Republic of the Philippines
Supreme Court
Manila

G.R. No. 224720-23 - ***Richard T. Martel, Allan C. Putong, Abel A. Guiñares, Victoria G. Mier, and Edgar C. Gan v. People of the Philippines***

G.R. No. 224765-68 - ***Benjamin P. Bautista, Jr. v. People of the Philippines***

Promulgated:
February 2, 2021

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CONCURRING OPINION

LAZARO-JAVIER, *J.*:

I **concur** in the **result** and a **sizeable portion** of the **more important doctrines** enunciated in the *ponencia* of the learned Justice Alfredo Benjamin S. Caguioa.

Elements of Section 3(e), Republic Act No. 3019 (RA 3019)

One. In the **context** of a violation of the relevant procurement statutes [Sections 356, 366, and 371 of the ***Local Government Code*** (LGC)] and Sections 4 and 10 of the ***Government Procurement Reform Act*** (GPRA), the elements of **Section 3(e) of RA 3019** are as follows: (1) the accused's violation of procurement laws **was done with** evident bad faith, manifest partiality, or gross inexcusable negligence; and (2) the accused's violation of procurement laws **caused** undue injury to any party or gave any private party unwarranted benefits, advantage or preference.[1]

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[1] *Sabaldan Jr. v. Office of the Ombudsman for Mindanao*, G.R. No. 238014, June 15, 2020.

Malice as element of evident bad faith, manifest partiality and gross inexcusable negligence

Two. I agree with the *ponencia* that the modes of **evident bad faith** and **manifest partiality** must be characterized by **malice** or **criminal intent**. For better or for worse, this has been how jurisprudence has expressly defined **evident bad faith**, and of late, in ***Sabaldan Jr. v. Office of the Ombudsman for Mindanao***,[2] has made this state of mind **also** an **express** element of **manifest partiality**.

To be sure, I see **no reason to distinguish** between evident bad faith and manifest partiality so far as this mental element is concerned. **Manifest partiality** cannot simply mean an open or clear inclination to favor another, because as humans we are faultlessly a fan of some than others, which without malice would be unjust to punish criminally. Further, we **cannot remove** malice as an element of **manifest partiality** since **even** the **third mode** of committing Section 3(e), RA 3019, **gross inexcusable negligence**, is ***culpa*** which by its **context** is actually a form of **malicious omission**.

In the context of a violation of the procurement statutes, there is **malice** or **criminal intent** when the violation is **done with a vicious and malevolent purpose or agenda** or ***dolus malus***.

To illustrate, the crime of physical injuries in *The Revised Penal Code* **cannot exist** without ***dolus malus***:[3]

> As an act that is *mala in se*, the existence of malicious intent is fundamental, since injury arises from the mental state of the wrongdoer — *iniuria ex affectu facientis consistat*. If there is no criminal intent, the accused cannot be found guilty of an intentional felony. Thus, in case of physical injuries under the [RPC], there must be a **specific *animus iniuriandi*** or **malicious intention to do wrong against the physical integrity or well-being of a person, so as to incapacitate and deprive the victim of certain bodily functions**. Without proof beyond reasonable doubt of the required *animus iniuriandi*, **the overt act of inflicting physical injuries *per se* merely satisfies the elements of freedom and intelligence in an intentional felony**. The **commission of the act does not, in itself, make a man guilty** unless **his intentions are**.[4]

Like the crime of physical injuries, the consummation of Section 3(e) demands **two criminal intents** – the **general** criminal intent and the **specific** criminal intent. Where a woman slaps a male suitor, the **general** criminal

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2 G.R. No. 238014, June 15, 2020.

3 US Legal.com at https://definitions.uslegal.com/d/dolus-malus/ (last accessed January 7, 2021): "***Dolus malus*** is a Latin phrase which means "**bad or evil deceit**." It refers to a **fraudulent design or intent**; an **unjustifiable deceit**. In short it is **the evil design** with which an act is accomplished **to the injury** of **another**; or it may be **the evil design** with which **an act is omitted** that ought to be done."

4 *Jabalde v. People*, 787 Phil. 255, 273 (2016) quoting *Villareal v. People*, 680 Phil. 527 (2012).

intent of **slapping** the suitor is **presumed** from the perpetration of such act. But to constitute physical injuries, there must also be the **specific** intent to **injure** him. This specific criminal intent may be **inferred** from the facts or circumstances **contextualizing** the slap, and if proved beyond reasonable doubt, is **the same** as the ***dolus malus***.

