



Republic of the Philippines
Supreme Court
Manila

FIRST DIVISION

NOTICE

Sirs/Mesdames:

Please take notice that the Court, First Division, issued a Resolution dated November 10, 2020 which reads as follows:

“G.R. Nos. 198265-66 (*Colonel Noel P. Mislang v. Office of the Ombudsman, Eduardo Barcelona and Elena Rosqueta*). – This Petition for *Certiorari*¹ under Rule 65 of the Rules of Court assails the Joint Resolution² dated May 9, 2011 of the Office of the Ombudsman finding probable cause for murder and frustrated murder against Colonel Noel P. Mislang (Col. Mislang), Mauro Durwin (Durwin), and Florencio Baharin (Baharin) for the killing of Corporal Antonio Rosqueta (Corporal Rosqueta) and wounding of Corporal Eduardo Barcelona (Corporal Barcelona).

Facts of the Case

The case stemmed from the complaint-affidavits filed by Mayor Cecilia Luna (Mayor Luna) for attempted murder; Elena Rosqueta, the widow of Corporal Rosqueta, for murder; and Corporal Barcelona (collectively, complainants) for frustrated murder before the Office of the Ombudsman in 2005.³

According to the complainants, sometime in the second week of April 2004, Col. Mislang, who was Corporal Barcelona and Corporal Rosqueta’s battalion commander, instructed them to assassinate Mayor Luna, then Mayor of Lagayan, Abra allegedly upon the orders of Abra Governor Vicente Valera (Governor Valera). Col. Mislang gave Corporal Barcelona and Corporal Rosqueta ₱5,000.00 to monitor Mayor Luna and to contact Durwin and Baharin who are the agents of Governor Valera. Subsequently, Col. Mislang ordered Corporal

¹ *Rollo*, pp. 5-46.

² *Id.* at 50-63.

³ *Id.* at 51-52.

Barcelona and Corporal Rosqueta to stay in a safe house with Durwin and Baharin. Durwin and Baharin allegedly confessed to Corporal Barcelona and Corporal Rosqueta that Col. Mislang contacts them whenever there is a special assignment for them, such as the assassination of a person.⁴

Sometime in the first week of May 2004, Col. Mislang gave Corporal Barcelona and Corporal Rosqueta ₱20,000.00 to fund the assassination and provided them with the plate numbers of the vehicles used by Mayor Luna. In the same month, they had an opportunity to kill Mayor Luna's son Ryan, but they failed to do so. Hence, they were harshly reprimanded by Col. Mislang.⁵

Sometime in the middle of June 2004, Col. Mislang instructed Corporal Barcelona and Corporal Rosqueta to assassinate Jendrick, the other son of Mayor Luna at his birthday party held on July 9, 2004. However, neither Ryan nor Jendrick was present at the birthday party. For this reason, Col. Mislang was once again enraged and belittled Corporal Barcelona and Corporal Rosqueta.⁶

Thereafter, Col. Mislang told Corporal Barcelona and Corporal Rosqueta to remain at the safe house. However, on September 4, 2004, the two went to the battalion camp to get their salary. It is where they were confronted by an angry Col. Mislang. Col. Mislang likewise confiscated the two .45 caliber pistols earlier given to them. Frightened by what Col. Mislang did, Corporal Barcelona and Corporal Rosqueta left the safe house.⁷

On September 29, 2004, Corporal Rosqueta received a text message from a certain Sergeant Orteza, the driver of Col. Mislang, that he and Corporal Barcelona are the subject of an assassination order issued by Col. Mislang. Sometime in December 2004, M/Sgt. Guilberto Peria ordered Corporal Barcelona and Corporal Rosqueta to report to the battalion camp, otherwise, they will be marked as Absent Without Leave (AWOL). However, Col. Mislang countermanded the order saying that he will take care of the two.⁸

Fearful for their safety, on December 17, 2004, Corporal Barcelona and Corporal Rosqueta decided to file a formal complaint

⁴ Id. at 53.

⁵ Id.

⁶ Id. at 54.

⁷ Id. at 54-55.

⁸ Id. at 55.

against Col. Mislang at the Department of National Defense and gave their sworn statement before the officers of the Intelligence Security Group in Fort Bonifacio.⁹ On December 22, 2004, Durwin and Baharin invited Corporal Barcelona and Corporal Rosqueta to a party at Durwin's house in Isabela. At a secluded place, Durwin and Baharin shot at Corporal Barcelona and Corporal Rosqueta. Corporal Rosqueta sustained gunshots in his skull which caused his death while Corporal Barcelona barely survived.¹⁰

Elena Rosqueta averred in her affidavit that in the morning of December 15, 2004, two persons, later identified as Durwin and Baharin, went to Rosqueta's home in Bigao, Ilagan, Isabela looking for Corporal Rosqueta.¹¹

Governor Valera, in his counter-affidavit, argued that there is no substantial evidence that links him to Corporal Barcelona and Corporal Rosqueta. He also assailed that the testimonies of the two are purely hearsay.¹²

