

REPUBLIC OF THE PHILIPPINES  
SANDIGANBAYAN  
Quezon City

**FOURTH DIVISION**

*Minutes of the proceedings held on August 25, 2016.*

Present:

Hon. JOSE R. HERNANDEZ ..... Associate Justice  
Hon. ALEX L. QUIROZ ..... Associate Justice  
Hon. GERALDINE FAITH A. ECONG ..... Associate Justice

*The following resolution was adopted:*

**SB-11-CRM-0467 - People of the Philippines v. Gloria M. Macapagal-Arroyo, Jose Miguel T. Arroyo, Benjamin S. Abalos, Sr., and Leandro R. Mendoza.**

This resolves the three (3) Demurrers to Evidence separately filed by accused former President Gloria Macapagal-Arroyo ("PGMA"),<sup>1</sup> Jose Miguel T. Arroyo ("Mike Arroyo"),<sup>2</sup> and Benjamin S. Abalos, Sr. ("Abalos"),<sup>3</sup> and the Oppositions<sup>4</sup> thereto by the plaintiff.

In an Information<sup>5</sup> filed before this Court on December 28, 2011, the Office of the Ombudsman charged PGMA, Mike Arroyo, Abalos, and Leandro R. Mendoza ("Mendoza") of the offense of violation of Section 3(g) of R.A. No. 3019, allegedly committed as follows:

*That in (sic) or about February to April 2007, in Malacañang, Manila, Philippines, or sometime prior or subsequent thereto, and within the jurisdiction of this Honorable Court, accused Gloria Macapagal Arroyo and Leandro R. Mendoza, both high ranking public officers, being then the President of the Republic of the Philippines and Secretary of the Department of Transportation and Communications (DOTC), respectively, committing the offense in relation to their office and while in the performance of their respective official functions, conspiring, and confederating with Jose Miguel T.*

<sup>1</sup> Demurrer to Evidence dated July 7, 2016 and filed on the same day.

<sup>2</sup> "Demurrer to Evidence" dated June 30, 2016 and filed on July 4, 2016.

<sup>3</sup> "Demurrer to Evidence" dated July 6, 2016 and filed on July 8, 2016.

<sup>4</sup> "Opposition (to the Demurrer to Evidence filed by Accused Benjamin S. Abalos, Sr. dated 6 July 2016),"

"Opposition (to the Demurrer to Evidence filed by Accused Jose Miguel T. Arroyo dated 30 June 2016)," and

"Opposition (to the Demurrer to Evidence filed by Accused Gloria Macapagal-Arroyo dated 6 July 2016)," all filed on July 14, 2016.

<sup>5</sup> Records, p. 1.

Arroyo and Benjamin S. Abalos, Sr., who both used their influence and office as the First Gentleman and Chairman of the Commission on Elections (COMELEC), did then and there willfully, unlawfully and criminally facilitate and fast-track the approval of the National Broadband Project Proposal of Zhong Xing Telecommunications Equipment International Investment Limited (ZTE) and thereafter enter into a contract titled "Contract for the the Supply of Equipment and Services for the National Broadband Network Project" dated April 21, 2007 with ZTE, represented by its Vice-President Yu Yong, a contract that is grossly and manifestly disadvantageous to the government of the Philippines due to, but not limited, to the following:

1. The actual cost of the ZTE proposal for the National Broadband Project was only US\$130 million but was finally pegged and overpriced at US\$329 Million.
2. ZTE's National Broadband Project covered only 30% of the country compared to the proposal of Amsterdam Holdings, Inc. (AHI) which would cover 80% of the country at a much lesser cost.
3. It was to be financed by a loan from EximBank of China, payment of which was to be guaranteed by the government of the Philippines, compared to the AHI proposal of implementing the project under the Build Operate and Transfer (BOT) scheme which would actually entail no cost to the government of the Philippines.

**CONTRARY TO LAW.**

In anticipation of the issuance of warrants of arrest against them, accused PGMA asked for A Hearing/Oral Arguments,<sup>6</sup> while accused Mike Arroyo and Mendoza moved for a Judicial Determination of Probable Cause.<sup>7</sup> The Court denied the motions, finding probable cause for the issuance of warrants of arrest for all four accused in a Resolution dated March 13, 2012.

On the same day, March 13, 2012, accused Mike Arroyo and Mendoza posted bail for their provisional liberty. Accused PGMA and Abalos, who were already detained and under the custody of the law in relation to another criminal case, posted bail on March 23, 2012 and April 11, 2012, respectively.

<sup>6</sup> "Motion for Hearing/Oral Arguments (prior to issuance of Warrant of Arrest)" dated March 9, 2012.

<sup>7</sup> Mike Arroyo's "Urgent Omnibus Motion for Judicial Determination of Probable Cause (with Prayer to Hold in Abeyance the Issuance of Warrant of Arrest and to Stay Any Further Proceedings)" and Mendoza's "Motion for Judicial Determination of Probable Cause" both dated March 9, 2012.

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On April 11, 2012, PGMA, Mike Arroyo and Abalos were arraigned. All three pleaded Not Guilty to the charge against them. Due to a medical condition, accused Mendoza was arraigned at a later date, on May 14, 2012, and also entered a plea of Not Guilty.

On March 6, 2013, the prosecution started presenting its witnesses, as follows:

1. Antonia P. Barros;<sup>8</sup>
2. Rodolfo Noel I. Lozada;<sup>9</sup>
3. Edzel C. Regalado;<sup>10</sup>
4. Liza L. Maza;<sup>11</sup>
5. Jarius Y. Bondoc;<sup>12</sup>
6. Fabian S. Fabian;<sup>13</sup>
7. Dante R. Madriaga;<sup>14</sup>
8. Jose C. De Venecia, Jr.;<sup>15</sup>
9. Ruben S. Reynoso, Jr.;<sup>16</sup>
10. Ramon P. Sales;<sup>17</sup>
11. Jose P. De Venecia III;<sup>18</sup>
12. Fortunato R. Abrenilla;<sup>19</sup>
13. Rodolfo Noel S. Quimbo;<sup>20</sup>
14. Teodoro A. Casiño;<sup>21</sup>
15. Joel A. Ocay;<sup>22</sup>
16. Joel M. De Guzman;<sup>23</sup>
17. Jocelyn P. Reyes;<sup>24</sup>
18. John Adrian M. Narag.<sup>25</sup>

The prosecution also tried to present Santiago Testor as witness, but was not allowed to by the Court because he was not among the witnesses listed in the Pre-Trial Order. Another witness, Aniceto Maghirang, was also unable to testify and identify a document, for being unable to produce written proof that the

<sup>8</sup> TSN dated March 6, 2013.

<sup>9</sup> Id.

<sup>10</sup> Id.

<sup>11</sup> TSN dated May 6, 2013.

<sup>12</sup> Id.

<sup>13</sup> Id.

<sup>14</sup> TSN dated July 8, 2013.

<sup>15</sup> TSNs dated August 5 and 28, 2013.

<sup>16</sup> TSN dated September 30, 2013.

<sup>17</sup> TSNs dated September 30, 2013 and October 1, 2013.

<sup>18</sup> TSNs dated November 25, 2013, March 17, 2014, and March 18, 2014.

<sup>19</sup> TSNs dated November 26, 2013 and March 18, 2014.

<sup>20</sup> TSN dated March 18, 2014.

<sup>21</sup> TSNs dated March 18, 2014 and June 2, 2014.

<sup>22</sup> TSN dated January 13, 2015.

<sup>23</sup> Id.

<sup>24</sup> TSN dated September 14, 2015.

<sup>25</sup> Id.

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confidential/privileged character of the transcript of the NEDA Cabinet Group Meeting on November 21, 2006 was waived by the proper office.

On November 25, 2015, the prosecution rested its case<sup>26</sup> and submitted its Formal Offer of Documentary Exhibits with Ex-Parte Motion for Re-Marking of Some Of Prosecution's Evidence on February 19, 2016. In a Resolution dated May 31, 2016, the Court admitted the following exhibits: Exhibit "C", "E", "F", "G", "H", "I", "J", "K", "L", "M" and its of submarkings, "N", "O", "P", "Q", "R", "S", "T", "U" and its submarkings, "V"- "V-8", "V-8-a", "V-9"- "V-21", "X", "Y", "Z", "AA", "BB", "DD" and its submarkings, "EE", "FF", "GG", "HH" and their respective submarkings, "II", "JJ", "KK", "LL", "MM", "NN" and its submarkings, "OO", "PP", "QQ", "RR", "SS", "TT", "UU", "WW" and its submarkings, "XX" and its submarkings, "ZZ" and its submarkings, "AAA", "AAA-1", "AAA-2", "AAA-3", "AAA-4", "AAA-5", "AAA-6", "DDD" and its sub-markings, and "EEE."

