transmitted to MIA authorities?

A I don't have the documents right now to show that they were transmitted, but I have a letter by our President, Mr. Olaguer, dated July 6, 1988, following up for payment of the balance of our receivables from MIA, sir.

*AJ AMORES

Q This matter of escalation costs, is it not a matter for a conference between the MIA and the PNCC for the determination as to the correct amount?

A I agree, your Honor. As far as we are concerned, our billings are what we deemed are valid receivables. And, in fact, we have been following up for payment.

Q This determination of the escalation costs was it accepted as the correct figure by MIA?

A I don't have any document as to the acceptance by MIA, your Honor, but our company was able to get a document or a letter by Minister Ongpin to President Marcos, dated January 7, 1985, with a marginal note or approval by former President Marcos.

*PJ GARCHITORENA

Q Basically, the letter of Mr. Ongpin is to what effect?

A The subject matter is approval of the supplementary contract and request for partial deferment of payment for MIA Development Project, your Honor.

Q It has nothing to do with the implementation of the escalation costs?

A The details show that most of the accounts refer to our escalations, your Honor.

Q Does that indicate the computation for escalations were already billed or you do not have any proof of that?

A Our subsidiary ledger was based on billings to MIA and this letter of Minister Ongpin appears to have confirmed our billings to MIA, your Honor.

*AJ AMORES

Q Were there partial payments made by MIA on these escalation billings?

A Based on records available as of today, the P102 million was reduced to about P56.7 million, if my recollection is correct, your Honor.

*PJ GARCHITORENA

Q Were the payments made before or after February 1986, since Mr. Olaguer is a new entrant to your company?

WITNESS

A The payments were made after December 31, 1985 but I think the payments were made before the entry of our President, your Honor. Actually, the payment was in the form of: assignments to State Investment of about P23 million; and then there was P17.8 million application against advances made or formerly given; and there were payments to PNCC of about P2.6 million and there was a payment for application on withholding and contractual stock of about P1 million; that summed up to P44.4 million all in all. And you deduct that from the P102 million, the remaining balance would be about P57 million.

*PJ GARCHITORENA

Q What you are saying is that, for all the payments made on this P102 million, only P2 million had been payments in cash?

A Yes, your Honor.

Q The rest had been adjustments of accounts, assignments of accounts, or offsetting of accounts?

A Yes, your Honor.

Q This is as of December 31, 1985?

A The P102 million was as of December 31, 1985, your Honor, but the balances is as of August 1987.

Q We are talking now about the P44 million, more or less, by which the basic account has been reduced. These reductions, whether by adjustment or assignment or actual delivery of cash, were made after December 31, 1985?

WITNESS

A Yes, your Honor.

Q And your records indicate when these adjustments and payments were made?

A Yes, your Honor.

*AJ AMORES

Q You said there were partial payments before of these escalation billings. Do we get it from you that there was an admission of these escalation costs as computed by you by MIA, since there was already partial payments?

A Yes, your Honor.

Q How were these payments made before February 1986, in case or check, if there were payments made?

A The P44 million payments was in the form of assignments, your Honor.

*PJ GARCHITORENA

Q The question of the Court is, before December 31, 1985, were there any liquidations made by MIA against these escalation billings?

A I have not reviewed the details of the record, your Honor. But the ledger card indicates that there were collections on page 2 of the Exhibit earlier presented. It will indicate that there were collections shown by credits indicated on the credit side of the ledger.

*AJ AMORES

Q Your ledger does not indicate the manner of giving credit to the MIA with respect to the escalation billings. Was the payment in cash or just credit of some sort before December 31, 1985?

A Before December 31, 1985, the reference of the ledger are official receipts and I suppose these were payments in cash, your Honor.

Q Do you know how the manner of this payment in cash was made by MIA?

A I do not know, your Honor.

*PJ GARCHITORENA

Q But your records will indicate that?

A The records will indicate that, your Honor.

*Q Except that you were not asked to bring them?

A Yes, your Honor.

Q At all events, we are talking of settlement or partial liquidation prior to December 31, 1985?

A Yes, your Honor.

*PJ GARCHITORENA

Q Subsequent thereto, we are talking merely of about P44 million?

A Yes, your Honor, as subsequent settlements.

Q After December 31, 1985?

A Yes, your Honor.

Q And they have liquidated that, as you described it, by way of assignments, adjustments, by offsets and by P2 million of cash payment?

A Yes, your Honor.

*AJ AMORES

Q Your standard operating procedure before December 31, 1985 in connection with or in case of cash payment, was the payment in cash or check?

A I would venture to say it was by check, your Honor.

Q Which is the safest way to do it?

A Yes, your Honor.

*PJ GARCHITORENA

Q And the business way?

A Yes, your Honor.

PJ GARCHITORENA

Continue.

PROS VIERNES

Q You mentioned earlier about the letter of former Minister Ongpin to the former President Marcos, did you say that that letter concurs with the escalation billings reflected in Exhibits "7" and "7-a"?

WITNESS

A The Company or the management is of the opinion that this letter, a copy of which we were able to get, is a confirmation of the acceptance of our billings, sir.

Q This letter of Minister Ongpin is dated January 7, 1985, whereas the entries of escalation billings as appearing in Exhibit "7" are dated June 30, 1985, would you still insist that the letter of January 1985 confirms the escalation billings as of June 1985?

A The entries started June 30 in the ledger card. And as of December 31, 1985, it stood at P102 million after payments were made as shown on the credit side of the ledger. I suppose that the earlier amount, before the payment was made, was bigger and therefore I would venture to say that the letter of January 7, 1985 contains an amount that is part of the original contract account. What are indicated in the ledger are escalation billings.

*PJ GARCHITORENA

Q We are talking about the letter of Minister Ongpin?

A The letter of Minister Ongpin refers to escalation billings, sir.

Q As of what date?

A The letter is dated January 7, 1985, your Honor.

PJ GARCHITORENA

Continue.

PROS. VIERNES

Q In accordance with this letter marked Exhibit “7” and “7-a”, there were credits made in favor of MIA in July and November until December 1985. These were properly credited to the account of MIA?

WITNESS

A Yes, sir.

Q In 1986, from your records as appearing in Exhibit “7-a”, there were no payments made to PNCC by MIA for the months of January to June 1986?

A Yes, sir.

Q And neither was the amount of P22 million remitted to PNCC by MIA?

A Yes, sir.

PROS VIERNES

That will be all, your Honor.

PJ GARCHITORENA

Redirect?

ATTY ANDRES

No redirect, your Honor.

*PJ GARCHITORENA

Questions from the Court.

*AJ AMORES

*Q From your records, for the month of January 1986, there was no payment of this escalation account by MIA?

WITNESS

A Yes, your Honor. But on page 2 of Exhibit “7” there appears an assignment of P23 million, that was on September 25, 1986.

Q But that is already under the present administration?

A After February 1986, your Honor.

Q But before February, in January 1986, there was no payment whatsoever by MIA to PNCC?

A Per record there is none appearing, your Honor.

*PJ GARCHITORENA

Q The earliest payment, whether by delivery of cash equivalent or of adjustment of account, or by assignment, or by offsets, when did these payments begin?

A Per ledger card, there were payments in 1985, prior to December 31, 1985, your Honor.

Q After December 31, 1985?

A There appears also P23 million as credit, that is a form of settlement, your Honor.

Q This is as of September 25?

A Yes, your Honor. There were subsequent settlements. P23 million is just part of the P44 million.

Q And what you are saying is that, PNCC passed the account to State Investment. In other words, State Investment bought the credit of MIA?

A Yes, your Honor.

Q And the amount of credit or receivables sold by PNCC to State Investment is P23 million?

A Yes, your Honor.

Q Is there a payback agreement?

A I have a copy of the assignment to State Investment but I have not yet reviewed the same, your Honor.

*AJ AMORES

Q As of now, is this obligation of MIA, now NAIA, paid to PNCC?

A There is still a balance of receivables from MIA as evidenced by a collection letter by our President dated July 6, 1988, your Honor. The amount indicated in the letter is P55 million.

PJ GARCHITORENA

Any clarifications you would like to make Mr. Estebal?

ATTY ESTEBAL

None, your Honor.

PJ GARCHITORENA

Mr. Viernes?

PROS VIERNES

No more, your Honor.

PJ GARCHITORENA

The witness is excused. Thank you very much Mr. Monera. x x x.”[41]

(TABUENA)

(In his direct examination, he testified that he caused the preparation of the checks totalling P55 Million pursuant to the MARCOS Memorandum and that he thereafter delivered said amount in cash on the three (3) dates as alleged in the information to Marcos’ private secretary Mrs. Jimenez at her office at Aguado Street, who thereafter issued a receipt. Tabuena also denied having used the money for his own personal use.)

“CROSS-EXAMINATION BY PROS. VIERNES

Q The amount of P55 million as covered by the three (3) checks Mr. Tabuena, were delivered on how many occasions?

A Three times, sir.

Q And so, on the first two deliveries, you did not ask for a receipt from Mrs. Gimenez?

A Yes, sir.

Q It was only on January 30, 1986 that this receipt Exhibit “3” was issued by Mrs. Gimenez?

A Yes, sir.

*PJ GARCHITORENA

Q So January 30 is the date of the last delivery?

A I remember it was on the 31st of January, your Honor. What happened is that, I did not notice the date placed by Mrs. Gimenez.

Q Are you telling us that this Exhibit “3” was incorrectly dated?

A Yes, your Honor.

Q Because the third delivery was on January 31st and yet the receipt was dated January 30?

A Yes, your Honor.

Q When was Exhibit “3” delivered actually by Mrs. Gimenez?

A January 31st, your Honor.

PJ GARCHITORENA

Continue.

PROS VIERNES

Q You did not go to Malacañang on January 30, 1986?

A Yes, sir, I did not.

Q Do you know at whose instance this Exhibit “3” was prepared?

A I asked for it, sir.

Q You asked for it on January 31, 1986 when you made the last delivery?

A Yes, sir.

Q Did you see this Exhibit “3” prepared in the Office of Mrs. Gimenez?

A Yes, sir.

Q This receipt was typewritten in Malacañang stationery. Did you see who typed this receipt?

A No, sir. What happened is that, she went to her room and when she came out she gave me that receipt.

*PJ GARCHITORENA

*Q What you are saying is, you do not know who typed that receipt?

WITNESS

A Yes, your Honor.

Q Are you making an assumption that she typed that receipt?

A Yes, your Honor, because she knows how to type.

Q Your assumption is that she typed it herself?

A Yes, your Honor.

PJ GARCHITORENA

Proceed.

PROS. VIERNES

Q This receipt was prepared on January 31, although it is dated January 30?

A Yes, sir, because I was there on January 31st.

Q In what particular place did Mrs. Gimenez sign this Exhibit “3”?

A In her office at Aguado, sir.

Q Did you actually see Mrs. Gimenez signing this receipt Exhibit “3”?

A No, sir, I did not. She was inside her room.

Q So, she was in her room and when she came out of the room, she handed this receipt to you already typed and signed?

A Yes, sir.

*AJ HERMOSISIMA

Q So, how did you know this was the signature of Mrs. Gimenez?

WITNESS

A Because I know her signature, your Honor. I have been receiving letters from her also and when she requests for something from me. Her writing is familiar to me.

Q So, when the Presiding Justice asked you as to how you knew that this was the signature of Mrs. Gimenez and you answered that you saw Mrs. Gimenez signed it, you were not exactly truthful?

A What I mean is, I did not see her sign because she went to her room and when she came out, she gave me that receipt, your Honor.

PJ GARCHITORENA

That is why you have to wait for the question to be finished and listen to it carefully. Because when I asked you, you said you saw her signed it. Be careful Mr. Tabuena.

WITNESS

Yes, your Honor.

PJ GARCHITORENA

Continue.

PROS VIERNES

Q Was there another person inside the office of Mrs. Gimenez when she gave you this receipt Exhibit “3”?

A Nobody, sir.

Q I noticed in this receipt that the last delivery of the sum of P55 million was made on January 30. Do we understand from you that this date January 30 is erroneous?

A Yes, sir, that January 30 is erroneous. I noticed it only afterwards. This should be January 31st, sir.

PROS VIERNES

That will be all, your Honor.

PJ GARCHITORENA

Redirect?

ATTY. ANDRES

No redirect, your Honor.

*PJ GARCHITORENA

Questions from the Court.

*AJ HERMOSISIMA

Q Why did you not ask for a receipt on the first and second deliveries?

A Because I know that the delivery was not complete yet, your Honor.

*PJ GARCHITORENA

Q So you know that the total amount to be delivered was P55 million?

A Yes, your Honor.

PJ GARCHITORENA

Response by Mr. Peralta to the testimony of Mr. Tabuena.

ATTY. ESTEBAL

We are adopting the testimony of Mr. Tabuena and we will also present the accused, your Honor.

*AJ DEL ROSARIO

Q From whom did you receive the President's memorandum marked Exhibit "1"? Or more precisely, who handed you this memorandum?

A Mrs. Fe Roa Gimenez, your Honor.

Q Did you ask Mrs. Fe Gimenez for what purpose the money was being asked?

A The money was in payment for the debt of the MIA Authority to PNCC, your Honor.

Q If it was for the payment of such obligation why was there no voucher prepared to cover such payment? In other words, why was the delivery of the money not covered by any voucher?

A The instruction to me was to give it to the Office of the President, your Honor.

*PJ GARCHITORENA

Q Be that as it may, why was there no voucher to cover this particular disbursement?

A I was just told to bring it to the Office of the President, your Honor.

*AJ DEL ROSARIO

Q Was that normal procedure for you to pay in cash to the Office of the President for obligations of the MIAA in payment of its obligation to another entity?

WITNESS

A No, your Honor, I was just following the Order to me of the President.

*PJ GARCHITORENA

Q So the Order was out of the ordinary?

A Yes, your Honor.

*AJ DEL ROSARIO

Q Did you file any written protest with the manner with which such payment was being ordered?

A No, your Honor.

Q Why not?

A Because with that instruction of the President to me, I followed, your Honor.

Q Before receiving this memorandum Exhibit "1", did the former President Marcos discuss this matter with

you?

A Yes, your Honor.

Q When was that?

A He called me up earlier, a week before that, that he wants to me pay what I owe the PNCC directly to his office in cash, your Honor.

*PJ GARCHITORENA

*Q By "I OWE", you mean the MIAA?

WITNESS

A Yes, your Honor.

*AJ DEL ROSARIO

Q And what did you say in this discussion you had with him?

A I just said, "Yes, sir, I will do it"

Q Were you the one who asked for a memorandum to be signed by him?

A No, your Honor.

Q After receiving that verbal instruction for you to pay MIAA's obligation with PNCC, did you not on your own accord already prepare the necessary papers and documents for the payment of that obligation?

A He told me verbally in the telephone that the Order for the payment of that obligation is forthcoming, your Honor. I will receive it.

Q Is this the first time you received such a memorandum from the President?

