



REPUBLIC OF THE PHILIPPINES
SANDIGANBAYAN
Quezon City

Special First Division

PEOPLE OF THE
PHILIPPINES,

OF THE

Plaintiff,

CRIMINAL CASE NO. SB-15-
CRM-0089

For: Violation of Section 3(e) of
R.A. 3019 (Anti-Graft and
Corrupt Practices Act)

-versus-

LORENZO G. FORMOSO III,
ARTHUR P. ANCHETA, JOHN
AND/OR JANE DOES,

Accused.

PRESENT:

DE LA CRUZ, J., *Chairperson,*
PONFERRADA, and
LAGOS, JJ.

Promulgated:

FEB 15 2016

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RESOLUTION

LAGOS, J.:

This resolves the *Motion for Judicial Determination of Probable Cause*¹ filed by accused Lorenzo G. Formoso III (Formoso) on December 04, 2015, the prosecution's *Comment/Opposition*² thereto dated December 17, 2015, and the said accused's *Reply*³ dated January 12, 2016.

Prior to the filing of the instant motion, the Court in its Resolution dated October 02, 2015, gave the prosecution fifteen (15) days from notice to file an amended information on account of a motion to quash filed by

¹ Records, Vol. I, p. 47 b.

² Id., Vol. II, p. 08.

³ Id., p. 44.

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Formoso. The prosecution in its *Compliance* filed on November 13, 2015, submitted the Amended Information. Accused Formoso now seeks a judicial determination of probable cause under the Amended Information, on the following grounds:

I

The very amendments introduced by the prosecution in the Amended Information confirms all along that there is really no probable cause to warrant the indictment of accused Formoso for violation of Section 3(e) of RA 3019, considering that:

- A. The participation, moreso approval of the DOTC bids and awards committee is not at all necessary considering that it is the CICT, an agency separate and distinct from DOTC which is the procuring entity of the EXS switch.
- B. There is no proof whatsoever to support the negative allegations in the Amended Information that (1) neither Advance nor its exclusive partner Lucent has exclusive proprietary rights over the EXS switch hence the EXS switch is not proprietary in nature; and that (2) Advance and Lucent were not exclusive dealers or distributors, or manufacturers of all EXS switches in the Philippines. It is Hornbook doctrine in law that when a criminal charge is predicated on a negative or a negative averment is an essential element of a crime, the burden is on the prosecution to prove the charge.
- C. Not only did the prosecution fail to present any proof of these negative allegations but such negative allegations are likewise completely debunked by the undisputed facts on record which show positively and directly that the EXS switch, being (1) manufactured by Excel and covered by US Patent No. 5546453; (2) exclusively distributed by Lucent; and (3) supplied in the Philippines only by Advance, is a proprietary item that can be directly procured pursuant to Sections 48(b) and 50(c) of RA 9184.

II

Accused Formoso displayed no manifest partiality towards Advance nor did he grant the latter unwarranted benefits. Advance, being the exclusive distributor of the EXS switch, was the only source which could have supplied the said toll switch needed for the Iloilo Toll Center.

III

No evident bad faith or “a manifest deliberate intent to do wrong or cause damage” can be attributed to accused Formoso. As borne from the records of the case, accused Formoso complied with all the requirements of RA 9184 and its Implementing Rules and Regulations when he recommended the direct procurement of the EXS switch. (Underscoring in the original.)

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The prosecution in its *Comment/Opposition* asserts (1) that the instant motion is “already mooted and academic” considering that, prior to the filing of the Amended Information, the Court had already determined probable cause and the same should be maintained; that the prosecution’s theory of the case remains the same despite the amendment, and (2) “the finding of probable cause by the Office of the Ombudsman for the filing of an Information against the accused is an executive function and ought to be respected by the courts.”

In his *Reply*, the accused argues that the determination of probable cause is not moot and academic and the court needs to “redetermine” probable cause; that the prosecution changed its theory of the case and that the prosecution’s contention on alleged manifest partiality are based on “bare and conclusory claims unsupported by any fact or evidence.”

