



REPUBLIC OF THE PHILIPPINES

Sandiganbayan

Quezon City

SIXTH DIVISION

PEOPLE OF THE PHILIPPINES, SB-18-CRM-0428 and 0429
Plaintiff, For: Estafa thru Falsification
of Official/Public Documents

Present

- versus -

FERNANDEZ, SJ, J.,
Chairperson
MIRANDA, J. and
VIVERO, J.

MARCELINO C. LIBANAN,
ET AL.,

Accused.

Promulgated:

AUG 13 2020

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RESOLUTION

FERNANDEZ, SJ, J.

This resolves the following:

- 1. Accused Agda's Motion for Leave to File Demurrer to Evidence;1
2. Accused Marcelino C. Libanan's Motion for Leave to File/Submit Demurrer to Evidence Within the Allowable Period From Receipt of the Order Granting Leave;2
3. Motion for Leave of Court to File Demurrer to Evidence3 filed by accused Reynaldo C. Dorado, Vener T. Dulfo and Samson C. Nervez;

[Handwritten signature]

1 Dated February 21, 2020; Record, Vol. 10, pp. 505-507

2 Dated February 21, 2020; Record, Vol. 10, pp. 498-504

3 Dated January 24, 2020; Record, Vol. 10, pp. 508-511

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4. Accused Necitas A. Ponferrada's *Motion for Leave to File Demurrer to Evidence*;<sup>4</sup>
5. *Joint Motion for Leave of Court to File Demurrer to Evidence*<sup>5</sup> filed by accused Clotilde J. Salazar and Manuel B. Japzon;
6. Accused Ma. Vilma B. Bormate's *Motion for Leave to File Demurrer*;<sup>6</sup>
7. Prosecution's *Consolidated Comment/Opposition (Re: Motion for Leave to File Demurrer to Evidence Filed by the Accused)*.<sup>7</sup>

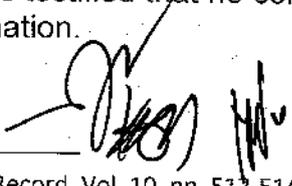
The accused, in their respective Motions, pray that they be allowed to file their respective demurrers to evidence.

Accused Jesus A. Agda avers:

1. The prosecution's documentary exhibits are mere photocopies, but it failed to lay down the procedural steps and requirements for the presentation of secondary evidence.
2. At the time material to the purported bidding, he was already retired and/or not a member of the BAC.

Accused Libanan avers:

1. The Information makes a general allegation as to his participation, for "being then a Congressman for the Lone District of Eastern Samar x x x."
2. The prosecution's documentary exhibits were mere photocopies. It failed to justify why said exhibits could be considered as secondary evidence.
3. The prosecution's witnesses have no personal knowledge of the incident.
4. No witness testified that he committed any overt act charged in the Information.



<sup>4</sup> Dated February 25, 2020; Record, Vol. 10, pp. 512-514

<sup>5</sup> Dated February 22, 2020; Record, Vol. 10, pp. 515-522

<sup>6</sup> Dated February 24, 2020; A copy is attached to accused Bormate's *Manifestation* dated February 27, 2020

<sup>7</sup> Dated March 4, 2020

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5. There is no evidence, direct or circumstantial, showing that he conspired or consented to any pre-conceived felonious act.

Accused Dorado, Dulfo and Nervez aver:

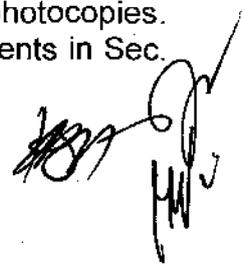
1. The prosecution's documentary exhibits are not original copies, in violation of the Best Evidence Rule. The witnesses who identified the same did not see the originals, and failed to prove that the copies were faithful reproductions of the originals. Neither did the parties stipulate that the copies were faithful reproductions of the respective originals.
2. The prosecution's witnesses were mere custodians of the documents. They had no personal knowledge of the due execution and contents thereof.
3. Witness Teodora D. Pelotos' findings in her COA Audit Report are belied and negated by her oral testimony and the prosecution's other documentary exhibits.
4. The prosecution failed to establish that the accused agreed to participate, directly or indirectly, in facilitating the procurement of the subject farm inputs in violation of R.A. No. 9184. This was even admitted by witness Gerhard G. Basco on cross-examination.
5. No evidence was presented to prove undue injury to the government.

