Republic of the Philippines
Supreme Court
Manila

SECOND DIVISION

ALEJANDRO C. RIVERA,
Petitioner,

- versus -

PEOPLE OF THE PHILIPPINES,
Respondent.

G.R. No. 156577

x - x

ALFREDO Y. PEREZ, JR.,
Petitioner,

- versus -

PEOPLE OF THE PHILIPPINES,
Respondent.

G.R. No. 156587

x - x

LUIS D. MONTERO,
Petitioner,

- versus -

PEOPLE OF THE PHILIPPINES,
Respondent.

G.R. No. 156749

Present:

CARPIO, *J.*, *Chairperson*,
DEL CASTILLO,
VILLARAMA, JR.,*
MENDOZA, and
LEONEN, *JJ.*

Promulgated:
DEC 03 2014

x - x

* Designated Acting Member in lieu of Associate Justice Arturo D. Brion, per Special Order No. 1888, dated November 28, 2014.

DECISION

MENDOZA, *J.*:

Assailed in these consolidated petitions for review on *certiorari* filed under Rule 45 of the Rules of Court are the August 30, 2002 Decision[1] and the January 16, 2003 Resolution[2] of the Sandiganbayan in Criminal Case No. 18684, which found accused Luis D. Montero *(Montero),* Alfredo Y. Perez *(Perez)* and Alejandro C. Rivera *(Rivera),* guilty beyond reasonable doubt of the crime of violation of Section 3 (e) of Republic Act (R.A.) No. 3019, otherwise known as the Anti-Graft and Corrupt Practices Act.[3]

The Facts

On February 3, 1988, the Memorandum of Agreement *(MOA)* entered into by the Department of Health *(DOH)*, the Department of Public Works and Highways, Department of Interior and Local Government, and the Development Coordinating Council for Leyte and Samar, for the construction of riverine boats to be used as floating clinics was executed and signed.[4] The construction of seven (7) units of these floating clinics was proposed for the delivery of health care services to the remote barangays in Samar and Leyte. Subsequently, on December 8, 1988, the DOH Region VIII entered into a negotiated contract with PAL Boat Industry *(PAL Boat)*, managed by Engineer Norberto Palanas *(Palanas*), with a contract price of □700,000.00.[5]

This controversy was generated by an anonymous letter from a concerned citizen sent to the Office of the Ombudsman *(Ombudsman)*, dated June 16, 1990, stating that there were small white boats for the DOH in a small shipyard within their neighborhood. It further stated that the boats were built many months ago but they had been left rotting on land, not on water. Appearing like dead ducks, they are leaning on their sides.[6] The

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[1] Penned by Associate Justice Francisco H. Villaruz, Jr., with Associate Justice Minita V. Chico-Nazario and Associate Justice Ma. Cristina G. Cortez-Estrada, concurring; *rollo* (G.R. No. 156749), pp. 24-85.
[2] Id. at 98-102.
[3] Section 3. Corrupt practices of public officers. 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:
x x x
(e) Causing any undue injury to any party, including the Government, or giving any private party any unwarranted benefits, advantage or preference in the discharge of his official administrative or judicial functions through manifest partiality, evident bad faith or gross inexcusable negligence. This provision shall apply to officers and employees of offices or government corporations charged with the grant of licenses or permits or other concessions.
[4] *Rollo* (G.R. No. 156587), pp. 234-235.
[5] Id. at 24-25.
[6] *Rollo* (G.R. No. 156577), p. 22.

concerned citizen asked why the boats were not delivered to the DOH. He was of the view that the country was losing money out of this deal.

On November 19, 1990, Graft Investigation Officer Avito Cahig of the Ombudsman (Visayas) issued the order directing Palanas–Contractor/PAL Boats; Luis Montero *(Montero)*, M.D., DOH Region VIII Regional Director; Alfredo Perez *(Perez)*, M.D., DOH Region VIII Assistant Regional Director; Engr. Alejandro C. Rivera *(Rivera)*, Sanitary Engineer; Rufino Soriano *(Soriano),* Project Coordinator; and Emilia Elazegui *(Elazegui)*, Chief Accountant, to file their "comment, answer and/or controverting evidence."

Except for Palanas, who had already passed away by then, all the others filed their respective comments. The Commission on Audit *(COA),* Region VIII was required to conduct a technical-financial audit on the project. On July 10, 1991, Internal Auditor Luz V. Ramos *(Ramos)* submitted the Memorandum reporting the anomalies in the floating clinics project.[7] On July 13, 1992, the COA issued its Joint Resolution recommending the filing of a criminal information for violation of Section 3(e) of R.A. No. 3019 against Montero, Perez, Rivera, Soriano and Elazegui.[8] On December 24, 1992, the Office of the Special Prosecutor *(OSP)* modified the resolution and dismissed the case against Elazegui for insufficiency of evidence. On February 11, 1993, the Amended Information was filed with the Sandiganbayan. It reads:

> That during the period September 1, 1988 up to September 30, 1989, at Tacloban City, Philippines, and within the jurisdiction of this Honorable Court, accused public officers of the Department of Health Regional Health Office No. VIII, Tacloban City, namely: Dr. Luis D. Montero, Regional Director, Dr. Alfredo Y. Perez, Assistant Regional Director and Chairman of the Prequalification Bids and Awards Committee, Alejandro C. Rivera, Regional Civil Works Implementation Officer and Rufino P. Soriano, Supervising Planning Officer and Project Coordinator, through evident bad faith and manifest partiality towards PAL Boat Industry represented by its manager Engr. Norberto Palanas, conspiring, confederating, and mutually helping one another, did then and there wilfully and unlawfully enter into a negotiated contract with said PAL Boat Industry for the construction of seven (7) Floating Clinics for a contract price of □700,000.00 the said seven units not being operational and with blatant defects despite payment of □630,000.00, accused Montero entering into said negotiated contract without waiting for approval of the project's plans and specifications by the Maritime Industry Authority (MARINA) and approving payments to PAL Boat Industry in the total amount of □630,000.00, accused PEREZ approving the commencement of

[7] Id. at 11.
[8] Id. at 12.

