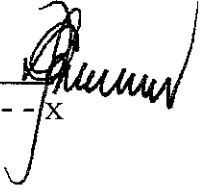


G.R. No. 239871 (LYNNA G. CHUNG vs. OFFICE OF THE OMBUDSMAN-FIELD INVESTIGATION OFFICE).

Promulgated:.

MAR 18 2021



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**DISSENTING OPINION**

**PERALTA, C.J.:**

Petitioner Lynna G. Chung filed this petition for *certiorari*, under Rule 65 of the Rules of Court, assailing the Office of the Ombudsman’s Joint Resolution dated March 14, 2018 in OMB-C-C-16-0055 and its Order dated May 8, 2018, which denied petitioner’s motion for partial reconsideration. The Office of the Ombudsman found probable cause against petitioner and five other officials of the Philippine National Railways (PNR) for violation of Section 3(e) of Republic Act (R.A.) No. 3019.

Petitioner was charged with former PNR General Manager Manuel Andal for alleged irregularities in the payment to Pandrol Korea for the purchase of rail fastening system, rail clips and insulators through direct contracting. The Office of the Ombudsman found that Andal and petitioner “authorized the full payments to Pandrol Korea and the charging of the cost of the opening of LC to the account of the PNR in violation of the Payment Schedule, particularly paragraph 5 (b) and (d) thereof, as stated in the contract, and Section 42.5 of the IRR-A of R.A. No. 9184.”

Petitioner alleges that: (1) she did not act with manifest partiality, evident bad faith or inexcusable negligence; (2) there were no irregularities in the payments to Pandrol Korea; (3) the mere opening of a letter of credit did not amount to payment; (4) the absence of a notice of disallowance by the Commission on Audit (COA) against the payments made to Pandrol Korea indicates that the payments were regular, necessary and lawful; and (5) she did not cause any undue injury to any party, including the government, or give any private party unwarranted benefits, advantage or preference.

The main issue is whether or not the Office of the Ombudsman gravely abused its discretion in finding probable cause that petitioner violated Section 3(e) of R.A. No. 3019.

Under Article XI, Section 13 of the 1987 Constitution, the Office of the Ombudsman has the duty to “[i]nvestigate on its own, or on complaint by any



person, any act or omission of any public official, employee, office or agency, when such act or omission appears to be illegal, unjust, improper, or inefficient.”

The Ombudsman Act of 1989 (R.A. No. 6770) likewise provides:

Sec 15. Powers, Functions and Duties. The Office of the Ombudsman shall have the following powers, functions and duties:

- (1) Investigate and prosecute on its own or on complaint by any person, any act or omission of any public officer or employee, office or agency, when such act or omission appears to be illegal, unjust, improper or inefficient. It has primary jurisdiction over cases cognizable by the *Sandiganbayan* and, in the exercise of this primary jurisdiction, it may take over, at any stage, from any investigatory agency of Government, the investigation of such cases.

The duty of the Ombudsman in the conduct of a preliminary investigation is to establish whether there exists probable cause to file an information in court against the accused.<sup>1</sup> “Probable cause” has been defined as the existence of such facts and circumstances as would excite the belief, in a reasonable mind, acting on the facts within the knowledge of the prosecutor, that the person charged was guilty of the crime for which he/she was prosecuted.<sup>2</sup> A finding of probable cause needs only to rest on evidence showing that more likely than not a crime has been committed and there is enough reason to believe that it was committed by the accused.<sup>3</sup> It need not be based on clear and convincing evidence of guilt, neither on evidence establishing absolute certainty of guilt.<sup>4</sup> A finding of probable cause merely binds over the suspect to stand trial.<sup>5</sup> It is not a pronouncement of guilt.<sup>6</sup>

In this case, the Office of the Ombudsman found probable cause that petitioner violated Section 3 (e) of R.A. No. 3019, viz.:

Section 3. Corrupt practices of public officers. — In addition to acts or omissions of public officers already penalized by existing law, the following shall constitute corrupt practices of any public officer and are hereby declared to be unlawful:

x x x x

<sup>1</sup> *Presidential Ad Hoc Fact-Finding Committee on Behest Loans v. Desierto*, (Resolution), 603 Phil. 18, 35 (2009).