### **Facts**

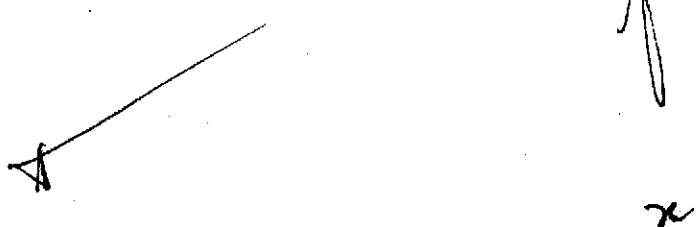
The present case was initiated by a Joint Complaint-Affidavit<sup>27</sup> filed by Teodoro Casiño, Liza Maza, and Maria Carolina Pagaduan-Araullo, before the Office of the Ombudsman, in their capacity as taxpayers and/or representative of Party-Lists. The complaint alleges that all four accused were in conspiracy in committing illegal acts that culminated in the signing of the Contract for the Supply of Equipment and Services for the National Broadband Network Project ("NBN-ZTE Contract") on April 21, 2007.

### **Approval of the NBN-ZTE Contract**

The NBN-ZTE Contract saw its beginnings in July 2006 when the Philippines entered into a Memorandum of Understanding (MOU) with China's Zhong Xing Telecommunications Equipment International Investment Limited (ZTE). Pursuant to the said MOU, ZTE proposed to build a National Broadband Network (NBN), which aims to inter-connect government offices throughout the country. ZTE shall provide the required fundings and financial support, while the different departments of the government of the Philippines

<sup>26</sup> Order dated November 25, 2015.

<sup>27</sup> Exhibit "M".



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shall provide the necessary assistance for the implementation of the NBN project.<sup>28</sup>

On August 7, 2006, ZTE submitted its proposal ("ZTE Proposal") to the Commission on Information and Communications Technology (CICT) of the Department of Transportation and Communication (DOTC).<sup>29</sup> At that time, DOTC was headed by accused Mendoza.<sup>30</sup>

DOTC, as the implementing agency of the NBN project, indorsed the ZTE Proposal to the Investment Coordination Committee (ICC) of the National Economic Development Authority (NEDA).<sup>31</sup>

Under the NEDA, the ZTE Proposal went through several layers of review. It was reviewed first by the NEDA Secretariat, followed by the NEDA Technical Board, and finally, by the the ICC Cabinet Committee.<sup>32</sup> Witness Ruben Reynoso, Jr. testified that Economic Internal Rate of Return (EIRR) of the NBN project was twenty-nine percent (29%). Under their policy, the hurdle rate for a project to be considered economically viable is only fifteen percent (15%). With a 29% EIRR, NEDA considered the project to be a reasonable investment and consequently gave it a positive recommendation.<sup>33</sup>

As a final step in the approval process, the NBN project was submitted to the NEDA Board, which is headed by the President of the Philippines.<sup>34</sup> During its evaluation before the NEDA Board, PGMA gave instructions to remove the overlapping components of the ZTE proposal and another project (Cyber Education project). The removal of the overlapping components effectively reduced the project cost of NBN from US\$379 Million to US\$330 Million.<sup>35</sup> During the meetings when the NBN project was evaluated, there were no objections on grounds of bribery or overpricing from any of the NEDA Board members.<sup>36</sup> On March 29, 2007, the NEDA Board approved the National Broadband Network project.<sup>37</sup>

<sup>28</sup> Exhibit "KK." DOTC letter to NEDA dated 16 April 2007.

<sup>29</sup> Exhibit "TT"

<sup>30</sup> Exhibit "G".

<sup>31</sup> TSN dated September 30, 2013, p.14. *See also*, Exhibit "KK".

<sup>32</sup> TSN dated September 30, 2013, pp. 18-22.

<sup>33</sup> *Id.* at 25-27.

<sup>34</sup> *Id.* at 18-22.

<sup>35</sup> Exhibit "XX-3".

<sup>36</sup> TSN dated March 18, 2014, p. 98-100.

<sup>37</sup> Exhibit "NN".

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### **Brokering for the Approval of the ZTE Proposal**

Accused Abalos, who was then Chairperson of the Commission on Elections, was accused of acting as a broker for the approval of the ZTE Proposal. This is the subject of a separate charge before this Court.

Witness Jose De Venecia, Jr. (JDV), then Speaker of the House of Representatives, testified that he was surprised to see Abalos in the company of ZTE officials, officials of the Shenzhen Province and protocol officers. He recounted that in November 2006, during a trip to Hong Kong, he received a call from then President GMA who was also in Hong Kong with then First Gentleman Mike Arroyo. PGMA invited JDV to a game of golf, which he accepted. On the way to the golf course, PGMA brought up the topic of ZTE and told him that the government would be taking up the project on a Build-Operate-Transfer (BOT) scheme.<sup>38</sup> This pleased him because he is the proponent of the BOT law, and this would mean that the project would be undertaken at no cost to the government.<sup>39</sup>

When they arrived at the Shenzhen Province in China where they would be playing golf, he was surprised to see Abalos there. Abalos was with several Chinese personalities, including the Protocol Officer of the Shenzhen municipal government and two other officials/employees of ZTE. They had breakfast, and after, Abalos invited them to play golf at the Shenzhen Golf Club.<sup>40</sup> During their golf game, a photo<sup>41</sup> of them was taken, which later came out in the newspapers.<sup>42</sup>

After playing golf, they had lunch at the nearby ZTE headquarters. He then learned that they were being hosted by ZTE.<sup>43</sup> During lunch, ZTE officials talked about the impressive structure of ZTE and their interest in marketing their technology and products to the Philippines.<sup>44</sup> A Chinese banker also made the confirmation that the Chinese government bank, Eximbank, would be prepared to finance the ZTE project.<sup>45</sup> JDV did not make a comment. Neither did PGMA and Mike Arroyo, who remained silent during the meeting.<sup>46</sup>

<sup>38</sup> TSN dated August 28, 2013, p.12.

<sup>39</sup> Id. at 41-42.

<sup>40</sup> Id. at 13-15.

<sup>41</sup> Exhibit "JJ".

<sup>42</sup> TSN dated August 28, 2013, p.23.

<sup>43</sup> Id. at 16.

<sup>44</sup> Id. at 19.

<sup>45</sup> Id. at 46.

<sup>46</sup> Id. at 47.

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After the meeting, the party of PGMA was toured through ZTE's division where their products were on display. Thereafter, they boarded their bus back to Hong Kong. Abalos did not join them and remained in Shenzhen.<sup>47</sup>

Another witness, Rodolfo Noel Lozada (Lozada), personal technical adviser<sup>48</sup> of NEDA Director General Romulo Neri, testified that Abalos interceded and brokered for the approval of the ZTE Proposal, for a fee.

Sometime in 2006, Lozada was introduced by Neri to accused Abalos during a lunch meeting at the Wack Wack Golf and Country Club,<sup>49</sup> together with ZTE officials Yu Yong and Fan Yang.<sup>50</sup> In that meeting, Abalos and the ZTE officials were asking Neri how the NBN project can be approved by NEDA. Neri informed them of the proper channels in seeking the approval of a project proposal. At the end of their lunch, Neri told Abalos that any question they may have about the NBN project should be coursed through Lozada.<sup>51</sup>

This meeting was followed by several interactions between Abalos and Lozada. They talked over the phone and had meetings,<sup>52</sup> mostly to inquire on the status of the ZTE Proposal to NEDA.<sup>53</sup> Lozada's impression is that Abalos was acting as a broker for ZTE.<sup>54</sup>

In one of these meetings, ZTE mentioned that they were getting concerned about the status of the project, specifically on whether or not it will still push through, because they have already given "advances" to Abalos.<sup>55</sup> Lozada said this information was disclosed to him because ZTE was getting distrustful of the information they are getting.<sup>56</sup> During a meeting on January 2007 at Shangri-la Manila which Neri attended, ZTE asked them if the proposal had already been approved by NEDA. Neri said, "no." ZTE officials got furious with Abalos and voices were raised. Neri then decided to excuse himself from the meeting, but asked that Lozada remain so he can report to Neri what happened afterwards.<sup>57</sup>

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<sup>47</sup> Id. at 19-20

<sup>48</sup> TSN dated March 6, 2013, p. 87.