> the project without determining the contractor's financial capacity to undertake the same and despite lack of approval of the project's plans and specifications by MARINA and also approving payments to the contractor, accused RIVERA and SORIANO failing to monitor, supervise and inspect the project in accordance with approved plans and specifications in order to safeguard the interest of the government, thereby causing undue injury to the government in the total amount of □630,000.00 and giving unwarranted benefits to PAL Boat Industry in the discharge of their official functions.
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> CONTRARY TO LAW.[9]

On February 12, 1993, an order of arrest was issued against all the accused. On separate dates, they posted bail for their temporary liberty. Thereafter, on March 10, 1993, they filed a motion for reinvestigation which was granted by the Sandiganbayan on April 2, 1993. On November 14, 1993, the OSP handed down the order maintaining its earlier findings. Thereafter, the Sandiganbayan resumed the criminal proceedings and scheduled the arraignment of the accused. Upon their arraignment, the accused pleaded "Not Guilty" to the offense charged.

On January 20, 1994, the OSP filed a motion to suspend the accused *pendente lite* pursuant to Section 13 of R.A. No. 3019. In a resolution, dated March 18, 1994, the Sandiganbayan granted the motion.

During the pre-trial, the parties marked their respective exhibits. Thereafter, the pre-trial stage was terminated.[10] On May 31, 1995, Perez filed a motion to demurrer with leave of court.[11] In its Resolution,[12] dated May 27, 1996, the Sandiganbayan denied his demurrer and set the case for trial.

Evidence of the Prosecution

During the trial, the prosecution presented Internal Auditor Ramos and Engineers Elmer Tiber *(Tiber)*, Jose Jocanao *(Jocanao)* and Loida Nicolas *(Nicolas).*

Ramos, former COA Resident Auditor of DOH Region VIII, testified that, at the request of the Ombudsman Visayas Office, she conducted a technical and financial audit of the negotiated contract between DOH

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[9] Id. at 56-57.
[10] *Rollo* (G.R. No. 156587), pp. 135-142.
[11] Id. at 145-158.
[12] Id. at 160-161.

Regional VIII and PAL Boat; and that as indicated in her audit report, she found that the project failed to comply with the pertinent provisions of Presidential Decree (P.D.) No. 1594, Prescribing Policies, Guidelines, Rules and Regulations for Government Infrastructure Contracts, resulting in revenue losses to the government.

Tibe, Head of the Motorpool Department of DOH Region VIII, testified that he supervised the repair and maintenance of the service vehicles of the regional office; that he was instructed by Dr. Ortiz, Montero's successor after his transfer to Region VI, to inspect the floating clinics; that from October 3, 1989 to December 15, 1989, they inspected some of the said vessels; that during his inspection, the said units were already painted and afloat; and that the units he inspected needed repairs worth □39,500.00.

Jocanao testified that upon the request of Elsa Soriano, he inspected one of the units and found that the defect in the unit was worth □2,500.00 although the unit was still travel-worthy.

Nicolas, the Supervising Shipbuilding Specialist of the Maritime Industry Authority *(MARINA),* testified that their office checked, reviewed and approved plans submitted by shipbuilding companies; that the letter submitted by Palanas, dated May 2, 1989, contained the blueprint plans which they initially checked, reviewed and approved; that in their letter-reply, dated May 17, 1989, they instructed Palanas to submit documents for the final approval of the plans; that Palanas, however, never replied to their letters; and that this fact led their office to believe that the project had been shelved.

The prosecution also adduced several documentary evidence along with the COA Audit Report of Ramos.

Evidence of the Defense

For its part, the defense presented all the accused and Soriano as witnesses.

Montero testified that, from September 1, 1988 to September 16, 1989, he was the Regional Director of the Regional Health Office No. VIII. Upon instruction of then President Corazon Aquino, the floating clinics project was to be implemented immediately. His office did not immediately proceed with the bidding process. There were two (2) prospective Manila-based contractors which were interested in the project. When they were informed

that they should have a dockyard in Tacloban for easy monitoring and supervision, the two contractors did not anymore respond. Meanwhile, he received a letter from Palanas, dated February 8, 1988, showing his interest in the floating clinics project. *Upon learning that Palanas was the only qualified and registered naval architect in Tacloban, through a MARINA certification,*[13] ***he called off the bidding*** *because he found it useless considering that he (Palanas) was the only qualified boat builder.*

Montero further stated that on November 21, 1988, after the DOH approved the plan and specifications for the boat, he notified Palanas of the requirements and procedure as to when to commence work and the schedule of the release of the 15% mobilization fee; that he opted not to wait for the approval of MARINA as the latter's jurisdiction extended only to boats weighing three (3) tons or more, which was **more or?** less than the weight of the floating clinics; that the period to complete the project was extended beyond the 120-day period because their agency incurred delays in paying PAL Boat its percentage accomplishment payments; and that when he was transferred to Region VI, ninety percent (90%) of the project was already completed.

On cross-examination, Montero replied that he sent a notice to pre-qualify to three (3) other contractors but only PAL Boat replied. He admitted that he did not publish in any newspaper the notice to pre-qualify because of the MARINA letter stating that Palanas was the only registered naval architect in the area.