Col. Mislang did not file any counter-affidavit. However, he filed three separate motions to dismiss dated June 18, 2010 moving for the dismissal of the case before the Ombudsman for violation of his right to due process and speedy disposition of cases. On September 21, 2010, Col. Mislang reiterated his prayer for the dismissal of the cases against him on the ground that similar complaints were also filed before the General Court Martial which already acquitted him.¹³

On September 30, 2010, the Ombudsman ordered all parties to file their verified position papers within 10 days from receipt of the order. Upon receipt of the said order, instead of filing his position paper, Col. Mislang reiterated his claim that he has not been furnished copies of the complaints filed by the complainants and prayed for the dismissal of the case.¹⁴

On May 9, 2011, the Ombudsman dismissed the complaint for attempted murder filed by Mayor Luna but recommended the filing of the Information for murder for the killing of Corporal Rosqueta and

⁹ Id.
¹⁰ Id. at 55-56.
¹¹ Id. at 56.
¹² Id.
¹³ Id. at 13.
¹⁴ Id. at 14.

frustrated murder for the wounding of Corporal Barcelona. According to the Ombudsman, while there was a plan to kill Mayor Luna, nevertheless, the evidence presented by complainants do not show that an overt act was undertaken to commit the same. Hence, there was no probable cause found against Governor Valera and Col. Mislang for the attempted murder complaint filed by Mayor Luna.¹⁵

However, the Ombudsman found probable cause to indict Col. Mislang, Durwin and Baharin for the murder of Corporal Rosqueta and frustrated murder of Corporal Barcelona. The Ombudsman held that the elements of the crime of murder qualified by evident premeditation are present in the case because Durwin and Baharin planned the execution of Corporal Barcelona and Corporal Rosqueta with precision.¹⁶ The Ombudsman, likewise, found probable cause to indict Col. Mislang based on circumstantial evidence. The Ombudsman gave credence to the affidavit of Corporal Barcelona who narrated that it was Col. Mislang who ordered the assassination of Luna and her family and who also ordered them to stay in the safe house and not to report to the battalion camp even when they were already marked as AWOL. The Ombudsman also considered the fact that Corporal Barcelona and Corporal Rosqueta received a text message from the driver of Col. Mislang that the latter ordered their execution. This circumstantial evidence led the Ombudsman to conclude that Col. Mislang is the author of the attack on Corporal Barcelona and Corporal Rosqueta.¹⁷

Without moving for the reconsideration of the Joint Resolution of the Ombudsman, Col. Mislang filed this Petition for *Certiorari*.¹⁸ According to Col. Mislang, the Ombudsman committed grave abuse of discretion when it rendered the Joint Resolution because Col. Mislang was already acquitted by the General Court Martial for the same issue and involving the same subject matter as the complaints filed before the Ombudsman. Thus, Col. Mislang claims that the Ombudsman resolution violates the doctrine of *res judicata*.¹⁹ Col. Mislang, likewise, invoked violation of his right to speedy disposition of cases and right to due process because he was not furnished with the affidavits of the complainants.²⁰

¹⁵ Id. at 57.
¹⁶ Id. at 58-60.
¹⁷ Id. at 61.
¹⁸ Id. at 5-46.
¹⁹ Id. at 33-36.
²⁰ Id. at 40-42.

In its Comment,²¹ the Office of the Solicitor General (OSG) counters that the findings of the General Court Martial does not bar the Ombudsman from recommending the filing of the Informations for murder and frustrated murder against Col. Mislang. The subject matter of the case before the court martial pertains to violation of Articles 96 (Conduct Unbecoming an Officer and a Gentleman), and 97 (disorders and neglects to the prejudice of good order and military discipline and all conduct of a nature to bring discredit upon the military service) of the Articles of War which are different from the subject matter of the preliminary investigation for murder and frustrated murder before the Ombudsman.²² The OSG agrees that circumstantial evidence proves that Col. Mislang is the author of the attack against Corporal Barcelona and Corporal Rosqueta.²³ The OSG insists that the right of Col. Mislang to speedy disposition of cases and due process are not violated because Col. Mislang was given the opportunity to be heard when he filed his motions to dismiss and when the Ombudsman ordered him to file his position paper.²⁴

Ruling of the Court

After a perusal of the records of the case, this Court resolves to dismiss the Petition for *Certiorari* for failure of Col. Mislang to show that the Ombudsman committed grave abuse of discretion amounting to lack or excess of jurisdiction in recommending the filing of the Information for murder and frustrated murder against him.

The resolution of the Ombudsman does not violate the doctrine of *res judicata*. The subject matter of the case where Col. Mislang was tried and eventually found not guilty by the General Court Martial, was for violation of Articles 96 and 97 or the Articles of War, more particularly described as follows:

Charge I: For Violation of Article of War 96

SPECIFICATION: In that LTC Noel P. Mislang 0-9155 INF (GSC) PA during his incumbency as the Commanding Officer of the 41st Infantry Battalion, 5th Infantry Division, Philippine Army, a person subject to military law, did, sometime April 2004 before the National and Local Election, at the province of Abra, wrongfully and

²¹ Id. at 547-574.