A Yes, your Honor.

Q And was that the last time also that you received such a memorandum?

A Yes, your Honor.

Q Did you not inquire, if not from the President, at least from Mrs. Gimenez why this procedure has to be followed instead of the regular procedure?

A: No, sir.

*AJ DEL ROSARIO

Q Why did you not ask?

A I was just ordered to do this thing, your Honor.

*AJ HERMOSISIMA

Q You said there was an "I OWE YOU"?

A Yes, your Honor.

Q Where is that "I OWE YOU" now?

A All I know is that we owe PNCC the amount of P99.1 million, your Honor. MIAA owes PNCC that amount.

Q Was this payment covered by receipt from the PNCC?

A It was not covered, your Honor.

Q So the obligation of MIAA to PNCC was not, for the record, cancelled by virtue of that payment?

A Based on the order to me by the former President Marcos ordering me to pay that amount to his office and then the mechanics will come after, your Honor.

Q Is the PNCC a private corporation or government entity?

A I think it is partly government, your Honor.

*PJ GARCHITORENA

Q That is the former CDCP?

A Yes, your Honor.

*AJ HERMOSISIMA

*Q Why were you not made to pay directly to the PNCC considering that you are the Manager of MIA at that time and the PNCC is a separate corporation, not an adjunct of Malacañang?

WITNESS

A I was just basing it from the Order of Malacañang to pay PNCC through the Office of the President, your Honor.

Q Do you know the President or Chairman of the Board of PNCC?

A Yes, your Honor.

Q How was the obligation of MIAA to PNCC incurred. Was it through the President or Chairman of the Board?

A PNCC was the one that constructed the MIA, your Honor.

*Q Was the obligation incurred through the President or Chairman of the Board or President of the PNCC? In other words, who signed the contract between PNCC and MIAA?

A Actually, we inherited this obligation, your Honor. The one who signed for this was the former Director of BAT which is General Singzon. Then when the MIA Authority was formed, all the obligations of BAT were transferred to MIAA. So the accountabilities of BAT were transferred to MIAA and we are the ones that are going to pay, your Honor.

Q Why did you agree to pay to Malacañang when your obligation was with the PNCC?

A I was ordered by the President to do that, your Honor.

Q You agreed to the order of the President notwithstanding the fact that this was not the regular course or Malacañang was not the creditor?

A I saw nothing wrong with that because that is coming from the President, your Honor.

Q The amount was not a joke, amounting to P55 million, and you agreed to deliver money in this amount through a mere receipt from the private secretary?

A I was ordered by the President, your Honor.

*PJ GARCHITORENA

Q There is no question and it can be a matter of judicial knowledge that you have been with the MIA for sometime?

A Yes, your Honor.

Q Prior to 1986?

A Yes, your Honor.

Q Can you tell us when you became the Manager of MIA?

A I became Manager of MIA way back, late 1968, your Honor.

Q Long before the MIA was constituted as an independent authority?

A Yes, your Honor.

*PJ GARCHITORENA

*Q And by 1986, you have been running the MIA for 18 years?

WITNESS

A Yes, your Honor.

Q And prior to your joining the MIA, did you ever work for the government?

A No, your Honor.

Q So, is it correct for us to say that your joining the MIA in 1968 as its Manager was your first employment with the government?

A Yes, your Honor.

Q While you were Manager of MIA, did you have other subsequent concurrent positions in the government also?

A I was also the Chairman of the Games and Amusement Board, your Honor.

Q But you were not the executive or operating officer of the Games and Amusement Board?

A I was, your Honor.

Q As Chairman you were running the Games and Amusement Board?

A Yes, your Honor.

Q What else, what other government positions did you occupy that time?

A I was also Commissioner of the Game Fowl Commission, your Honor.

*PJ GARCHITORENA

*Q That is the cockfighting?

WITNESS

A Yes, your Honor.

Q Here, you were just a member of the Board?

A Yes, your Honor.

Q So you were not running the commission?

A Yes, your Honor.

Q Any other entity?

A No more, your Honor.

Q As far as you can recall, besides being the Manager of the MIA and later the MIAA for approximately 18 years, you also ran the Games and Amusement Board as its executive officer?

A Yes, your Honor.

Q And you were a commissioner only of the Game Fowl Commission?

A Yes, your Honor.

Q Who was running the commission at that time?

A I forgot his name, but he retired already, your Honor.

Q All of us who joined the government, sooner or later, meet with our Resident COA representative?

A Yes, your Honor.

*PJ GARCHITORENA

*Q And one of our unfortunate experience (sic) is when the COA Representative comes to us and says: "Chairman or Manager, this cannot be". And we learn later on that COA has reasons for its procedure and we learn to adopt to them?

WITNESS

A Yes, your Honor.

Q As a matter of fact, sometimes we consider it inefficient, sometimes we consider it foolish, but we know there is reason in this apparent madness of the COA and so we comply?

A Yes, your Honor.

Q And more than anything else the COA is ever anxious for proper documentation and proper supporting papers?

A Yes, your Honor.

Q Sometimes, regardless of the amount?

A Yes, your Honor.

Q Now, you have P55 million which you were ordered to deliver in cash, not to the creditor of the particular credit, and to be delivered in armored cars to be acknowledged only by a receipt of a personal secretary. After almost 18 years in the government service and having had that much time in dealing with COA people, did it not occur to you to call a COA representative and say, "What will I do here?"

A I did not, your Honor.

*PJ GARCHITORENA

*Q Did you not think that at least out of prudence, you should have asked the COA for some guidance on this matter so that you will do it properly?

WITNESS

A What I was going to do is, after those things I was going to tell that delivery ordered by the President to the COA, your Honor.

Q That is true, but what happened here is that you and Mr. Dabao or you and Mr. Peralta signed requests for issuance of Manager's checks and you were accommodated by the PNB Office at Nichols without any internal documentation to justify your request for Manager's checks?

A Yes, your Honor.

Q Of course we had no intimation at that time that Mr. Marcos will win the elections but even then, the Daily Express, which was considered to be a newspaper friendly to the Marcoses at that time, would occasionally come with so-called expose, is that not so?

A Yes, your Honor.

Q And worst, you had the so-called mosquito press that would always come out with the real or imagined scandal in the government and place it in the headline, do you recall that?

A Yes, your Honor.

*PJ GARCHITORENA

Q Under these circumstances, did you not entertain some apprehension that some disloyal employees might leak you out and banner headline it in some mosquito publications like the Malaya at that time?

WITNESS

A No, your Honor.

*PJ GARCHITORENA

I bring this up because we are trying to find out different areas of fear. We are in the government and we in the government fear the COA and we also fear the press. We might get dragged into press releases on the most innocent thing. You believe that?

A Yes, your Honor.

Q And usually our best defense is that these activities are properly documented?

A Yes, your Honor.

Q In this particular instance, your witnesses have told us about three (3) different trips from Nichols to Aguado usually late in the day almost in movie style fashion. I mean, the money being loaded in the trunk of your official car and then you had a back-up truck following your car?

A Yes, your Honor.

Q Is that not quite a fearful experience to you?

A I did not think of that at that time, your Honor.

*PJ GARCHITORENA

Q You did not think it fearful to be driving along Roxas Boulevard with P25 million in the trunk of your car?

WITNESS

A We have security at that time your Honor.

ATTY. ANDRES

Your Honor, the P25 million was in the armored car; only P5 million was in the trunk of his car.

*PJ GARCHITORENA

Thank you for the correction. Even P1 million only. How much more with P5 million inside the trunk of your car, was that not a nervous experience?

A As I have said, your Honor, I never thought of that.

PJ GARCHITORENA

Thank you very much, Mr. Tabuena. You are excused. x x x.”[42]

(PERALTA)

(He testified on direct examination that he co-signed with Tabuena a memorandum request for the issuance of the Manager’s Check for P5 Million upon order of Tabuena and that he [Peralta] was aware that MIAA had an existing obligation with PNCC in the amount of around P27 Million. He affirmed having accompanied Tabuena at the PNB Villamor Branch to withdraw the P5 Million, but denied having misappropriated for his own benefit said amount or any portion thereof.)

“CROSS-EXAMINATION BY PROS VIERNES

Q Will you please tell the Honorable Court why was it necessary for you to co-sign with Mr. Tabuena the request for issuance of Manager’s check in the amount of P5 million?

A At that time I was the Acting Financial Services Manager of MIAA, sir, and all withdrawals of funds should have my signature because I was one of the signatories at that time.

Q As Acting Financial Services Manager of MIAA, you always co-sign with Mr. Tabuena in similar requests for the issuance of Manager's checks by the PNB?

A That is the only occasion I signed, sir.

Q Did you say you were ordered by Mr. Tabuena to sign the request?

A Yes, sir, and I think the order is part of the exhibits. And based on that order, I co-signed in the request for the issuance of Manager's check in favor of Mr. Luis Tabuena.

PROS VIERNES

Q Was there a separate written order for you to co-sign with Mr. Tabuena?

WITNESS

A Yes, sir, an order was given to me by Mr. Tabuena.

*PJ GARCHITORENA

Was that marked in evidence?

WITNESS

Yes, your Honor.

*PJ GARCHITORENA

What exhibit?

WITNESS

I have here a copy, your Honor. This was the order and it was marked as exhibit "N".

PROS VIERNES

It was marked as Exhibit "M", your Honor.

Q How did you know there was an existing liability of MIAA in favor of PNCC at that time?

A Because prior to this memorandum of Mr. Tabuena, we prepared the financial statement of MIAA as of December 31, 1985 and it came to my attention that there was an existing liability of around P27,999,000.00, your Honor.

Q When was that Financial Statement prepared?

A I prepared it around January 22 or 24, something like that, of 1986, sir.

Q Is it your usual practice to prepare the Financial Statement after the end of the year within three (3) weeks after the end of the year?

A Yes, sir, it was a normal procedure for the MIAA to prepare the Financial Statement on or before the 4th Friday of the month because there will be a Board of Directors Meeting and the Financial Statement of the prior month will be presented and discussed during the meeting.

*PJ GARCHITORENA

Q This matter of preparing Financial Statement was not an annual activity but a monthly activity?

A Yes, your Honor.

Q This Financial Statement you prepared in January of 1986 recapitulated the financial condition as of the end of the year?

A Yes, your Honor.

PJ GARCHITORENA

Continue.

PROS VIERNES

Q You made mention of a request for Escalation Clause by former Minister Ongpin. Did you personally see that request?

A When this order coming from Mr. Tabuena was shown to me, I was shown a copy, sir. I have no file because I just read it.

Q It was Mr. Tabuena who showed you the letter of Minister Ongpin?

A Yes, sir.

*PJ GARCHITORENA

And that will be Exhibit?

ATTY. ANDRES

Exhibit "2" and "2-A", your Honor.

PROS VIERNES

Q You also stated that you were with Mr. Tabuena when you withdrew the amount of P5 million from the PNB Extension Office at Villamor?

A Yes, sir.

Q Why was it necessary for you to go with him on that occasion?

A Mr. Tabuena requested me to do the counting by million, sir. So what I did was to bundle count the P5 million and it was placed in two (2) peerless boxes.

Q Did you actually participate in the counting of the money by bundles?

A Yes, sir.

Q Bundles of how much per bundle?

A If I remember right, the bundles consisted of P100s and P50s, sir.

Q No P20s and P10s?

A Yes, sir, I think it was only P100s and P50s.

*PJ GARCHITORENA

Q If there were other denominations, you can not recall?

A Yes, your Honor.

PROS VIERNES

Q In how many boxes were those bills placed?

A The P5 million were placed in two (2) peerless boxes, sir.

Q And you also went with Mr. Tabuena to Aguado?

A No, sir, I was left behind at Nichols. After it was placed at the trunk of the car of Mr. Tabuena, I was left behind and I went back to my office at MIA.

Q But the fact is that, this P5 million was withdrawn at passed 5:00 o'clock in the afternoon?

A I started counting it I think at around 4:30, sir. It was after office hours. But then I was there at around 4:00 o'clock and we started counting at around 4:30 p.m. because they have to place it in a room, which is the

office of the Manager at that time.

Q And Mr. Tabuena left for Malacañang after 5:00 o'clock in the afternoon of that date?

A Yes, sir. After we have counted the money, it was placed in the peerless boxes and Mr. Tabuena left for Malacañang.

PROS VIERNES

Q And you yourself, returned to your office at MIA?

WITNESS

A Yes, sir.

Q Until what time do you hold office at the MIA?

A Usually I over-stayed for one (1) or two (2) hours just to finish the paper works in the office, sir.

Q So, even if it was already after 5:00 o'clock in the afternoon, you still went back to your office at MIA?

A Yes, sir.

PROS VIERNES

That will be all, your Honor.

PJ GARCHITORENA

Redirect?

ATTY. ESTEBAL

No redirect, your Honor.

*PJ GARCHITORENA

Questions from the Court.

*AJ DEL ROSARIO

*Q Did you not consider it as odd that your obligation with the PNCC had to be paid in cash?

WITNESS

A Based on the order of President Marcos that we should pay in cash, it was not based on the normal procedure, your Honor.

Q And, as Acting Financial Services Manager, you were aware that all disbursements should be covered by vouchers?

A Yes, your Honor, the payments should be covered by vouchers. But then, inasmuch as what we did was to prepare a request to the PNB, then this can be covered by Journal Voucher also.

Q Was such payment of P5 million covered by a Journal Voucher?

A Yes, your Honor.

Q Did you present that Journal Voucher here in Court?

A We have a copy, your Honor.

Q Do you have a copy or an excerpt of that Journal Voucher presented in Court to show that payment?

A We have a copy of the Journal Voucher, your Honor.

Q Was this payment of P5 million ever recorded in a cashbook or other accounting books of MIAA?

A The payment of P5 million was recorded in a Journal Voucher, your Honor.

*PJ GARCHITORENA

*Q In other words, the recording was made directly to the Journal?

WITNESS

A Yes, your Honor.

*Q There are no other separate documents as part of the application for Manager's Check?

A Yes, your Honor, there was none.

*AJ DEL ROSARIO

Q After the payment was made, did your office receive any receipt from PNCC?

A I was shown a receipt by Mr. Tabuena, the receipt given by Mrs. Fe Roa Gimenez, your Honor. Inasmuch as the payment should be made through the Office of the president, I accepted the receipt given by Mrs. Fe Gimenez to Mr. Tabuena.

Q After receiving that receipt, did you prepare the necessary supporting documents, vouchers, and use that receipt as a supporting document to the voucher?

A Your Honor, a Journal Voucher was prepared for that.

Q How about a disbursement voucher?

A Inasmuch as this was a request for Manager's check, no disbursement voucher was prepared, your Honor.

*AJ DEL ROSARIO

*Q Since the payment was made on January 31, 1986, and that was very close to the election held in that year, did you not entertain any doubt that the amounts were being used for some other purpose?

ATTY. ESTEBAL

With due respect to the Honorable Justice, we are objecting to the question on the ground that it is improper.