Perez testified that he was the Chairman of the Regional Infrastructure and Bid Committee *(RIBAC)* from September 1988 to September 1989; that the RIBAC prequalified bidders and issued awards to contractors; that he signed the Notice of Award in favor of PAL Boat for a negotiated contract; that as part of the pre-qualification process, he required Palanas to submit pre-qualification documents such as the profile list of company equipment and machineries, organizational set-up, manpower, financial status, facility layout, company background, location map, and track record; that he, together with Rivera and Soriano, visited the shipyard twice sometime in November 1988 to verify the information; and that thereafter, he reported that PAL Boat was technically and financially capable of undertaking the project.

Perez likewise admitted that he recommended the approval of progress payments to PAL Boat based on the accomplishment reports of his staff. The office retained □70,000.00 of the contract price as guaranty for any defects or repairs to be made. After the units were accepted, defects in

[13] Id. at 239.

the units were discovered and were repaired using the funds retained by their office.

On cross-examination, Perez *admitted not asking from Palanas a copy of the company's paid-up capital because, based on his ocular inspection, he was convinced that the company was financially capable of handling the project.* He was aware that the capital of PAL Boat was only □50,000.00 and that its liabilities totalled □114,000.00. Nevertheless, he pre-qualified it because he also considered the company's other assets. The documents of Palanas *showed that the company project for the last six months involved only the construction of one banca and the repair of another.* He also admitted that he did not publish an invitation to pre-qualify although he posted notices on the bulletin board.[14] Before the units were delivered to their respective end-users, the technical staff of the regional office first tested them.

Rivera, Civil Implementing Officer of the project, testified that he gave technical assistance to the project by conducting its weekly monitoring and inspection; that before the project was implemented, their office received copies of the plans and specifications and other supporting documents of the project from Palanas although these were not yet approved by the DOH Secretary; that prior to the approval of the project, he and the other accused inspected the construction site to check if Palanas was capable of undertaking the project; that during the course of the implementation of the project, Palanas requested for progress payments; and that he also submitted accomplishment reports by comparing the work progress with the plans and specification, detailed estimates, and program of work and by making a ratio and proportion in averaging every item of work.

On cross-examination, Rivera said that he pre-qualifed PAL Boat utilizing the documents submitted to them; that he reviewed the lay-out, background of the contractor, dockyard site, list of equipment, and materials; and that during the inspection, defects were found in some of the units but these were eventually repaired and rehabilitated using the funds from the DOH Regional Office.

Finally, Soriano, the Supervising and Planning Officer, testified that his participation in the project involved the coordination and monitoring of the status of the project; that he frequently visited the construction site; that when the floating clinics were finished, their office did not accept them because of the defects found during the inspection and also because COA had not inspected them yet; and that during this hiatus, typhoon *Ruping*

[14] *Rollo* (G.R. No. 156577), pp. 79-80.

struck the area and totally destroyed all the units which were then docked at Palanas' dockyard.

Sandiganbayan Ruling

In the Decision,[15] dated August 30, 2002, the Sandiganbayan found accused Montero, Perez and Rivera guilty of the crime charged but acquitted Soriano for failure of the prosecution to prove his guilt beyond reasonable doubt.

The graft court held Montero liable for violating Section 3(e) of R.A. No. 3019 by entering into a negotiated contract with PAL Boat. While it was true that the MARINA's approval was not necessary pursuant to Section 3(b) of P.D. No. 474 since the floating clinics did not exceed three (3) tons, he was still liable as he resorted to a negotiated contract. The court *a quo* clarified that their agency could only enter into a negotiated contract if there was a failure of bidding. In this case, there was none. Instead, there was an aborted bidding.

Montero attempted to justify the absence of public bidding by arguing that Palanas was the only registered naval architect and marine engineer in Tacloban. The court *a quo,* however, opined that this should not have prevented him from conducting a public bidding. Instead, he should have published a region-wide invitation to bid to attract other qualified contractors, not only from Tacloban City, but from other nearby provinces.

As to the liability of Perez, the Sandiganbayan likewise found him guilty of the crime charged. He was the Chairman of the RIBAC who pre-qualified Palanas. He knew that Palanas had more liabilities than capital and yet he still pre-qualified him based on an ocular inspection. His undue haste was also not in accordance with the rules because the prequalification documents submitted to their office were not under oath and duly authorized.

The graft court also discovered that at the time Palanas offered to undertake the projects, PAL Boat had no valid business permit yet. He only applied for a business permit on September 29, 1988 after DOH Undersecretary Manuel Roxas III approved the negotiated contract. The court *a quo* also noted that he failed to publish an invitation to bid for the project as required by P.D. No. 1594. His bare assertion that he posted the notices in their bulletin board without any substantiating evidence was a self-serving statement.

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[15] Id. at 56-118.

Rivera was also held liable because he recommended to pre-qualify Palanas based on the documents submitted by the latter. As part of the technical staff, he should have followed the Implementing Rules and Regulations *(IRR)* by requiring Palanas to submit the detailed engineering documents consisting of design standards, field surveys, contract plans, quantities, special provisions, unit prices, agency estimate, bid/tender documents, and program work. The inadequate submission of these documents led to the improper monitoring of the project.