Accused Ponferrada avers that her demurrer to evidence will be on the following grounds:

1. The prosecution's evidence is insufficient in point of law to make out a case for Violation of Sec. 3(e) of R.A. No. 3019. It cannot sustain the issues of whether or not the accused conspired; whether or not direct contracting is prohibited; and whether or not the elements of the offense are present;
2. The probative value of the prosecution's evidence; and,
3. The constitutional rights of due process, to be informed of the nature and cause of the accusation against the accused, and to speedy disposition of cases.

Accused Salazar and Japzon aver:

1. The prosecution's documentary exhibits are mere photocopies. The prosecution failed to comply with the requirements in Sec.



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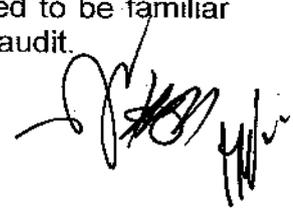
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- 5, Rule 130 of the Rules of Court, and thus, its evidence has no probative weight.
2. The witness who testified on the existence of the machine copies of the documents were mere custodians who have no personal knowledge as to the existence and due execution of the originals.
3. The prosecution failed to prove that undue advantage was given to AKAME, and undue injury to the government was caused.
4. Undue injury is negated because there was actual delivery of the fertilizers.
5. The prosecution failed to prove that undue advantage or benefits were given when the contract was awarded to AKAME. There is no testimonial evidence showing that there were irregularities in the conduct of the bidding. On the other hand, the prosecution's documentary exhibits were mere photocopies.
6. Heads of procuring entities are given enough leeway to rely on the regularity of the recommendations of their subordinates.
7. The prosecution failed to prove that the accused conspired.

### Accused Bormate avers:

1. The prosecution failed to show that the accused acted with manifest partiality, evident bad faith or gross inexcusable negligence.
  - a. The prosecution failed to present positive evidence to show that the BAC's decision to pursue direct contracting was irregular.
  - b. The prosecution did not present documentary evidence to substantiate the allegations that (a) no canvass was conducted for suitable substitutes; and (b) there was no justification for direct contracting.
  - c. Nothing in the prosecution's documentary evidence would establish the alleged irregularities.
  - d. The prosecution's witnesses merely testified as to the custody and the existence of the originals, despite the fact that as resident auditors, they are presumed to be familiar with the transactions they are mandated to audit.



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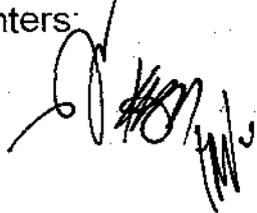
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- e. No Audit Observation Memorandum or Notice of Disallowance was presented. Had the same been issued, the accused would have been afforded the opportunity to address or to rectify whatever purported irregularities that may have attended the transaction.
  - f. The COA Reports are unreliable and inaccurate because the audit was haphazardly done, as shown by the TSN of the cross-examination of Ms. Teodora Pelotos, the COA Auditor who conducted the audit.
2. The prosecution failed to establish the grant of unwarranted benefits.
    - a. The prosecution's evidence shows that both AKAME and NBEM-21 were accredited by, and registered with, the FPA.
    - b. The prosecution sought to prove that AKAME was only a local distributor for Region X, and was not authorized to distribute fertilizer to the Provincial Government of Eastern Samar in Region VIII. However, the Information did not allege that AKAME was only a distributor for Region X.
    - c. Even if such fact was alleged, Ms. Lansangan testified that there was no real distinction between a local and a national distributor because the requirements for both licenses are uniform.
    - d. She was not remiss in her duties as BAC Chairperson. The BAC Resolutions show that the BAC conducted a technical evaluation of AKAME, and deliberated on the importance of NBEM-21. In the absence of irregularities in the award, no benefits, advantage or preference were extended to AKAME.
  3. No undue injury was caused to the government. The funds were used to pay for the fertilizers, which were delivered by AKAME, and which were duly received.
  4. Absent a clear showing of evident bad faith, manifest partiality, or gross inexcusable negligence, mistakes or errors in the procurement process should never be used as a basis for conviction.