<sup>2</sup> *Galario v. Office of the Ombudsman Mindanao*, 554 Phil. 86, 100-101 (2007), citing *Raro v. Sandiganbayan*, 390 Phil. 917, 945-946 (2000).

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*



(e) Causing any undue injury to any party, including the Government, or giving any private party any unwarranted benefits, advantage or preference in the discharge of his official administrative or judicial functions through manifest partiality, evident bad faith or gross inexcusable negligence. This provision shall apply to officers and employees of offices or government corporations charged with the grant of licenses or permits or other concessions.

The Office of the Ombudsman said that records showed that former General Manager Andal and petitioner facilitated the irregular release of payments to Pandrol Korea, thus:

On complainant's allegation that respondents Andal and Lynna Chung facilitated the irregular release of payments to Pandrol Korea, records show that it is indeed the case. Respondents Andal and Lynna Chung authorized the full payments to Pandrol Korea and the charging of the cost of the opening of LC to the account of the PNR in violation of the Payment Schedule, particularly paragraph 5 (b) and (d) thereof, as stated in the contract and Sec. 42.5 of the IRR-A of R.A. No. 9184.

Respondent Andal's claim that he did not agree with the 15% advance payment because he wanted to protect the interest of the PNR is too arbitrary to be considered and is an admission of his violation of the sanctity of the contract. He cannot amend the terms of the contract without the consent of the PNR Board. His claim that he was protecting the interest of the PNR was belied by the fact that he ordered and approved the full payments to Pandrol Korea before the pre-requisite submission of shipment documents.

On respondent Lynna Chung's claims that "she was only 'directed'" by respondent Andal to effect payment to Pandrol Korea; that she "had no discretion in the matter but to authorize payment for Pandrol's rail fastening assemblies;" and that she "had no reason to doubt or withhold payment for Pandrol Korea," especially since the contract was supported by the BAC Resolution and the Board Resolution, these are all flimsy attempts to wash her hands off[f] the matter. Her office was not a mere stamp pad of the PNR General Manager, the PNR-BAC, or the PNR Board. As Manager of the Administrative and Finance Department, it was her duty to ensure that all payments of the PNR are supported by valid and original documents and are made according to the terms of the applicable contract. She had abandoned her duty by placing her signature on documents authorizing and releasing the payments to Pandrol Korea without verifying their conformity with the payment terms under the contract. Her relationship with private respondent Jaewoo Chung also becomes a factor in the aspect of the irregular payments to Pandrol Korea.<sup>7</sup>

Documents on record of full payment authorized by petitioner, without regard to the 15% advance payment and payment of the remaining 85% of the amount for each delivery stipulated in the payment schedule of the contract, are:

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<sup>7</sup> *Rollo*, Vol. I, pp. 102-104.



- (1) Petitioner's letter<sup>8</sup> dated June 8, 2009 addressed to the Manager of PVB to debit the peso equivalent of US\$1,155,000.00 against PVB C/A No. 00501-00593-3 to cover payment to Pandrol Korea Limited for the importation of Pandrol rail fastening assembly.
- (2) Petitioner's letter<sup>9</sup> dated February 23, 2010 addressed to the Manager of PNB to debit the peso equivalent of US\$225,000.00 against PNB S/A 41-648-830001-5 upon opening of the LC in favor of Pandrol Korea for the purchase of 50,000 rail clips and 50,000 nylon insulators.

Petitioner's letter dated June 8, 2009 correlates with full payment for the first delivery of 30,000 sets of e-AT20123 Concrete Sleeper Fastening Assembly in the total price of US\$1,155,000.00 per the contract between PNR and Pandrol Korea. While petitioner's letter dated February 23, 2010 correlates with full payment for the 50 pieces of rail clips worth US\$175,000.00 and 50 pieces of rail insulators worth US\$50,000.00 or a total price of US\$225,000.00.

