Zamora Poblador Vilchez & Bretana Law Offices

'14 SEP 30 [illegible]

Received by:

REPUBLIC OF THE PHILIPPINES
NATIONAL CAPITAL REGION
REGIONAL TRIAL COURT
MAKATI CITY
BRANCH 147

PEOPLE OF THE PHILIPPINES,
Plaintiff,

-versus-

Criminal Case No: 14-198

JAN ROBERT GUSTAFSSON,
SHERWIN QUIAMBAO ,
BERNADETTE GONZALES DE GUZMAN,
Accused.

x----------x

ORDER

For resolution is a Motion for Reconsideration dated July 14, 2014 filed by the prosecution assailing the Order dated June 26, 2014 of Judge Elpidio R. Calls, Presiding Judge of the Regional Trial Court , Branch 133, Makati City dismissing the present case against all the accused, namely: Jan Robert Gustafsson, Sherwin Quiambao, and Sylvia Bernadette Gonzales de Guzman for the crime of qualified theft under Article 310 of the Revised Penal Code.

The criminal Information filed against all the accused that gave rise to this incident reads as follows:

"That on or about the 13th day of April 2012, in the City of Makati, Philippines, and within the jurisdiction of this Honorable Court, accused Jan Gustafsson, in his capacity as managing director, and accused Sylvia Bernadette Gonzales de Guzman and Sherwin Quiambao, in their capacity as authorized signatories of Spectrogen Corporation, with grave abuse of confidence, conspiring, and confederating together, did then and there willfully, unlawfully and feloniously take and carry away the amount of US$160,338 (approximately Php6,413,520 in pesos @ P40 per dollar) belonging to Spectrogen Corporation represented by Jesulito T. Cabes, by withdrawing the money from the account of the complainant, without the consent, and to the damage and prejudice of the corporation.

CONTRARY TO LAW."

The Motion for Reconsideration raised the following arguments:

(I) The assailed Order was issued with grave abuse of discretion and in violation of Section 6, Rule 112 of the Rules of Court, warranting its reversal.

(II) The Honorable Court issued the assailed Order with grave abuse of discretion and committed grave error by taking into consideration extraneous matters which do not form part of the records of the preliminary investigation before it.

(III) The assailed Order prematurely required the exhaustive presentation of the prosecution's evidence during the determination of probable cause to issue a warrant of arrest. Precisely, a full-blown trial on the merits is necessary in this case.

(IV) The Honorable Court committed error in failing to find that there is probable cause to charge the accused for the crime of qualified theft considering that all the elements of the crime are present.

a. Contrary to the ruling of the Honorable Court, the accused, in conspiracy with one another, unlawfully took personal property of US$160,338.00
b. Contrary to the ruling of the Honorable Court, the accused's taking of US$160,338.00 was done with intent to gain.
c. Contrary to the ruling of the Honorable Court, the accused-movants' taking of US$160,338.00 was done without the consent of the owner, private complainant Spectrogen."

Accused filed a Motion to Expunge with Comment/Opposition Ad Cautelam on September 8, 2014 essentially arguing that the prosecution's Motion for Reconsideration does not bear the conformity of the public prosecutor; that the issuance of the assailed Order was without grave abuse of discretion there being no violation of Section 6, Rule 112 of the Rules of Court and that all the documents/pieces of evidence which were made the basis of the order of dismissal form part of the records of the court; and that the elements of the crime of qualified theft are absent. Traversing the same, the prosecution filed its Reply with Opposition on September 11, 2014 which in turn was subject of Reply to the Opposition with Rejoinder to the Reply filed by the accused on September 17, 2014

This Court is called upon to determine whether there is probable cause for the purpose of issuing warrants of arrest against the accused pursuant to Section 6 of Rule 112 of the Rules of Court, after personal evaluation of the resolution of the prosecutor and its supporting evidence.

The crime of qualified theft is punished under Article 310 of the Revised Penal Code and is committed as follows:

Art. 310. Qualified Theft. _***The crime of theft shall be punished by the penalties next higher by two degrees than those respectively specified in the next preceding article, if committed by a domestic servant, or with grave abuse of confidence, or if the property stolen is motor vehicle, mail matter or large cattle or consists of coconuts taken from the***

premises of a plantation, fish taken from a fishpond or fishery or if property is taken on the occasion of fire, earthquake, typhoon, volcanic eruption, or any other calamity, vehicular accident or civil disturbance.