*AJ DEL ROSARIO

I will withdraw the question.

*PJ GARCHITORENA

What is the ground for impropriety?

ATTY. ESTEBAL

This is not covered in the direct examination, and secondly, I don't think there was any basis, your Honor.

*PJ GARCHITORENA

Considering the withdrawal of the question, just make the objection on record.

*AJ HERMOSISIMA

Q As a Certified Public Accountant and Financial Manager of the MIAA, did you not consider it proper that a check be issued only after it is covered by a disbursement voucher duly approved by the proper authorities?

A Your Honor, what we did was to send a request for a Manager's check to the PNB based on the request of Mr. Tabuena and the order of Mr. Tabuena was based on the Order of President Marcos.

*PJ GARCHITORENA

Q In your capacity as Financial Services Manager of the MIAA, did you not think it proper to have this transaction covered by a disbursement voucher?

WITNESS

A Based on my experience, payments out of cash can be made through cash vouchers, or even through Journal Vouchers, or even through credit memo, your Honor.

*AJ HERMOSISIMA

Q This was an obligation of the MIAA to the PNCC. Why did you allow a disbursement by means of check in favor of Mr. Luis Tabuena, your own manager?

A We based the payment on the order of Mr. Tabuena because that was the order of President Marcos to pay PNCC through the Office of the President and it should be paid in cash, your Honor.

Q You are supposed to pay only on legal orders. Did you consider that legal?

ATTY. ESTEBAL

With due respect to the Honorable Justice, the question calls for a conclusion of the witness.

*PJ GARCHITORENA

Considering that the witness is an expert, witness may answer.

WITNESS

A The order of president Marcos was legal at that time because the order was to pay PNCC the amount of P5 million through the Office of the President and it should be paid in cash, your Honor. And at that time, I know for a fact also that there was an existing P.D. wherein the President of the Republic of the Philippines can transfer funds from one office to another and the PNCC is a quasi government entity at that time.

*AJ HERMOSISIMA

Q Are you saying that this transaction was made on the basis of that P.D. which you referred to?

A I am not aware of the motive of the President, but then since he is the President of the Philippines, his order was to pay the PNCC through the Office of the President, your Honor.

Q As Financial Manager, why did you allow a payment in cash when ordinarily payment of an obligation of MIAA is supposed to be paid in check?

A I caused the payment through the name of Mr. Tabuena because that was the order of Mr. Tabuena and also he received an order coming from the President of the Philippines at that time, your Honor.

*PJ GARCHITORENA

*Q Mr. Peralta, are not Journal Vouchers merely entries in the Journals to correct certain statements of accounts earlier made in the same journal?

In other words, really what you are telling us is that, a Journal Voucher is to explain a transaction was otherwise not recorded.

WITNESS

A Yes, your Honor.

Q Therefore, when you said that a Journal Voucher here is proper, you are saying it is proper only because of

the exceptional nature of the transactions?

A Yes, your Honor.

*Q In other words, as an Accountant, you would not normally authorize such a movement of money unless it is properly documented?

ATTY. ESTEBAL

With due respect to the Honorable Presiding Justice, I think the question is misleading because what the witness stated is...

*PJ GARCHITORENA

Be careful in your objection because the witness understands the language you are speaking, and therefore, you might be coaching him.

ATTY. ESTEBAL

No, your Honor. I am also an accountant that is why I could say that...

*PJ GARCHITORENA

Please be simple in your objection.

ATTY. ESTEBAL

The question is misleading on the ground that what the witness stated earlier is that the Journal Voucher in this particular case was supported, your Honor.

*PJ GARCHITORENA

Overruled, may answer.

WITNESS

A The transaction was fully documented since we have the order of the General Manager at that time and the order of President Marcos, your Honor.

Q Are you saying the Order of the General Manager is an adequate basis for the movement of money?

A Yes, your Honor, because at that time we have also a recorded liability of P27 million.

Q We are not talking of whether or not there was a liability. What we are saying is, is the order of the General Manager by itself adequate with no other supporting papers, to justify the movement of funds?

A Yes, your Honor. The order of Mr. Luis Tabuena was based on our existing liability of P27,931,000.00, inasmuch as we have that liability and I was shown the order of President Marcos to pay P5 million through the Office of the President, I considered the order of Mr. Luis Tabuena, the order of President Marcos and also the existing liability of P27 million sufficient to pay the amount of P5 million. Inasmuch as there is also an escalation clause of P99.1 million, the payment of P5 million is fully covered by those existing documents.

*PJ GARCHITORENA

You keep flooding us with details we are not asking for. We are not asking you whether or not there was valid obligation. We are not asking you about the escalation clause. We are asking you whether or not this particular order of Mr. Tabuena is an adequate basis to justify the movement of funds?

WITNESS

When we pay, your Honor, we always look for the necessary documents and at that time I know for a fact that

there was this existing liability.

*PJ GARCHITORENA

When we ask questions and when we answer them, we must listen to the question being asked and not to whatever you wanted to say. I know you are trying to protect yourself. We are aware of your statement that there are all of these memoranda.

*Q By your disbursement of such amount, you are saying that the order of Mr. Tabuena by itself is adequate?

WITNESS

A As far as I am concerned, your Honor, inasmuch as we have a liability and I was shown the Order of President Marcos to pay PNCC through his office, I feel that the order of the General Manager, the order of President Marcos, and also the memorandum of Minister Ongpin are sufficient to cause the payment of P5 million.

*PJ GARCHITORENA

*Q This Presidential Decree which authorizes the President to transfer funds from one department to another, is this not the one that refers to the realignment of funds insofar as the Appropriation Act is concerned?

WITNESS

A Because at that time, your Honor, I have knowledge that the President is authorized through a Presidential Decree to transfer government funds from one office to another.

*PJ GARCHITORENA

Q Under the Appropriation Act. Are payments of debts of the MIAA covered by the Appropriation Act?

A I think the liability was duly recorded and appropriations to pay the amount is.....

(interrupted)

*PJ GARCHITORENA

Q Tell me honestly, is your answer responsive to the question or are you just throwing words at us in the hope that we will forget what the question is?

A No, your Honor.

Q Are you telling us that the debts incurred by MIAA are covered by the Appropriations Act so that the payment of this debt would be in the same level as the realignment of funds authorized the President? Or are you telling as you did not read the Decree?

A I was aware of that Decree, your Honor.

*PJ GARCHITORENA

Mr. Estebal, will you include in your memorandum what are the Decrees authorizing this movement of funds?

ATTY. ESTEBAL

Yes, your Honor.

*PJ GARCHITORENA

Q It is true that President Marcos was the President, but he was not an officer of the MIAA, was he?

A No, your Honor.

Q In fact, for purposes of internal control, you have different officers and different officials in any company either government or private, which are supposed to check and balance each other, is it not?

A Yes, your Honor.

Q So that when disbursements of funds are made, they are made by authority of not only one person alone so that nobody will restrain him?

A Yes, your Honor.

Q These checks and balances exist in an entity so that no one person can dispose of funds in any way he likes?

A Yes, your Honor.

Q And in fact, the purpose for having two (2) signatories to documents and negotiable documents is for the same purpose?

A Yes, your Honor.

*PJ GARCHITORENA

*Q In other words, the co-signatories counter check each other?

WITNESS

A Yes, your Honor.

*Q In your case, you would be the counter check for Mr. Tabuena?

A Yes, your Honor.

Q In other words, even if Mr. Tabuena is the Manager, you as Financial Services Manager and as counter signatory are in a position to tell Mr. Tabuena, "I am sorry, you are my superior but this disbursement is not proper and, therefore, I will not sign it.", if in your opinion the disbursement is not proper?

A Yes, your Honor.

Q Therefore, as co-signatory, you are expected to exercise your judgment as to the propriety of a particular transaction?

A Yes, your Honor.

Q And this is something you know by the nature of your position and because you are a Certified Public Accountant?

A Yes, your Honor.

*AJ DEL ROSARIO

Q You admit that the payment of P5 million and P50 million were unusual in the manner with which they were disposed?

A Yes, your Honor.

Q Did you submit a written protest to the manner in which such amount was being disposed of?

A A written protest was not made, your Honor, but I called the attention of Mr. Tabuena that since this payment was upon the order of President Marcos, then I think as President he can do things which are not ordinary.

Q If you did not prepare a written protest, did you at least prepare a memorandum for the record that this was an extra-ordinary transaction?

A I called the attention of Mr. Tabuena that this was an extra-ordinary transaction and no written note, your Honor.

PJ GARCHITORENA

Thank you very much Mr. Peralta, you are excused. x x x.”[43]

This Court has acknowledged the right of a trial judge to question witnesses with a view to satisfying his mind upon any material point which presents itself during the trial of a case over which he presides.[44] But not only should his examination be limited to asking “clarificatory” questions,[45] the right should be sparingly and judiciously used; for the rule is that the court should stay out of it as much as possible, neither interfering nor intervening in the conduct of the trial.[46] Here, these limitations were not observed. Hardly in fact can one avoid the impression that the Sandiganbayan had allied itself with, or to be more precise, had taken the cudgels for the prosecution in proving the case against Tabuena and Peralta when the Justices cross-examined the witnesses, their cross-examinations supplementing those made by Prosecutor Viernes and far exceeding the latter’s questions in length. The “cold neutrality of an impartial judge” requirement of due process was certainly denied Tabuena and Peralta when the court, with its overzealousness, assumed the dual role of magistrate and advocate. In this connection, the observation made in the Dissenting Opinion to the effect that the majority of this Court was “unduly disturbed” with the number of court questions alone, is quite inaccurate. A substantial portion of the TSN was incorporated in the majority opinion not to focus on “numbers” alone, but more importantly to show that the court questions were in the interest of the prosecution and which thus depart from that common standard of fairness and impartiality. In fact, it is very difficult to be, upon review of the records, confronted with “numbers” without necessarily realizing the partiality of the Court. In “US v. De Sisto” (2 Cir., 1961, 289 F 2d 833), for example, a new trial was required because the trial judge, as in this case, indulged in extensive questioning of defendant and his witnesses, and the reviewing court also had to amplify on “numbers” to bolster this. It was pointed out in the “De Sisto” case that the judge asked 3,115 questions of all witnesses, the prosecutor asked but 1,381, defense counsel 3,330. The judge’s questions to the defendant De Sisto totalled 306, the prosecutor’s 347, and the defense counsel’s, 201. After referring to these figures, the court stated:

“ . . . It is indeed an impressive proportion, but no such mathematical computation is of itself determinative. However, taking all this in conjunction with the long and vigorous examination of the defendant himself by the judge, and the repeated belittling by the judge of defendant’s efforts to establish the time that Fine left the pier, we fear that in its zeal for arriving at the facts the court here conveyed to the jury too strong an impression of the court’s belief in the defendant’s probable guilt to permit the jury freely to perform its own function of independent determination of the facts. x x x”

The majority believes that the interference by the Sandiganbayan Justices was just too excessive that it cannot be justified under the norm applied to a jury trial, or even under the standard employed in a non-jury trial where the judge is admittedly given more leeway in propounding questions to clarify points and to elicit additional relevant evidence. At the risk of being repetitious, we will amplify on this via some specific examples. Based on the evidence on record, and on the admission of Tabuena himself, the P55 million was delivered to the President’s Office thru Mrs. Gimenez, in obedience to the Presidential directive. One Sandiganbayan Justice, however, hurled the following questions to Peralta:

“AJ DEL ROSARIO

Q: Since the payment was made on January 31, 1986, and that was very close to the election held in that year, did you not entertain any doubt that the amounts were being used for some other purposes?

ATTY. ESTEBAL

With due respect to the Honorable Justice, We are objecting to the question on the ground that it is improper.

AJ DEL ROSARIO

I will withdraw the question.

PJ GARCHITORENA

What is the ground for impropriety?

ATTY. ESTEBAL

This is not covered in the direct examination, and secondly, I don't think there was any basis, Your Honor.

PJ GARCHITORENA

Considering the withdrawal of the question, just make the objection on record."

Nothing from the preceding questions of counsels or of the court would serve as basis for this question. How then, can this be considered even relevant? What is the connection between the payment made to the President's office and the then forthcoming presidential "snap election"? In another instance, consider the following questions of Presiding Justice Garchitorena:

*PJ GARCHITORENA

*Q Mr. Peralta, are not Journal Vouchers merely entries in the Journals to correct certain statements of accounts earlier made in the same journal?

xxx

*Q In other words, really what you are telling us is that, a Journal Voucher is to explain a transaction was otherwise not recorded.

xxx

*Q Therefore, when you said that a Journal Voucher here is proper, you are saying it is proper only because of the exceptional nature of the transactions?

xxx

*Q In other words, as an Accountant, you would not normally authorize such a movement of money unless it is properly documented?

ATTY. ESTEBAL

With due respect to the Honorable Presiding Justice, I think the question is misleading because what the witness stated is...

*PJ GARCHITORENA

Be careful in your objection because the witness understands the language you are speaking, and therefore, you might be coaching him.

ATTY. ESTEBAL

No, your Honor. I am also an accountant that is why I could say that...

*PJ GARCHITORENA

Please be simple in your objection.

ATTY. ESTEBAL

The question is misleading on the ground that what the witness stated earlier is that the Journal Voucher in this

particular case was supported, your Honor.

*PJ GARCHITORENA

Overruled, may answer.

WITNESS

A The transaction was fully documented since we have the order of the General Manager at that time and the order of President Marcos, your Honor.

*Q Are you saying the Order of the General Manager is an adequate basis for the movement of money?

*Q We are not talking of whether or not there was a liability. What we are saying is, is the order of the General Manager by itself adequate with no other supporting papers, to justify the movement of funds?

*PJ GARCHITORENA

You keep flooding us with details we are not asking for. We are not asking you whether or not there was valid obligation. We are not asking you about the escalation clause. We are asking you whether or not this particular order of Mr. Tabuena is an adequate basis to justify the movement of funds?

*PJ GARCHITORENA

When we ask questions and when we answer them, we must listen to the question being asked and not to whatever you wanted to say. I know you are trying to protect yourself. We are aware of your statement that there are all of these memoranda.

*Q By your disbursement of such amount, you are saying that the order of Mr. Tabuena by itself is adequate?

*PJ GARCHITORENA

*Q This Presidential Decree which authorizes the President to transfer funds from one department to another, is this not the one that refers to the realignment of funds insofar as the Appropriation Act is concerned?

*PJ GARCHITORENA

*Q Under the Appropriation Act. Are payments of debts of the MIAA covered by the Appropriation Act?

*PJ GARCHITORENA

*Q Tell me honestly, is your answer responsive to the question or are you just throwing words at us in the hope that we will forget what the question is?

xxx

*Q Are you telling us that the debts incurred by MIAA are covered by the Appropriations Act so that the payment of this debt would be in the same level as the realignment of funds authorized the President? Or are you telling as you did not read the Decree?

