REPUBLIC OF THE PHILIPPINES
Sandiganbayan
Quezon City

FIRST DIVISION

PEOPLE OF THE PHILIPPINES,
Plaintiff,

CRIM. CASE NO. SB-09-CRM-0078

- versus -

Present

DE LA CRUZ, *J.*, *Chairperson*
LAGOS, &
QUIROZ, *JJ.*

ANTONIO P. BELICENA,
ULDARICO P. ANDUTAN JR.,
ROWENA P. MALONZO,
FAUSTINO T. CHINGKOE,
GLORIA "ENG ENG" CHAN CHINGKOE,
GRACE T. CHINGKOE,
CATALINA ARANAS BAUTISTA,
Accused.

Promulgated On:

March 9 2011

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RESOLUTION

LAGOS, *J.*

This resolves the following:

1. MOTION TO RECALL WARRANT OF ARREST, dated September 13, 2010, of accused Faustino T. Chingkoe and Gloria C. Chingkoe

2. COMMENT/OPPOSITION TO ACCUSED FAUSTINO T. CHINGKOE'S AND GLORIA C. CHINGKOE'S MOTION TO RECALL WARRANTS OF ARREST, dated October 4, 2010, of the prosecution.

3. REPLY (TO: COMMENT AND OPPOSITION TO ACCUSED FAUSTINO T. CHINGKOE'S AND GLORIA C. CHINGKOE'S MOTION TO RECALL WARRANTS OF ARREST), dated October 15, 2010, of Faustino T. Chingkoe and Gloria C. Chingkoe.

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4. MOTION FOR A PROPER JUDICIAL DETERMINATION OF PROBABLE CAUSE WITH MOTION TO VACATE THE 03 APRIL 2009 RESOLUTION, dated November 23, 2010, of accused Uldarico P. Andutan, Jr.

5. COMMENT AND OPPOSITION TO ACCUSED ULDARICO P. ANDUTAN, JR.'S MOTION FOR A PROPER DETERMINATION OF PROBABLE CAUSE WITH MOTION TO VACATE THE 3 APRIL 2009 RESOLUTION, dated December 3, 2010, of the prosecution.

6. REPLY TO THE COMMENT AND OPPOSITION DATED 3 DECEMBER, dated December 29, 2010, of accused Uldarico P. Andutan, Jr.

A. Motion to Recall Warrant of Arrest filed by Faustino and Gloria Chingkoe

In their motion, the Spouses Faustino and Gloria Chingkoe ("Spouses Chingkoe", for brevity), argue that indispensable to the commission of the offense of plunder is that a "public officer" amasses, accumulates or acquires ill-goten wealth. They emphasize that the crime of plunder is committed by public officers and that unless the public officer accused of plunder, has himself acquired ill-gotten wealth, no person could have connived with him in the commission of the crime of plunder. They further argue that the tax credit certificates with a total face value of P73,762,618.00 issued to FILSTAR (a corporation allegedly owned and controlled by the Spouses Chingkoe) cannot be regarded as "wealth" as defined in Republic Act 7080 which defines the crime of Plunder.

The prosecution, argues on the other hand, that it has sufficiently established probable cause to justify the issuance of a warrant of arrest by the Court against the accused because: (1) in Plunder, the acquisition of wealth in itself need not have been done directly by the public officer; (2) the ultimate beneficiary of the illegally acquired wealth may therefore actually be an individual other than the public officer; and (3) tax credit certificates are negotiable instruments and are therefore assets falling under the definition of "wealth" under R.A. 7080. Additionally, it orally argued during the March 3, 2011 clarificatory hearing that since conspiracy is specifically alleged in the Information, the act of one is the act of all, thus, the act of illegally amassing wealth by the Spouses Chingkoe must be taken to be also the act of the public officers charged herein.

