

THIRD DIVISION

[G.R. NO. 172602, April 13, 2007]

**HENRY T. GO, PETITIONER, VS. THE FIFTH DIVISION,
SANDIGANBAYAN AND THE OFFICE OF THE SPECIAL
PROSECUTOR, OFFICE OF THE OMBUDSMAN, RESPONDENTS.**

DECISION

CALLEJO, SR., J.:

Before the Court is the petition for *certiorari* under Rules 65 of the Rules of Court filed by Henry T. Go seeking to nullify the Resolution dated December 6, 2005 of the *Sandiganbayan* in Criminal Case No. 28092, entitled *People of the Philippines vs. Vicente C. Rivera, Jr. and Henry T. Go*, which denied his motion to quash. Likewise sought to be nullified is the *Sandiganbayan* Resolution of March 24, 2006 denying petitioner Go's motion for reconsideration.

The factual and procedural antecedents of the case are as follows:

On May 5, 2003, this Court rendered the Decision in *Agan, Jr. v. Philippine International Air Terminals Co., Inc. (PIATCO)*,^[1] declaring as null and void the 1997 Concession Agreement, the Amended and Restated Concession Agreement (ARCA), and the Supplemental Contracts entered into between the Government, through the Department of Transportation and Communications (DOTC) and the Manila International Airport Authority (MIAA), and PIATCO.

By the aforementioned contracts (collectively known as the PIATCO contracts), the Government awarded in favor of PIATCO the project for the development of the Ninoy Aquino International Airport Passenger Terminal III (NAIA IPT III) under a build-operate-and-transfer (BOT) scheme pursuant to Republic Act (RA) No. 6957 as amended by RA 7718 (BOT Law).^[2]

The Court ruled that Paircargo Consortium, PIATCO's predecessor-in-interest, was not a qualified bidder as it failed to meet the financial capability requirement under the BOT Law. Moreover, the PIATCO contracts were declared null and void for being contrary to public policy. The penultimate paragraph of the Court's Decision states thus:

CONCLUSION

In sum, this Court rules that in view of the absence of the requisite financial capacity of the Paircargo Consortium, predecessor of respondent PIATCO, the award by the PBAC of the contract for the construction, operation and maintenance of the NAIA IPT III is null and void. Further, considering that the 1997 Concession Agreement contains material and substantial amendments, which amendments had the effect of converting

the 1997 Concession Agreement into an entirely different agreement from the contract bidden upon, the 1997 Concession Agreement is similarly null and void for being contrary to public policy. The provisions under Section 4.04(b) and (c) in relation to Section 1.06 of the 1997 Concession Agreement and Section 4.04(c) in relation to Section 1.06 of the ARCA, which constitute a direct government guarantee expressly prohibited by, among others, the BOT Law and its Implementing Rules and Regulations are also null and void. The Supplements, being accessory contracts to the ARCA, are likewise null and void.^[3]

Subsequently, an affidavit-complaint, later amended, was filed with the Office of the Ombudsman by Ma. Cecilia L. Pesayco, Corporate Secretary of Asia's Emerging Dragon Corporation (AEDC), charging several persons in connection with the NAIA IPT III project. The AEDC was the original proponent thereof which, however, lost to PIATCO when it failed to match the latter's bid price.

After conducting a preliminary investigation thereon, the Office of the Ombudsman filed with the *Sandiganbayan* the Information dated January 13, 2005 charging Vicente C. Rivera, as then DOTC Secretary, and petitioner Go, as Chairman and President of PIATCO, with violation of Section 3(g)^[4] of RA 3019, also known as the Anti-Graft and Corrupt Practices Act. The case was docketed as Criminal Case No. 28092, entitled *People of the Philippines vs. Vicente C. Rivera, Jr. and Henry T. Go*. The Information reads:

I N F O R M A T I O N

The undersigned Graft Investigation and Prosecution Officer II, Office of the Deputy Ombudsman for Luzon, accuses VICENTE C. RIVERA, JR. and HENRY T. GO with Violation of Sec. 3 (g), R.A. No. 3019 committed as follows:

On or about November 26, 1998, or sometime prior or subsequent thereto, in Quezon City, Philippines and within the jurisdiction of this Honorable Court, the accused VICENTE C. RIVERA, JR., Secretary of the Department of Transportation and Communications (DOTC), committing the offense in relation to his office and taking advantage of the same, in conspiracy with accused HENRY T. GO, Chairman and President of the Philippine International Air Terminals, Co., Inc. (PIATCO), did then and there, willfully, unlawfully and feloniously enter into an Amended and Restated Concession Agreement (ARCA), after the project for the construction of the Ninoy Aquino International Passenger Terminal III (NAIA IPT III) was awarded to Paircargo Consortium/PIATCO, which ARCA substantially amended the draft Concession Agreement covering the construction of the NAIA IPT III under Republic Act 6957 as amended by Republic Act 7718 (BOT Law) providing that the government shall assume the liabilities of PIATCO in the event of the latter's default specifically Article IV, Section 4.04 (c) in relation to Article I, Section 1.06 of the ARCA which term is more beneficial to PIATCO and in violation

of the BOT law, and manifestly and grossly disadvantageous to the government of the Republic of the Philippines.

CONTRARY TO LAW.^[5]

On February 11, 2005, petitioner Go posted a cash bond for his provisional liberty.

On February 15, 2005, the *Sandiganbayan* issued a Hold Departure Order against Rivera and petitioner Go.

On March 28, 2005, petitioner Go was arraigned and entered a plea of "not guilty."

On May 26, 2005, Rivera filed a Motion for Judicial Determination (or Re-Determination) of Probable Cause and Motion to Dismiss. The *Sandiganbayan* gave petitioner Go a period of ten (10) days within which to file a comment thereon.

On June 20, 2005, petitioner Go filed his Comment with Motion to Quash. Adopting the view advanced by Rivera, petitioner Go harped on the alleged "missing documents," including Pesayco's amended affidavit-complaint and those others that were mentioned in the resolution of the Office of the Deputy Ombudsman finding probable cause against Rivera and petitioner Go, but which were not allegedly in the records. Petitioner Go maintained that apart from the bare allegations contained in Pesayco's affidavit-complaint, there was no supporting evidence for the finding of the existence of probable cause against him and Rivera. Petitioner Go further alleged that he could not be charged under Section 3(g) of RA 3019 because he is not a public officer and neither is he capacitated to enter into a contract or transaction on behalf of the government. At least one of the important elements of the crime under Section 3(g) of RA 3019 is not allegedly present in his case.

On June 21, 2005, petitioner Go filed a Manifestation with Motion to Substitute the Comment with Motion to Quash, which the prosecution, through the Office of the Ombudsman, opposed.

On December 6, 2005, the *Sandiganbayan* issued the assailed Resolution denying Rivera's Motion for Judicial Determination (Re-Determination) of Probable Cause and Motion to Dismiss and petitioner Go's Motion to Quash.

The *Sandiganbayan* ruled that, contrary to the prosecution's submission, it could still entertain petitioner Go's Motion to Quash even after his arraignment considering that it was based on the ground that the facts charged do not constitute an offense. Nonetheless, the *Sandiganbayan* denied petitioner Go's Motion to Quash holding that, contrary to his claim, the allegations in the Information actually make out the offense charged. More particularly, the allegations that accused Rivera, as DOTC Secretary, in conspiracy with petitioner Go, entered into the ARCA with petitioner Go/PIATCO, which agreement was manifestly and grossly disadvantageous to the government, are constitutive of the elements of the offense charged as defined under Section 3(g) of RA 3019.

The *Sandiganbayan* explained that petitioner Go's contentions that he is not a public officer, he did not conspire with Rivera in the execution of the ARCA and, in any case, the said agreement cannot be said to be manifestly and grossly disadvantageous to the government, could not be properly considered for the

purpose of quashing the Information on the ground relied upon by him. According to the *Sandiganbayan*, these matters raised by petitioner Go have to be proved during trial.

The decretal portion of the assailed *Sandiganbayan* Resolution reads:

WHEREFORE, in light of the foregoing, the "Motion for Determination (Re-Determination) of Probable Cause and Motion to Dismiss" and the "Motion to Quash," filed by accused Vicente C. Rivera, Jr. and Henry T. Go, respectively, are hereby DENIED.