*PJ GARCHITORENA

Mr. Estebal, will you include in your memorandum what are the Decrees authorizing this movement of funds?

ATTY. ESTEBAL

Yes, your Honor.

*PJ GARCHITORENA

*Q It is true that President Marcos was the President, but he was not an officer of the MIAA, was he?

*Q In fact, for purposes of internal control, you have different officers and different officials in any company either government or private, which are supposed to check and balance each other, is it not?

*Q So that when disbursements of funds are made, they are made by authority of not only one person alone so that nobody will restrain him?

*Q These checks and balances exist in an entity so that no one person can dispose of funds in any way he likes?

*Q And in fact, the purpose for having two (2) signatories to documents and negotiable documents is for the same purpose?

*PJ GARCHITORENA

*Q In other words, the co-signatories counter check each other?

*Q In your case, you would be the counter check for Mr. Tabuena?

*Q In other words, even if Mr. Tabuena is the Manager, you as Financial Services Manager and as counter signatory are in a position to tell Mr. Tabuena, "I am sorry, you are my superior but this disbursement is not proper and, therefore, I will not sign it.", if in your opinion the disbursement is not proper?

*Q Therefore, as co-signatory, you are expected to exercise your judgment as to the propriety of a particular transaction?

*Q And this is something you know by the nature of your position and because you are a Certified Public Accountant?"[47]

How can these questions be considered clarificatory when they clearly border more on cross-examination questions? Thus, the Dissenting Opinion's focus on the distinction between the two kinds of trial to justify the Sandiganbayan's active participation in the examination of petitioners Tabuena and Peralta and witness Monera, with due respect, appears insignificant to this case. Let it, therefore, be emphasized anew that:

"A trial judge should not participate in the examination of witnesses as to create the impression that he is allied with the prosecution."[48]

"We doubt not that the sole motive of the learned judge was to ascertain the truth of the transaction, but it is never proper for a judge to discharge the duties of a prosecuting attorney. However anxious a judge may be for the enforcement of the law, he should always remember that he is as much judge in behalf of the defendant accused of crime, and whose liberty is in jeopardy, as he is judge in behalf of the state, for the purpose of safeguarding the interests of society."[49]

"Ordinarily it is not good practice for the presiding judge himself to examine witnesses at length. The circumstances may be such in a given case as to justify the court in so doing....This court, however, has more than once said that the examination of witnesses is the more appropriate function of counsel, and the instances are rare and the conditions exceptional which will justify the presiding judge in conducting an extensive examination. It is always embarrassing for counsel to object to what he may deem improper questions by the court. Then, in conducting a lengthy examination, it would be almost impossible for the judge to preserve a judicial attitude. While he is not a mere figurehead or umpire in a trial, and it is his duty to see that justice is done, he will usually not find it necessary to conduct such examinations. The extent to which this shall be done must largely be a matter of discretion, to be determined by the circumstances of each particular case, but in so doing he must not forget the

function of the judge and assume that of an advocate....”[50]

“While it is true that the manner in which a witness shall be examined is largely in the discretion of the trial judge, it must be understood that we have not adopted in this country the practice of making the presiding judge the chief inquisitor. It is better to observe our time-honored custom of orderly judicial procedure, even at the expense of occasional delays....The judge is an important figure in the trial of a cause, and while he has the right, and it is often his duty, to question witnesses to the end that justice shall prevail, we can conceive of no other reason, for him to take the trial of the cause out of the hands of counsel.”[51]

“The examination of witnesses is the more appropriate function of counsel, and it is believed the instances are rare and the conditions exceptional in a high degree which will justify the presiding judge in entering upon and conducting an extended examination of a witness, and that the exercise of a sound discretion will seldom deem such action necessary or advisable.”[52]

“He [the judge] may properly intervene in a trial of a case to promote expedition, and prevent unnecessary waste of time, or to clear up some obscurity, but he should bear in mind that his undue interference, impatience, or participation in the examination of witnesses, or a severe attitude on his part toward witnesses, especially those who are excited or terrified by the unusual circumstances of a trial, may tend to prevent the proper presentation of the cause, or the ascertainment of the truth in respect thereto.”[53]

“The impartiality of the judge — his avoidance of the appearance of becoming the advocate of either one side or the other of the pending controversy is a fundamental and essential rule of special importance in criminal cases....”[54]

“Our courts, while never unmindful of their primary duty to administer justice, without fear or favor, and to dispose of these cases speedily and in as inexpensive a manner as is possible for the court and the parties, should refrain from showing any semblance of one-sided or more or less partial attitude in order not to create any false impression in the minds of the litigants. For obvious reasons, it is the bounden duty of all to strive for the preservation of the people’s faith in our courts.”[55]

“Time and again this Court has declared that due process requires no less than the cold neutrality of an impartial judge. Bolstering this requirement, we have added that the judge must not only be impartial but must also appear to be impartial, to give added assurance to the parties that his decision will be just. The parties are entitled to no less than this, as a minimum guaranty of due process.”[56]

We are well aware of the fear entertained by some that this decision may set a dangerous precedent in that those guilty of enriching themselves at the expense of the public would be able to escape criminal liability by the mere expedient of invoking “good faith”. It must never be forgotten, however, that we render justice on a case to case basis, always in consideration of the evidence that is presented. Thus, where the evidence warrants an acquittal, as in this case, we are mandated not only by the dictates of law but likewise of conscience to grant the same. On the other hand, it does not follow that all those similarly accused will necessarily be acquitted upon reliance on this case as a precedent. For the decision in this case to be a precedent, the peculiar circumstances and the evidence that led to the petitioner’s acquittal must also be present in subsequent cases.

Furthermore, as between a mere apprehension of a “dangerous precedent” and an actual violation of constitutionally enshrined rights, it is definitely the latter that merits our immediate attention. For the most dangerous precedent arises when we allow ourselves to be carried away by such fears so that it becomes lawful to sacrifice the rights of an accused to calm the fearful. In our eagerness to bring to justice the malefactors of the Marcos regime, we must not succumb to the temptation to commit the greatest injustice of visiting the sins of the

wrongdoers upon an innocent.

WHEREFORE, in view of the foregoing, herein petitioners Luis A. Tabuena and Adolfo M. Peralta are hereby ACQUITTED of the crime of malversation as defined and penalized under Article 217 of the Revised Penal Code. The Sandiganbayan Decision of October 12, 1990 and the Resolution dated December 20, 1991 are REVERSED and SET ASIDE.

SO ORDERED.

Narvasa, C.J., Regalado, Bellosillo, Vitug, Kapunan, Mendoza, and Torres, JJ., concur. Padilla, Davide, Romero, Puno, and Panganiban, JJ., dissent.

Hermosisima, Jr., J., took no part being a signatory to SB decision.

[1] Taken under Section 7 of P.D. 1606, as amended (the Sandiganbayan Law), Section 1, Rule XIX of the Revised Rules of the Sandiganbayan and Rule 45 of the Rules of Court. The petitions were ordered consolidated by the Court in an En Banc Resolution dated October 1, 1992.

[2] Promulgated on October 22, 1990; Rendered by the First Division then composed of Justices Garchitorena (ponente), Hermosisima (now Associate Justice of this Court) and Del Rosario.

[3] Promulgated on January 10, 1992.

[4] Records, Vol. I, p. 26.

[5] Records, Vol. I, pp. 119-120.

[6] Tabuena avers that the Sandiganbayan:

“A

Erred and committed reviewable error in ruling that petitioner’s withdrawal of the P55 Million was not for a lawful purpose or for a lawful debt. In the process, the Sandiganbayan clearly ignored several pieces of evidence submitted by petitioner, and instead misapprehended the full import of the Ongpin Memorandum (Exh. “2”, as attachment of Annex “I”), to which the Marcos order to pay referred (Exh. “1”, attachment to Annex “I”). In so concluding, the Sandiganbayan laid its conclusions open to review as its judgment is in effect based on misapprehension of facts (*Cruz vs. Sosing*, L-4875, November 27, 1953); and in ignoring several material pieces of evidence abused its discretion (*Buyco vs. People*, 51 OG 7927).

B

Erred and committed reviewable error in ruling that the Ongpin Memorandum (Exh. “2” and “2-A”, See Annex “I”), and the Marcos approval thereof (Exh. “1”, *id.*) did not support the withdrawal and payment of monies by petitioner. In so concluding, the Sandiganbayan again clearly misapprehended the Ongpin and Marcos Memoranda, and the ledger of PNCC.

C

Erred and committed reviewable error in ruling that petitioner was in bad faith when he complied with the presidential order to pay; in thus concluding the Sandiganbayan indulged in speculations and conjectures (*Joaquin vs. Navarro*, 93 Phil. 257), or otherwise went beyond the issues (*Evangelista vs. Alco*, L-11139, April 23, 1958); the Sandiganbayan also erred in not ruling that petitioner is entitled to justifying circumstance under Par. 6, Art.

11, and/or the exempting circumstance provided under Pars. 5 and 6 of Art. 12 of the Revised Penal Code.

D

Erred and committed reviewable error in ruling that petitioner was unable to account for the money. In so doing, the Sandiganbayan contradicted the ruling in *U.S. vs. Catolico*, 18 Phil. 504. It also erred in holding petitioner accountable for acts not charged in the amended informations, and in so doing convicted him without jurisdiction.

E

Erred and committed reviewable error in ruling that petitioner was not entitled to immunity as provided by Sec. 17, Article VII of the 1973 Constitution. The Sandiganbayan therefore had no jurisdiction to try the cases.

F

Erred and committed reviewable error in ruling that proof beyond reasonable doubt of petitioner's guilt was submitted by the prosecution. In so doing, the Sandiganbayan wrongly shifted the burden of proof and denied petitioner the benefits of the presumption of innocence, of Secs. 1 and 2, Rule 131, and the absence of demand under the last paragraph of Art. 217 of the Revised Penal Code."

Peralta for his part claim that:

"1. Respondent court grossly and seriously erred in convicting herein accused despite the absence of proof that he allegedly converted the funds withdrawn to his own personal benefit as charged in the information in glaring violation of his basic constitutional right to be presumed innocent.

"2. Respondent also grossly erred in convicting herein accused on the basis of mere assumptions, conjectures and inferences devoid of factual basis in another court likewise grossly and seriously erred in convicting herein accused for a crime not charged in the information again in violation of another constitutional right, that is the right to be informed of the accusation or right to due process.

"3. Respondent court serious and glaring violation of his right to be presumed innocent until his guilt is established by proof beyond reasonable doubt.

"4. Respondent court finally erred in refusing to recognize the applicability of the immunity provision embodied in the Constitution and of the justifying circumstance of obedience to a lawful order as valid defenses in this case."

[7] Citing *PNB v. Tugab*, 66 Phil. 583 and *People v. Pascua*, 71 O.G. 2474.

[8] Citing *Tubb v. People*, 101 Phil. 114.

[9] 197 SCRA 94.

[10] 18 Phil. 504.

[11] 24 Phil. 230.

[12] 47 Phil. 48.

[13] *Lewis v. People*, 99 Colo. 102, 60 Pac. [2d] 1089; *Lawver v. State*, 221 Ind. 101, 46 N.E. [2d] 592; *State v. Schmidt*, 72 N. Dak. 719, 10 N.W. [2d] 868. *Underhill's Criminal Evidence*, 5th Ed., Book 3, p. 1421.

[14] *Federal Lindgren v. United States*, 260 Fed. 772. *Underhill*, *ibid*.

[15] Section 8, Article VII of the 1973 Constitution provides:

“The President shall have control of all ministries.”

[16] No. 6, Article II, Revised Penal Code.

[17] Sandiganbayan Decision, pp. 37-38.

[18] Sandiganbayan Decision, p. 41.

[19]TSN, March 17, 1989, p. 7; Vol. III, Records, p. 409.

[20] TSN, March 17, 1989, p. 8; Vol. III, Records, p. 410.

[21] TSN, March 17, 1989, p. 10; Vol. III, Records, p. 412.

[22] Gregorio, Fundamentals of Criminal Law, 1988 8th Ed., p. 59.

[23] 78 Phil. 67.

[24] Padilla, Revised Penal Code, Book One, Vol. I, 7th Ed. 1974., p. 248. See also: Aquino, The Revised Penal Code, Vol. I, 1987 Ed., p. 207. In the very words of the Court in the “Nassif” case:

“El mero acto de escribir un empleado de la categoria del recurrente, en el Exhibit B, la palabra “sold,” por orden de su principal que le paga el sueldo, sin prueba alguna de dolo o malicia de su parte, no crea por si solo ninguna responsabilidad. Si antes de insertar dicha palabra en el referido documento, o al tiempo de hacerlo, el recurrente hubiese sabido o sospechado de alguna manera que era para justificar un acto impropio de su principal, cosa que, por cierto, no se ha probado, ni puede desprenderse de la decision impugnada, indudablemente podria hacersele responsable a dicho recurrente, de la falsificacion cometida, si no como coautor, por lo menos como complice. Todo esto y la circunstancia justificativa invocada por el recurrente, eximen a este de toda responsabilidad.”

[25] Decision, p. 45.

[26] 145 SCRA 435.

[27] Supra.

[28] Sandiganbayan Decision, p. 50.

[29] People v. Fabian, No. 10790-CR, March 12, 1973. 69 O.G. 12150, No. 53.

[30] 18 Phil. 428.

[31]197 SCRA 262.

[32] Supra, p. 431.

[33] Supra, p. 273.

[34] Development Bank of the Philippines v. Pundogar, 218 SCRA 118, 163.

[35]People v. Exala, Dissenting Opinion, 221 SCRA 494, 503

[36] People v. Olfindo, 47 Phil. 1, citing U.S. v. Abijan, 1 Phil. 83; People v. Borbano, 76 Phil. 703; Perez v. Court of Appeals, 127 SCRA 636.

[37] See TSN of March 17, 1989, Records, Vol. III, pp. 408-423.

[38] See pp. 1-27 TSN of May 2, 1990, Records, Vol. III, pp. 439-465.

[39] See pp. 32-53 of TSN, of May 2, 1990, Records, Vol. III, pp. 470-490.

[40] Confrontation.--Confrontation consists of confronting the witness with damaging facts which he cannot deny and which are inconsistent with his evidence. It is a destructive technique, but when it fails to destroy it may still succeed in weakening.

Probing.--Probing consists of inquiring thoroughly into the details of the story to discover the flaws.

Insinuation.--Insinuation consists of leading or forcing the witness by adding facts at one point and modifying details at another, to give a version of his evidence which is more favorable to the other side. The Technique of Advocacy, by John H. Munkman, pp. 66-67; p. 75; pp. 91-92.

[41] TSN, March 17, 1989, pp. 11-21; Records, Vol. III, pp. 413-423.

[42] TSN, May 2, 1990, pp. 11-27; Records, Vol. III, pp. 449-465.

[43] TSN, May 2, 1990, pp. 35-53; Records, Vol. III, pp. 473-490.