<sup>49</sup> Id. at 39-40.

<sup>50</sup> Id. at 44.

<sup>51</sup> Id. at 45.

<sup>52</sup> Id. at 47.

<sup>53</sup> Id. at 62.

<sup>54</sup> Id. at 47.

<sup>55</sup> Id. at 67, 69.

<sup>56</sup> Id. 75.

<sup>57</sup> Id. at 79-80.



Lozada also mentioned that accused Mike Arroyo once dropped by during a meeting with Abalos and Jose De Venecia III.<sup>58</sup> Abalos told Mike Arroyo that the project was already "okay." Mike Arroyo turned to Lozada and asked, "okey na nga ba?" To which Lozada replied, "hindi pa ho tapos talaga."<sup>59</sup>

Neri likewise mentioned to Lozada that proposals for the NBN project have different political sponsors:<sup>60</sup> The "former First Couple" for Abalos, and former Speaker JDV for the other proponent of the NBN project, which is Amsterdam Holdings, Inc.<sup>61</sup>

### ***The Unsolicited AHI Proposal***

ZTE was not the only party who submitted a proposal for undertaking the NBN project. Witness Jose De Venecia III (JDV III) testified that his company, Amsterdam Holdings, Incorporated (AHI), submitted their own proposal, unsolicited, to DOTC.

According to JDV III, his idea to provide broadband service to the government started in January 2006.<sup>62</sup> The AHI Proposal, or the "The Orion Network," aimed to establish a national broadband network for the government, at no cost, since it would be implemented under a BOT scheme. It would cover all chartered cities and first, second, and third class municipalities. It envisioned to bring down the telecommunication cost of the government by at least twenty-five percent (25%) than what it currently spends on telecommunication services.<sup>63</sup> Based on the COA reports and representations made by Senator Ralph Recto as reported in the newspapers at that time, telecommunication expenses of the government amount to Four Billion Pesos (P4 Billion) a year.<sup>64</sup>

If the AHI proposal is chosen, it would request the government for an Executive Performance Undertaking (EPU). This undertaking will obligate all government offices to subscribe to the services of AHI at a reduced telecommunications service cost of 25% less than the prevailing market rates.<sup>65</sup> Conversely, if AHI cannot offer a rate

<sup>58</sup> Id. at 93, 96.

<sup>59</sup> Id. at 98-99.

<sup>60</sup> Id. at 57-58.

<sup>61</sup> Id. at 92.

<sup>62</sup> TSN dated November 25, 2013, p. 21.

<sup>63</sup> Id. at 16-17.

<sup>64</sup> Id.

<sup>65</sup> TSN dated March 17, 2014, pp. 82-83. See also, Exhibit "V" attachment (5<sup>th</sup> Draft of the Memorandum of Understanding between AHI and DOTC).



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that is 25% less than the market rates, the government need not buy the services of AHI.<sup>66</sup>

Thus, on September 2006, AHI presented its proposal to Neri.<sup>67</sup> JDV III wanted to get Neri's views because the AHI Proposal is an unsolicited proposal.<sup>68</sup> In October 2006, they received a letter from Neri, encouraging them to pursue the project. AHI then made a formal submission of its proposal to DOTC on December 5, 2006,<sup>69</sup> although the stamp on the cover letter of the AHI proposal shows that this was received by DOTC only on January 2, 2007.<sup>70</sup>

After the submission of the AHI proposal, JDV III started to get numerous voice mail messages from Abalos, who requested for a meeting. He did not return Abalos' calls<sup>71</sup> until his father, Speaker JDV, called him and asked that he (JDV III) meet Abalos in the Speaker's house for breakfast. During that meeting, Abalos again invited him for another breakfast meeting the next day at the Wack-Wack Golf and Country Club.<sup>72</sup>

At the Wack Wack meeting, Abalos disclosed that he has a "relationship with ZTE",<sup>73</sup> and asked that JDV III withdraw his proposal from DOTC. Abalos offered him Ten Million Dollars (US \$10,000,000.00) as consideration for the withdrawal of the AHI proposal, but JDV III refused.<sup>74</sup> Abalos said that he wanted to be a part of the telecommunications industry, and asked if there is a way that the two of them could collaborate. JDV III then offered him a seat in the board of AHI, after Abalos retires.<sup>75</sup>

The breakfast at Wack Wack was followed by several other meetings. In one of these meetings, Abalos introduced JDV III to Assistant Secretary Formoso of CICT as Abalos' "partner in this telecommunications project." JDV III just kept quiet.<sup>76</sup> At another meeting, Abalos then asked him to fly to Shenzhen to meet with ZTE officials. JDV III agreed, after getting confirmation from Lozada that he (Lozada) and Neri would also be attending the same meeting. JDV III said that he feels safer with Neri around.<sup>77</sup>

<sup>66</sup> TSN dated November 25, 2013, p. 21.

<sup>67</sup> Id. at 15.

<sup>68</sup> TSN dated March 17, 2014, p. 65.

<sup>69</sup> TSN dated November 25, 2013, p. 22.

<sup>70</sup> TSN dated March 18, 2014, p. 34. (exhibit?)

<sup>71</sup> TSN dated November 25, 2013, p. 24-26.

<sup>72</sup> Id. at 29.

<sup>73</sup> Id. at 31.

<sup>74</sup> Id.

<sup>75</sup> Id. at 32.

<sup>76</sup> Id. at 33.

<sup>77</sup> Id. at 34-35.

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On December 27, 2006, JDV III went to Shenzhen, but found out that Neri and Lozada were not there.<sup>78</sup> He then proceeded to meet Abalos at the latter's hotel suite, and Abalos showed him the ZTE proposal which will be the topic during the ZTE meeting.<sup>79</sup> He noticed that the draft ZTE Proposal has a cost of US\$262 Million and a coverage of only 30% of the country.<sup>80</sup> He immediately called his engineers in Manila to evaluate the ZTE Proposal, by faxing them a copy of the document. The response he got from them was that the project cost of the ZTE proposal should only be US\$130 Million, a cost lower than what was stated in the ZTE proposal.<sup>81</sup>

JDV III brought the matter of the overpricing of the contract to Abalos.<sup>82</sup> Abalos got angry and said ZTE should not do this to the Filipino people. He said he would bring it up during the meeting with ZTE officials.<sup>83</sup> During the meeting, however, Abalos asked the ZTE officials when the project will be finalized, so that the money could be given to him. Abalos said that the President, the Speaker, and the political party were waiting for the funds to be given to them.<sup>84</sup> Abalos implied to ZTE officials that the President and his father are involved in the deal, and this incensed JDV III. He asked Abalos to meet him outside the meeting room, and confronted him about the matters raised during the meeting. Abalos just kept quiet.<sup>85</sup>

After going back to the meeting room, Abalos got mad, and started banging his fist on the table. He told ZTE's Yu Yong and Fan Yang that he will be busy as it would be elections in the Philippines the following year. Abalos also said that he would be the most powerful man in the Philippines during that time.<sup>86</sup> JDV III thought Abalos got upset because there was no official or formal commitment from ZTE on when they can give his money. On the other hand, ZTE officials were also angry because of the demands of Abalos.<sup>87</sup> They even asked Abalos, "*what about the advance that we've already made, Mr. Chairman[?]*"<sup>88</sup>

JDV III flew back to the Philippines within the same day. He continued to meet Abalos, just to promote a commercial standpoint

<sup>78</sup> Id. at 35-36.

<sup>79</sup> Id. at 37.

<sup>80</sup> Exhibit "V-3."

<sup>81</sup> TSN dated November 25, 2013, p. 41-42.

<sup>82</sup> Id. at 44.

<sup>83</sup> Id. at 51.

<sup>84</sup> Id. at 52.

<sup>85</sup> Id. at 53-54.

<sup>86</sup> Id. at 55.

<sup>87</sup> Id. at 57.

<sup>88</sup> Id. at 55.