In its *Consolidated Comment/Opposition*, the prosecution counters:



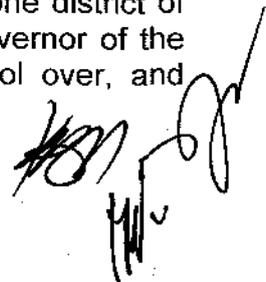
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1. Contrary to the accused' claim, not all of the prosecution's documentary exhibits are photocopies. The parties even compared the certified true copies of the documents marked as Exhibits E, L, M to N, O, P, Q, R-2, S, T, U, X, Y to Z, BB, CC, DD, EE-2, FF and GG with the originals. The defense confirmed that said exhibits were faithful reproductions of the original documents.
2. The prosecution presented witnesses who testified that they had seen the originals, and that they have personal knowledge of the execution of the FPA List of Licensed Fertilizer Handlers as of 31 December 2004 and the FPA List of Fully Registered Fertilizer as of December 2004; certified copies of the checks; and certified copy of the COA Audit Report on the P49M Farm Inputs and Farm Implements Released to DA Regional Office No. VIII, because they prepared the same.
3. The prosecution established the loss or destruction of the original copies of the documents in the custody of the DA-RFO No. 8. Its witnesses testified that a fire gutted DA RFO No. 8, including the Office of the Resident Auditor, on December 20, 2004, and destroyed the records kept therein.
4. The Court is not precluded from taking judicial notice of the existence of SARO No. E-04-00164 issued on February 3, 2004 and its Annex A, considering that said documents have been the subject of several cases pertaining to the Fertilizer Funds Scam.
5. The admissibility of the prosecution's documentary exhibits is no longer an issue because the same had already been admitted in evidence.
6. The prosecution was able to establish all the elements of Violation of Sec. 3(e) of R.A. No. 3019.
7. The accused were public officers of the Provincial Government of Eastern Samar at the time material to these cases.
8. The accused acted with manifest partiality, evident bad faith and/or gross inexcusable negligence.
9. The accused facilitated the procurement of NBEM-21 fertilizers from AKAME without competitive bidding, in violation of R.A. No. 9184.
  - a. Accused Libanan, as Representative of the lone district of Eastern Samar, and accused Salazar, as Governor of the Province of Eastern Samar, exercised control over, and



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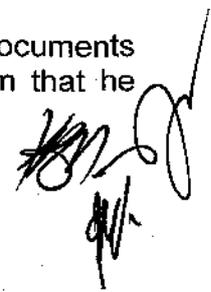
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were accountable for the fund allocations under SARO No. E-04-00164.

- b. On March 3, 2004, DA Region VIII, the House of Representatives, represented by accused Libanan, and the Province of Eastern Samar, represented by accused Salazar, entered into an agreement to jointly implement the FIFI Program in Eastern Samar. On the same day, DA Region VIII and the Province of Eastern Samar entered into an agreement to jointly implement the FIFI Program in Eastern Samar.
- c. Accused Salazar approved the request for the purchase of 3,332 sacks of NBEM Farm Inputs with an estimated cost of ₱5 million.
- d. Accused Bids and Awards Committee (BAC) members, and accused Agda, as Provincial Agriculturist and End-User, recommended the procurement of NBEM-21 Microbial Inoculant and Soil Activator from AKAME Marketing through direct contracting. Such recommendation based on their claim that AKAME was the exclusive distributor of said NBEM-21 fertilizer.
- e. Accused Salazar and Libanan approved said recommendation.
- f. Thereafter, accused BAC members and accused Agda recommended the award of the contract for the supply of NBEM-21 to AKAME. Accused Libanan and Salazar approved the recommendation, and the contract was awarded to AKAME.
- g. AKAME was registered as an Area Distributor only for Region X. Thus, it was not authorized to sell and/or distribute fertilizer in Eastern Samar.
- h. AKAME was not the exclusive distributor of NBEM-21. Said fertilizer was a registered product of J.P. BYM Food Mix Co., which was registered as Manufacturer – Distributor, authorized to distribute products nationwide.
- i. There was no justification for the resort to direct contracting.
- j. Accused Libanan actively participated in the utilization of the FIFI fund allocated to the lone district of Eastern Samar for the procurement of NBEM Farm Inputs from AKAME.
- k. Accused Agda's signature appears on the documents pertaining to the subject procurement. His claim that he



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was already retired and/or not a member of the BAC at the time of the transaction is a matter of defense.