As to the essential elements of Section 3(e) of R.A. No. 3019, the Sandiganbayan was satisfied that these were substantiated by the COA Audit Report which stated that the accused failed to withhold the 10% retention money, 1% withholding tax and 2% contractor's tax on the first three progress payments. The government could have had □47,590.20 retention money and □6,191.50 taxes, in the total amount of □53,781.70. These reflect a clear undue injury dealt to the government. The □47,590.20 retention money could have been added to the balance of □70,000.00 as an additional security in the performance of the contract. Also, the failure to withhold these amounts, at the very least, showed gross negligence. The decretal portion of the Sandiganbayan decision thus reads:

> WHEREFORE, the Court finds the accused Luis Montero y Dayot, Alfredo Perez, Jr. y Yap, Alejandro Rivera y Caniedo GUILTY beyond reasonable doubt of violating Section 3(e) of R.A. No. 3019, as amended, otherwise known as the Anti-Graft and Corrupt Practices Act, and hereby sentences each of the accused to suffer the indeterminate penalty of SIX (6) Years and ONE (1) Month as minimum, to NINE (9) Years and ONE (1) Day as maximum, to further suffer perpetual disqualification from public office; to indemnify, jointly and severally, the Government of the Republic of the Philippines in the amount of □53,781.70, representing the undue injury that it suffered, and to pay the costs of this action proportionately.
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> Accused Rufino Soriano y Pilario, however, is hereby ACQUITTED of the crime charged for failure of the prosecution to prove his guilt beyond reasonable doubt. The bail bond posted by him for his provisional liberty is hereby cancelled.
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> SO ORDERED.[16]

[16] Id. at 116-117.

The accused filed their respective motions for reconsideration, but they were eventually denied by the Sandiganbayan in its January 16, 2003 Resolution.[17]

Hence, these petitions.

G.R. No. 156749

Petitioner Montero contends that the MARINA had no jurisdiction over the project. He also argues that they were charged with causing undue injury against the government, amounting to □630,000.00, but the undue injury that they were found to have caused was only □53,781.70. Moreover, the law that he violated was Executive Order *(E.O.)* No. 651, which imposed a different penalty and was not even filed with the National Administrative Registrar.[18]

On August 11, 2003, the OSP filed its Joint Comment[19] in G.R. No. 156749 and G.R. No. 156577 where it argues that although E.O. No. 651 was cited in the decision, Montero was actually charged with, and found guilty of, violating Section 3(e) of R.A. No. 3019. The OSP also avers that the □53,781.70 was already included in the □630,000.00 claim of undue injury cited in the information.

In the Reply,[20] filed on September 8, 2005, Montero reiterates his arguments.

The Court required the parties to file their respective memoranda. In its Joint Memorandum,[21] filed on August 11, 2011, the OSP stresses that Montero had no valid reason to resort to a negotiated contract because none of the allowable circumstances under P.D. No. 1594 were present.

G.R. No. 156587

Perez argues that conspiracy was not proven because Soriano was acquitted and this exoneration showed that the act of one was not the act of all. He reiterates his position that he did assess the financial capacity of PAL

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[17] Id. at 124-128.
[18] *Rollo* (G.R. No. 156749), p. 16.
[19] Id. at 145-175.
[20] Id. at 229-232.
[21] Id. at 243-293.

Boat. As to his approval of the payments to PAL Boat, he cited *Arias v. Sandiganbayan,*[22] where it was stated that the heads of offices could rely to a reasonable extent on their subordinates on good faith. Moreover, he claims that his visit to the construction site to personally inspect the project, showed him that the defects of the boats were so minor and minimal that the balance of □70,000.00 was more than enough to shoulder them.

In its Comment,[23] filed on December 12, 2003, the OSP states that Perez pre-qualified Palanas even though he knew that PAL Boat had more liabilities than capital, contrary to the requirement of IB 1.5 of the IRR of P.D. No. 1594.

In his Reply,[24] filed on February 12, 2004, Perez stresses that PAL Boat had a 1,200 square meter land which was sufficient to consider it as financially capable of undertaking the project.

In the Joint Memorandum[25] of the OSP, the incompetence of PAL Boat to financially and technically undertake the project was underscored. Because of its lack of capital, the construction of the boats was dependent on government funds. Moreover, PAL Boat was reported to have been operating since 1982, but it only applied for a business license on September 29, 1988, when it was pre-qualified by Perez. The OSP also belies his claim that the delivery of the floating clinics to the end-users warranted their exoneration.

Perez filed his Memorandum[26] on October 3, 2011, reiterating his earlier arguments.

G.R. 156577

Rivera contends that the anonymous complaint should have been under oath or with supporting affidavits and that the COA Audit Report was not verified. He also stresses that the value of the undue injury dealt to the government in the amount of □53,781.70 could be set off by the □70,000.00 retained amount.

The OSP comments that the anonymous complaint was not under oath precisely because the complainant was anonymous and that Administrative Order *(A.O.)* No. 7 did not require the COA Audit Report to be verified. As to the claim of off-setting, it could not be considered because the

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[22] 259 Phil. 794, 801 (1989).
[23] *Rollo* (G.R. No. 156587), pp. 290-310.
[24] Id. at 318-334.
[25] Id. at 430-447.
[26] Id. at 315-332.

□53,781.70 retention money for every progress payment was different from the □70,000.00 balance from the project price.

The Reply[27] of Rivera, filed on September 1, 2005, was only a rehash of his prior arguments.

In its Joint Memorandum,[28] the OSP underscores that it was too late in the day for Rivera to raise the issue on his claimed violation A.O. No. 7. In Rivera's Memorandum,[29] filed on January 9, 2012, he only reiterated his previous positions.

These petitions are anchored on the sole issue:

WHETHER OR NOT THE CONVICTION OF THE PETITIONERS FOR THE CRIME OF VIOLATING SECTION 3(E) OF R.A. NO. 3019 IS PROPER.

The Court's Ruling

The petitions are bereft of merit.