The pertinent elements for the present crime of qualified theft for grave abuse of confidence under Article 310 of the Revised Penal Code are:

1. That there be taking of personal property;
2. That said property belongs to another;
3. That the taking be done with intent to gain;
4. That the taking be done without the consent of the owner;
5. That the taking be accomplished without the use of violence against or intimidation of persons or force upon things; and
6. That it be done with grave abuse of confidence. (People vs. Puig, 563 SCRA 564 [2008]; Astudillo vs. People, 509 SCRA 302 [2006]; Gaviola vs. People, 480 SCRA 436 [2006]; Rebucan vs. People, 507 SCRA 332 [2006])

In the assailed Order of June 26, 2014, probable cause was held to be wanting against all of the accused as there was no taking of the amount of US$160,338.00, as it was made in payment of legal fee after it went through accounting procedure. It was ruled that accused Gustaffson being Spectrogen's former Managing Director during the time of the disbursement of that amount negotiated for the contract to which payment of the legal fee pertained, for the benefit of said company and there appears no limit to his authority to approve payments or spending, without need of board approval. The assailed Order further held that the said payment redounded to the benefit of Spectrogen because it was for the settlement of the aborted casino project at the Clark Freeport Zone and that CGMI did not claim damages against Spectrogen for the withdrawal of the project and that none of the accused benefitted from this transaction. Finally, it was found in the assailed Order that there was failure to "allege any specific acts performed by each and every accused, on any overt acts in furtherance of the alleged conspiracy much less that each of them acted or had knowledge of the same evil design."

After a careful and judicious review of the pertinent facts borne by the records and guided by all of the foregoing standards, this Court reverses the assailed Order of June 26, 2014.

The task of the presiding judge when the Information is filed with the Court is first and foremost to determine the existence or non-existence of probable cause for the arrest of the accused. (***Baltazar vs. People, 560 SCRA 278 [2008]*** The determination whether probable cause exists to issue a warrant of arrest is a judicial function to decide whether there is a necessity for placing the accused under the immediate custody in order not to frustrate the ends of justice. ***(People vs. Capwa, 541 SCRA 516 [2007]***

Probable cause for the purpose of issuing a warrant of arrest pertains to facts and circumstances which would lead a reasonably discreet and prudent person to believe that an offense has been committed by the person sought to be arrested. Judges do not conduct a *de novo* hearing to determine the existence of probable cause-they just personally review the initial determination of the prosecutor finding a probable cause to see if it is supported by substantial evidence. (***De Joya vs. Marquez, 481 SCRA 376 [2006]***. As afore-stated, pursuant to Section 6, Rule 112 of the Rules of Court, in the determination ofprobable cause, the Court is guided by the resolution of the prosecutor and its supporting evidence.

Gleaned from the records, the Court finds that there exists a *prima facie* case for qualified theft committed under the circumstances outlined in Article 310 of the Revised Penal Code. At the very least, the varying and opposing versions presented by the parties and most importantly the defenses vigorously raised by the accused which are heavily factual in character, necessitates a full-blown evidentiary scrutiny, evaluation and analysis. This stage at which the Court is called upon to determine probable cause is not yet the proper occasion or procedure therefor. To reach that stage of the proceedings entails a prior determination of the existence of probable cause for the purpose of issuing a warrant of arrest and thereby acquire jurisdiction over the persons of the accused.This Court deems it more prudent and appropriate to be afforded the fullest opportunity to weigh the respective pieces of evidence put forward by the parties through evidentiary trial proceedings.

The quintessential inquiry is whether there is probability that theft occurred, or more concretely, whether there was indeed probably a taking of the US$160,338.00. Disputing the allegation of taking, accused Gustaffson stated in his Counter affidavit that he was Managing Director of Spectrogen which engaged a certain Casino Management Group Incorporated (CMGI) to conduct a feasibility study to set up a land-based casino at the Clark Freeport Zone in Pampanga.When Spectrogen backed out from its commitment, accused Gustaffsonallegedly used the US$160,338.00 to settle any liability.