Black’s Law Dictionary (6th ed.), defines “probable cause” as “[a] set of probabilities grounded in the factual and practical considerations which govern the decisions of reasonable and prudent persons and is more than mere suspicion but less than the quantum of evidence required for conviction.” (Underscoring supplied.)

The function and duty for the determination of probable cause consists of two kinds. One is “executive,” and the other is “judicial.” The executive kind is one made during preliminary investigation and it is a function that rightly pertains to the public prosecutor, who is given a broad discretion to determine whether probable cause exist and to charge those whom he or she believes to have committed the crime as defined by law and thus should be held for trial. On the other hand, the **judicial** determination of probable cause is one made by the judge to ascertain whether a warrant of arrest should be issued against the accused. It is rooted on Article III, Sec. 2 of the 1987 Constitution which provides, among others, that no arrest warrant shall issue except upon probable to be determined personally by the judge. In this regard, the judge must be satisfied that based on the evidence submitted, there is necessity to place the accused under custody in order not to frustrate the ends of justice.⁴ Here, the accused seeks for a judicial determination of probable cause which is, to reiterate, “one to be made to ascertain whether a warrant of arrest should be issued against the accused.”

This case was filed with the Sandiganbayan on March 30, 2015 and thereafter, on June 24, 2015, a Resolution⁵ was adopted by this Court finding probable cause for the issuance of a warrant of arrest. This finding was,

⁴ See Pamaran, Manuel R., *Revised Rule of Criminal Procedure Annotated*, 2012 ed., pp. 236-237, citing *People v. Castillo*, 590 SCRA 95.

⁵ See p. 300, Records, Vol. I. The Minute Resolution was approved by Justices Ponferrada, Inoturan and Herrera.

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however, based on the original information filed by the Ombudsman which was later ruled to be insufficient as the allegations therein did not constitute an offense.⁶ Necessarily, with the filing and admission of the Amended Information, the original Information is deemed vacated and abandoned. Thus, any probable cause finding based on the same becomes *functus officio*. Moreover, the Amended Information contains at least three (3) new averments and, therefore, instead of being precluded, this Court is now duty-bound to determine whether there is probable cause under the Amended Information. Under Rule 112, Section 6 of the Rules, the Court must “personally evaluate the resolution of the prosecutor and its supporting evidence.” The records supporting the information consist of the affidavits and counter-affidavits of the parties and their witnesses, together with the other supporting evidence and the resolution in the case.⁷

The Court may dismiss the case if it finds the resolution and its supporting evidence wanting. Considering that all the other allegations (e.g., manifest partiality and/or evident bad faith, willful giving of unwarranted benefits and advantage, etc.) in the Amended Information are rooted on the alleged procurement of the EXCEL Switch without public bidding notwithstanding the alleged absence of proprietary or dealership rights over the EXCEL Switch by Lucent and/or Advance Solutions, the Court must satisfy itself that there is enough evidence on record to sustain the allegations in the Amended Information.

After a thorough review of the affidavits and counter-affidavits of the parties and their witnesses and other supporting evidence, the Court is convinced that no evidence exists to establish that Lucent and Advance have no exclusive proprietary rights over the EXCEL Switch or that Advance and/or Lucent are not exclusive manufacturers or dealers of EXCEL Switch in the Philippines. To begin with, the bare allegation of private complainant Matias that ***“Hence, the use of Excel Switch is not proprietary in nature because there are still available global Switches in the market with same or better capability than the EXCEL Switch brand which is much cheaper”***⁸ was never substantiated by any proof, documentary or otherwise. In fact, this allegation is *non-sequitur* because proprietary rights arise from the fact that the holder of such rights must have a patent, copyright or trademark over a product and not on the fact that “there are still available global Switches in the market” better and cheaper than the EXCEL Switch. Nothing in Matias’ complaint-affidavit or any other supporting evidence on which the Ombudsman resolution dated September 12, 2013 is based on, show that Lucent or Advance had no exclusive propriety rights over the EXCEL Switch or that Advance or Lucent are not exclusive dealers or

⁶ See Resolution dated October 2, 2015, pp. 437-443, Records, Vol. i.