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and see what ZTE could offer. He was willing consider ZTE as a potential supplier to AHI if ZTE could offer a better price and service, since AHI, if chosen, will still be looking for a contractor to undertake the project.<sup>89</sup>

Between January and February 2007, JDV III met with the Technical Working Group (TWG) of DOTC to discuss his proposal.<sup>90</sup>

Around February 2007, Abalos again invited him for a snack at Shangrila Hotel. Abalos mentioned that Mike Arroyo was also in the same hotel.<sup>91</sup> He saw Abalos and Mike Arroyo having a conversation, but he was not made part of it because he was sitting at a different table.<sup>92</sup>

JDV III also mentioned an incident when Abalos suddenly called him on the phone and got mad at him, accusing him that he was spreading rumors that the ZTE proposal was overpriced. Abalos claimed he knew this because he wiretapped JDV III's phone.<sup>93</sup>

After this incident, he went to see his father, Speaker JDV. He saw accused Mendoza there, who was asking political support from JDV for Mendoza's son who was running for Congress at that time. JDV III asked Mendoza about AHI's proposal. Mendoza replied that someone is mad at JDV III, implying that the person is Abalos. Mendoza offered to arrange a meeting between JDV III and Abalos to resolve their differences.<sup>94</sup>

The "reconciliation meeting" between JD VIII and Abalos was then set in Wack Wack, at around 8:00 in the morning.<sup>95</sup> JDV III was surprised to see Mike Arroyo there. It was during this meeting the Mike Arroyo allegedly told JDV III to back off from the NBN project, because it is his (Mike Arroyo's) project. JDV III explained that AHI's proposal has merits. Mike Arroyo did not reply, stood up, went to other side of the room, and engaged in small talk with Ruben Reyes. JDV III decided to leave the meeting.<sup>96</sup>

Towards the end of February 2007, DOTC asked them to submit their final proposal. AHI replied that the proposal they submitted on December 5, 2006 was their final proposal.

<sup>89</sup> Id. at 59.

<sup>90</sup> Id. at 60.

<sup>91</sup> Id. at 61.

<sup>92</sup> Id. at 63.

<sup>93</sup> Id. at 65-66.

<sup>94</sup> Id. at 66-67.

<sup>95</sup> TSN dated March 17, 2014, p. 118.

<sup>96</sup> TSN dated November 25, 2013, 68-69.

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Finally, he learned through the Malacañang Gazette that the NBN-ZTE contract was signed by the Philippines and ZTE in China, on April 21, 2007. The contract price was US\$329 Million.

### **ZTE Proposal v. AHI Proposal**

In the Information, prosecution intends to prove that the NBN-ZTE Contract is grossly and manifestly disadvantageous. During the presentation of evidence in chief, the prosecution presented evidence comparing the ZTE Proposal with the AHI Proposal on three categories or aspects, namely: the contract price, the network coverage, and the financing scheme under which the project will be undertaken.

#### Contract Price

The prosecution asserts that the price of the NBN project should only be US\$130 Million—the same amount that AHI proposed for the build-out of the NBN project.<sup>97</sup> However, the prosecution only relied on the oral testimony of witness JDV III. It did not present any documentary evidence showing how much was the cost of the proposed ZTE project submitted to CICT/DOTC as of August 7, 2006.

On the other hand, witness Rodolfo Lozada testified and claimed that the project cost of the ZTE Proposal is US\$260 Million,<sup>98</sup> in contrast to JDV III's assertion.

Dante Madriaga, an engineer who worked as a consultant for ZTE, also testified for the prosecution. He claimed that he joined ZTE to help out in the design of the proposed network. The concept was to design the broadband similar to the ARESCOM project, another broadband proposal but conceptualized under the Department of Interior and Local Government (DILG), which did not materialize because it was no longer a priority of the new Secretary. The ARESCOM project was then presented to TELOF and NEDA.

Madriaga declared that while he is not privy to the project cost as he was in charge of the technical design, he was nevertheless shown the actual proposal by his Chinese counter-parts at ZTE. From what was shown to him, he learned that the contract price was US\$289 million.<sup>99</sup> Madriaga also claimed that the US\$289

<sup>97</sup> TSN dated March 7, 2013, p. 8.

<sup>98</sup> TSN dated March 6, 2013, p. 57.

<sup>99</sup> TSN dated July 8, 2013, p.32.

project cost is for the initial design only, the scope of which covers all government networks and offices in the whole country, including ARMM Region, Sulu and Tawi-Tawi.<sup>100</sup> However, additional costs were incurred when changes or modification were made to the ZTE project design, to include far-flung barangays, upon the suggestion of Assistant Secretary Formoso.<sup>101</sup> The proposed project cost now ballooned to \$329 Million.<sup>102</sup> Again, he claimed that he learned of the proposed project cost because it was shown to him.

Towards the end of the testimony of Madriaga, he was confronted with an affidavit<sup>103</sup> which he admitted to have been executed and presented before the Office of the Ombudsman during the preliminary investigation,<sup>104</sup> although he did not testify about some matters contained therein in Court. For example, in his affidavit, he tried to explain the various increases in the project cost of the NBN. Madriaga claimed that when ZTE hired him, he was informed by Leo San Miguel that the ARESCOM project, the predecessor of the NBN project, would be taken over by ZTE. He then reminded San Miguel that the contract price for the Arescom project was US\$130 Million, "inclusive of commission".<sup>105</sup> Later, he learned from San Miguel that the contract price was increased to US\$139 Million, and then to US\$189 Million, to accommodate the "commission" of the "Filipino group." The US\$189 Million contract price is broken down as follows: US\$99 Million for the actual project cost, and US\$90 Million as "commission."<sup>106</sup>

A subsequent contract price increase mentioned in the affidavit, which Madriaga also did not testify to in open court, is the "reason" for increase of the ZTE project proposal from US\$189 Million to US\$269 Million. During a meeting in Wack Wack, San Miguel informed him that the new "tongpats" has increased from US\$90 Million to US\$140 Million. The US\$239 Million is broken down as follows: US\$99 Million for the actual project cost, and US\$140 Million as "tongpats".<sup>107</sup>

Another revision to the contract – the shift from the use of satellite to terrestrial network – also caused the actual project cost to increase to US\$129 Million. With the "commission" remaining at

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<sup>100</sup> Id. at 31.

<sup>101</sup> Id. at 36.

<sup>102</sup> Id. at 33-35.

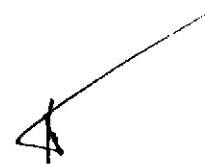
<sup>103</sup> Exhibit "DD".

<sup>104</sup> TSN dated July 8, 2013, p.42-43.

<sup>105</sup> Exhibit "DD-3".

<sup>106</sup> Exhibit "DD-2" to "DD-5".

<sup>107</sup> Exhibit "DD-7".



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US\$140 Million, the total proposed ZTE project cost amounted to US\$269 Million.<sup>108</sup>

The final increase happened in March 2007, according to Madriaga. He learned that the new contract price is now US\$329 Million, as the coverage of the network was extended to 100% of the country. This expansion entailed an additional cost of US\$10 Million. Also, there is a new "commission" of US\$20 Million for a certain Ricky Razon, and US\$30 Million for use in the 2007 Elections.<sup>109</sup>

Incidentally, the minutes of the NEDA Board Meetings show that when the DOTC indorsed the ZTE Proposal to the NEDA Board, the project cost was already pegged at US\$379 Million.<sup>110</sup> However, the Chairman of NEDA Board, herein accused PGMA, ordered for a modification of the project proposal, to remove the overlapping components of the NBN project with DepEd's Cyber Education Project.<sup>111</sup> This caused the funding requirement to be reduced from US\$379 Million to US\$330 Million.<sup>112</sup>

### Broadband Network Coverage

Witness JDV III testified that Abalos showed him the draft ZTE Project Proposal, already priced at US\$262 Million, but with a coverage of only 30% of the country.<sup>113</sup> On the other hand, the AHI Proposal would cover 80% of the country at a much lesser cost of US\$240 Million (as evaluated by ZTE).<sup>114</sup> For the AHI Proposal however, JDV III was unequivocal in his assertion that the initial project build-out would cover only the chartered cities, first, second and third class municipalities<sup>115</sup> but given the concentration of the population in these areas, the coverage would be approximately 80%.