[44] US v. Hudieres, 27 Phil. 45; US v. Lim Kui, 35 Phil. 504; US v. Binayao, 35 Phil. 23.

[45] People v. Opida, 142 SCRA 295.

[46] York v. US, 299 Fed. 778.

[47] TSN, May 2, 1990, pp. 35-53; Records, Vol. III, pp. 473-490.

[48] People v. Opida, supra.

[49] Murphy v. State, 13 Ga. App. 431, 79 S.E. 228.

[50] People v. Bernstein, 250 Ill. 63, 95 N.E. 50.

[51] Dreyer v. Ershowsky, 156 App. Div. 27, 140 N.Y. Supp. 819.

[52] Dunn v. People, 172 Ill. 582, 50 N.E. 137.

[53] Com. v. Myma, 278 Pa. 505, 123 Atl. 786.

[54] Adler v. US, 104 C.C.A. 608, 108 Fed. 464.

[55] Campaner v. Alano, CA-G.R. No. 2558-R, December 15, 1948.

[56] People v. Opida, supra.

DISSENTING OPINION

DAVIDE, JR. J.:

Last 20 September 1996 in *Regala v. Sandiganbayan*,^[1] this Court erected a barrier to the constitutionally mandated task to recover ill-gotten wealth and in the punishment of those who dirtied their hands with it. This the Court did by impliedly granting immunity from civil suit or liability under an expanded interpretation of the lawyer-client privilege, lawyers who were alleged to have acted as co-conspirators or dummies of certain parties in the acquisition of such wealth.

The acquittal decreed by the majority in the cases under consideration places another obstacle to such recovery

and punishment by granting immunity from any criminal liability those who were ordered by then President Marcos to disburse government funds for alleged payment of obligations. This is the immediate impression anyone can get from the following sweeping pronouncement in the ponencia:[2]

In the case at bench, the order emanated from the office of the President and bears the signature of the President himself, the highest official of the land. It carries with the presumption that it was regularly issued. And on its face, the memorandum is patently lawful for no law makes the payment of an obligation illegal. The fact, coupled with the urgent tenor for its execution constrains one to act swiftly without question. *Obedientia est legis essentia*...

What this suggests is that no one could disobey then President Marcos, a suggestion made more eloquent with the quotation of the dissenting opinion of Mr. Justice Cruz in *Development Bank of the Philippines v. Pundogar*. [3] That dissent cannot be used to justify the petitioner's "obedience," otherwise, this Court would thus overturn the majority opinion in the said case and adopt the dissent as the new rule.

Henceforth, all those similarly situated as the appellants or those who could simply provide any reason for their compelled obedience to Mr. Marcos can go scot-free. The meaning of EDSA and its message for history would thus be obliterated. The acquittal then perpetuates a sad day for this Court – a day of mourning for those who fought against the dictatorship and of triumph and joy for the dictator's collaborators, nominees, associates and friends.

I cannot join the majority in these cases.

My analysis of the ponencia indicates that the acquittal is based on the following:

1. The accused-appellants merely acted in obedience to an order by a superior for some lawful purpose; hence, they incur no criminal liability pursuant to Article 11(6) of the Revised Penal Code.
2. Even granting that the order was not for a lawful purpose, they acted in good faith.
3. Their basic constitutional right to due process was violated by the way the Sandiganbayan actively took part in the questioning of a defense witness and of the accused themselves.

I

I shall first take up the third.

The ponencia admits that the appellants did not raise as an issue the Sandiganbayan's violation of their right to due process; nevertheless, it ruled that such failure is not an impediment to the consideration of the violation "as additional basis for a reversal since the settled doctrine is that an appeal throws the whole case open to review, and it becomes the duty of the appellate court to correct such errors as may be found in the judgment appealed from whether they are made the subject of assignments of error or not"[4]

I beg to disagree.

First, there is no showing at all that the extensive participation by the Justices of Sandiganbayan in questioning the appellants and their witness indicated prejudgment of guilt, bias, hatred, or hostility against the said appellants. On the contrary, the quoted portions of the questions propounded by the Justices manifest nothing but a sincere desire to ferret out the facts to arrive at the truth which are crucial in the determination of the innocence or guilt of the appellants. These Justices, as trial magistrates, have only exercised one of the inherent rights of a judge in the exercise of judicial function. What this Court stated eighty-three years ago in *United States v. Hudieres*[5] needs repeating:

It is very clear, however, from a review of the whole proceedings that the only object of the trial judge in propounding these questions was to endeavor as far as possible to get the truth as to the facts to which the witnesses were testifying. The right of a trial judge to question the witnesses with a view to satisfying his mind upon any material point which presents itself during the trial of a case over which he presides is too well established to need discussion. The trial judges in this jurisdiction are judges of both the law and the facts, and they would be negligent in the performance of their duties if they permitted a miscarriage of justice as a result of a failure to propound a proper question to a witness which might develop some material fact upon which the judgement of the case should turn. So in a case where a trial judge sees that the degree of credit which he is to give the testimony of a given witness may have an important bearing upon the outcome, there can be no question that in the exercise of a sound discretion he may put such questions to the witness as will enable him to formulate a sound opinion as to the ability or willingness of the witness to tell the truth. The question asked by the trial judge in the case at bar were in our own opinion entirely proper, their only purpose being to clarify certain obscure phases of the case; and while we are inclined to agree with counsel that some of the observations of the trial judge in the course of his examination might as well have been omitted, there is no reason whatever to believe that the substantial rights of the defendants were in anywise prejudiced thereby.

The appellants themselves did not find any impropriety in the conduct of the Justices, or that if they did find nothing therein to prejudice their right to due process is best proven by their failure to assign it as error.

Second, even granting *arguendo* that the conduct of the Justices constituted such a violation, the appellants are forever estopped from raising that issue on ground of waiver. This Court would risk an accusation of undue partiality for the appellants were it to give them the premium for their torpor and then reward them with acquittal. Such waiver is conclusively proven in these cases. From the quoted portions of the testimonies of the witnesses for the appellants, it is clear that their counsel did not object to, or manifest on record his misgivings on, the active participation of the Justices in the examination (or cross examination) of the witnesses. Nothing could have prevented the counsel for the appellants from doing so. Then, too, as correctly pointed out in the ponencia, they made no assignment of error on the matter.

In our jurisdiction, rights maybe waved unless the waiver is contrary to law, public order, public policy, morals, or good customs, or is prejudicial to a third person with a right recognized by law.[6]

In *People v. Donato*,^[7] this Court made the following statement on what rights may be waived:

As to what rights and priveleges may be waived, the authority is settled:

x x x the doctrine of waiver extends to rights and privileges of any character, and, since the word ‘waiver’ covers every conceivable right, it is the general rule that a person may waive any matter which affects his property, and any alienable right or privilege of which he is the owner or which belongs to him or to which he is legally entitled, whether secured by contract, conferred with statute, or guaranteed by constitution provided such rights and privileges rest in the individual, are intended for his sole benefit, do not infringed on the rights of other, and further provided the waiver of the right or privilege is not forbidden by law, and does not contravene public policy; and the principle is recognized that everyone has a right to waive, and agree to waive, the advantage of a law or rule made solely for the benefit and protection of the individual in his private capacity, if it can be dispensed with and relinquish without infringing on any public right, and without detriment the community at large.x x x

Although the general rule is any right or privilege conferred by statute or guaranteed by constitution may be waived, a waiver in the derogation of a statutory right is not favored, and a waiver will be inoperative and void if it infringes in the rights of others, or would be against public policy or moral in the public interest maybe waived.

While it has been stated generally that all personal rights conferred by statute or guaranteed by constitution may be waived, it has also been said that constitutional provisions intended to protect property may be waived, and even some of the constitutional rights created to secure personal liberty are subjects of waiver.[8]

In *Commonwealth vs. Petrillo*,[9] it was held:

Rights guaranteed to one accused of a crime fall naturally into two classes: (a) those in which the state, well as the accused, is interested; and (b) those which are personal to the accused, which are in the nature of personal privileges. Those of the first class cannot be waived; those of the second may be.

It is “competent for a person to waive a right guaranteed by the Constitution, and to consent to action which would be invalid if taken against his will..[10]

This court has recognized waivers of constitutional rights such as, for example, the right against unreasonable searches and seizures;[11] the right to counsel and to remain silent;[12] and the right to be heard.[13]

Even the 1987 Constitution expressly recognizes a waiver of rights guaranteed by its Bill of Rights. Section 12 (1) of Article III thereof on the right to remain silent and to have a competent and independent counsel, preferably of his own choice states:

x x x These rights cannot be waived except in writing and in the presence of counsel.

This provision merely particularizes the form and manner the form and manner of the waiver; it, nevertheless, clearly suggests that the other rights may be waived in some other form or manner provided such waiver will not offend Article 6 of the Civil Code.

We hereby rule that the right to bail is another of the constitutional rights which can be waived. It is right which is personal to the accused and whose waiver would not be contrary to law, public order, public policy, morals, or good customs, or prejudicial to third person with a right recognized by law.

In the cases below, the perceived violation, if at all existed, was not of the absolute totality of due process, but more appropriately of the right to an impartial trial, which is but an aspect of the guarantee of due process.[14] I submit that the right to an impartial trial is waivable.

II

I also disagree with the view of the majority that all the requisites of the sixth justifying circumstance in Article 11 of the Revised Penal Code are present. I submit that the 8 January 1986 Memorandum of President Marcos can by no means be considered “lawful” order to pay P55 Million to the PNCC as alleged partial payment of the MIAA’s account to the former. The alleged basis of such memorandum is the 7 January 1985 Memorandum of Trade and Industry Minister Roberto Ongpin, which even conforms the absence of any factual basis for the order of payment of P55 Million:

In this connection, please be informed that Philippine National Construction Corporation (PNCC), formerly CDCP, has accomplishment billings on the MIA Development Project aggregating P98.4 million inclusive of accomplishments for the aforecited contracts. In accordance with contract provisions, outstanding advances totalling P93.9 million are to be deducted from said billings which will leave a net amount due to PNCC of only P4.5 million, thus:

At the same time, PNCC has potential escalation claims amounting to P99 million in the following states of approved/evaluation:

Approved by Price Escalation Committee (PEC) but pended for lack of funds

P 1.9 million

Endorsed by project consultants and currently being evaluated by PEC

30.7 million

Submitted by PNCC directly to PEC and currently under evaluation

66.5 million

T o t a l

P99.1 million

There has been no funding allocation for any of the above escalation claims due to budgetary constraints.

The MIA Project has been completed and operational as far back as 1982 and yet residual amounts due to PNCC have not been paid, resulting in undue burden to PNCC due to additional cost of money to service its obligations for this contract.

To allow PNCC to collect partially its billings, and in consideration of its pending escalation billings, may we request for His Excellency's approval for a deferment of the repayment of PNCC's advances to the extent of P30 million corresponding to about 30% of P99.1 million in escalation claims of PNCC, of which P32.5 million has been officially recognized by MIADP consultants but could not be paid due to lack of fundings.

Our proposal will allow BAT to pay PNCC the amount of P34.5 million out of existing MIA Project funds. This amount represents the excess of the gross billings of PNCC of P98.4 million over the undeferred portion of the repayment of advances of P63.9 million.

If Ongpin's memorandum is given full faith, it is clear that PNCC's "accomplishment billings" for work accomplished, including accomplishments on the "supplemental contracts" (whose authority therefor was just sought for), aggregated to P98.4 million. Since there were advances given to PNCC in the total amount of P93.9 million, the net amount due the PNCC was only P4.5 million.

However, in view of the approval by President Marcos of Ongpin's request "for deferment of the repayment of PNCC's advances to extent of 30 million," only P63.9 million of PNCC's advances was to be deducted from the accomplishment billings of P98.4 million. The net amount due thus became P34.5 million. Hence, as pointed out by the Sandiganbayan, if any payments were due under Ongpin's Memorandum, they would only be for that amount (P34.5 million). The Order of then President Marcos to withdraw has, therefore, exceeded by P20.5 million. Clearly, the order of payment of P55 million had no factual and legal basis and was therefore unlawful.

III

Not an iota of good faith was shown in the conduct of the appellants.

Being responsible accountable officers of the MIAA, they were presumed to know that, in light of "the undeferred portion of the repayment" of PNCC's advances in the amount of P63.9 million, the MIAA's unpaid balance was only P34.5 million. They also ought to know the procedure to be followed in the payment of contractual obligations. First and foremost there were the submission by the PNCC of its claims with the required supporting documents and the approval of the claims by the appropriate approving authority of MIAA. When the President Marcos ordered immediate payment, he should not have been understood as to order suspension of the accepted budgeting, accounting and auditing rules on the matter. Parenthetically, it may be stated here that although President Marcos was a dictator, he was reported to be and even projected himself as, a "faithful" advocate of the

rule of law. As a matter of fact, he did not hesitate to issue a decree, letter of instruction, or any presidential issuance in anticipation of any planned actions or activities to give the latter the façade or semblance of legality, wisdom, or propriety. When he made the order to appellant Tabuena, President Marcos must only be understood to order the money. There was no way for Tabuena to entertain any fear that disobedience to the order because of its lawfulness or delay in the execution of the order due to compliance with the requirements would cause his head or life. He offered no credible evidence for such fear. This Court should not provide one for him. That Tabuena served Mr. Marcos until the end of the latter's regime and even beyond only proved a loyalty not based on fear but on other considerations.

Moreover, the manner the appellant effected the withdrawal was most unusual, irregular, and anomalous. He has not shown any evidence that what he did was the usual practice in his office.

What happened in this case showed the appellants' complicity as principal by direct participation in the malversation of the MIAA's funds. The appellants should, therefore, be thankful to the Sandiganbayan for holding them liable therefor only through negligence.

I vote then to AFFIRM in toto the assailed decision.

[1] G.R. No. 105938.

[2] Page 26.

[3] 218 SCRA 118, 163 [1993].

[4] Citing *People v. Ofindo*, 47 Phil. 1 [1924], citing *U.S. vs. Abijan*, 1 Phil. 83 [1902]; *People v. Borbano*, 76 Phil. 703 [1946]; *Perez v. Court of Appeals*, 127 SCRA 636 [1984].

[5] 27 Phil., 45, 47-48 [1914]

[6] Article 6, Civil Code.

[7] 198 SCRA 130, 154-155 [1991].

[8] Citing 92 C.J.S., 1066-1068 (*italics supplied for emphasis*).

[9] Citing 16 A. 2d 50, 57, 340 Pa. 33, cited in note 71 C.J.S., 1068.

[10] Citing ARTURO M. TOLENTINO, *Civil Code of the Philippines*, vol. 1, 1985 ed., 31-32, citing *Waxman v. United States*, 12 Fed. 2nd 775.

[11] Citing *People v. Malasugui*, 63 Phil. 221 [1936]; *de Garcia v. Locsin*, 65 Phil. 689 [1938].