The said documents support the finding of the Office of the Ombudsman that petitioner authorized the full payments to Pandrol Korea, without observing the 15% advance payment and thereafter payment of the remaining 85% of the amount for each delivery, in violation of the Payment Schedule, particularly paragraph 5 (b) and (d), *viz.*:

5. Payment Schedule

The payment shall be made to the Supplier as herein mentioned:

x x x x

- b) For each scheduled payment, an advance payment equivalent to fifteen percent (15%) of the Price of the delivery shall be paid to the SUPPLIER within ten (10) calendar days from receipt by the SUPPLIER of a Purchase Order from the PURCHASER, subject to the provision of Item 5 (c) below.

x x x x

- d) The payment of the remaining eighty-five percent (85%) of the amount for each delivery shall be paid to the SUPPLIER upon presentation to the advisory bank of the following shipment documents:

- (1) Packing List;
- (2) Bill of Lading;
- (3) Inspection Certificate;
- (4) Commercial Invoice;

<sup>8</sup> *Id.* at 296.

<sup>9</sup> *Id.* at 311.

- (5) Authenticated Export Declaration;
- (6) Marine Insurance Policy: at least one hundred ten percent (110%) of the total contract value of shipment and shall cease thirty (30) days after arrival of GOODS at the warehouse designated by the PURCHASER.<sup>10</sup>

Petitioner asserts that the said authorization letters addressed to PVB and PNB to debit against PNR's account the peso equivalent of US\$1,155,000.00 and US\$225,000.00, respectively, to cover (full) payment of the items ordered were necessary for the opening of the Letters of Credit as required in the contract and in obedience to the directive of her superior, General Manager Andal. She also argues that the mere opening of a letter of credit did not amount to payment.

It can be observed that the said letters of petitioner instructing PVB and PNB to debit PNR's account in the amount of US\$1,155,000.00 and US\$225,000.00, respectively, were the total price of the items ordered, and the said sums of money were for payment of the items ordered without indicating that payment should be in accordance with the payment schedule in the contract requiring 15% advance payment and payment of the remaining 85% of the amount for each delivery upon compliance with the prerequisites for payment.

Petitioner's letters dated June 8, 2009 and February 23, 2010 did not merely authorize the opening of a letter of credit because her letters clearly state that the debit of the amounts were to cover (full) payment of the goods purchased from Pandrol Korea. Moreover, it was General Manager Andal who applied for a letter of credit on June 2, 2009 covering the shipment of the Pandrol rail fastening assembly in the amount of US\$1,155,000.00.<sup>11</sup> The disbursement of the funds and terms of the letter of credit depended on the authorization for payment by Andal and petitioner based on the contract between PNR and Pandrol Korea.

Thus, even if the debit of the said amounts on PNR's account was necessary to fund the letter of credit earlier applied for by Andal for the beneficiary Pandrol Korea, still petitioner authorized full payment of the goods without regard to payment in accordance with the terms of the contract: 15% advance payment and payment of the remaining 85% of the amount for each delivery upon presentation of the required shipping documents. The transmission<sup>12</sup> of the issue of documentary credit sent by PVB to Wachovia Bank, Seoul in favor of the beneficiary, Pandrol Korea, authorized full payment, as it was up to the amount of US\$1,155,000.00 (which reflects the authorization letter dated June 8, 2009 of petitioner), for the first delivery of

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<sup>10</sup> *Id.* at 271.

<sup>11</sup> *Id.* at 275.

<sup>12</sup> *Id.* at 277.



30,000 sets of Pandrol rail fastening assembly upon presentation of the specified shipping documents to the advisory bank. There is no evidence on record that advance payment of 15% was made. Thus, the Office of the Ombudsman is correct in stating that General Manager Andal and petitioner authorized full payment to Pandrol Korea, which was not in accordance with the terms of the contract as they did not observe the 15% advance payment and payment of the remaining balance upon presentation to the advisory bank of the required shipping documents. It was also observed that in the aforementioned transmission, two required shipment documents in the contract, namely, the Inspection Certificate and Authenticated Export Declaration, were not included among the documents required for presentation to the advisory bank for payment of the 30,000 sets of Pandrol rail fastening system.