Contrary to the claim of JDV III, it was testified to by the other prosecution witnesses, Madriaga<sup>116</sup> and Ruben Reynoso, Jr.,<sup>117</sup> that

<sup>108</sup> Exhibit "DD-7" to "DD-8".

<sup>109</sup> Exhibit "DD-11".

<sup>110</sup> Exhibit "XX-3".

<sup>111</sup> Exhibit WW-7".

<sup>112</sup> Exhibit "XX-3".

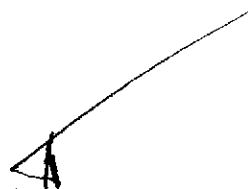
<sup>113</sup> Exhibit "V-3".

<sup>114</sup> Exhibit "V", paragraph 19.

<sup>115</sup> TSN dated March 17, 2014, pp.77-78.

<sup>116</sup> TSN dated July 8, 2013, p. 87.

<sup>117</sup> TSN dated September 30, 2013, p.38.



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the final NBN-ZTE contract covered 100% of the country, covering all municipalities, including far-flung barangays in remote areas.

### Financing Scheme

Under the ZTE Proposal, the funding for the NBN project was to be sourced from a loan facility to be extended by the Export-Import Bank of China (Exim Bank), which loan would be guaranteed by the government of the Philippines. The initial term of the loan is seven (7) years, with a grace period of three (3) years, and a loan interest of four percent (4%) per annum.<sup>118</sup>

Later, during the March 29, 2007 NEDA Board meeting, the loan terms and conditions were modified extending the payment period from seven (7) years to ten (10) years, the grace period from three (3) years to five (5) years, and finally, the interest rate lowered from 4% to 3% per annum.<sup>119</sup>

The AHI Proposal, on the other hand, was to be implemented under a Build Operate and Transfer (BOT) scheme that would entail no initial cost or risk to the government. Under this scheme, the government is expected to pay only around 25% less than the telecommunications cost annually, or roughly three billion pesos in telecommunication expenses every year.<sup>120</sup>

During the cross-examination of JDV III, he admitted that AHI has not undertaken any project, including telecommunications projects, since its incorporation in 2002. The corporation has no earnings and that it has no legislative franchise to provide telecommunications service. Its authorized capital stock is One Million Pesos, with a paid up capital stock of around Three Hundred Twelve Thousand Eight Hundred Pesos (P312,800.00).<sup>121</sup> AHI also has no assets, machineries or equipment. It has no regular employees, as it outsourced all personnel requirement. He also testified that he (JDV III) is the beneficial owner of AHI.<sup>122</sup>

Since its capital is only a fraction of the price of the project cost, JDV III claims that it plans to borrow from Huawei Technology Supplier Credits and other financial institutions to finance the project. However, he acknowledged that no institution

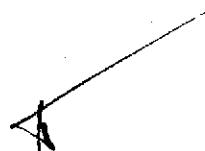
<sup>118</sup> TSN March 18, 2014, p. 97.

<sup>119</sup> Id. at 103-104. See also, Exhibit "XX-6."

<sup>120</sup> TSN dated March 17, 2014, p. 93.

<sup>121</sup> Id. at 58-63.

<sup>122</sup> TSN dated November 25, 2013, p. 13.



would lend him the capital without winning the project first.<sup>123</sup> He could no longer recall what the borrowing rates were at that time, but it could be as low as five percent (5%).<sup>124</sup>

In a BOT arrangement, the government incurs no cost during the "build-out" or construction stage as it would be the project proponent, in this case, AHI, who will bear this cost. Moreover, when the project enters the operation stage, the operator would continue to incur cost. The construction cost, operational cost, cost of money like interest and loan repayments, and decent profits, this being a business undertaking, would be "passed on" by the project proponent/operator to the customer, which in this case, is the government. Prosecution witness Speaker JDV also acknowledged that any loan interest incurred by the operator from borrowing capital to finance the project would have to be passed on to its customer.<sup>125</sup>

### Issue

Is the prosecution's evidence sufficient to hold the accused Gloria Macapagal-Arroyo, Leandro R. Mendoza, Jose Miguel T. Arroyo and Benjamin S. Abalos liable for entering, in behalf of the government, into a grossly and manifestly disadvantageous contract?

### Discussion

The three accused, Gloria Macapagal-Arroyo, Jose Miguel Arroyo and Benjamin Abalos, asked the Court, through the Demurrers to Evidence filed, to look into the sufficiency of evidence established by the prosecution in its evidence in chief.

The office of a Demurrer to Evidence is to challenge the sufficiency of the whole evidence presented to sustain a verdict.<sup>126</sup>

Thus, in this case, to determine sufficiency, the Court will proceed to examine all the elements of the crime charged and make a determination if the prosecution was able to sufficiently prove the same.

Section 3 (g), R.A. No. 3019 states:

<sup>123</sup> TSN dated March 17, 2014, p. 85.

<sup>124</sup> Id. at 84.

<sup>125</sup> TSN dated August 28, 2013, pp. 31-34.

<sup>126</sup> *Katigbak v. Sandiganbayan*, G.R. No. 140183, July 10, 2003, 405 SCRA 558.



*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:*

xxx

*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.*

Prosecution maintains that all the accused conspired with each other in entering into a contract with ZTE Corporation for the fulfillment of the NBN project, which contract is manifestly and grossly disadvantageous to government, as shown by the following circumstances: a.) the actual ZTE project cost to undertake the NBN project of government was only \$130 million but was finally pegged at an overpriced amount of \$329 million; b.) the NBN project as proposed by ZTE would cover only 30% country while that of AHI would cover 80% of the country at a much lesser cost; and c.) ZTE will be financed by a loan from Eximbank of China, payment of which was to be guaranteed by the Philippine government, whereas the AHI proposal will entail no cost to the government as it will be implemented under the Build Operate and Transfer (BOT) scheme.

Several jurisprudence, including *Froilan vs. Sandiganbayan*,<sup>127</sup> enumerate the elements of this particular crime as follows:

- (a) that the accused is a public officer;*
- (b) that he entered into a contract or transaction on behalf of the government; and*
- (c) that such contract or transaction is grossly and manifestly disadvantageous to the government*

As defined in Section 2 par. b of the R.A. No. 3019, a "Public officer" includes elective and appointive officials and employees, permanent or temporary, whether in the classified or unclassified or exempt service receiving compensation, even nominal, from the government as defined in the preceding subparagraph.

Exhibits "C",<sup>128</sup> "E",<sup>129</sup> "F",<sup>130</sup> "G",<sup>131</sup> "H",<sup>132</sup> "I",<sup>133</sup> "J",<sup>134</sup> and "K"<sup>135</sup> are clear and indubitable proofs that accused PGMA,

<sup>127</sup> G.R. No. 115221, March 17, 2000, 385 Phil. 32-45.

<sup>128</sup> Service Record of former President Gloria Macapagal-Arroyo.

<sup>129</sup> Oath of Office of Secretary Leandro R. Mendoza.

<sup>130</sup> Appointment of Leandro R. Mendoza as DOTC Secretary.

<sup>131</sup> Service Record of Leandro R. Mendoza.

<sup>132</sup> Personal Data Sheet of former COMELEC Chairman Benjamin S. Abalos, Sr.

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Mendoza and Abalos are public officers within the purview of Sec. 2 par. b, R.A. No. 3019. PGMA was the duly elected President of the Republic of the Philippines, having been elected and sworn into office in 2004. Mendoza was appointed and served as Secretary of the Department of Transportation and Communications (DOTC) at the time material to this case. And Abalos was then the Chair of the Commission on Elections.

Accused First Gentleman was not a public officer during the NBN transaction but was alleged to have conspired with the accused public officers.

On the other hand, although accused Abalos was a public officer at the time when the NBN-ZTE contract was negotiated and signed, he could not be considered as public officer who contracted or transacted with ZTE on behalf of the government. Therefore, Abalos could not be charged in this case in his capacity as a public officer but as a person who conspired with the public officer or officers who entered into a grossly and manifestly disadvantageous contract for government. The issue of conspiracy will be further discussed later.