[12] Citing *People v. Royo*, 114 SCRA. 304 [1982]; *Morales v. Enrile*, 121 Phil. 538 [1983]; *People v. Colana*, 63 Phil.126 SCRA 23 [83]; *People v. Sanchez*, 132 SCRA 103 [1984]; *People v. Galit*, 135 SCRA 465 [1985]; *People v. Quizon*, 142 SCRA 362 [1986].

[13] Citing *Abriol v. Homeres*, 84 Phil. 525 [1949]; *People v. Dichoso*, 96 SCRA 957 [1980].

[14] JOAQUIN G. BERNAS, *The Constitution of the Republic of the Philippines*, vol. 1 [1987], 387.

DISSENTING OPINION

PANGANIBAN, J.:

In the main, majority ruled that Petitioners Luis Tabuena and Adolfo Peralta should be acquitted because they were merely obeying the order of then President Ferdinand E. Marcos to deliver “thru this Office, the sum of FIFTY FIVE MILLION (P55,000,000.00) PESOS in cash as partial payment of MIAA’s account” with the Philippine National Construction Company. In their Dissenting Opinion, Justices Romero, Davide and Puno have shown how weak and unpersuasive this ruling is under applicable Philippine laws and jurisprudence. I will not repeat their illuminative discussions. Let me just stress three more points:

(1) The defense of “obedience to superior’s order” as already obsolete. Fifty years ago, the Nazi war criminals tried to justify genocide against the Jews and their other crimes against humanity by alleging they were merely following the orders of Adolf Hitler, their adored fuehrer. However, the International Military Tribunal at Nuremberg in its Judgment dated October 1, 1946,[1] forcefully debunked this Nazi argument and clearly ruled that (t)he true test x x x is not the existence of the order but whether moral choice was in fact possible.”

In 1947, the United Nations General Assembly adopted a Resolution firmly entrenching the principle of moral choice, inter alia, as follows:[2]

“The fact that a person acted pursuant to an order of his government or of superior does not relieve him from responsibility under international law, provided a moral choice was in fact possible to him.”

In the Nuremberg trials, the defendants were military officers of the Third Reich who were duty-bound to obey direct orders on pain of court martial and death at a time when their country was at war. Nonetheless, they were meted out death sentence by hanging or long-term imprisonments. In the present case, the accused are civilian officials purportedly complying with a memorandum of the Chief Executive when martial law had already been lifted and the nation was in fact just about to vote in the “snap” presidential election in 1986. The Sandiganbayan did not impose death but only imprisonment ranging from seventeen years and one day to twenty years. Certainly a moral choice was not only possible. It was in fact available to the accused. They could have opted to defy the illegal order, with no risk of court martial or death. Or they could have resigned. They knew or should have known that the P55 million was to be paid for debt that was dubious[3] and in a manner that was irregular. That the money was to be remitted in cold cash and delivered to the private secretary of the President, and not by the normal crossed check to the alleged creditor, gave them a moral choice to refuse. That they opted to cooperate compounded their guilt to a blatant conspiracy to defraud the public treasury.

(2) resurreing this internationally discredited Nazi defense will , I respectfully submit, set a dangerous precedent in this country. Allowing the petitioners to walk deprives this Court of the moral authority to convict any subaltern of the martial law dictator who was merely “following orders.” This ludicrous defense can be invoked in all criminal cases pending not only before this Court but more so before inferior courts, which will have no legal option but to follow this Court’s doctrine.[4]

(3) Mercy and compassion are virtues which are cherished in every civilized society. But before they can invoked, there must first be justice. The Supreme Court’s duty is to render justice. The power to dispense pardon lies elsewhere. Verily, the Constitution ordains a final conviction by the courts before the President can exercise his power to wipe away penalty.[5] Such is the legal and natural precedence and order of things: justice first before mercy. And only he who sincerely repents his sin, restitutes for it, and reforms his life deserves forgiveness and mercy.

I therefore vote to AFFIRM the assailed Sandiganbayan Decision convicting the petitioners of malversation.

[1] 41 AJIL 172, 221 (1947).

[2] For the full text of the Resolution, please see Salonga and Yap, Public International Law, Third Edition, p. 235-236.

[3] Submitted before the Sandiganbayan was Memorandum of then Minister of Trade Roberto Ongpin dated January 7, 1985, stating that the MIAA had total account of P98.4 million due the PNCC. Subtracting however the “outstanding advances totalling P93.9 x x x will leave a net amount due to PNCC of only P4.5 million,” explained Mr. Ongpin. Even if the P30 million advances which Pres. Marcos is claimed to have authorized PNCC to retain, is added to this “net amount due” of P4.5 million, the total would run up to only P34.5 million – still P20.5 million shy of the P55 million actually disbursed.

[4] In Ty vs. Trampe, 250 SCRA 500, 521, December 1, 1995, judges were admonished to follow “established laws, doctrines and precedents.” Hence, “once a case has been decided one way, then another case involving exactly the same point at issue should be decided in the same manner.” Tay Chun Suy vs. Court of Appeals, 299 SCRA 151, 163, January 7, 1994.

[5] In People vs. Salle, Jr., 250 SCRA 581, December 4, 1995 this Court expressly held that Section 19, Article VII of the present Constitution prohibits the presidential grant of pardon unless there is “conviction by final judgment” of the accused.

DISSENTING OPINION

PUNO, J.:

I join the Dissenting Opinion of Madam Justice Florida Ruth Romero where I find both right and righteousness happily intersecting each other. I am, however, constrained to write this brief dissent in view of the impact of the majority decision to our criminal justice system which many perceive leaves much to be desired.

I

It should be immediately stressed that petitioners were convicted of the crime of malversation by negligence. The felony was committed by petitioners not by means of deceit (*dolo*) but by fault (*culpa*). According to Article 3 of the Revised Penal Code, there is fault when the wrongful act results from imprudence, negligence, lack of foresight, lack of skill. Justice J.B.L. Reyes explains the difference between a felony committed by deceit and that committed by fault in this wise: “x x x In intentional crimes, the act itself is punished; in negligence or imprudence, what is principally penalized is the mental attitude or condition behind the act, the dangerous recklessness, lack of care or foresight, the *imprudencia punible*.”[1]

In light of this well-carved distinction, the long discourse of the majority decision hailing petitioners’ good faith or lack of intent to commit malversation is off-line. To justify the acquittal of petitioners, the majority should strive to show that petitioners did not commit any imprudence, negligence, lack of foresight or lack of skill in obeying the order of former President Marcos. This is nothing less than mission impossible for the totality of the evidence proves the utter carelessness of petitioners in the discharge of their duty as public officials. The evidence and their interstices are adequately examined in the dissent of Madame Justice Romero and they need not be belabored.

For the same reason, the majority cannot rely on the doctrine of mistake of fact as ground to acquit petitioners. It found as a fact that “ x x x Tabuena acted under the honest belief that the P55 million was due and demandable debt x x x .” This court has never applied the doctrine of mistake of fact when negligence can be imputed to the

accused. In the old, familiar case of *People vs. Ah Chong*,^[2] Mr. Justice Carson explained that ignorance or mistake of fact, if such ignorance or mistake of fact is sufficient to negative a particular intent which under the law is a necessary ingredient of the offense charge (e.g., in larceny *animus furendi*, in murder, malice, etc.), cancels the presumption of intent and works an acquittal, except in those cases where the circumstances demand a conviction under the penal provisions touching criminal negligence. Hence, Ah Chong was acquitted when he mistook his houseboy as a robber and the evidenced showed that his mistake of fact was not due to negligence. In the case at bar, the negligence of the petitioners screams from page to page of the records of the case. Petitioners themselves admitted that the payments they made were “out of the ordinary” and “not based on normal procedure.”

As aforesaid, the cornerstone of the majority decision is its finding of good faith on the part of the petitioners. Viewed from a more critical lens, however, the evidence cannot justify a finding of good faith. The violation of auditing rules are too many yet the majority merely winks at them by ruling that petitioner Tabuena “x x x did not have luxury of time to observe all auditing procedures of disbursement considering the fact that the Marcos Memorandum enjoined ‘immediate compliance’ with the directive that he forward to the President’s office the P55 million cash.” With due respect, I am disquieted by the mischiefs that will be mothered by this ruling. To begin with, the country was no longer under martial rule in 1986 and petitioners were under no compulsion to violate our laws. It also ought to be obvious that the order for immediate compliance even if made by the former President cannot be interpreted as a green signal by a subordinate official to disregard our laws. Indeed, no person, not even the President can order the violation of our laws under any excuse whatsoever. The first and foremost duty of the President is to uphold the sanctity of our laws. Thus, the Constitution requires the President to take an oath or affirmation where he makes the solemn pledge to the people: “I do solemnly swear (or affirm) that I will faithfully and conscientiously fulfill my duties as President of the Philippines, preserve and defend its constitution, execute its laws, do justice to every man, and consecrate myself to the service of the Nation. x x x.”^[3] To be sure, the need for petitioners to make an immediate payment is really not that immediate. The facts show that former President Marcos first called petitioner Tabuena by telephone and asked him to make the payment. One week after or on January 8, 1986, the former President issued a written memorandum reiterating the order to pay. Payments were made in three tranches – first on January 10, 1986, the second on January 16, 1986 and the third on January 31, 1986. Clearly then, it took petitioner one month to comply with the Order. Given the personnel of petitioner Tabuena in his office, one month provides enough time to comply with the rules. In any event, petitioner did not request former President Marcos for additional time to comply with the rules if they felt in good faith that they need more time. Petitioner short-circuited the rules by themselves. Nothing in the Marcos Memorandum compelled them to disregard the rules. The Memorandum merely stated “Your immediate compliance is appreciated”. The language of the Memorandum was as polite as it could be. I fail to discern any duress in the request as the majority did.

II

The determination of the degree of participation that should be allowed to a judge in the questioning of a witness is a slippery slope in constitutional law. To a certain extent, I agree with the majority that some of the questions propounded by the justices of the respondent Court crossed the limits of propriety. Be that as it may, I am not prepared to conclude with certainty that the next and tone of the questions denied petitioners the right to an impartial trial. Bias is a state of mind which easily eludes evidence. On the basis of the evidence before us we cannot hold that we have plumbed the depth of prejudice of the justices and have unearthed their partiality. The more telling evidence against the petitioners are documentary in nature. They are not derived from the answers elicited by questions from the justices which the majority, *sua sponte*, examined and condemned as improper.

III

Finally, I can not but view with concern the probability that the majority decision will chill complaints against graft pending before the respondent Court. From the majority decision, it is crystalline that petitioners blindly obeyed the Marcos Memorandum despite its fatal and facial flaws. The majority even quotes these inculpatory admissions of petitioner Tabuena, viz:[4]

“x x x

“AJ del Rosario

“x x x

“Q If it was for the payment of such obligation why was there no voucher to cover such payment? In other words, why was the delivery of the money not covered by any voucher?

“A The instruction to me was to give it to the Office of the President, your Honor.

“PJ Garchitorena

“Q Be that as it may, why was there no voucher to cover this particular disbursement?

“A I was just told to bring it the Office of the President, your honor.

“AJ del Rosario

“Q Was that normal procedure for you to pay in cash to the office of the President for obligations of the MIAA in payment of its obligation to another entity?

“A No, your Honor, I was just following the Order to me of the President.

“PJ Garchitorena

“Q So the Order was out of the ordinary?

“bb Yes, your Honor.

“AJ del Rosario

“Q Did you file any written protest with the manner with which such payment was being ordered?

“A No, your Honor.

“Q Why not?

“A Because with that instruction of the President to me, I followed your Honor.

“AJ Hermosisima

“Q Why were you not made to pay directly to the PNCC considering that you are the manager of MIA at that time and the PNCC is separate corporation, not an adjunct of Malacañang?

“A I was just basing it from the Order of the Malacañang to pay PNCC through the Office of the President, your Honor.

“x x x

“A You agreed to the order of the President notwithstanding the fact that this was not the regular course of Malacañang was not the creditor?

“A I saw nothing wrong with that because that is coming from the President, your Honor.”

In effect, petitioners' shocking submission is that the President is always right, a frightening echo of the antediluvian idea that the King can do no wrong. By allowing the petitioners to walk, the majority has validated petitioners' belief that the President should always be obeyed as if the President is above and beyond the law. I cannot accept this dangerous ruling even if I look at it through the eyes of faith. One of the gospels in constitutional law is that the President is powerful but not more paramount than the law. And in criminal law, our catechism teaches us that it is loyalty to the law that saves, not loyalty to any man. Let us not bid goodbye to these sacrosanct principles.

[1] Aquino, the Revised Penal Code, Vol. I, 1976 ed., p. 60.

[2] 15 Phil. 488, 493.

[3] Section 5, Article VII of the Constitution.

[4] See pp. 41-45 of majority decision.

DISSENTING OPINION

ROMERO, J.:

Obedience, rightly directed, is a virtue well-worth cultivating - obedience of children to their elders; obedience to lawful authority by citizens; obedience to the behests of what is highest and finest in one's self.

Misguided, such as indiscriminate obeisance to questionable mandates, no matter if emanating from authoritative figures whose slightest whisper and scribbled orders are law, this can lead man to perdition.

In government, a pliant bureaucracy that is disinclined to resist unethical, immoral, even downright illegal directives from "above" is easily corrupted and can only bring disrepute to the entire system. In this context, can subordinate public officials like herein petitioner escape criminal prosecution by the simple expedient of claiming that they were merely following orders from a superior? This disquisition will demonstrate that certain requisites are indispensable before anyone can claim immunity from penal sanctions for seemingly justifiable acts.

This dissenting opinion will narrate the facts for the sake of accuracy for the ponencia seems to have overlooked or glossed over vital circumstances which make the conclusion embodied herein irresistible.

Petitioners were charged with violation of Article 217 of the Revised Penal Code (the Code) for alleged malversation of a total of P55 million from the public funds of the Manila International Airport Authority (MIAA). The informations filed on three separate dates in 1986 accused them, as accountable officers, of intentionally withdrawing said amount for the ostensible purpose of paying a non-existent obligation of MIAA to the Philippine National Construction Corporation (PNCC), but which they misappropriated and converted for their personal use and benefit.

In their defense, petitioners claimed they acted in good faith and in compliance with a verbal and later, a written order from no less than the former President Ferdinand E. Marcos. In a Presidential Memorandum (the Marcos Memorandum) dated January 8, 1986, the latter allegedly commanded petitioner Tabuena, in his capacity as General Manager of MIAA, "to pay immediately the Philippine National Construction Corporation, thru this Office (Office of the President), the sum of FIFTY FIVE MILLION (P55,000,000.00) PESOS in cash as partial payment of MIAA's account with said company mentioned in a Memorandum of (Trade and Industry) Minister Roberto Ongpin to this Office dated January 7, 1985...."[1] (The Ongpin Memorandum). On the assumption that MIAA indeed had a due and demandable debt to PNCC for work done on the airport, Tabuena, with the help of

Gerardo G. Dabao and Adolfo M. Peralta, MIAA Assistant General Manager and Financial Services Department Acting Manager, respectively, made three withdrawals from the account of MIAA with the Philippine National Bank first, on January 10, 1986 for P25 million, then on January 16, 1986 for another P25 million and lastly, on January 31, 1986 for P5 million. The three manager's check covering the withdrawals were all applied for and issued in the name of Tabuena. Curiously, while the checks were issued by the MIA extension office of PNB, they were encashed at the Villamor airbase branch. Each time the cash was delivered directly to the office of Marcos' private secretary, Fe Roa-Gimenez. The latter issued a receipt^[2] signed by her but only after the last delivery. No PNCC receipt was ever given to petitioners.