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As a brief background, the Court on April 3, 2009, issued an order finding probable cause against the Spouses Chingkoe and the other accused. On the same date a warrant for the arrest of all of the accused was issued. Justices Geraldez, Ponferrada, and Gesmundo issued the Resolution finding probable cause while Justice Geraldez as Chairman, signed the warrant of arrest. No bail was recommended in view of the capital nature of Plunder.

Faustino Chingkoe filed a Motion for Reconsideration (of the Resolution finding probable cause) on April 20, 2009. This, together with ten (10) other Motions, was denied by the Court in a Resolution dated August 3, 2009, which simply stated that the Court "after going over and scrutinizing once again the entire records of the preliminary investigation, is still convinced that probable cause existed against all the accused." In the strong belief that there was really no probable cause against them, the Spouses Chingkoe filed the instant motion on September 13, 2009, without them being placed under custody.

Despite the fact that the Spouses Chingkoe remain at-large while praying for an affirmative relief in their motion, the Court takes cognizance of the same. Custody of the law is not required for the adjudication of reliefs other than an application for bail. However, while the accused are not yet under the custody of the law, any question on the jurisdiction over the person of the accused is deemed waived by the accused when he files any pleading seeking an affirmative relief, except in cases when the accused invokes the special jurisdiction of the court by impugning such jurisdiction over his person.[1]

That being said, We shall now proceed to determine whether probable cause lie against the movants for the crime of Plunder. The documentary support to the Information for Plunder filed against all of the accused consist mainly of the Complaint-Affidavit executed by Felix Chingkoe, the Investigation Report of the SPTF156, and the Joint Resolution of the Ombudsman. A painstaking and exhaustive examination of these documents reveal no single shred of finding that any of the public officers charged herein amassed, accumulated, and acquired ill-gotten wealth to the tune of at least P50 Million.

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[1] Alawiya v. Datumanong, 585 SCRA 267, 280 [2009].

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What the abovementioned documents only allege is that the public officers involved herein conspired with the Spouses Chingkoe and other private individuals, by issuing or allowing the issuance of tax credit certificates (TCCs for brevity) based on spurious and/or falsified documents submitted by FILSTAR, which were later on used by FILSTAR to pay-off its tax obligations and/or assigned by FILSTAR to two oil companies, Petron and Shell, for valuable consideration, with these two oil companies later on using the TCCs to pay for their customs and tax liabilities with the government. None of those documents however, point to any *scintilla* of evidence that the proceeds resulting from the TCCs' assignment or conversion by the Spouses Chingkoe landed in the pockets of any public officer.

A tax credit is defined under Section 21 of the Omnibus Investments Code of 1987 as follows:

> "Article 21. 'Tax credit' shall mean any of the credits against taxes and/or duties equal to those actually paid or would have been paid to evidence which a tax credit certificate shall be issued by the Secretary of Finance or his representative, or the Board, if so delegated by the Secretary of Finance. x x x."

The above-cited provision further states that a legitimate claimant who is granted a tax credit certificate (TCCs) may either use it to pay taxes, duties, charges and fees due to the National Government, or transfer the same under such conditions as may be determined by the Board of Investments after consultation with the DOF. In this regard, the pertinent portion of Article 21 of EO No. 226 provides:

> "x x x. The tax credit certificates including those issued by the Board pursuant to laws repealed by this Code but without in any way diminishing the scope of negotiability under their laws of issue are transferable under such conditions as may be determined by the Board after consultation with the Department of Finance. The tax credit certificate shall be used to pay taxes, duties, charges and fees due to the National Government; x x x."

If the TCCs were used by FILSTAR as direct payment for its tax obligation or were assigned to other tax-paying entities (like Shell and Petron), then clearly it was FILSTAR and/or the Spouses Chingkoe who amassed wealth in the form of either monetary savings or monetary consideration received from

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the assignees of these TCCs. The findings by the Ombudsman further show that the Deeds of Assignment executed by FILSTAR in favor of Petron were made in consideration of credit notes which Petron issued to FILSTAR. These credit notes were in turn, conveyed by FILSTAR to several companies, who paid valuable consideration to FILSTAR. The buyers of these Petron credit notes, utilized the same to buy oil from Petron. Clearly, again, it was FILSTAR and/or the Spouses Chingkoe who were the recipients of the monies paid out by the end-users of the Petron credit notes. The TCC transaction chain ended up to that point. The crucial link establishing that the public officers charged herein were given by FILSTAR or the Spouses Chingkoe any amounts generated by the TCCs assignment or conversion into monetary value remains missing.