Violations of procurement provisions per se not probative of criminal intent

Three. A violation of a procurement provision *per se* **does not necessarily give rise** to either a **general** criminal intent or a **specific** criminal intent. It all depends upon the specific procurement violation committed. This is **because not all violations** of procurement provisions are **criminal** in nature. For instance, here, the **wrong** use of the **direct purchasing** exception to the general rule of a **public bidding** and the **wrong** reference to **brand names** in the purchase documents are **not crimes** or **offenses** though perhaps they may give rise to **administrative** or **civil** liabilities. Hence, in the latter examples, it would **take more than the violations themselves** to prove ***dolus malus*** or even just a **general criminal intent** – for ***malus dolus*, facts or circumstances** or **statutory language** from which to infer from the violations an **intent to cause fraud** upon the government or its coffers or **to commit or further graft and corrupt practices** will be **necessary**, while for ***general criminal intent***, we will have to **require** a **statute criminalizing** the **mere erroneous use even if in good faith** of any of the exceptions to public bidding or the **mere erroneous reference sans bad faith** to brand names in purchase documents.

As in the present case, **violations of a procurement provision** may constitute the **predicate act** for a charge under Section 3(e) of RA 3019. This however **does not mean** that the specific violations **would already prove by themselves** the first element of Section 3(e). As stated, we would **require more** to ensure a successful prosecution. This is **acutely true** here since **(i)** the **wrong** use of the **direct purchasing** exception to the general rule of a **public bidding** and the **wrong** reference to **brand names** in the purchase documents are **not** even crimes or offenses, and more importantly, **(ii)** the **first element** of Section 3(e) itself **demands** proof of ***dolus malus***.

No evidence of criminal intent

Three. There is **nothing** from which we may infer ***dolus malus*** from the specific violations of the procurement statutes referred to in this case. **Neither** the LGC **nor** the GRPA characterizes the **mere commission** of any of the violations as presumptively *dolus malus*. There are also **no facts** or **circumstances** from which to infer this **specific criminal intent**. The subject

violations **do not even** connote **general criminal intent** because these violations are **not** defined or penalized as **criminal** acts.

The **wrong use** of **brand names** – specifically, the specification of preference for two (2) units of Toyota Hilux 4x4 SR5, one (1) unit of Mitsubishi L300 Exceed DXX2500 Diesel and two (2) units of Ford Ranger XLT 4x4 – in the purchase documents was cited in the Dissent of the learned Justice Marvic Mario Victor F. Leonen as **conclusive proof of *dolus malus***.

On the other hand, petitioners **objected** to their conviction, arguing that the brand names were used as mere benchmarks of the relevant characteristics and/or performance requirements of *pick-up trucks for general use* that their office needed. They **even went to the extent** of telling the Sandiganbayan in open court that all they had envisioned purchasing were vehicles for *general use as pick-up trucks*.

I am **not too naïve to believe** petitioners' claims that the **specified brand names** were **mentioned only** as **benchmarks** of relevant characteristics or performance requirements. They are **more sophisticated** *and* **discerning** than what they would want to project. They are **the type** who would **not** refer to toothpastes as Colgate, refrigerators as Frigidaire, sodas as Coca Cola, rubber shoes as Adidas, photocopiers as Xerox, 8-track players as Pioneer, passenger jeepneys as Sarao, Asian utility vehicles as Ford Fiera, computers as IBM, wristwatches as Seiko, or jeans as Levis. Of course, petitioners, especially petitioner Bautista, **specifically wanted** Toyota Hilux 4x4 SR5, Mitsubishi L300 Exceed DXX2500 Diesel and Ford Ranger XLT 4x4. They **knew what specifically appealed** to their taste, what they thought would to them be not only **comfortable** and **useful** but more so **gutsy** and **beautifully rugged.**

Still, I **do not find** these **specific** choices **consciously** chosen by petitioners to be **indicative** of ***dolus malus***.

Vehicles are purchased not only because of their **utilitarian value**. If these were the only consideration – *only the general need for moving around* – we would already be inundated with fleets upon fleets of low-cost even second-hand government vehicles. Truth to tell, vehicles are **chosen** for their *over-all performance*, *durability*, *after-service assurances*, *freebies*, and *comfort*, which would **most likely be at par** with every major vehicle and major car producer and distributor, **but also** for the **X-factor** and **appeal** they bring to the table.