SO ORDERED.^[6]

Petitioner Go filed a motion for reconsideration thereof but it was denied by the *Sandiganbayan* in the Resolution dated March 24, 2006.

Petitioner Go now seeks recourse to the Court and, in support of his petitioner, alleges that:

A.

The Honorable *Sandiganbayan* committed grave abuse of discretion amounting to lack or excess of jurisdiction in not ruling that Section 3(g) does not embrace a private person within its proviso.

B.

The Honorable *Sandiganbayan* committed grave abuse of discretion amounting to lack or excess of jurisdiction in not ruling that there is no probable cause to hold petitioner for trial.^[7]

Petitioner Go contends that Section 3(g) of RA 3019, by its text, cannot be extended or even enlarged by implication or intendment to bring within its limited scope private persons. The said provision of law allegedly punishes only public officers as it penalizes the act of "entering, on behalf of the government, into any contract or transaction manifestly and grossly disadvantageous to the same, whether or not the public officer profited or will profit thereby." As a private person, he could not allegedly enter into a contract "on behalf of the government," there being no showing of any agency relations or special authority for him to act for and on behalf of the government.

Citing several cases,^[8] petitioner Go enumerates the following elements of Section 3(g) of RA 3019:

- (1) that the accused is a public officer;
- (2) that he entered into a contract or transaction on behalf of the government; and
- (3) that such contract or transaction is grossly and manifestly disadvantageous to the government.

He also cites *Marcos v. Sandiganbayan*^[9] where the Court acquitted then First Lady Imelda R. Marcos of the charge of violation of Section 3(g) of RA 3019 as it found

that she did not sign the subject Lease Agreement, entered into between the Light Railway Transit Authority (LRTA) and Philippine General Hospital Foundation, Inc. (PGHFI), as a public officer, but in her capacity as Chairman of the PGHFI, a private entity. As such, the Court held that the first element of the offense charged, i.e., that the accused is a public officer, was wanting.

Petitioner Go claims that, in the same manner, the first element of the offense charged against him is absent because he is not a public officer who is authorized by law to bind the government through the act of "entering into a contract." He also points out that, similar to his case, in *Marcos*, the Information also alleged that the former First Lady conspired with a public officer, then Minister Jose P. Dans of the Ministry of Transportation and Communications, in entering into a contract. Nonetheless, the Court therein dismissed the allegation of conspiracy.

Petitioner Go maintains that by any of its definition,^[10] he cannot be considered a "public officer." Further, only a public officer can enter into a

contract in representation of the government. He stresses that the first element of the offense, i.e., that the accused is a public officer, is an essential ingredient of the crime under Section 3(g) of RA 3019. He likens it to the crime of parricide where the essential element is the relationship of the offender to the victim and, citing a criminal law book author, a stranger who cooperates in the execution of the offense is not allegedly guilty of this crime. The stranger is allegedly either liable for homicide or murder but never by "conspiracy to commit parricide."^[11]

By parity of reasoning, according to petitioner Go, the first essential element of the crime penalized under Section 3(g) of RA 3019 is that the offender must be a public officer. Since he is not a public officer, one of the essential elements of the offense is lacking; hence, there is no other recourse but to quash the Information.

Section 9 of RA 3019 was also cited which reads:

SEC. 9. Penalties for violation. —

(a) Any public officer or private person committing any of the unlawful acts or omissions enumerated in Sections 3, 4, 5, and 6 of this Act shall be punished with imprisonment for not less than six years and one month or fifteen years, perpetual disqualification from public office, and confiscation or forfeiture in favor of the Government of any prohibited interest and unexplained wealth manifestly out of proportion to his salary and other lawful income.

x x x

Petitioner Go posits that had it been the intention of the lawmakers to penalize private persons who supposedly "conspired" with public officers in violation of Sections 3, 4, 5 and 6 of RA 3019, it could have easily used the conjunctive "and," not "or," between the terms "public officer" and "private person" in Section 9 thereof.

Petitioner Go takes exception to the *Sandiganbayan's* pronouncement that even as a private individual he is not excluded from the coverage of Section 3(g) of RA 3019