It is settled that the appellate jurisdiction of the Court over decisions and final orders of the Sandiganbayan is limited only to questions of laws; as its the factual findings, as a rule, are conclusive upon the Court.[30]

A question of fact exists when the doubt or difference arises as to the truth or falsehood of facts or when the query invites calibration of the whole evidence considering mainly the credibility of witnesses, the existence and relevancy of specific surrounding circumstances as well as their relation to each other and to the whole, and the probability of the situation.[31]

In this case, the petitioners asked this Court to re-evaluate the Sandiganbayan's appreciation of the evidence presented, specifically the COA Audit Report, the various certifications and letters, and the testimonies of the witnesses. As the Court is not a trier of facts, a reassessment of testimonies may not be conducted absent a showing that the findings of the court *a quo* is based on a misapprehension of facts. Verily, a perusal of the Sandiganbayan decision would reveal that the testimonies of prosecution and

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[27] *Rollo* (G.R. No. 156577), pp. 219-222.
[28] Id. at 243- 293.
[29] Id. at 315- 332.
[30] *Cabaron v. People*, 681 Phil. 1, 6 (2009).
[31] *Mendoza v. People*, 500 Phil. 550, 558 (2005).

defense witnesses, both on direct and cross-examination, were appreciated in detail. As will be discussed hereunder, the Sandiganbayan considered the totality of circumstances that led to the conclusion that the accused violated the law. Suffice it to say, none of the exceptions that would warrant a reversal of the Sandiganbayan's findings of fact are extant in this case; thus, they remain conclusive and binding to the Court.[32]

At any rate, the Court has reviewed and scrutinized the records and found no cogent reason to reverse the conviction of the petitioners, who were charged with violating Section 3(e) of R.A. No. 3019. The essential elements of such crime are as follows:

1. The accused must be a public officer discharging administrative, judicial or official functions;

2. The accused must have acted with manifest partiality, evident bad faith or gross inexcusable negligence; and

3. The action of the accused caused undue injury to any party, including the government, or gave any private party unwarranted benefits, advantage or preference in the discharge of the functions of the accused.[33]

The Court has consistently held that there are two ways by which a public official violates Section 3(e) of R.A. No. 3019 in the performance of his functions, namely: (1) by causing undue injury to any party, including the Government; or (2) by giving any private party any unwarranted benefit, advantage or preference. The accused may be charged under either mode or both. The disjunctive term "or" connotes that either act qualifies as a violation of Section 3(e) of R.A. No. 3019.[34]

It is not enough that undue injury was caused or unwarranted benefits were given as these acts must be performed through manifest partiality, evident bad faith or gross inexcusable negligence. Proof of any of these three in connection with the prohibited acts mentioned in Section 3(e) of R.A. No. 3019 is enough to convict.[35]

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[32] *Coloma v. Sandiganbayan,* G.R. No. 205561, September 24, 2014.
[33] *Albert v. Sandiganbayan*, 559 Phil. 439, 450 (2009).
[34] *Braza v. Sandiganbayan*, G.R. No. 195032, February 20, 2013, 691 SCRA 471, citing *Velasco v. Sandiganbayan*, 492 Phil. 669, 677 (2005); *Constantino v. Sandiganbayan*, 559 Phil. 622, 638 (2007).
[35] *Sison v. People*, G.R. Nos. 170339, 170398-403, March 9, 2010, 614 SCRA 670, 679.

The terms partiality, bad faith, and gross inexcusable negligence have been explained as follows:

> "Partiality" is synonymous with "bias" which "excites a disposition to see and report matters as they are wished for rather than as they are." "Bad faith does not simply connote bad judgment or negligence; it imputes a dishonest purpose or some moral obliquity and conscious doing of a wrong; a breach of sworn duty through some motive or intent or ill will; it partakes of the nature of fraud." "Gross negligence has been so defined as negligence characterized by the want of even slight care, acting or omitting to act in a situation where there is a duty to act, not inadvertently but wilfully and intentionally with a conscious indifference to consequences in so far as other persons may be affected. It is the omission of that care which even inattentive and thoughtless men never fail to take on their own property."[36]

The Information filed against the petitioners stated that it was committed "[t]hrough evident bad faith and manifest partiality towards PAL Boat Industry x x x thereby causing undue injury to the government x x x and giving unwarranted benefits to PAL Boat Industry in the discharge of their official functions."[37]

The Court finds that the petitioners indeed (1) committed undue injury to the government and (2) gave unwarranted benefits to PAL Boat through manifest partiality. These findings will be discussed *in seriatim.*

The accused gave unwarranted benefits to PAL Boat through manifest partiality

The Court rules that the petitioners gave unwarranted benefits to PAL Boat and its manager, Palanas, especially in its pre-qualification. The word "unwarranted" means lacking adequate or official support; unjustified; unauthorized or without justification or adequate reason. "Advantage" means a more favorable or improved position or condition; benefit, profit or gain of any kind; benefit from some course of action. "Preference" signifies priority or higher evaluation or desirability; choice or estimation above another.[38]

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[36] *Alvarez v. People*, G.R. No. 192591, June 29, 2011, 653 SCRA 52, 59.
[37] *Rollo* (G.R. No. 156749), pp. 21-22.
[38] *Ambil v. Sandiganbayan*, G.R. No. 175457, July 6, 2011, 653 SCRA 576.

As correctly found by the Sandiganbayan, PAL Boat was not financially and technically capable of undertaking the floating clinics project. The court *a quo* believed that the petitioners knew that and still awarded the project to PAL Boat. They also failed to follow the proper procedure and documentations in awarding a negotiated contract. These unwarranted benefits were due to the manifest partiality exhibited by them in numerous instances.