The first element of Sec. 3 (g), R.A. No. 3019 requires that the person accused must be a public officer who enters into a contract or transaction on behalf of government. In *Go vs. Sandiganbayan*<sup>136</sup>, the Supreme Court explained this requirement:

*The philosophy behind this is that the public officer is duty bound to see to it that the interest of the government is duly protected. Thus, should the contract or transaction entered into by such public officer is manifestly or grossly disadvantageous to the government's interests, the public officer is held liable for violation of Section 3 (g), whether or not this public officer profited or will profit thereby.*

There is no question of the existence of the second element as to accused Mendoza. He signed the "Contract for the the Supply of Equipment and Services for the National Broadband Network Project" with ZTE on April 21, 2007, for and in behalf of government, in his capacity as Secretary of the DOTC.

Even if the copy of the contract that was offered in evidence was a mere photocopy, without an acknowledgment or notarization, the existence and authenticity of such contract is no longer an

<sup>133</sup> Appointment of Benjamin S. Abalos, Sr. as Chairman of COMELEC

<sup>134</sup> Oath of Office of Benjamin S. Abalos, Sr. as Chairman of COMELEC

<sup>135</sup> Service Record of Benjamin S. Abalos, Sr.

<sup>136</sup> G.R. No. 172602, September 3, 2007, 558 Phil. 736-758.

issue as this Court takes judicial notice of its existence; thus, there is no need for further proof of this fact.

Section 1 of Rule 129 of the Rules of Court provides that:

*A court shall take judicial notice, without the introduction of evidence, of the existence and territorial extent of states, their political history, forms of government and symbols of nationality, the law of nations, the admiralty and maritime courts of the world and their seals, the political constitution and history of the Philippines, the official acts of the legislative, executive and judicial departments of the Philippines, the laws of nature, the measure of time, and the geographical divisions.*

Certainly, the act of accused then DOTC Secretary Mendoza in signing the "Contract for the Supply of Equipment and Services for the National Broadband Network Project" with ZTE is an official act of the executive department, considering that he was cloaked with the authority to sign for and in behalf of government as Cabinet Secretary, and that the NBN project itself was duly approved by the NEDA Board.

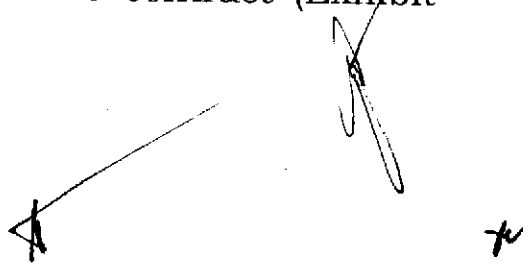
Moreover, in the case of *Suplico vs. NEDA et. al.*<sup>137</sup>, the Supreme Court already took judicial notice of the cancellation of the "proposed ZTE-NBN Project". It said:

*Under the rules, it is **mandatory** and the Court has no alternative but to take judicial notice of the official acts of the President of the Philippines, who heads the executive branch of our government. It is further provided in the above-quoted rule that the court shall take judicial notice of the foregoing facts **without introduction of evidence**. Since we consider the act of cancellation by President Macapagal-Arroyo of the proposed ZTE-NBN Project during the meeting of October 2, 2007 with the Chinese President in China as an **official act of the executive department**, the Court must take judicial notice of such official act without need of evidence.<sup>138</sup>*

The cancellation of the project, contract or agreement presupposes the existence of a project, contract or agreement which is sought to be cancelled.

However, on the part of accused PGMA, it is the observation of this Court that she is not a signatory to the DOTC and ZTE agreement entitled "Contract for the Supply of Equipment and Services for the National Broadband Network Project", as it was accused Mendoza who was the signatory thereof. Neither is she the official witness to the said agreement since the contract (Exhibit

<sup>137</sup> G.R. No. 178830, July 14, 2008, 558 SCRA 329.  
<sup>138</sup> Id. at 353.



x-----x

"X") shows that it was Assistant Secretary Lorenzo G. Formoso who signed as witness for and in behalf of government.

Witness JDV III, on the other hand, testified that the signing of the contract was witnessed by PGMA.

A Well, firstly, towards the end of February, we were asked [by] Assistant Secretary Soñeja to submit our final proposals and we have informed Assistant Secretary Soñeja that the proposal that we gave on December 5 was our final proposal, ma'am.

And then I heard that the contract was signed in China via the Malacañang Gazette where it said that the Government had signed the contract with ZTE, for the amount of \$329 million, ma'am.

Q When did you learn about this contract signing in China?

A First week of March, soon after ASEC Soñeja asked for the final proposals, ma'am.

Q Sir, after you've learned of that contract signing in China, are you referring to the contract with ZTE?

A Yes, ma'am.

Q So after you've learned of that contract signing in China, what did you do, sir?

A Well, there was nothing to be done. The contract was signed by the DOTC, Secretary Mendoza with ZTE in China, witnessed by the President.<sup>139</sup>

But his testimony is just hearsay since he merely obtained such information from the news or media. There is no other evidence put forward by the prosecution to establish the fact that PGMA was present during the contract signing between DOTC and ZTE. Besides, being a witness to the contract signing, if at all true, could hardly be considered within the purview of "entering into a contract or transaction" for and in behalf of government.

The prosecution, through the testimonies of witnesses JDV III, and former Speaker JDV, sought to establish and attribute the different acts mentioned in the Information to accused PGMA—*i.e.*, that she facilitated, fast-tracked, and thereafter, entered into a contract with ZTE in conspiracy with her other co-accused.

<sup>139</sup> TSN dated November 25, 2013, pp. 69-70.

Unfortunately, facilitating and fast-tracking a particular contract are not acts punished by Sec. 3 (g) of R.A. No. 3019. What is within the purview of this section is the act of entering into a grossly and manifestly disadvantageous contract for and in behalf of government. The facilitation and fast-tracking of the contract or agreement are not and could not be viewed as part of "entering" into a contract. These acts are non-offenses within the context of Sec. 3 (g), R.A. No. 3019. This is so under the maxim in statutory construction—*expressio unius est exclusio alterius*.

"It is a settled rule of statutory construction that the express mention of one person, thing, or consequence implies the exclusion of all others. The rule is expressed in the familiar maxim, *expressio unius est exclusio alterius*.

The rule of *expressio unius est exclusio alterius* is formulated in a number of ways. One variation of the rule is the principle that what is expressed puts an end to that which is implied. *Expressum facit cessare tacitum*. Thus, where a statute, by its terms, is expressly limited to certain matters, it may not, by interpretation or construction, be extended to other matters. . . .

The rule of *expressio unius est exclusio alterius* and its variations are canons of restrictive interpretation. They are based on the rules of logic and the natural workings of the human mind. They are predicated upon one's own voluntary act and not upon that of others. They proceed from the premise that the legislature would not have made specified enumeration in a statute had the intention been not to restrict its meaning and confine its terms to those expressly mentioned."<sup>140</sup>

Inasmuch as Section 3 (g) of R.A. No. 3019 can only be committed by the public official who entered into a contract, agreement or transaction on behalf of government, then it is only accused Mendoza, who could be correctly charged as a public officer. If at all, the charges against PGMA can only be made if she is in conspiracy with Mendoza, Jose Miguel Arroyo and Abalos. The existence or non-existence of conspiracy shall be discussed after the discussion on the elements of the crime.

We now proceed to examine the presence of the third element of the crime which is, that the "Contract for the Supply of Equipment and Services for the National Broadband Network Project" with ZTE on April 21, 2007 is grossly and manifestly disadvantageous to the government.

<sup>140</sup> *Malinias v. Commission on Elections*, G.R. No. 146943, October 4, 2002, 390 SCRA 480, 491-492, citing Ruben E. Agpala, *Statutory Construction*, (1990), pp.160-161.

The prosecution maintains that the gross and manifest disadvantage to government are shown through these characterization, among others, to wit: a.) the contract is overpriced at \$329 million when the project costs is only \$130 million; b.) the contract with ZTE covered only 30% of the country compared to the proposal of Amsterdam Holdings, Inc. (AHI) which would have covered 80% of the country at a much lesser cost; and c.) the financing scheme is disadvantageous because ZTE is to be financed from a loan from Eximbank of China, payment of which is to be guaranteed by the Philippine government, while the proposal of AHI would not entail cost to the Philippine government.

Readily, it can be said that after a judicious review of all the oral and documentary exhibits of the prosecution, the third element of Section 3 (g), R.A. No. 3019 is obviously missing.

After taking a serious look at the evidence offered by the prosecution, the Court is convinced that the only basis for pegging the ZTE cost is the testimony of JDV III, the pertinent portion of which is reproduced for emphasis:<sup>141</sup>

Q Sir, what did you [do] after being shown by Chairman Abalos this ZTE proposal?