The Joint Resolution[2] issued by the Ombudsman itself, on which this Court based its initial finding of probable cause, clearly stated that:

> "As already established from documentary evidence, twenty-eight (28) tax credit certificates issued in favor of FILSTAR in the aggregate amount of **Seventy Three Million Seven Hundred Sixty Two Thousand Six Hundred Eighteen (P73,762,618.00) Pesos** were utilized by FILSTAR, either by direct payment for its other tax and duties and obligations, or by assignment thereof to other tax-paying corporations, the Government suffered loss in terms of legitimate taxes or revenues that it could have rightfully collected from FILSTAR, PETRON, and SHELL. **Thus, from the foregoing, there is reasonable ground to engender a well-founded belief that Spouses Faustino and Gloria Chingkoe, with the indispensable cooperation of public respondents and in connivance with other private respondents, had unjustly enriched themselves in the amount of Seventy Three Million Seven Hundred Sixty Two Thousand Six Hundred Eighteen (P73,762,618.00) Pesos** to the damage and prejudice of the Government through a combination or series of overt acts of the public respondents, for which they should be indicted for the crime of Plunder." (Emphasis supplied, p.39)

This finding of the Ombudsman in its Joint Resolution is apparently due to the total absence of any *nexus* establishing a connecting link to any public officer with respect to the acquisition of ill-gotten wealth. Otherwise stated, the conspiracy alleged to have been concocted by all of the accused, whether public or private individuals, did not involve any showing that any public officer actually obtained any monetary consideration or was able to share or was rewarded by FILSTAR or the Spouses Chingkoe with the equivalent monetary value of the

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[2] Joint Resolution, Special Presidential Task Force vs. Antonio P. Belicena, et al. OMB-C-C-07-0339-G and OMB-C-C-03-0236-D, dated February 23, 2009.

TCCs. At best, the public officers' alleged complicity in blindly approving and issuing the TCCs can be taken as indispensable acts in the commission of the other offenses[3] they have been indicted for, as such acts indicate manifest partiality and bias in favor of FILSTAR.

In ***Jose "Jinggoy" E. Estrada v. Sandiganbayan (Third Division), et al.***, 377 SCRA 538, the Supreme Court held that the *gravamen* of the conspiracy charge for the crime of plunder is that each accused, whether public officers or private individuals, by their individual acts, must have agreed to participate, directly or indirectly, in the amassing, accumulation and acquisition of ill-gotten wealth of and/or for the accused public officer (in the said case, former President Joseph Ejercito Estrada). The Supreme Court in that case said that:

> "There is no denying the fact that the plunder of an entire nation resulting in material damage to the national economy is made up of a complex and manifold network of crime. In the crime of plunder, therefore, different parties may be united by a common purpose. In this case at bar, the different accused and their different criminal acts have a commonality – **to help the former President amass, accumulate or acquire ill-gotten wealth**. Subparagraphs (a) to (d) in the Amended Information alleged the different participation of each accused in the conspiracy. The gravamen of the conspiracy charge, therefore, is not that each accused agreed to receive protection money from illegal gambling, that each misappropriated a portion of the tobacco excise tax, that each accused ordered the GSIS and SSS to purchase shares of Belle Corporation and receive commissions from such sale, nor that each unjustly enriched commissions from such sale, nor that each unjustly enriched himself from commissions, gifts, and kickbacks; rather, **it is that each of them by their individual acts, agreed to participate, directly or indirectly in the amassing, accumulation and acquisition of ill-gotten wealth of and/or for former President Estrada**." (Emphasis supplied, pp.555-556)

As discussed above, the Joint Resolution of the Ombudsman arrived at a conclusion completely opposite to the situation envisioned in *Estrada* cited above, as it was the Spouses Chingkoe who were clearly found by the Ombudsman to have unjustly enriched themselves in conspiracy and with the assistance of the public officers charged herein. In this case, there is no showing that the conspirators' common design was towards enriching any public officer, as required in *Estrada*.