Would there *really* be **suitable substitutes** for **vehicles** when **suitable substitutes** have been **overbroadly defined** as articles "which would serve **substantially the same purpose** or produce **substantially the same results** as the brand, type, or make of article originally desired or requisitioned"?

But what factors should be included in and excluded from the **determination** of *the same purpose* or *the same results*? Would a **sense of respectability and dignity** be a factor in determining *the same purpose* or *the same results*? Would a reclining seat inside a **Sarao jeepney** be serving *substantially the same purpose* or producing *substantively the same results* as a reclining seat inside a **Mazda CX-30** or a **Toyota Alphard**? The fact is that **choices of vehicles** would depend **not just** on utility and price **but also** on the ooze of attraction from its grills, the ruggedness of its style, the brand appeal they each carry, and so much more imponderables.

In the end, it would be **unjust to jail** public servants simply because they acted humanly **but not maliciously**. If they did **not** profit from the procurement violations or did **not** allow others to **unwarrantedly** profit from government coffers, if the **government receives value for value** as this is defined by market forces, there would be **no *dolus malus*** and **no violation** of **Section 3(e)** of **RA 3019.**

I **can hardly reconcile** the claim that **procurement standards** are **sacrosanct** and **worth protecting** and **regulating**, *yet* the procurement statutes **have not criminalized deviations** from their standards. This fact alone **should signal strongly** that such **deviations per se** do **not** give rise to criminal liabilities under other statutes since they **do not** by themselves prove ***dolus malus***. These **deviations** do **not** presume **general** criminal intent *because* merely committing them is **not even** a criminal act.

Here, *other than* the explicit brand preference, there are **no** other facts or circumstances from which to infer ***dolus malus***. On the contrary, brand preference for some specialized products like vehicles may **actually be warranted** and **encouraged** by both **societal** and **market values**. Further, **by itself**, brand preference is not a crime. It has **not** been criminalized in our jurisdiction.

No evidence of malicious omission

Four. I also find **no** evidence of **malicious omission** by petitioners. For sure, they **intentionally omitted** compliance with the requirements of **direct purchasing**. Their belated obtention of certifications supports the claim that they **knew for sure** what **direct purchasing** called for and when it was **appropriate to resort** to this exception. However, I am unable to find **malice** in what they have done. The **standing question** is, *did they omit compliance to pursue a specific result that is fraudulent or corrupt, and if yes, what was this specific fraudulent or corrupt result?* There is simply **no evidence** of such **malice** in petitioners' *deliberate non-compliance* with the requisite procedures and documentation.

No evidence of injury to the Government or a private party, no evidence of unwarranted benefits and advantage to the dealers of the specifically preferred vehicles

Five. I agree that the Government and any private party were **not** injured by the decision to **directly purchase** the brand-specified vehicles. The Government received value for its money. **No** private party ever complained of being denied a business or the right to bid. Jurisprudence[5] has consistently held:

> x x x Unlike in actions for torts, **undue injury in Sec. 3(e) cannot be presumed even after a wrong or a violation of a right has been established**. Its existence must be proven as one of the elements of the crime. In fact, the causing of undue injury, or the giving of any unwarranted benefits, advantage or preference through manifest partiality, evident bad faith or gross inexcusable negligence constitutes the very act punished under this section. Thus, it is required that the **undue injury be specified, quantified and proven to the point of moral certainty**.
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> In jurisprudence, **"undue injury" is consistently interpreted as "actual damage." Undue** has been defined as "*more than necessary*, not proper, [or] illegal;" and **injury** as "*any wrong or damage done to another*, either in his person, rights, reputation or property [; that is, the] invasion of any legally protected interest of another." **Actual damage**, in the context of these definitions, is akin to that in civil law.
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> In turn, **actual or compensatory damages** is defined by Article 2199 of the Civil Code as follows:
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> Art. 2199. Except as provided by law or by stipulation, one is entitled to an adequate compensation only for such pecuniary loss suffered by him as he has duly proved. Such compensation is referred to as actual or compensatory damages.
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> It **naturally follows** that **the rule that should likewise be applied in determining undue injury is that in determining actual damages**, the court **cannot rely on mere assertions, speculations, conjectures** or **guesswork**, but **must depend on competent proof** and on the **best evidence obtainable** regarding **specific facts** that could afford some **basis for measuring compensatory or actual damage**.
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> ....
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> Complainant's testimony regarding her **family's financial stress was inadequate** and **largely speculative. Without giving specific details**, she made only **vague references** to the fact that her four children were all going to school and that she was the breadwinner in the family. She, however, **did not say that she was unable to pay their tuition fees**

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[5] *Alvarez v. People*, 692 Phil. 89 (2012); *Guadines v. Sandiganbayan*, 665 Phil. 563, 577 (2011); *Soriano v. Marcelo*, 597 Phil. 308, 317-319 (2009); *Uriarte v. People*, 540 Phil. 477, 497 (2006); *Santos v. People*, 520 Phil. 58, 71 (2006); *Llorente Jr. v. Sandiganbayan*, 350 Phil. 820, 837-839 (1998).