The ruling case law is that theft is produced when there is deprivation of personal property due to its taking by one with intent to gain, and, viewed from that perspective, it is immaterial to the product of the felony that that the offender, once having committed all the acts of execution for theft, is able or unable to freely dispose of the property stolen since the deprivation from the owner alone has already ensued from such acts of execution. Unlawful taking, or *apoderamiento*, is deemed complete from the moment the offender gains possession of the thing, even if he has no opportunity to dispose of the same. (***Valenzuela vs. People, 525 SCRA 306 [2007]***

Prescinding from the foregoing, it becomes clear that the element of taking is not at all seriously disputed. Whether the circumstances presented in this case constitute taking or constitute payment as posited in the assailed

Order of June 26, 2014 and argued by accused is barely an accurate proposition to begin with. The matter of alleged payment for settlement of an obligation of Spectrogen corporation as claimed by the accused does not, in the sequence or stage of events in relation to the crime of theft prove or disprove the taking itself. The matter of alleged payment is properly embraced in the realm of whether such taking was done with intent to gain.Payment is not an antithesis to taking. Otherwise stated, to argue that there was payment plausibly means that the taking (that necessarily took place) of the personal property was for the purpose of effecting payment of a legal obligation of the owner thereof, thereby possibly negating an intent to gain characterizing such taking.

The second element, i.e., that the property belongs to another, in this case, to Spectrogen company, is not in dispute. The fourth element, i.e., that the taking be done with intent to gain, and the fifth element, i.e., that the taking be done without the consent of the owner, are intertwined. Fundamental criminal law posits that any taking without the consent of the owner is generally presumed to have been done or accomplished with an intent to gain. So the inquiry is, was there consent from Spectrogen, specifically from its Board of Directors, in connection with the taking of its US$160,338.00? Accused points to a voucher that passed through the signatories of Spectrogen, allowing the supposed payment of said amount. Yet, the evidence on record also points to accused Quiambao and de Guzman as ultimate signatories, specifically on the BDO Foreign/Domestic Telegraph Transfer Application Form (Annex G of the Complaint-Affidavit) and admittedly upon the instructions of accused Gustaffson. On the space provided for "beneficiary name" in the said telegraph transfer, what appears is the name "Jose Luis Yulo," not CMGI. No Board Resolution from either Spectrogen or CMGI appears from the record. No corresponding contract involving the supposed project that gave rise to the supposed settlement liability has been presented. No demand of some sort emanated from CMGI for the supposed transaction. And even assuming there was such transaction or project, it does not appear at all that CMGI has performed what part of such alleged project. Basic is the rule on evidence that the party claiming the existence of something or claiming the affirmative of a proposition has the burden to prove the same. Accused have not discharged this burden. In his Counter-affidavit, accused Gustaffson defended the existence of the supposed transactionthrough his letter addressed to CMGI's Yulo, attached as Annex 2 thereof. This letter, however, is unavailing, as it is even devoid of any indication or justification how the US$160,338.00 came about. The letter does not show that CMGI had already performed its supposed obligation in the claimed project or that CMGI has actually incurred expenses in connection with its supposed performance of the contract. On the contrary, this letter states that the amount is "In recognition that CMGI may have incurred some expense during the discussions to date . . ." and nothing more. In other words, this letter even exposes the speculative character of the supposed basis of the alleged settlement transaction. The respective authorities of the signatories of the letter do not also appear.

With all these circumstances revealed on record, this Court cannot justify finding a semblance of validity to the alleged transaction as presented by the accused. The Court also notes with approval the observation in the Resolution of the Office of the City Prosecutor that "the records of the company and the declaration of respondents clearly vary as to the nature of the obligation allegedly paid. The voucher attached to the complaint shows the amount was for legal fees. Respondents however, insist it was in payment for services rendered and damages in connection with a feasibility study to set up a casino at the Clark Freeport Zone which was not completed. For an expenditure of this magnitude, the purpose should be clear." The claimed feasibility study or even just a shadow thereof does not appear from the records.

The fifth element regarding the absence of violence or intimidation against persons or force upon things is not in dispute. The sixth and last element, i.e., that the taking be done with grave abuse of confidence is borne by the admissions of the accused themselves specifically in their respective counter-affidavits, regarding their high-ranking positions in Spectrogen company, which positions are necessarily imbued with confidence. The facility through which the taking was perpetrated was precisely rendered possible because of the power, authority and influence they wield on the company.