[3] All the accused herein are also the accused in 28 other cases for violation of Section 3(e) of R.A. 3019, pending before the Sandiganbayan

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It is true that the allegations of conspiracy in the Information should not be confused with the adequacy of evidence that may be required to prove it. However, conspiracy in this case is not charged as a crime in itself but only as the mode of committing the crime of Plunder. Thus, conspiracy is not the gravamen of the Plunder charge in this case. For the act of amassing, accumulating, and acquiring ill-gotten wealth to be considered as the act of all of the accused charged herein, there must be something either in the Ombudsman Joint Resolution or the SPTF 156 investigation report that would point out the conspiracy or commonality of design and purpose of the conspirators to directly or indirectly enrich a public officer. Otherwise stated, the conspiracy must be geared towards a common design or purpose to enrich a public officer and not the other way around.

The prosecution basically argues that since there is an allegation of conspiracy in the Information for Plunder, the criminal acts alleged therein pertaining to the amassing, accumulation, and acquisition of ill-gotten wealth also pertain to the public officers charged herein, the act of one being the act of all. This is too simplistic an argument and is obviously *non-sequitur*. It is basic in criminal law that every element of the crime must be proven to be present for the crime to exist. Hence, the existence of conspiracy alone cannot prove beyond reasonable doubt that any of the public officers herein was unjustly enriched. That fact must be separately and indispensably proven.

While the Court agrees with the prosecution that in Plunder, the acquisition of ill-gotten wealth need not be done directly by the public officer, it must be, however, shown that the public officer was principally and ultimately benefited or enriched. Conversely stated, in Plunder there must necessarily and indispensably be proof that a public officer unjustly enriched himself to the tune of at least P50 million. Without this element, there can be no Plunder. Considering this, there is no probable cause for the issuance of a warrant of arrest not only against the Spouses Chingkoe, but also against their other co-accused. The warrant of arrest issued on April 3, 2009 against all the accused herein must, therefore, be recalled and set aside.

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B. Motion for Proper Determination of Probable Cause filed by accused Andutan

Considering the discussion and conclusion reached by the Court in the abovementioned Motion filed by the Spouses Chingkoe, finding lack of probable cause to justify the issuance of the warrant of arrest against all of the accused for Plunder, We find it unnecessary to further discuss and act on accused Andutan's Motion for a Proper Determination of Probable Cause.

In parting, the Court reiterates the reminder made by the Supreme Court in ***Juan Ponce Enrile v. Judge Salazar, et al.***, *(186 SCRA 217, 244 [1990])*, stating:

> "All courts should remember that they form a part of an independent judicial system; they do not belong to the prosecution service. A court should never play into the hands of the prosecution and blindly comply with its erroneous manifestations. Faced with an information charging a manifestly non-existent crime, the *duty of a trial court is to throw it out.* Or at the very least and where possible, make it conform to the law."

Wherefore premises considered, the Court finding lack of probable cause to justify the issuance of a warrant of arrest against all of the accused, the Motion for the Recall of the Warrant of Arrest dated April 3, 2009 is **GRANTED**. The said warrant is ordered **LIFTED** and **SET ASIDE**. The Motion for Proper Determination of Probable Cause filed by accused Andutan is deemed **MOOTED**. Consequently, this case is ordered **DISMISSED**.

SO ORDERED.

RAFAEL R. LAGOS
Associate Justice

We concur:

EFREN N. DE LA CRUZ
Associate Justice/Chairperson

ALEX L. QUIROZ*
Associate Justice

* Sitting as Special Member per Administrative Order No. 204-2010 dated November 5, 2010.