A I consulted with Richard [Pratte], who's my CPO, one of my branch engineers in Manila, and together with George [Zhu], the ZTE Country Manager at that time, with regard to the cost, how much would that ZTE proposal be based on what was shown to me by Chairman Abalos.

Q How did you consult with them, sir?

A I sent a document via fax to Manila and I told them if they can give me a response because we have a planned meeting with ZTE in two (2) hours, ma'am.

Q And what was the response of your consultants, sir?

A The question I asked them is how much would this network cost, if you could give me a budget for it, and after an hour and a half, they gave me a quote. And they said it roughly costs about \$130million, ma'am.

JDV III was able to come up with the amount because this was the estimate given to him by his engineer, Richard Pratte, after he (JDV III) faxed the ZTE documents shared by Abalos to him at their meeting in Hongkong, China.<sup>142</sup> Nevertheless, JDV III did not offer

<sup>141</sup> TSN dated November 25, 2013, pp. 41-42.

<sup>142</sup> Id. See also, Exhibit "V".

x-----x

any explanation on how they were able to come up with this amount and what factors were considered in coming up with the cost estimation. It is unclear whether the BOQ or the bill of quantities was part of the "proposal" that was shown by Abalos to JDV III.

Moreover, it has already been proven that there were changes in the technical design of the ZTE project proposal from satellite to terrestrial-based platform for data, VOIP and internet connectivity as well as in the coverage to include the far-flung barangays, as the DILG telecommunications project is merged into the ZTE proposal. But it is unclear to the mind of the Court which proposal was shown to JDV III and faxed by him to his engineer, who in turn, made the cost estimates. Was it the original proposal or the modified proposal upon recommendation of TELOF? One thing is certain though—the proposal shown to JDV III was not the one that was approved by the NEDA Board on March 29, 2007,<sup>143</sup> because PGMA as Chair of the NEDA Board ordered the last modification only on March 27, 2007,<sup>144</sup> which is after the date when JDV III requested his engineer to make a costing.

Further, prosecution witness Madriaga, design engineer of ZTE corporation, said that the actual cost of the ZTE proposal that was initially submitted, as shown to him by his Chinese ZTE co-employee, is US\$289 million.<sup>145</sup> This does not, however, explain what constitutes "actual cost". Does actual cost include the cost of equipment, cost of installation, labor cost, administrative cost such as freight, communication and office costs, including cost of money? Or is it limited only to the actual cost of equipment? This can never be known to the mind of the Court.

In sum, there is no certainty to the mind of the Court that the ZTE cost for the supply of equipment and services for the NBN project is in fact only \$130 million.

The second evidence of gross and manifest disadvantage of the NBN-ZTE contract is the coverage of the project. In this issue, the prosecution witnesses are in conflict with each other.

In his Affidavit,<sup>146</sup> JDV III states:

"xxx. I asked to have ZTE evaluate our own [AHI] proposal, and their people came up with a costing of Two Hundred Forty Million

<sup>143</sup> Exhibit "XX-17".

<sup>144</sup> Exhibit "WW-7".

<sup>145</sup> TSN dated July 8, 2013, p.31.

<sup>146</sup> Exhibit "V".



X-----X

United States Dollars (US\$240,000,000.00) for the broadband facilities and equipment, which would cover about eighty percent (80%) of the country, as opposed to the original "Abalos" proposal which was to cover only thirty percent (30%) of the country, and which cost only \$130 million but was overpriced to \$262 million.  
xxx<sup>147</sup>

On the other hand, on the issue of coverage of the ZTE proposal, Madriaga declared:<sup>148</sup>

Q And the bottom line here is that, the coverage of your design covered almost the entire country, hundred percent (100%)?

A Yes, Sir.

Q So when the prosecution charges in its Information that the national broadband project covered only thirty percent (30%) of the country, that's flat-out wrong, right? It's wrong?

A Thirty percent (30%), no, Sir.

Q Because it covered a hundred percent (100%)?

A No, Sir, not the one that I designed. It didn't cover a hundred percent (100%).

Q Did you design a nationwide...(INTERRUPTED)

A Yes, Sir, we designed...(INTERRUPTED)

Q (CONTINUES) ... broadband network?

A (CONTINUES) ... a nationwide broadband network ... (INTERRUPTED)

Q More than thirty percent (30%)?

A More than thirty percent (30%).<sup>149</sup>

xxx

Q The second design, according to you, now included the far-flung barangays?

A Yes, Sir.

<sup>147</sup> Id. at par. 19.

<sup>148</sup> TSN dated July 8, 2013.

<sup>149</sup> Id. at 57.



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Q And this ensured one hundred percent (100%) coverage of the country.

A Yes, Sir.

Q And since, according to you, your design became part of the contract of the ZTE as actual design, would you now say that the contract of ZTE, as signed, extended to one hundred percent (100%) coverage of the country?

A Yes, Sir.

Q So, therefore, I'll pose this question again: when the Information charges that the coverage of the ZTE proposal is only thirty percent (30%), that is wrong?

A That's not true, Sir.

Q That is not true?

A That's wrong.<sup>150</sup>

Even the testimony of former CICT Chair Sales debunks the prosecution's claim that the coverage of NBN-ZTE is only 30%. He said:<sup>151</sup>

Q And since it is a national broadband network, it covers the nation, is it not?

A Yes, Sir.

Q And when you say it covered the nation, it covered almost a 100% of the nation?

A Not exactly, sir, a part of it, sir.

Q A good part of the nation?

A A good part.

Q How much would that good part be, 90%?

A Not even 90%. I believe, sir, but probably 90% of the population, maybe 30% or 40% of the area.

Q Ninety percent of the population? It will cover 25,000 sites, will it not?

A Higher, sir. About 43,000 barangays was mentioned.

<sup>150</sup> Id. at 87.

<sup>151</sup> TSN dated October 1, 2013, p. 33.

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Q And this 43,000 barangay would include 4<sup>th</sup> to 6<sup>th</sup> class municipalities?

A I think so, sir.

Moreover, the term "coverage" of the project has two meanings—the first one refers to spatial coverage and the other refers to population. Spatial coverage is the actual areas—cities, municipalities and barangays where the telecommunication services can be accessed. Population refers to the number of Filipinos or the populace who can access the services. Perhaps, the ambiguity is also a factor that created confusion considering that clearly, ZTE's proposal refers to the "spatial coverage" while AHI's proposal refers to "population". Unfortunately, this was also not clarified by prosecution.

In the case of *Caunan vs. People*<sup>152</sup>, the Sandiganbayan convicted certain local government officials in Metro Manila for the purchase of certain "*walis-tingting*". In reversing the conviction, the Supreme Court declared:

"The reasoning of the Sandiganbayan is specious and off tangent. The audit team reached a conclusion of gross overpricing based on documents which, at best, would merely indicate the present market price of *walis tingting* of a **different specification**, purchased from a **non-supplier** of Parañaque City, and the price of *walis tingting* purchased in **Las Piñas City**. Effectively, the prosecution was unable to demonstrate the requisite burden of proof, *i.e.*, proof beyond reasonable doubt, in order to overcome the presumption of innocence in favor of petitioners."<sup>153</sup>

Applying the reasoning of the Supreme Court in *Caunan* to this case, it could be interpreted to mean that the pricing of ZTE is different from that of AHI because they may have different equipment that may be installed, which this Court will never know as this was not pointed by the prosecution. Those issues that were pointed out by the prosecution were the different medium of transmitting their services (satellite, terrestrial, wireless etc.), the different areas of coverage and the different maintenance/operation protocol, that will ultimately impact the project cost.

So, this Court can, with certainty, declare that this fact was not sufficiently proven by the prosecution.

The last characteristic identified by the prosecution to indicate that the NBN-ZTE contract was grossly and manifestly

<sup>152</sup> G.R. Nos. 181999 & 182001-04, 182020-24, September 2, 2009, 597 SCRA 538.

<sup>153</sup> *Id.* at 556.



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disadvantageous to government is the financing scheme adopted by ZTE. In other words, prosecution believes that the financing scheme adopted by ZTE, which is through a loan guaranteed by the Philippine government, is disadvantageous when compared to the Build, Operate and Transfer (BOT) scheme proposed by AHI, since the government will not incur any cost in the build-out in the latter. To make such statement is to compare apples and oranges—two different financial schemes altogether, with its own strengths, benefits, weaknesses and disadvantages. Certainly, they are of different classes, and comparison should not be made.