On October 22, 1990, the Sandiganbayan's First Division rendered a decision finding petitioners guilty.

Petitioners raise two issues, namely, that they were charged with intentional malversation (which they labelled as malversation by direct appropriation) but were convicted of malversation by negligence, and that they acted in good faith.

As regards the first argument, the variance between the crime charged and that proved by the prosecution is immaterial, as stated by the ponente.

As regards the second issue, it is argued that good faith is a valid defense in malversation for it negates criminal intent. Petitioners claim that when they committed the acts complained of, they were merely following then President Marcos' oral and written directives. They rely on Article 11, paragraph 6 of the Code which states, *inter alia*:

"ART. 11. Justifying circumstances. - the following do not incur any criminal liability:

x x x x x x x x

6. Any person who acts in obedience to an order issued by a superior for some lawful purpose."

For an act to be justified under the abovequoted provision, therefore, three requisites must concur: (a) an order must have been issued by a superior; (b) the order must be for a lawful purpose; and (c) the means used by the subordinate in carrying out such order must itself be lawful.^[3]

In the case at bar, Tabuena was allegedly ordered by President Marcos to pay the PNCC from MIAA's fund, thus ostensibly meeting the first requirement but not the others. For there is a qualification which significantly changes the picture. The payment was to be in cash and immediately made through the Office of the President. It is to be pointed out that it is one thing to be ordered to pay a due and demandable obligation; it is another to make such payment to someone other than the lawful obligee and worse, when the subordinate is forced to breach official channels to comply with the order.

It must be stressed that Tabuena and his co-accused, Peralta and Dabao, disregarded standard operating procedures in following the President's order. As observed by the Sandiganbayan, "there were no vouchers to authorize the disbursements in question. There were no bills to support the disbursement. There were no certifications as to the availability of funds for an unquestionably staggering sum of P55 Million." Disbursement vouchers are specifically required under Sec. 4 (5) of Presidential Decree No. 1445 (P.D. No. 1445), while the certificate of availability of funds is needed to comply with Sec. 47, Title I-B, Bk. V of the Administrative Code of 1987^[4] and Sec. 344 of the Local Government Code of 1991.^[5] To compound the duplicity, the checks, issued by one branch of PNB were encashed in another - all made in cash instead of by crossed check payable to PNCC! Conspicuously, such cash outlay was made without prior approval or authority of the Commission on Audit.^[6] Finally, the last two payment were made despite the non-issuance of a receipt for the first. In fact, the

receipt given after the delivery of the last installment was not even issued by the PNCC, the legal Obligee and avowed recipient of the money. Instead it emanated from the office of Roa-Gimenez, a complete stranger to the alleged contract between MIAA and PNCC, who did not even indicate in what capacity she signed it. To compound the mystery, the money was even delivered to her office, not in Malacanang, but at nearby Aguado Street. The entire process, done with haste and with a total disregard of appropriate auditing requirements was, in the words of petitioners themselves, "an extraordinary transaction,"[7] admittedly "out of the ordinary" and "not based on normal procedure." [8]

Disbursement of government funds, especially one as gargantuan as the one made by petitioners, is a complex process, unlike the basic over-the-counter transactions that they purportedly made it to appear. Far from being lawful, the payment of the alleged obligation of MIAA to PNCC through the Office of the President may at best be labelled as irregular. "The term 'irregular expenditure' signifies an expenditure incurred without adhering to established rules, regulations, procedural guidelines, policies, principles or practices that have gained recognition in law. Irregular expenditures are incurred without conforming with prescribed usages and rules of discipline. There is no observance of an established pattern, course, mode of action, behavior, or conduct in the incurrence of an irregular expenditure....." [9]

Specifically, disbursement of public funds must conform with the following principles:

"(1) No money shall be paid out of the Treasury except in pursuance of an appropriation made by law.[10]

(2) No public money or property shall be appropriated, applied, paid, or employed, directly or indirectly, for the use, benefit, or support of any sect, church, denomination, sectarian institution, or system of religion, or of any priest, preacher, minister, or other religious teacher, or dignitary as such, except when such priest, preacher, minister, or dignitary is assigned to the armed forces, or to any penal institution, or government orphanage or leprosarium.[11]

(3) All money collected on any tax levied for a special purpose shall be treated as special fund and paid out for such purpose only. If the purpose for which this special fund was created has been fulfilled or abandoned, the balance, if any, shall be transferred to the general funds of the government.[12]

(4) All resources of the government shall be managed, expended or utilized in accordance with law and regulations safeguarded against loss or wastage through illegal or improper disposition to ensure efficiency, economy and effectiveness in the operations of government. The responsibility to take care such policy is faithfully adhered to rests directly with the chief or head of the government agency concerned.[13]

(5) Disbursement or disposition of government funds or property shall invariably bear the approval of the proper officials.[14]

(6) Claims against government funds shall be supported with complete documentation.[15]

(7) All laws and regulations applicable to financial transactions shall be faithfully adhered to.[16]

(8) Generally accepted principles and practices of accounting as well as of sound management and fiscal administration shall be observed, provided that they do not contravene existing laws and regulations" [17]

Assuming arguendo that petitioners acted in good faith in following the President's order, undeniably, they were negligent as found by the trial court. The instructions in the President's order should have sufficed to put any accountable head of an office, Tabuena included, on guard. Why was he being required to pay MIAA's obligation to the PNCC, if needed there were any, and not directly to the latter but through the Office of the President? Why was the entire transaction not coursed through proper channels, viz., the accounting office? Why was such a huge

disbursement to be made in cash, instead of by crossed check, which is not only safer, faster, and more convenient, but in accord with auditing requirements?

Obedience to a superior's order does not connote blind obedience. Being the general manager of such a mammoth organization like the MIAA, he should, at the very least, have exercised ordinary prudence by verifying with the proper official under him whether the agency had indeed an outstanding indebtedness to the PNCC before ordering any payment to be made through official channels. Such routine measures were cavalierly disregarded. The whole process seemed no different from a petty, personal transaction.

As evidence later revealed, PNCC's receivables from MIAA amounted to P102,475,392.35, the bulk which comprised escalation charges. From that time until Corazon C. Aquino assumed the Presidency, a total of P44.4 million was paid, but only P2 million of this in cash; the rest was set off or compensated against other debts, or assigned to other creditors. The financial records did not show that PNCC received any sums of money from MIAA during the period January to June, 1986 when the block payments were being made in quarter millions. Only on September 25, 1986, long after President Marcos had gone, was an assignment of P23 million actually made by MIAA in favor of PNCC.[18]

Even the Ongpin memorandum, which is the basis of the Marcos Memorandum, failed to show where the amount of P55 million cropped up. The former contained, inter alia, the following matters: (a) it requested the President's approval of Minister Ongpin's recommendation "for eight (8) supplemental contracts pertaining to the MIA Development Project (MIADP) between the Bureau of Air Transport (BAT) and Philippine National Construction Corporation (PNCC), formerly CDCP...";[19] (b) it informed the President that PNCC had collectibles from MIAA only in the amount of P4.5 million, which is the difference between the accomplishment billings on the MIADP totalling to P98.4 million and PNCC's advances of P93.9 million; and (c) it informed the President that PNCC had potential escalation claims against MIAA in the amount of P99 million, "potential" because they have yet to be approved by the Price Escalation Committee (PEC).

The only remaining piece of evidence which would show that MIAA owed PNCC anything as of the date of the Marcos Memorandum is MIAA's balance sheet,[20] which indicates its liability to PNCC as of December 31, 1985 to be P27,931,000.00.[21] How can petitioners claim to have acted in good faith when they withdrew the P55 million from MIAA's fund knowing fully well that the amount due PNCC was only a little over half the amount, as shown by their own evidence?

The ponencia states that "... the good faith of Tabuena ... was not at all affected even if it later turned out that PNCC never received the money."

It is precisely our thesis that Tabuena did not act in good faith in complying with the President's orders because of the reasons aforesaid, summarized as follows:

(a) The President's order was "out of the ordinary" and "not based on normal procedure," which would have entailed making an "extraordinary transaction," as admitted by petitioners themselves. This proves that they were at the time they received the order, aware that paying MIAA's supposed P55 million obligation to PNCC through the Office of the President in cash was questionable.

(b) As the head of MIAA, Tabuena should have been more cautious in disbursing the funds. He did not even stop to think about the legality of the entire process even when he did not receive any kind of receipt for the first two deliveries of money worth P50 million. When he did get a receipt, it was not an official receipt from PNCC, the legal creditor, but from the President's private secretary. It must also be noted that the cash was all delivered to Gimenez' office at Aguado St., not at her office at Malacañang.

(c) Tabuena breached official channels to procure the money. There was no vouchers not bills to authorize or support the disbursements. There was also no certificate of availability of funds. The payment was made in cash without COA's approval, at a time when the ceiling for cash payments was merely P5,000.00. As stated earlier, no official receipt from PNCC supported the payment. The entire process was "done with haste and with a total disregard of appropriate auditing requirements."

As regards the payments to Roa-Gimenez, these were absolutely unwarranted because whatever "authority" she claimed to have emanated, not from the creditor PNCC but from the President. Petitioners were required by law to settle their indebtedness with PNCC directly, the Party whose in favor th eobligation was constituted.[22] The only instance when such questionable payments could have been valid was if it had redounded to PNCC's benefit, which was not proved at all in this case.[23] As creditor, the PNCC was not even bound to accept payment, if any, from the President's private secretary, the latter being a third person who had no interest whatsoever in the discharge of MIAA's obligation.[24]

The ponencia states that the Marcos Memorandum was "patently lawful for no law makes the payment of an obligation illegal."

This statement is premised on the existence of an established creditor-debtor relationship between the payor and the payee. In this, case, however, the obligor was being made to pay to a party other that the legal obligee when no novation of the obligation has taken place. How can such an arrangement be possibly accord with law?

The preceeding established facts clearly show that petitioners were remiss in discharging their duties as accountable officers. As correctly observed by the court a quo:

"... (T)he Ongpin Memorandum could not justify Pres. Marcos' memorandum of January 8, 1986; this in turn could not justify Luis Tabuena's payment of P55 million to Fe Roa Gimenez.

... (T)he amount which could be payable by Tabuena in his capacity as the head of MIAA in January of 1986 could not be in excess of P27.931 million – until other claims had been duly approved. This approva, on the other hand, could not come from the President but from the Price Escalation Committee (PEC) before which, accoriding to the Ongpin Memorandum itself, these claims for escalation had been submitted for approval.

The PEC was not shown to have approved these amounts as of the time Tabuena made any of the withdrawals for P55 million.

x x x x x x x x

Tabuena says he had properly accounted for the P55 million he had withdrawn from the MIAA's funds. By this Tabuena means he gave the money to Fe Roa Gimenez, presumably in representation of Pres. Ferdinand Marcos.

Neither Pres. Marcos, however, nor Fe Roa Gimenez was entitled to received or issue acquittance for a debt in favor of the PNCC. Tabuena's claim, therefore, that he delivered the P55 million to her is not properly accounting for P55 million.

In fact, when we come right down to it, nobody has issued an acquittance in behalf of the PNCC for the P55 million paid by Luis Tabuena. Since Tabuena says he was paying P55 million to the PNCC, it was incumbent upon him to show a receipt from or in behalf of PNCC. Tabuena has shown no receipt.

Tabuena was not authorized to part with government money without any receipt.

When Tabuena gave P55 million intended for the PNCC to Fe Roa Gimenez or to Pres. Marcos, Tabuena was paying government funds to persons not entitled to receive those funds. He was therefore, guilty of malversation

of those funds.

X X X X X X X X

Tabuena says he has accounted for the money because he has told us where the money went. But to account, on more proper use of the term, injects a sense of responsibility for the disposition of funds for which one is answerable.

So when one asks if Tabuena has accounted for the P55 million belonging to MIAA, the question really is whether accused Tabuena disposed of the sum in a responsible manner consistent with his duty. The answer must be in negative.

Payments must be delivered to payees. Payments intended for the PNCC must be delivered to the PNCC or to someone authorized by the PNCC to accept payments for it. Neither Pres. Marcos nor Fe Roa Gimenez are shown to have been authorized to accept money for the PNCC nor to deliver money to the PNCC (or to any creditor of the MIAA for that matter). In fact, though Pres. Marcos may have been the Supreme Magistrate of the land and the chief enforcer of the law, the law neither authorized him to pay for the MIAA nor to accept money for the PNCC.

Accused Tabuena's statement therefore, that he represented overwhelming evidence of the delivery of the P55 million to Pres. Marcos' private secretary does not prove that he has accounted for the money, that is, that he has properly disposed of that sum according to law.

On the contrary, what the evidence shows is that accused Tabuena delivered the P55 million to people who were not entitled thereto, either as representatives of MIAA or of the PNCC.

It proves that Tabuena had deliberately consented or permitted through negligence or abandonment, some other person to take such public funds. Having done so, Tabuena, by his own narration, has categorically demonstrated that he is guilty of the misappropriation or malversation of P55 million of public funds.”[25]

Time and again, this Court has deferred to the findings of fact of the trial court, owing its enviable position of having seen the physical evidence and observed the witnesses as they testified. We see no reason to depart now from this policy.

Tabuena was also personally accountable for the funds in his custody, being the head of a government agency such as MIAA and discharging fiscal functions as such. In this regard, the Manual on Certificate of Settlement and Balances (Rev. 1993) (The Manual) states, inter alia:

“TITLE IV. ACCOUNTABILITY, RESPONSIBILITY AND LIABILITY FOR GOVERNMENT FUNDS AND PROPERTY

Government officials and employees, in the discharge of fiscal functions, shall ensure that all government resources are managed, expanded and utilized in accordance with law, rules and regulations and safeguard against loss or wastage thru illegal or improper disposition.

In the implementation of the above functions, they shall be guided by the following provisions:

SECTION 26. ACCOUNTABILITY FOR GOVERNMENT FUNDS AND PROPERTY

26.1 Every officer of any government agency whose duties permit or require the possession or custody of government funds or property shall be accountable therefor and for safekeeping thereof in conformity with law.