²² Id. at 558-559.

²³ Id. at 562.

²⁴ Id. at 566.

unlawfully issued an order to Cpl Eduardo A. Barcelona 805092 (Inf) PA and Pfc Antonio R. Rosqueta 792505 (Inf) PA, intelligence operatives of 41st Infantry Battalion, 5th Infantry Division, Philippine Army, to assassinate Mayor Cecil Luna, and her family, of Lagayan, Abra.

Charge II: For Violation of Article of War 97

SPECIFICATION: In that LTC Noel P. Mislang 0-9155 INF (GSC) PA while being the Commanding Officer of the 41st Infantry Battalion, 5th Infantry Division, Philippine Army, a person subject to military law, did fail to muster all resources and authority as the commander of his unit to decisively and promptly accost and impose appropriate disciplinary actions against Cpl Eduardo A. Barcelona 805092 (Inf) PA and Pfc Antonio R. Rosqueta 792505 (Inf) PA, intelligence operatives of 41st Infantry Battalion, 5th Infantry Division, Philippine Army, erring personnel under his command.²⁵

A plain reading of the charge against Col. Mislang before the General Court Martial would show that it pertains to the instruction of Col. Mislang to assassinate Mayor Luna and his failure to impose necessary sanctions against Corporal Barcelona and Corporal Rosqueta when they went on AWOL. The proceeding before the court martial is akin to an administrative proceeding where a finding of guilt will entail the dismissal of Col. Mislang from service. In contrast, the preliminary investigation undertaken by the Ombudsman seeks to determine whether probable cause exists to indict Col. Mislang with murder and frustrated murder. Hence, there is no merit for Col. Mislang's claim that his acquittal by the General Court Martial bars the Ombudsman from proceeding with the preliminary investigation.

Further, Col. Mislang cannot claim violation of his right to due process. The essence of procedural due process is embodied in the basic requirement of notice and a real opportunity to be heard.²⁶ Based on the records, Col. Mislang even admitted receiving an order from the Ombudsman to file his position paper. However, instead of filing the same, he filed a motion to dismiss. Clearly, Col. Mislang was

²⁵ Id. at 27-28.

²⁶ *Disciplinary Board, Land Transportation Office v. Gutierrez*, 812 Phil. 148, 153 (2017).

given the opportunity to be heard and explain his side, but he chose not to do so.

Col. Mislang's claim of violation of his right to speedy disposition of cases is likewise without merit. In determining whether there was inordinate delay in the conduct of preliminary investigation *vis-à-vis* the violation of the accused's right to speedy disposition of his cases, the Supreme Court time and again used the balancing test which considers: (1) the length of delay; (2) the reason for delay; (3) the defendant's assertion or non-assertion of his right; and (4) the prejudice to the defendant as a result of the delay.²⁷ In this case, there is no showing that the determination of probable cause during the preliminary investigation conducted by the Ombudsman was attended by malice. There is no evidence that it was politically motivated. The case before the Ombudsman involves three criminal complaints against Col. Mislang and three other respondents. The criminal complaints are also related to three other administrative cases against the same respondents. Hence, a thorough resolution of all these interrelated cases cannot be hastily done without causing prejudice to all the parties involved.

The determination of probable cause against those in public office during a preliminary investigation is a function that belongs to the Office of the Ombudsman. The Ombudsman has the discretion to determine whether a criminal case, given its attendant facts and circumstances, should be filed or not.²⁸ Courts do not interfere in the Ombudsman's exercise of discretion in determining probable cause, unless there are compelling reasons. The Ombudsman's finding of probable cause, or lack of it, is entitled to great respect absent a showing of grave abuse of discretion.²⁹ Grave abuse of discretion is an evasion of a positive duty or a virtual refusal to perform a duty enjoined by law or to act in contemplation of law as when the judgment rendered is not based on law and evidence but on caprice, whim and despotism.³⁰

In this case, Col. Mislang failed to show caprice or arbitrariness on the part of the Ombudsman in issuing the Joint Resolution.

²⁷ *Martin v. Ver*, G.R. No. L-62810, July 25, 1983

²⁸ *Salugada v. Sandiganbayan*, 633 Phil. 369, 382 (2010).

²⁹ *Cam v. Casimiro*, 762 Phil. 72 (2015).

³⁰ *Supra* note 28, p. 383.

WHEREFORE, the Petition for *Certiorari* is **DISMISSED**.
The Joint Resolution dated May 9, 2011 issued by the Office of the
Ombudsman is **AFFIRMED**.

SO ORDERED.” *ZALAMEDA, J.*, on official leave.

By authority of the Court:

LIBRADA C. BUENA
Division Clerk of Court *LCB*

by:

MTS
MARIA TERESA B. SIBULO
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