First, petitioner Montero unreasonably entered into a negotiated contract with PAL Boat. The IRR of P.D. No. 1594 enumerates the instances when a negotiated contract may be entered into:

> IB.2.4.2 By Negotiated Contract.
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> 1. Negotiated contract may be entered into only where any of the following conditions exists and the implementing office/agency/corporation is not capable of undertaking the contract by administration:
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> a. In times of emergencies arising from natural calamities where immediate action is necessary to prevent imminent loss of life and/or property.
>
> **b. Failure to award the contract after competitive bidding for valid cause or causes.**
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> In these cases, bidding may be undertaken through sealed canvass of at least three (3) contractors. Authority to negotiate contracts for projects under these exceptional cases shall be subject to prior approval by heads of agencies within their limits of approving authority.
>
> c. Where the subject contract is adjacent or contiguous to an ongoing project and it could be economically prosecuted by the same contractor provided that he has no negative slippage and has demonstrated a satisfactory performance.
>
> [Emphasis supplied]

The above-stated provision enumerates instances where a negotiated contract can be allowed. Parenthetically, P.D. No. 1594 and its implementing rules are clear to the effect that infrastructure projects are awarded in the order of priority as follows: First, by public bidding and

second by a negotiated contract. Resort to negotiated contract, however, is permitted only after a failure of public bidding. The implementing rules are clear as to when there is a failure of public bidding. Thus, if no bid is acceptable in accordance with the implementing rules during the first bidding, the project should again be advertised for a second bidding and in the event the second bidding fails anew, a negotiated contract may be undertaken.[39]

Montero espouses that there was a failure of bidding, thus, necessitating a negotiated contract. As correctly found by the Sandiganbayan, however, there was no failure of bidding. Rather, there was an aborted bidding. As admitted by Montero, they never conducted the public bidding.[40] So there can never be a failure of bidding when there is no public bidding to begin with.

The justification of Montero is that the MARINA informed them that Palanas of PAL Boat was the only registered naval architect and marine engineer. For said reason, according to him, it would be futile to conduct public bidding if Palanas was the only qualified participant.[41] As correctly held by the Sandiganbayan, he should have instead published a region-wide invitation to bid.[42] And even assuming that Palanas was the only naval architect and marine engineer in Region VIII or in the whole Visayas Region, a public bidding must still be conducted. It was only after conducting the required public bidding that it could be fully verified that PAL Boat was the only qualified bidder, especially with regard to its financial and technical competence.

A competitive public bidding aims to protect public interest by giving it the best possible advantages thru open competition. It is precisely the mechanism that enables the government agency to avoid or preclude anomalies in the execution of public contracts.[43]The manifest reluctance of the petitioner to hold a public bidding and award the contract to the winning bidder smacks of favoritism and partiality toward PAL Boat.

Second, Perez as Chairman of RIBAC, pre-qualified PAL Boat despite its financial inability to undertake the project, and inspite of his knowledge that PAL Boat had more liabilities than capital.[44] The purpose of pre-qualification in any public bidding is to determine, at the earliest

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[39] *D.M. Consunji, Inc., v. COA*, 276 Phil. 595, 605-606 (1991).
[40] *Rollo* (G.R. No. 156577), p. 69.
[41] Id. at 70.
[42] Id. at 99.
[43] *Garcia v. Burgos,* 353 Phil. 740, 767-768 (1998).
[44] *Rollo,* (G.R. No. 156577), p. 79.

opportunity, the ability of the bidder to undertake the project. Thus, with respect to the bidder's financial capacity at the pre-qualification stage, the government agency must examine and determine the ability of the bidder to fund the entire cost of the project by considering the maximum amounts that each bidder may invest in the project at the time of pre-qualification. [45]

In this case, Perez knew that PAL Boat had only a capital of □50,000.00 with a liability of □114,000.00. In his defense, he claimed that during their ocular inspection of the construction site, PAL Boat had a 1,200 square meter land which was sufficient to consider it as financially capable of undertaking the project. This excuse is not acceptable. P.D. No. 1594 provides that:

> Section 3. Prequalification of Prospective Contractors.
>
> x x x x
>
> (c) Financial Requirements. The **net worth** and **liquid assets** of the prospective contractor must meet the requirements, to be established in accordance with the rules and regulations to be promulgated pursuant to Section 12 of this Decree, to enable him to satisfactorily execute the subject project. x x x x
>
> [Emphases supplied]

Liquid assets of a prospective contractor are specifically required so that the contractor can easily comply with the project, despite some delay in the progress payments. In this case, the alleged 1,200-square meter lot of PAL Boat was an unliquidated asset and should not have been considered in determining its financial capability. As found by the Sandiganbayan, PAL Boat did not have the working capital to augment whatever routinary delay that may occur in the release of funds.

Not only did the company have insufficient liquid assets, there were other dubious findings on PAL Boat. The Sandiganbayan found that PAL Boat did not have a business license despite its operation since 1982.[46] It was only one week after the negotiated contract was approved when it applied for a business permit or on September 29, 1988.[47] These glaring circumstances should have warned Perez to disqualify PAL Boat as a bidder. Perez also failed to publish the notice invitation to bid. His lone testimony that he had posted such notices was self-serving absent any other proof.

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[45] *Agan v. Philippine International Air Terminals Co., Inc.*, 450 Phil. 744, 811-812 (2003).
[46] *Rollo* (G.R. No. 156577), p. 79.
[47] Id. at 79.

Third, Rivera, as Civil Implementing Officer, also pre-qualified PAL Boat.[48] He used the documents submitted to their office and reviewed the lay-out, background of the contractor, dockyard site, and list of equipment and materials. As correctly ruled by the Sandiganbayan, as part of the technical staff, he should have checked the requirements of the IRR and made Palanas submit a detailed engineering documentation of the project consisting of design standards, field surveys, contract plans, quantities, special provisions, unit prices, agency estimate, bid/tender documents, and program work. The submission of insufficient detailed engineering documents led to the improper monitoring of the project.

As properly stated in the COA Audit Report,[49] Rivera failed to submit the proper documents for technical evaluation within five (5) days from the perfection of the negotiated contract. An inquiry as to the reasons for non-compliance initially revealed that the agency did not conduct the detailed engineering works. Had the contract underwent technical evaluation, corrective measures for defects could have been made. As there was lack of proper basis for evaluation, the petitioners merely relied on ocular inspections, which were insufficient to properly monitor the project.