26.2 Every accountable officer shall be properly bonded in accordance with law.

SECTION 27. RESPONSIBILITY FOR GOVERNMENT FUNDS AND PROPERTY

The head of any agency of the government is immediately and primarily responsible for all government funds and properly pertaining to his agency.

Persons entrusted with the possession or custody of the funds or property under the agency head shall be immediately responsible to him without prejudice to the liability of either party to the government.

SECTION 28. SUPERVISION OVER ACCOUNTABLE OFFICERS

The head of any agency or instrumentality of the national government or any government-owned or controlled corporation and any other self-governing board or commission of the government shall exercise the diligence of a good father of family in supervising the accountable officers under his control to prevent the incurrence of loss of government funds or property, otherwise he shall be jointly and severally liable with the person primarily accountable therefor. x x x.

SECTION 29. LIABILITY OF ACCOUNTABLE, SUPERIOR AND SUBORDINATE OFFICERS FOR GOVERNMENT FUNDS

29.1 Every officer accountable for government funds shall be liable for all losses resulting from the unlawful deposit, use, or application thereof and for all losses attributable to negligence in the keeping of the funds.

29.2 Liability of Superior Officers. – A public officer shall not be civilly liable for acts done in the performance of his official duties, unless there is a clear showing of bad faith, malice or gross negligence.

x x x x x x x x

29.5 Liability of Subordinate Officers. – No subordinate officer or employee shall be civilly liable for acts done by him in good faith in the performance of his duties. However, he shall be liable for willful or negligent acts done by him which are contrary to law, morals, public policy and good customs even if he acted under order or instructions of his superiors.

SECTION 30. LIABILITY FOR UNLAWFUL/ILLEGAL EXPENDITURES OR USES OF GOVERNMENT FUNDS.

30.1.1 Expenditures of government funds or uses of government property in violation of law or regulations shall be a personal liability of the official or employee found to be directly responsible therefor.

30.1.2 Every expenditure or obligation authorized or incurred in violation of law or of the annual budgetary measure shall be void. Every payment made in violation thereof shall be illegal and every official or employee authorizing or making such payment or taking part therein, and every person receiving such payment shall be jointly and severally liable for the full amount so paid or received.” (underscoring supplied)

The ponente points out that our reference to the Manual supports the view that Tabuena was only civilly liable.

This is a misappreciation of the entire sense of the dissent. It must be borne in mind that said reference was made after the conclusion was reached that Tabuena was indeed criminally liable for his acts. It is hornbook knowledge that criminal liability carries with it the civil, specially when, as in this case, the latter arose from the former. Hence, the statement: “Tabuena was also personally accountable for the funds in his custody, . . .”

Sections 29.2 and 29.5 of the Manual, which the ponente uses to illustrate his point, actually includes exceptions to the grant of immunity from civil liability of a public officer for acts done in the performance of his official duties: (a) The preceding statement itself says that the acts must be done “in the performance of his official duties;” (b) Sec. 29.2 exempts him from civil liability, “unless there is a clear showing of bad faith, malice or gross negligence;” and (c) Sec. 29.5 states that “he shall be liable for willful or negligent acts done by him which are contrary to law, morals, public policy and good customs even if he acted under order or instructions of his

superiors.” The quoted provision have been once more underscored herein.

The ponencia further states that “(t)here is no showing that Tabuena has anything to do whatsoever with the execution of the MARCOS memorandum.” But very clearly, the admitted facts show that it was precisely Tabuena who implemented or executed the said Memorandum.

The ponencia cites Acebedo where the accused was acquitted after it was shown that it was actually the latter’s secretary who collected and converted the money. Tabuena’s case is starkly different, for her it was Tabuena himself who personally turned over the money to the President’s secretary. It was done with his full knowledge and consent, the obvious irregularity thereof notwithstanding.

In petitioner Peralta’s case, we again yield to the factual findings of the trial court. It said:

“ . . . The question is whether or not Peralta properly signed the third application for the issuance of a Manager’s Check drawn against the MIAA’s savings account with the Villamor Office of the Philippine National Bank.

At the time that accused Peralta signed the request for the issuance of a Manager’s Check, he was the Acting Financial Services Manager of the MIAA and all withdrawals of funds required is (sic) co-signature.

The reason for the designation of more than one co-signatory is not merely useless ceremony; it is to serve as a counter check for the propriety of the disbursement.

While, indeed, accused Luis Tabuena was the highest official in the MIAA and had authority to disburse its funds, this authority was not absolute. It had to be for properly subsisting obligations and the disbursement had to be against funds existing for that purpose. This is one reason for the need of supporting documentation before disbursements of funds are authorized. And this is the special need for finance officers such as Adolfo Peralta, as Financial Services Manager, to be co-signatories (sic): to particular instance, the existence of the balance to be covered by the manager’s check the application for which had been presented for his co-signature.

In this case, Adolfo Peralta speaks of the existence of (the) P27.9 million liability in favor of the PNCC as justification for his acts herein. True enough, for that amount was the liability as of December 31, 1985. As finance officer, however, he could not claim ignorance of the fact that as of January 29, 1986, the date of the application for a manager’s check which he signed, two previous manager’s checks worth P25 million each had already been applied for and the total amount of P50 million had already been withdrawn....

It was only two weeks after these two withdrawals when Peralta, as Finance Service Manager, participated in the authorization for the disbursement of another P5 million. This last withdrawal brought up the total of withdrawals to P55 million for the payment of a P27.9 million obligation.

Thus while it is true, as Adolfo Peralta claims, that there was a liability in favor of the PNCC, there was no way Peralta could disclaim the responsibility for the excessive withdrawals to the extent of P5 million thereof allegedly to pay that liability. There was no way Peralta could justify his co-signing the application for a manager’s check for P5 million on January 29, 1986.”

The ponente cites a dissenting opinion of Justice Isagani A. Cruz in *Development Bank of the Philippines v. Pandogar* to uphold his ponencia. Need we remind our respected colleague that the corroborative value of a dissenting opinion is minimal? Precisely, it supports a position contrary to, and obviously unacceptable to the majority.

Petitioners were found guilty of malversation by negligence which is possible even if the charge was for intentional malversation. This does not negate, however, their criminal liability; it merely declares that negligence takes the place of malice. Article 3 of the Code provides the rationale when it explicitly states that “felonies are

committed not only by means of deceit but also by means of fault.”

The Sandiganbayan’s finding that petitioners converted and misappropriated the P55 million cannot simply be brushed aside upon the petitioner’s claim that the money was delivered in good faith to the office of the President under the mistaken assumption that the President was entitled to receive the same. They rely on the case of *People v. Fabian*,^[26] which declared that “(g)ood faith in the payment of public funds relieves a public officer from the crime of malversation.” But the very same decision also cites Article 217 to the effect that malversation may be committed by an accountable public officer by negligence if he permits any other person to take the public funds or property in his custody. It is immaterial if petitioners actually converted or misappropriated MIAA’s funds for their own benefit, for by their very negligence, they allowed another person to appropriate the same.

The fact that no conspiracy was established between petitioners and the true embezzlers of the P55 million is likewise no moment. The crime of malversation, as defined under Article 217 of the Code,^[27] was consummated the moment petitioners deliberately turned over and allowed the President’s private secretary to take custody of public funds intended as payment of MIAA’s obligation to the PNCC, if obligation there was at all. That petitioner Tabuena who was then the General Manager of MIAA personally and knowingly participated in the misfeasance compounds the maleficence of it all. Rank may have its privileges but certainly a blatant disregard of law and administrative rules is not one of them. It must be etched in the minds of public officials that the underside of privileges is responsibilities.

As accountable officers, petitioners clearly transgressed administrative and legal bounds. Even on the pretext of obeying a superior’s seemingly legitimate orders, their actuations can hardly be justified. To rule otherwise would set an alarming precedent where all that public officials who have unlawfully enriched themselves at the people’s expense and those accused of graft and corruption would have to exculpate themselves from any wrong doing would to be invoke Article 11, paragraph 6 of the Code, thus gaining instant immunity from criminal prosecution.

Government officials, particularly heads of their agencies who, by virtue of their exalted positions exude power and authority but pay blind obeisance to orders of those higher up in the bureaucratic hierarchy regardless of the illegality, impropriety or immorality of such orders, would do well to internalize this prayer for national leaders delivered by former Senate President Jovito R. Salonga in Malacanang on November 24, 1996:

“x x x x x x x x

When they begin to think of how much power they can possess, help them to know the many things that are beyond their power – the change of season, sun and rain, moonlight and starlight and all the wonders of Your creation;

When they are led to believe that they are exempt from public accountability, help them to know that they are ultimately accountable to You, the God of truth and justice and mercy;

xxx xxx xxx

The ponencia makes the final observation that the limitations on the right of judges to ask questions during the trial were not observed by respondent court; that the three Justices who heard the testimonies asked 37 questions of witness Francis Monera, 67 of Tabuena, and 41 of Peralta – more than what the prosecutors and defense counsels propounded.

While such numbers unduly disturbed the ponente, it cannot be gainsaid that such action by the member of the First Division of respondent Sandiganbayan was, under the circumstances, not only necessary and called for, but likewise legally acceptable.

In the first place, even the ponente makes the observation that petitioners did not raise this matter as error. In other words, they did not feel prejudiced by the respondent court's actuations; nor did they construe the series of questions asked of them by the Justices as indicative of any unfairness or partiality violative of their right to due process.

Then, too, it must be noted that there is a difference in the right of a judge in a non-jury system, like that obtaining in the Philippines, to question witness or parties themselves, and that of a judge in a jury trial. The bulk of jurisprudence used in the ponencia was decided in the United States, where the jury system is extensively utilized in civil as well as in criminal trials. In this regard, "(I)t has been noted that the opinion of the judge, on account of his position and respect and confidence reposed in him and in his learning and assumed impartiality, is likely to have great weight with the jury and such fact of necessity requires impartial conduct on his part. The judge is a figure of overpowering influence, whose every change in facial expression is noted, and whose every word is received attentively and acted upon with alacrity and without question." [28]

Thus, while a trial judge is expected to be circumspect in his choice of words lest they be construed as signs of partiality, he "is not, however, required to remain silent and passive throughout a jury trial;" [29] he should, instead, "conduct a trial in an orderly way with a view to eliciting the truth and to attaining justice between the parties." [30]

Inasmuch as it is the jury which has the burden of meting out justice, it is acceptable for a judge in a jury trial to "ask any question which would be proper for the prosecutor or defense counsel to ask so long as he does not depart from a standard fairness and impartiality." [31] "Questions designed to clarify points and to elicit additional relevant evidence, particularly in a non-jury trial, are not improper." [32]

The numerous questions asked by the court *quo* should have been scrutinized for any possible influence it may have had in arriving at the assailed decision. The true test for the appropriateness or inappropriateness of court queries is not their quantity but their quality, that is, whether the defendant was prejudiced by the trial court's actions; otherwise, they would have raised this issue in the instant petition.

The ponencia states that he is "well aware of the fear entertained by some that this decision may set a dangerous precedent in that those guilty of enriching themselves at the expense of the public would be able to escape criminal liability by the mere expedient of invoking "good faith". Our position has been either misinterpreted or misread for we do not merely speak of "good faith". In fact, our main trust is that such a breed of people who enriched themselves at the expense of the public might handily use as an excuse or a justifying circumstance to escape liability their having obeyed the "lawful orders" of their superior under Article 11, paragraph 6 of the Revised Penal Code.

The ponente makes a plea towards the close of his decision, that we should not act impulsively in the instant case. "In our eagerness to bring to justice the malefactors of the Marcos regime, we must not succumb to the temptation to commit the greatest injustice of visiting the sins of the wrongdoers upon an innocent."

In our opinion, precisely, Tabuena and Peralta are wrongdoers, guilty of acts punishable by law. Needless to say, under our system of laws, they must be meted out the corresponding penalty. We draw attention to the fact that nowhere in this dissent do we single out the so-called "malefactors of the Marcos Regime" alone. We addressed ourselves to all who commit venalities at the expense of the people, as defined and punished by law but who try to justify their actions by invoking the very law which they violated.

For the reasons stated above, I vote to affirm petitioners' conviction by respondent court.

- [1] Exh. "1," Rollo, p. 231.
- [2] Exh. "3," *ibid.*, p. 234.
- [3] Reyes, *The Revised Penal Code*, I, 1993, pp. 203-204; Kapunan and Faylona, *Criminal Law*, 1993, p. 82.
- [4] Sec. 607, Chapter 26, Title VII, *The Administrative Code*.
- [5] A new provision which was not in *Batas Pambansa Blg. 337 (The Local Government Code of 1983)*.
- [6] COA Circular No. 91-350 dated March 4, 1991, increased the ceiling for cash payments from P5,000.00 to P10,000.00. The Basic Guidelines for Internal Control, issued by the COA on January 31, 1977, set the ceiling even lower at P1,000.00.
- [7] TSN, May 2, 1990, p. 53.
- [8] *Ibid.*, p. 17.
- [9] COA Circular No. 85-55-A, September 8, 1985.
- [10] Sec. 29 (1), Art. VI, 1987 Constitution (Sec. 18 [1], Art. VIII, 1973 Constitution).
- [11] Section 29 (2), *ibid.* (Section 18 [2], *ibid.*).
- [12] Section 29 (3), *ibid.* (new provision).
- [13] Section 1, Chapter I, Title I-B, Bk. V, *The Administrative Code of 1987 (new)*.
- [14] Section 4 (5), P.D. 1445; Section 344, 1991 Local Government Code (new).
- [15] Section 4 (6) and Section 55 (4), *ibid.*; COA Circular 78-84, August 1, 1987; COA Circular 81-155.
- [16] Section 4 (7) and Section 55 (2), *ibid.*
- [17] Section 4 (8), *ibid.*
- [18] TSN, March 17, 1989, pp. 7-20.
- [19] Exhibit "2," Rollo, p. 232.
- [20] Exhibit "4," *ibid.*, p. 235.
- [21] Exhibit "4-a," *id.*
- [22] Art. 1240, *Civil Code of the Philippines*.
- [23] Art. 1241, par. 2, *ibid.*
- [24] Art. 1246, par. 1, *id.*
- [25] Rollo, pp. 385-387.
- [26] *Supra*.
- [27] 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, ... (Emphasis supplied)

[28] 75 Am Jur 2d, Trial, Sec. 272, citing U.S. v. Candelaria Gonzales (CA5 Tex) 547 F2d 291.

[29] Ibid.

[30] Id., citing U.S. v. Slone (CA6 Ky) 833 F2d 595, 24 Fed Rules Evid Serv 339.

[31] Id., citing Johnston v. Birmingham (Ala App) 338 So 2d 7.

[32] Id., citing Eggert v. Mosler Safe Co. (Colo App) 730 P2d 895; Law Offices of Lawrence J. Stockler PC v. Rose, 174 Mich App 14, 436 NW2d 70, app den 434 Mich 862, reconsideration den (Mich) 1990 Mich LEXIS 962, and reconsideration den (Mich) 1990 Mich LEXIS 963.

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