At this stage of the proceedings, where evidentiary matters are heavily disputed especially on the matter of conspiracy, it is worthwhile to be guided by law and jurisprudence regarding the relative participation of the three accused indicted in the present case. To find conspiracy as existent would altogether render all the three accused stand trial as principals of the crime of qualified theft charged herein. Under Article 17 of the Revised Penal Code, the following are considered principals: (1) those who take a direct part in the execution of the act; (2) those who directly force or induce others to commit it; or (3) those who cooperate in the commission of the offense by another act without which it would not have been accomplished.

Foregoing considered, it is not altogether difficult for the Court to find and so rule that accused Gustaffson is a principal.The same degree of participation can be concluded with respect to accused Quiambao and de Guzman, the company's authorized signatories who signed, executed and delivered BDO Foreign/Domestic Telegraphic Application Form for the telegraphic transfer of the amount of US$160,338.00. Accused Gustaffson was Spectrogen's Managing Director, and accused Quiambao the Finance Manager. It was accused Gustaffson who ordered the payment in his capacity as Managing Director, albeit unquestionably without specific approval or corresponding Board Resolution from Spectrogen's Board of Directors and even without a contract with CGMI at all. Notably, in accused de Guzman's counter-affidavit, at paragraph 6 thereof, she categorically admitted to her "act of signing BDO foreign/domestic telegraphic application form" and that she was, as admitted by accused Gustaffson, "merely acting

on his (Gustaffson's) orders." Accused Quiambao's two-page Counter-Affidavit also reveals his complicity with the conduct of accused Gustaffson, as he claimed to having email correspondence with the latter on the subject, specifically that "Mr. Gustaffson also e-mailed me to say that he will inform me when the settlement can be paid the following day. I replied that the payment can be made then." Accused Quiambao and de Guzman are, as guided by the foregoing law and jurisprudence, therefore can be safely conclude to have conspired with accused Gustafsson especially with respect to how close their acts are intertwined in the general scheme of things and activities in relation to accused Gustaffson, as insisted by the prosecution.

In the case of ***Ganaden vs. Ombudsman,(650 SCRA 76),*** " the absence or presence of a conspiracy among the accused is evidentiary in nature and is a matter of defense, the truth of which can be best passed upon after a full-blown trial on the merits."

On a final note, the technical argument on the matter of the public prosecutor's conformity as well as the counter-arguments raised against such objection, are neither controlling nor consequential, especially since, at any rate, as borne by the records, the Reply filed by the prosecution appears to bear the conformity of the public prosecutor.

Be that as it may, as ruled by the Supreme Court in the case of ***Martinez vs. Court of Appeals, (237 SCRA 575),*** "under Section 2, ***(now Section 1)*** Rule 122 of the 1988 Rules of Criminal Procedure , the right to appeal from a final judgment or order in a criminal case is granted to " any party" except when the accused is placed thereby in double jeopardy.

In ***People vs. Guido, (57 Phil.52)*** the Supreme Court ruled that the word "party" must be understood to mean not only the government and the accused, but also other persons who may be affected by the judgment rendered in the criminal proceeding.

WHEREFORE , IN VIEW OF THE FOREGOING, the court finds the existence of probable cause against all the accused. Accordingly , let a Warrant of Arrest be issued against accused Jan Robert Gustaffson, Sherwin Quiambao, and Sylvia Bernadette Gonzales de Guzman.

No bail recommended.

SO ORDERED.

Makati City, September 29, 2014.

RONALD B. MORENO
Presiding Judge

Copy furnished:

Pros. Macario F. Milliendez, Jr.
Public Prosecutor
Office of the City Prosecutor
17th Floor , Makati City Hall Building
Makati City

Atty. Magello S. Arbolura
Counsel for the Accused
DEFENSOR LANTION BRIONES VILLAMOR & TOLENTINO LAW OFFICES
Suite 2604-A, 26TH Floor East Tower
Philippine Stock Exchange Center
Exchange Road, Ortigas Business Center

Atty. James Gerard M. Baello
Private Prosecutor
ZAMORA POBLADOR VASQUEZ & BRETANA
5TH Floor Montepino Bldg.
138 Amorsolo St., Legaspi Village Makati City