What is a BOT?

What is a loan agreement?

Also, it should be emphasized that in a BOT, it does not mean that the government will not incur any cost for the project at all. After the supply and installation of the broadband network and during its operation, the government, as its client or customer, will have to pay AHI for the services rendered, even if AHI emphasized that the said cost will be 25% lower than the current cost of telecommunication at that time. There is payment for the services rendered because AHI needs to recover its build-out cost, maintenance cost, cost of money, interest fees, and of course, profit, as testified to by JDV III. Thus, the assertion of the prosecution in the Information that the AHI scheme is free is a misnomer because the government will still pay for the delivery of services. While there may be no capital outlay, the operational expenses are still high. On the other hand, in the case of ZTE, the broadband network, the backbone of the telecommunication, will be owned and controlled by government. The capital outlay for the project was to be shouldered by the government, and the money sourced from a loan from Eximbank of China. The operation of the network would be shouldered by government as well. The analysis of the Court is just limited up to this point as it is not prepared to scrutinize cost-benefit analysis and technical benefits of these two schemes, these not being brought out during the prosecution's presentation of evidence. The attachments to the NBN-ZTE contract were not even offered by the prosecution. The final proposal of AHI was also not offered in evidence. And, if it were offered, the Court has no technical capacity to make such a determination.

Therefore, the fact that the ZTE financing scheme is grossly and manifestly disadvantageous compared to the BOT scheme proposed by AHI was not sufficiently proven.

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Taken as a whole, the prosecution failed to establish that the NBN-ZTE contract entered into by accused Mendoza is grossly and manifestly disadvantageous to government.

The terms "gross" and "manifest" are comparative terms. Before an act can be considered "gross" or "manifest," there must be a standard by which the same is weighed and measured. Jurisprudence defined "manifest" as "evident to the senses, open, obvious, notorious, unmistakable etc."<sup>154</sup> while "gross" is defined as "glaring, reprehensible, culpable, flagrant, shocking, etc."<sup>155</sup>

Given the oral and documentary evidence presented by the prosecution, there are no obvious, clear, open, glaring and shocking indicators that the NBN-ZTE contract would be disadvantageous to government.

The Court shall now proceed to determine the sufficiency of the alleged conspiracy between the four (4) accused, especially the conspiracy involving accused PGMA, Abalos and Jose Miguel Arroyo.

It is an accepted legal principle that in conspiracy, the act of one is the act of all. But like the elements of the crime, conspiracy is never presumed. It must be sufficiently proven by the prosecution in evidence. Like the physical acts constituting the crime itself, the elements of conspiracy must be proven beyond reasonable doubt. In this case, the Court cannot be persuaded by the theory of the prosecution that there was a conspiracy between the accused. There is no sufficient evidence shown by the prosecution to establish conspiracy.

On the other hand, interesting is the opinion of Supreme Court Associate Justice Ynares-Santiago in the 2007 case of *Go vs. Sandiganbayan*, earlier cited, that Section 3 (g) can only be committed by public officers who entered into a grossly and manifestly disadvantageous contract. It said:

**"From a cursory reading of the Information, it indubitably shows that all the elements enumerated for the violation of Section 3 (g) relate to the public officer, not to the private individual, for as have been emphasized, Section 3 (g) is a crime that can only be committed by public officers.**

<sup>154</sup> *Sajul v. Sandiganbayan*, G.R. No. 135294, November 20, 2000, 345 SCRA 248, 267.  
<sup>155</sup> *Id.* at 267-268.

x-----x

This brings to the fore the overstated point that Section 3 (g), by its clear terms, can only be committed by public officers, for if it were otherwise, then the law itself would have clearly provided for it.

xxx

There are indeed offenses punishable under the Revised Penal Code or other special laws where the mere allegation of conspiracy will suffice in order to validly charge the persons who connived in the commission of the offense. In Section 3 (g), however, and other penal provisions, which can only be committed by a certain class of persons, an allegation of conspiracy to indict those which are clearly not within its purview, is deficient..."<sup>156</sup>

Still in the same case, Justice Adolfo Azcuna, in his concurring opinion explained that acts establishing conspiracy must be specifically alleged in Sec. 3 (g), R.A. No. 3019. Otherwise, there will be an infringement of the constitutional right of accused to be informed of the charges against him. He said:

There is, however, a need to distinguish the instance, as in this case, where the conspiracy is an *element* of the offense itself and not merely a circumstance that increases the penalty. For the only way a private individual can be liable under Sec. 3 (g) is if he acted in *conspiracy* with the public official. Where the conspiracy is constitutive of the offense, it should be alleged with more specifics than where it merely increases the penalty to that of the most guilty. Otherwise, there would be a failure to accord the accused his constitutional right to be informed of the nature of the offense of which he stands charged.<sup>157</sup> (Underscoring supplied)

As to how accused Jose Miguel Arroyo, Abalos and even PGMA conspired with DOTC Secretary Mendoza when he entered and signed the contract between NBN and ZTE is not detailed into specifics by the prosecution in the Information. This failure to specify the circumstances establishing conspiracy among the four accused is violative of their right to be informed of the accusations hurled against them.

Lastly, even if this Court finds and considers that the NBN-ZTE contract entered into by accused Mendoza contain provisions that are grossly and manifestly disadvantageous, it should be remembered that the "Contract for the Supply of Equipment and Services for the National Broadband Network Project" with ZTE on April 21, 2007 was already cancelled by accused PGMA. In fact, in the case of *Suplico vs. NEDA*, earlier cited, the Supreme Court took judicial notice of such cancellation. Thus, the second element of

<sup>156</sup> G.R. No. 172602, September 3, 2007, 532 SCRA 130, 138.

<sup>157</sup> *Id.* at 142.

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the crime—that there was a contract entered into by the public officer, is no longer present. The case of *Duterte vs. Sandiganbayan*<sup>158</sup> is in point:

The second element of the crime — that the accused public officers entered into a contract in behalf of the government — is absent. The computerization contract was rescinded on 6 May 1991 before SAR No. 91-05 came out on 31 May 1991 and *before* the Anti-Graft League filed its complaint with the Ombudsman on 1 August 1991. Hence, at that time the Anti-Graft League instituted their complaint and the Ombudsman issued its Order on 12 November 1991, there was no longer any contract to speak of. The contract, after 6 May 1991 became in contemplation of law, non-existent, as if no contract was ever executed.<sup>159</sup>

When this case was filed on December 28, 2011, the NBN-ZTE contract was already cancelled. Thus, legally and following the *Duterte* ruling, there was no more contract to refer to at the time of the filing of this case.

As a final note, this Court takes note of the death of accused Mendoza on October 7, 2013. By reason of his death, this Court dismisses the case against him, based on Article 89 of the Revised Penal Code, which provides:

Art. 89. Criminal liability is totally extinguished:

1. By the death of the convict, as to personal penalties; and as to pecuniary penalties, liability therefore is extinguished only when the death of the offender occurs before final judgment;

xxx.


“It ain’t no sin if you crack a few laws now and then, just so long as you don’t break any.”

*Mae West*  
*Every Day’s a Holiday (film), 1937*

**WHEREFORE**, the Demurrers to Evidence of accused Gloria Macapagal-Arroyo, Jose Miguel T. Arroyo, and Benjamin S. Abalos,

<sup>158</sup> G.R. No. 130191, April 27, 1998, 289 SCRA 721.

<sup>159</sup> *Id.* at 745.



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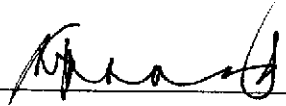
Sr. are **GRANTED**. This case is then **DISMISSED** against all accused.

SO ORDERED.

Quezon City, Metro Manila, Philippines.

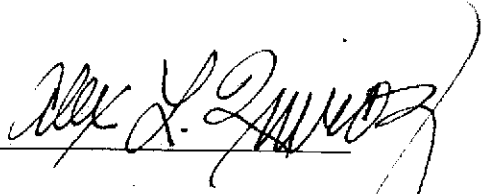
Approved:

HERNANDEZ, J., Chairperson



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QUIROZ, J.



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ECONG, J.



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