This Court is convinced that all these circumstances taken together clearly demonstrate the manifest partiality of the petitioners towards PAL Boat, giving the latter unwarranted benefits to obtain the government project.

The accused caused undue injury to the Government through their manifest partiality

The Sandiganbayan was correct in ruling that the petitioners also caused undue injury to the government through their continuing and manifest partiality towards PAL Boat.

Undue injury in the context of Section 3(e) of R.A. No. 3019 should be equated with that civil law concept of "actual damage." Unlike in actions for torts, undue injury in Sec. 3(e) cannot be presumed even after a wrong or a violation of a right has been established. Its existence must be proven as one of the elements of the crime. In fact, the causing of undue injury, or the giving of any unwarranted benefits, advantage or preference through manifest partiality, evident bad faith or gross inexcusable negligence constitutes the very act punished under this section. Thus, it is required that

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[48] Id. at 88.
[49] Id. at 112.

the undue injury be specified, quantified and proven to the point of moral certainty.[50]

As correctly stated by the Sandiganbayan, the COA Audit Report visibly established the undue injury committed against the government. The total contract price of the seven (7) floating clinics was ₱700,000.00. The DOH, however, only paid ₱630,000.00 because, upon the discovery by the new Regional Director Ortiz of the defects of the vessels, Palanas was required to conduct repairs. Still he failed to do so. Ortiz formally severed the contract of PAL Boat and did not anymore pay the remaining balance of ₱70,000.00.

According to the COA Audit Report cited in the Sandiganbayan decision, three progress payments were paid to PAL Boat during the project where the petitioners failed to impose the 10% retention money (₱47,590.20), the 1% withholding tax and the 2% contractors tax (₱6,191.50), in the total amount of ₱53,781.70.[51] The report noted that the petitioners consistently failed to withhold these amounts from the progress payments. Petitioners did not even bother to shed light on their failure to deduct these amounts. Appropriately, the Sandiganbayan ruled that the ₱53,781.70 was the undue injury caused to the government. The report also remarked that the ₱47,590.20 retention money could have augmented the ₱70,000.00 balance to be used in repairing the blatant defects of the vessels.[52]

The petitioners contend that the amount of ₱53,781.70 could be easily offset by the ₱70,000.00 balance and, thus, no undue injury was caused to the government. Apparently, they failed to grasp the concept of retention money under P.D. No. 1594. According to the then IRR of P.D. No. 1594:

> Progress payments are subject to retention of ten percent (10%) referred to as the "retention money." Such retention shall be based on the total amount due to the contractor prior to any deduction and **shall be retained from every progress payment** until fifty percent (50%) of the value of works, as determined by the Government, are completed. If, after fifty percent (50%) completion, the work is satisfactory done and on schedule, no additional retention shall be made; otherwise, the ten percent (10%) retention shall be imposed.[53]
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> [Emphasis supplied]

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[50] *Soriano v. Ombudsman*, 597 Phil. 308, 318.
[51] *Rollo* (G.R. No. 156577), pp. 112-114 .
[52] Id. at 113.
[53] CI 6, IRR of P.D. No. 1594.

This provision, which is likewise reflected in the negotiated contract,[54] clearly states that the retention money is the amount retained, at a rate of 10%, in every progress payment. Retention money is a form of security which seeks to ensure that the work is satisfactorily done and on schedule. It is withheld by the procuring entity from progress payments due to the contractor to guarantee indemnity for uncorrected discovered defects and third-party liabilities in infrastructure projects.[55]

The □53,781.70 was the retention money and taxes that should have been retained by the petitioners in every progress payment. It is completely different from the □70,000.00 balance of the project which Regional Director Ortiz refused to pay to PAL Boat. They came from different sources but could have been both used for the same purpose of repairing the vessels. Regrettably, the petitioners chose not to impose retention money and taxes against PAL Boat, to the detriment of the government.

Indeed, manifest partiality of the petitioners towards PAL Boat led to an undue injury against the government. The Court entertains no doubt in this regard.

Delivery of the floating clinics to the end-users does not warrant the acquittal of the accused

Perez contends that, although the floating clinics had minor defects, an important fact stood out - that the vessels were delivered to the riverside barangays of Samar and Leyte. The vessels, however, were not correctly built by PAL Boat and the government even had to spend additional funds to rehabilitate them.

When Montero was transferred to Region VI and Ortiz replaced him as Regional Director of DOH Region VIII on September 16, 1989, the vessels were reported to have been 90% complete. Upon inspection of prosecutor witnesses, Engrs. Tibe and Jocanao, from October to December 1989, patent defects were discovered.[56] Ortiz required Engr. Palanas to repair the defects at his own expense but the latter did not do so or could not do so. This could only mean that PAL Boat had really no financial resources.

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[54] *Rollo* (G.R. No. 156577), p. 178.
[55] *New Bian Tek Commercial, Inc., v. Ombudsman*, 596 Phil. 652, 656 (2009).
[56] *Rollo* (G.R. No. 156577), p. 61.

On November 5, 1990, Ortiz informed Palanas that they would terminate the contract with PAL Boat. On November 12, 1990, typhoon *Ruping* struck Tacloban City and destroyed the vessels. The government had to rehabilitate the floating clinics using additional funds. The vessels were completed in December 1991.[57]

Based on the summary of events, the defects were only discovered when Director Ortiz came into office. Were it not for his intervention, the petitioners would have probably continued the anomalous contract with PAL Boat. The final delivery of the floating clinics to the end-users was not due to the proficiency of PAL Boat, as the contract was already terminated. The government was obligated to use more funds and effort to rehabilitate the vessels. The petitioners could not certainly use the fact of completion of the floating clinics to avoid criminal liability.