⁷ Sec. 8, Rule 112, Rules of Court.

⁸ See p. 29, Records Vol. .

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manufacturers of the same in the Philippines. No evidence was relied upon by the Ombudsman to show that EXCEL Switch patent had been issued in favour of another entity. Also, no evidence is on record that Lucent or Advance is not the exclusive dealer or manufacturer of the EXCEL Switch in the Philippines. On the contrary, the Ombudsman itself openly rejected and refuted this bare allegation of Matias, as it found and declared that the existence of other manufacturers or distributors of EXCEL Switch besides Lucent **“was not established at all”**⁹. This is a categorical finding which destroys any factual basis behind Matias’ allegation mentioned above.

On the other hand, the documents submitted by accused Formoso show that the EX Switch is covered by a patent in favour of Excel Switching Corporation, which has an exclusive arrangement with Lucent Philippines to offer EXCEL Switch in the Philippines.¹⁰ Lucent Philippines confirmed that it was working with Advance on an exclusive basis for the NTP 1-2 Project.¹¹ Advance also informed CICT that it was the exclusive partner of Lucent Philippines for the said project.¹²

Accused Formoso’s filing of the instant motion even provided the Ombudsman a chance to submit sufficient evidence to prove its additional allegations in the Amended Information. To reiterate, if any patent, copyright or trademark existed giving propriety or dealership rights over the EXCEL Switch to any other party other than Excel, Lucent and/or Advance, then the Ombudsman should have had produced it by now. As it is, the Ombudsman did not dispute in its comment/opposition the existence of the patent in favour of Excel, Excel’s exclusive arrangement with Lucent, and the latter’s designation of Advance as exclusive distributor.

Backtracking, it should be remembered that Matias’ allegation that Lucent and/or Advance had no propriety or dealership rights over the EXCEL Switch was a negative averment. In criminal cases, if the subject of a negative averment is inherent in the offense as an essential ingredient thereof, the prosecution has the burden of proof, as for instance absence of a license in illegal possession of firearm. (*People v. Macagaling*, 237 SCRA 299 [1994]). If the negative allegation is an essential ingredient of the offense, the prosecution has the burden of proof. (*People v. Quebral*, 68 Phil. 568 [1939]). The burden of proving the absence of propriety rights was therefore with the prosecution. It cannot hurdle this burden by simply asserting that respondent Formoso failed to adduce clear and concrete evidence showing that the EXCEL Switch was covered by a valid patent or any similar intellectual property right issued in the name of Advance or

⁹ See Resolution dated September 12, 2013, p. 11, Records, Vol. I.

¹⁰ See p. 544, Records, Vol. I.

¹¹ See p. 81, Records, Vol. I.

¹² See p. 82, Records, Vol. I.

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Lucent, and duly registered with the Intellectual Property Office, as it did in the Resolution dated September 12, 2013. Accused Formoso was not obliged to do this because of the complainant's negative averment. Without hurdling this burden, either by showing that another entity had propriety rights over EXCEL Switch or at least showing proof that Lucent or Advance also did not have such dealership rights, then no probable cause exists against accused Formoso. Direct contracting of products of propriety nature and those sold by exclusive dealership is an accepted alternative method of procurement under R.A. 9184, without need of public bidding.

The Prosecution cannot successfully argue that these matters are evidentiary and the time to present the same should be at the trial because the accused's right to be free from the rigors and troubles of a full-blown trial will be violated. The prosecution cannot just pin its hopes that some credible evidence will turn up during trial without trampling on accused's rights.

WHEREFORE, premises considered, the Court rules that there is no probable cause to hold accused Formoso for trial and, therefore, orders that this case against him be **DISMISSED**. The hold departure order issued against him is ordered set aside and the bailbond posted by him is ordered released and cancelled.

SO ORDERED.


RAFAEL R. LAGOS
Associate Justice

WE CONCUR:


EFREN N. DE LA CRUZ
Associate Justice
Chairperson


RODOLFO A. PONFERRADA
Associate Justice