As stated by the Office of the Ombudsman, as Manager of the Administrative and Finance Department, it was petitioner's duty to ensure that all payments of the PNR are supported by valid and original documents and are made according to the terms of the applicable contract. Why did petitioner fail to point out to Andal that the contract calls for 15% advance payment, and then 85% payment upon presentation of the required shipping documents? It is noted that in a subsequent purchase of 40,000 sets of Pandrol rail fastening system per Purchase Order<sup>13</sup> dated January 22, 2015, the officers of PNR, who were no longer Andal and petitioner, observed the 15% advance payment in accordance with the contract dated May 21, 2009.

In regard to petitioner's argument that the absence of a notice of disallowance by the Commission on Audit against the payments made to Pandrol Korea indicates that the payments were regular, necessary and lawful, respondents, in their Comment, aptly cited *Dimayuga v. Office of the Ombudsman*,<sup>14</sup> which held that "a finding of probable cause does not derive its veracity from the findings of the COA, but from the independent determination of the Ombudsman."

As a general rule, the Court does not interfere with the Ombudsman's determination of the existence or absence of probable cause.<sup>15</sup> A finding of probable cause is a finding of fact which is generally not reviewable by this Court.<sup>16</sup> As cited in a long line of cases, this Court has pronounced that it cannot pass upon the sufficiency or insufficiency of evidence to determine the existence of probable cause.<sup>17</sup> The rule is based not only upon respect for the investigatory and prosecutory powers granted by the Constitution to the Office of the Ombudsman but upon practicality as well.<sup>18</sup> If it were otherwise, this

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<sup>13</sup> *Id.* at 337.

<sup>14</sup> 528 Phil. 42, 50 (2006).

<sup>15</sup> *Galario v. Office of the Ombudsman*, *supra* note 2 at 102.

<sup>16</sup> *Id.*

<sup>17</sup> *Id.* at 103.

<sup>18</sup> *Id.*

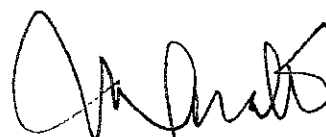


Court will be clogged with an innumerable list of cases assailing investigatory proceedings conducted by the Office of the Ombudsman with regard to complaints filed before it, to determine if there is probable cause.<sup>19</sup>

Only where there is a clear case of grave abuse of discretion by the Ombudsman will this Court interfere with the Ombudsman's findings of probable cause.<sup>20</sup> By "grave abuse of discretion" is meant such capricious and whimsical exercise of judgment as is equivalent to lack of jurisdiction.<sup>21</sup> It has been held that abuse of discretion alone is not sufficient, but that the abuse must be so grave, as where the power is exercised in an arbitrary or despotic manner by reason of passion, prejudice or personal hostility, and it must be so patent and gross as to amount to an evasion of positive duty or to a virtual refusal to perform a duty enjoined or to act at all, in contemplation of law.<sup>22</sup> For *certiorari* to lie, there must be a capricious, arbitrary and whimsical exercise of power.<sup>23</sup> It is absent in this case.

The validity and merits of petitioner's defense and evidence submitted to this Court are best ventilated before the Sandiganbayan where a case has been filed against petitioner. To stress, this Court is not a trier of facts. Petitioner stated in her Reply<sup>24</sup> that her case<sup>25</sup> in the Sandiganbayan has been consolidated with three other cases<sup>26</sup> involving five other defendants. It can be assumed that the Sandiganbayan has already received and reviewed the evidence of the parties in this case and is ready with its decision, considering that it has promulgated its decision on the criminal cases<sup>27</sup> against General Manager Manuel Andal on January 22, 2021.

Accordingly, there being no grave abuse of discretion on the part of the Office of the Ombudsman, I vote to dismiss the petition.



**DIOSDADO M. PERALTA**  
Chief Justice

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<sup>19</sup> *Id.*

<sup>20</sup> *Id.* at 102.

<sup>21</sup> *Imutan v. Court of Appeals*, 190 Phil. 233 (1981).

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> *Rollo*, Vol. II. (unpaginated)

<sup>25</sup> SB-18-CRM-0512.

<sup>26</sup> SB-18-CRM-0510; SB-18-CRM-0511; and SB-18-CRM-0513.

<sup>27</sup> SB-18-CRM-0511 and SB-18-CRM-0513.