> and the **specific damage brought by such nonpayment**. The fact that **the "injury" to her family was unspecified or unquantified does not satisfy the element of undue injury**, as akin to actual damages. As in civil cases, actual damages, if not supported by evidence on record, cannot be considered.
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> In the present case, petitioner claims that the **form of injury** he suffered from the act of Garcia in referring his case to the DOJ is the **resultant delay in the resolution of his Complaint** against Palad. **However, other than such assertion, petitioner failed to adduce evidence of the actual loss or damage** he suffered by reason of the delay. While it is not necessary that a specific amount of the damage be proven with absolute certainty, **there must be some reasonable basis by which the court can measure it**. Here, petitioner utterly failed to support his bare allegation of undue injury

However, I do **not agree** that the dealers of the **directly purchased** vehicles did **not** get **benefits** and **advantage from the direct purchase**. A sale is still a sale, a business is appreciated precisely because business was consummated. The question is **whether** the benefits and advantage from the direct purchase were **unwarranted.**

I do **not** believe that the benefits and advantage received by the dealers of the preferred brand names were **unwarranted**. To be **so**, we have to ask **another question** – if the procurement provisions were **not** violated, would the sale or business or transaction **not have** pushed through? If the answer is yes, the sale or business or transaction would **not** have been consummated, then the benefits or advantage would be **unwarranted**. However, if the answer is in the negative, that it ***could have*** pushed through, the benefits or advantage was **not unwarranted** or at least there **would have been reasonable doubt** about whether the benefits or advantage were **unwarranted.**

Here, given the **nature** of the items to be purchased – vehicles – it was **not improbable**, or was **indeed all too probable**, that even if the procurement provisions on direct purchasing were followed, the **selected vehicles** would have been **the same vehicles** that would have been bought. The **result** in the end would have been a **difference without any distinction** from the situation we have now in the present case. This is because the **nature** of vehicles is that they are **really brand-specific**. A Toyota, a Ford, a Mitsubishi, have **features inherent only to these brands**. A **reasonably prudent person** would **not** shop for a vehicle **without reference to the brand name** and **with reference solely to its utility** and **price**. To **claim otherwise** would simply be forging a scenario **contrary to common logic** and **human experience**.

Villarosa v. People not on all fours with the facts in the case at bar

Six. I reiterate my stand in ***Villarosa v. People***[6] that the same was **wrongly decided**, *viz.*:

> There can be no good faith where the circumstances point to the necessary mental element of the offense charged – manifest partiality, evident bad faith or inexcusable negligence. As noted, our case law has already settled the legal impact of petitioner's feigned ignorance of the utter lack of power to issue extraction permits. Petitioner gave out extraction permits repeatedly, albeit he had no authority to do so under the clear and unequivocal provision of Section 138 of the Local Government Code, Section 43 of the Philippine Mining Act, and Provincial Ordinance No. 2005-004. As a result, petitioner's unlawful act benefited and gave advantage to private parties that used the unduly permits to illegally extract resources. Despite petitioner's actual or at least strongly presumed knowledge of his lack of power to do so, he disputed, nay breaded the plain and categorical language of the Local Government Code, the Philippine Mining Act, and the Provincial Ordinance No. 2005-004. His actions manifest partiality, evident bad faith or inexcusable negligence.

In ***Villarosa***, petitioner there was **several times overruled** about his asserted authority to issue extraction permits. **Several times, too, he ignored** the overruling of his issuance. His acts **gave enormous benefits** to contractors. These **benefits were unwarranted** – *had he followed the law on the proper authority to issue the extraction permits, he would not have been able to issue these permits and the favored contractors would not have been favored after all.* These glaring facts in ***Villarosa*** make it an **unworthy precedent** to be followed here. The facts are **different**; these facts **distinguish** one from the other.

In sum, I concur in the result and vote to acquit petitioners.

AMY C. LAZARO-JAVIER

[6] G.R. Nos. 233155-63, June 23, 2020.