Arias v. Sandiganbayan is not applicable in the present case

Perez invokes the *Arias* doctrine[58] which states that "[a]ll heads of offices have to rely to a reasonable extent on their subordinates and on the good faith of those who prepare bids, purchase supplies, or enter into negotiations." He contends that he merely relied on the vouchers and reports prepared by his subordinates and released the payments in good faith.

To clarify, the *Arias* doctrine is not an absolute rule. It is not a magic cloak that can be used as a cover by a public officer to conceal himself in the shadows of his subordinates and necessarily escape liability. Thus, this ruling cannot be applied to exculpate the petitioners in view of the peculiar circumstances in this case which should have prompted them, as heads of offices, to exercise a higher degree of circumspection and, necessarily, go beyond what their subordinates had prepared.[59]

The case of *Cruz v. Sandiganbayan*[60] carved out an exception to the Arias doctrine, stating that:

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[57] *Rollo* (G.R. No. 156587), p. 241.
[58] 259 Phil. 794, 801 (1989).
[59] *Lihaylihay v. People*, G.R. No. 191219, July 31, 2013. http://sc.judiciary.gov.ph/jurisprudence/2013/july2013/191219.pdf, last visited November 28, 2014.
[60] 504 Phil. 321, 334-335 (2005).

> Unlike in Arias, however, there exists in the present case an exceptional circumstance which should have prodded petitioner, if he were out to protect the interest of the municipality he swore to serve, to be curious and go beyond what his subordinates prepared or recommended. In fine, the added reason contemplated in Arias which would have put petitioner on his guard and examine the check/s and vouchers with some degree of circumspection before signing the same was obtaining in this case.

In the case at bench, Perez should have placed himself on guard when the documents and vouchers given to him by his subordinates did not indicate the retention money required by P.D. No. 1594. Moreover, when he personally inspected the construction site of PAL Boat, he should have noticed the financial weakness of the contractor and the defective works. Deplorably, Perez kept mum and chose to continue causing undue injury to the government. No other conclusion can be inferred other than his manifest partiality towards PAL Boat.

Conspiracy among the accused exists despite the acquittal of Soriano

Finally, the petitioners contend that the acquittal of Soriano showed the inexistence of conspiracy among them. In conspiracy, the act of one is not the act of all. There being no common design among them, they deserve to be acquitted.

Their argument does not merit consideration.

A conspiracy exists when two or more persons come to an agreement concerning the commission of a felony and decide to commit it. To determine conspiracy, there must be a common design to commit a felony.[61] A conspiracy is in its nature a joint offense. The crime depends upon the joint act or intent of two or more person. Yet, it does not follow that one person cannot be convicted of conspiracy. As long as the acquittal or death of a co-conspirator does not remove the basis of a charge of conspiracy, one defendant may be found guilty of the offense.[62]

In this case, the common criminal design of the petitioners was their act of pre-qualifying PAL Boat and subsequently of entering into a negotiated contract. As stated by the Sandiganbayan, Soriano was acquitted because the prosecution failed to show that he had any participation in pre-

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[61] *People v. Morilla*, G.R. No. 189833, February 5, 2014.
[62] *People v. Dumlao*, 599 Phil. 565, 586 (2009).

qualifying PAL Boat for the contract.[63] He merely performed monitoring activities during the implementation of the project. The criminal design still exists despite Soriano's acquittal, because all the petitioners were involved in pre-qualifying PAL Boat. Rivera recommended the pre-qualification of PAL Boat, which was approved by Perez and then Montero eventually entered into a negotiated contract with it. Hence, the unity of criminal design and execution was very patent.

Guilt of the accused was proven beyond reasonable doubt

In criminal cases, to justify a conviction, the culpability of the accused must be established by proof beyond a reasonable doubt. The burden of proof is on the prosecution, as the accused enjoys a constitutionally enshrined disputable presumption of innocence. The court, in ascertaining the guilt of the accused, must, after having marshalled the facts and circumstances, reach a moral certainty as to the accused's guilt. Moral certainty is that degree of proof which produces conviction in an unprejudiced mind. Otherwise, where there is reasonable doubt, the accused must be acquitted.[64]

In this case, the Court is convinced that the guilt of the petitioners was proven beyond reasonable doubt and that the Sandiganbayan did not err in its findings and conclusion. The totality of the facts and circumstances demonstrates that they committed the crime of violation of Section 3(e) of R.A. No. 3019 by causing undue injury to the government and giving unwarranted benefits to PAL Boat through manifest partiality. The moral certainty required in criminal cases has been satisfied.

WHEREFORE, the petitions are **DENIED**. The August 30, 2002 Decision and the January 16, 2003 Resolution of the Sandiganbayan in Criminal Case No. 18684, are **AFFIRMED.**

SO ORDERED.

JOSE CATRAL MENDOZA
Associate Justice

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[63] *Rollo* (G.R. No. 156577), pp. 108-109.
[64] *Cuanan v. People*, 614 Phil. 179, 194 (2009).

WE CONCUR:

ANTONIO T. CARPIO
Associate Justice
Chairperson

MARIANO C. DEL CASTILLO
Associate Justice

MARTIN S. VILLARAMA, JR.
Associate Justice

MARVIC M.V.F. LEONEN
Associate Justice

ATTESTATION

I attest that the conclusions in the above Decision had been reached in consultation before the case was assigned to the writer of the opinion of the Court's Division.

ANTONIO T. CARPIO
Associate Justice
Chairperson, Second Division

CERTIFICATION

Pursuant to Section 13, Article VIII of the Constitution and the Division Chairperson's Attestation, I certify that the conclusions in the above Decision had been reached in consultation before the case was assigned to the writer of the opinion of the Court's Division.

MARIA LOURDES P. A. SERENO
Chief Justice