10. The accused public officers gave unwarranted benefits to AKAME when they dispensed with the public bidding in the procurement of the subject fertilizers, which resulted in undue injury to the provincial government in the amount disbursed.
11. Conspiracy need not be shown by direct proof of an agreement of the parties to commit the crime. The accused' combined acts were so interrelated and so irregularly performed that any reasonable person will conclude that their acts were concerted and performed for the common purpose of awarding the contract for the procurement of NBEM fertilizers to AKAME without public bidding, and without any legal basis for resorting to an alternative method of procurement.

### THE COURT'S RULING

In *Bernardo v. Court of Appeals*,<sup>8</sup> the Supreme Court held that the trial court is given the discretion to grant leave to the accused to file a demurrer for the purpose of determining whether the accused is merely stalling the proceedings. *Viz.:*

In fine, under the new rule on demurrer to evidence the accused has the right to file a demurrer to evidence after the prosecution has rested its case. If the accused obtained prior leave of court before filing his demurrer, he can still present evidence if his demurrer is denied. However, if he demurs without prior leave of court, or after his motion for leave is denied, he waives his right to present evidence and submits the case for decision on the basis of the evidence for the prosecution. This power to grant leave to the accused to file a demurrer is addressed to the sound discretion of the trial court. The purpose is to determine whether the accused in filing his demurrer is merely stalling the proceedings.

(underscoring supplied)

After a careful examination of the prosecution's evidence and the arguments in the accused' respective Motions, this Court rules that granting the accused leave to file their demurrers to evidence will accomplish nothing but delay the proceedings.

<sup>8</sup> G.R. No. 119010, September 5, 1997

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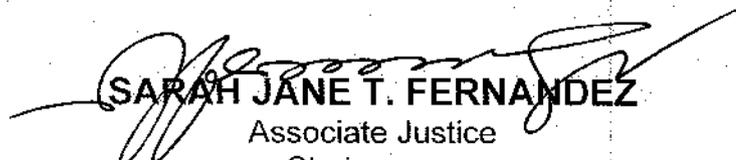
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**WHEREFORE**, the respective Motions of accused Agda, Libanan, Dorado, Dulfo, Nervez, Ponferrada, Salazar, Japzon and Bormate are hereby DENIED for lack of merit.

As provided in Sec. 23, Rule 119<sup>9</sup> of the Rules of Court, they may adduce evidence in their defense, or in the alternative, they may file their demurrers to evidence without leave of court.

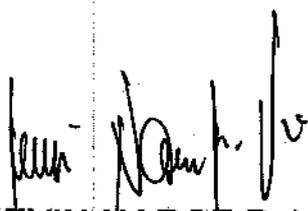
Said accused are given five (5) days from receipt of this Resolution to file their respective manifestations, by personal service or registered mail, and electronically, to inform this Court whether they are submitting their demurrers to evidence without leave of court. The hearings for the initial presentation of the defense evidence are set on August 25 and 26, 2020. Said hearings will be considered cancelled upon receipt by this Court of said accused' manifestations that they intend to submit their demurrer to evidence without leave of court.

SO ORDERED.

  
**SARAH JANE T. FERNANDEZ**  
Associate Justice  
Chairperson

**We Concur:**

  
**KARIZ B. MIRANDA**  
Associate Justice

  
**KEVIN NARCE B. VIVERO**  
Associate Justice

<sup>9</sup> Sec. 23. *Demurrer to evidence.* – After the prosecution rests its case, the court may dismiss the action on the ground of insufficiency of evidence (1) on its own initiative after giving the prosecution the opportunity to be heard or (2) upon demurrer to evidence filed by the accused with or without leave of court.

If the court denies the demurrer to evidence filed with leave of court, the accused may adduce evidence in his defense. When the demurrer to evidence is filed without leave of court, the accused waives the right to present evidence and submits the case for judgment on the basis of the evidence for the prosecution.

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